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Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities

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I. INTRODUCTION

Children from low-income and minority families disproportionately populate the juvenile court, as well as juvenile shelter care, detention, and incarceration facilities.¹ Less obvious, but equally intense, is the concentration in the juvenile system of children with undiagnosed and unmet special education needs.² For many special education eligible children swept into the school-to-prison pipeline, a pivotal point is a status offense charge for truancy, ungovernability, or running away.³ The “school-to-prison

1. See, e.g., JOY G. DRYFOOS, ADOLESCENTS AT RISK: PREVALENCE AND PREVENTION 39 tbl.3.7 (1991) (describing low economic status as a “major predictor” of adolescent delinquency); JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS 3–5 (1991); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 6–30 (2007), available at http://nccd-crc.issuelab.org/research/listing/and_justice_for_some_differential_treatment_of_youth_of_color_in_the_justice_system (presenting data showing disproportionate representation of minority youth at all stages of the juvenile justice process); Michael J. Leiber, *Disproportionate Minority Confinement (DMC) of Youth: An Analysis of State and Federal Efforts to Address the Issue*, 48 CRIME & DELINQ. 3, 14–19 (2002) (assessing how states have addressed the federal DMC mandate); cf. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 9 (2006) [hereinafter OJJDP, NATIONAL REPORT], available at <http://ojjdp.ncjrs.org/ojstatbb/nr2006/index.html> (reporting that nearly one-third of black juveniles live below the poverty line); Martha J. Coutinho & Donald P. Oswald, *Disproportionate Representation in Special Education: A Synthesis and Recommendations*, 9 J. CHILD & FAM. STUD. 135, 135–56 (2000) (summarizing the current consensus on disproportionate representation of minorities in special education).
2. See David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, in RACIAL INEQUITY IN SPECIAL EDUCATION 93, 99–100 (Daniel J. Losen & Gary Orfield eds., 2002) (concluding that the educational system is allowing children with or at risk for emotional disturbance to be funneled into the juvenile justice system rather than supporting their emotional, behavioral, and educational needs); ROBERT B. RUTHERFORD, JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 7–19 (2002), available at <http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf> (reviewing and describing the prevalence of disabilities in detained youth); Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System*, JUV. JUST. BULL., July 2000, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf> [hereinafter Burrell & Warboys, *Special Education and the Juvenile Justice System*] (“A significant proportion of youth in the juvenile justice system have education-related disabilities and are eligible for special education and related services”); Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 UDC/DCSL L. REV. 389 (1995) (collecting citations on the prevalence of disabilities among incarcerated youth); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 4 n.2 (2003) [hereinafter Tulman, *Disability and Delinquency*]; Clyde A. Winters, *Learning Disabilities, Crime, Delinquency and Special Education Placement*, 32 ADOLESCENCE 451 (1997) (noting that between 28% and 43% of incarcerated youth require special education services); see also NATIONAL COUNCIL ON DISABILITY, ADDRESSING THE NEEDS OF YOUTH WITH DISABILITIES IN THE JUVENILE JUSTICE SYSTEM: THE CURRENT STATUS OF EVIDENCE-BASED RESEARCH 11–12 (2003) [hereinafter NCD], available at <http://www.ncd.gov/newsroom/publications/pdf/juvenile.pdf> (noting the high prevalence of learning disabilities and serious emotional disturbance among incarcerated youth and generally weak research regarding prevalence of children with disabilities in the delinquency system).
3. Status offense charges are distinguished from delinquency charges. Delinquency charges are charges for behavior that is criminal for both children and adults over the age of majority. See, e.g., David J. Steinhart, *Status Offenses*, 6 THE FUTURE OF CHILDREN 86, 86 (1996) (“A status offense is behavior that

pipeline” represents the ways in which the failures of school systems to educate our children contribute to the increase in the juvenile justice and adult prison population.⁴

State and federal law and policy favor keeping children with their families,⁵ mainstreaming special education students with non-disabled peers,⁶ and deinstitutionalizing status offenders.⁷ Although status offender diversion programs are designed to be a catalyst for children’s integration into the community and a bulwark against exclusion, children identified as status offenders often find themselves in court proceedings and ultimately in restrictive placements, out of their schools, and out of their homes. Thus, pushing children with undiagnosed and unmet special

is unlawful for children, even though the same behavior is legal for adults.”). Underage drinking is also a status offense. Not surprisingly, children with disabilities are more likely to develop substance abuse problems. See James R. Gress & Marion S. Boss, *Substance Abuse Differences Among Students Receiving Special Education School Services*, 26 CHILD PSYCHIATRY & HUM. DEV. 235, 244 (1996) (“[S]ignificant differences in substance abuse among special education students were identified for each grade level.”); Jeffrey S. Kress & Maurice J. Elias, *Substance Abuse Prevention in Special Education Populations: Review and Recommendations*, 27 J. SPEC. EDUC. 35, 38–39 (1993) (reviewing literature on prevalence of substance abuse in the special education population).

4. In this way, the concept is both descriptive and normative. It is descriptive in that there are empirical connections between schools and law enforcement. See Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, in 99 NEW DIRECTIONS FOR YOUTH DEVELOPMENT: DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE 9 (Johanna Wald & Daniel J. Losen eds., 2003) (presenting empirical evidence of the pipeline and policies to address it). It is normative in that these empirical connections represent both moral and legal failures. See ADVANCEMENT PROJECT ET AL., EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15–19 (2005), available at <http://www.ncscatfordham.org/binarydata/files/FINALEOLrep.pdf> (describing how zero tolerance policies fail children and increase disproportionate minority representation). Part of the failure of schools to educate children can be seen in the high dropout rate among minority students. See GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 2 (2004) (noting a 50.2% graduation rate among black students and a 68% graduation rate among all students nationwide); cf. CHILDREN’S DEFENSE FUND, AMERICA’S CRADLE TO PRISON PIPELINE 3 (2007) (“At crucial points in [poor children’s] development, from birth through adulthood, more risks and disadvantages cumulate and converge that make a successful transition to productive adulthood significantly less likely and involvement in the criminal justice system significantly more likely.”).
5. The Uniform Law Commissioners’ Model Juvenile Court Act of 1968, the blueprint for state laws on child welfare, delinquency, and status offense matters, requires “achiev[ing] the . . . purposes [of the Act] in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety.” MODEL JUVENILE CT. ACT § 1(3) (Unif. Law Comm’rs 1968) [hereinafter MODEL ACT].
6. The Individuals with Disabilities Education Act (“IDEA”) contains a requirement for placing children with disabilities in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5) (2006); see also *infra* Part III.A.3.
7. The legislative history of the Juvenile Justice and Delinquency Prevention Act of 1974 (“JJDP”) is clear on this point. See S. REP. NO. 93–1011 (1974), reprinted in 1974 U.S.C.C.A.N. 5283 (“These [juvenile] status offenders generally are inappropriate clients for the formal police courts and corrections process of the juvenile justice system. These children and youth should be channeled to those agencies and professions which are mandated [and in] fact purport to deal with the substantive human and social issues involved in these areas.”). See generally Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384 (2007) (discussing the deinstitutionalization policy of the JJDP and the way in which Congress later created a loophole in the policy).

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education needs into the status offense system runs contrary to federal policy and is ultimately counterproductive.

Special education law can be instrumental in shutting down the pipeline in two ways. To begin, children who receive appropriate special education services can avoid the sorts of behaviors—like unruliness in school and ungovernability at home—that lead to status offense charges. Prevention and early intervention are, self-evidently, superior approaches. Special education law provides for early intervention and preventive services while maintaining youth in their own home and in the community. Schools have a legal obligation to identify students with special education needs and to provide them with individualized services to address those needs.⁸ Appropriate implementation of federal special education mandates that identify and serve youth with special education needs can go a long way toward preventing youth from being caught up in the school-to-prison pipeline.

The second instrumental use of special education law can come about because some youth do get caught up in the school-to-prison pipeline. A child facing status offense charges is likely to be a child for whom school system personnel failed to provide appropriate special education services, and with whom parents have become increasingly frustrated. As such, an attorney should use that failure in conjunction with a well-grounded understanding of federal special education law as a key component of the defense strategy.

Additionally, the defense attorney should offer to help the child and the child's parents obtain appropriate special education services to address the child's needs, to stabilize the family, and to extricate the child from the status offense system. Effective use of special education advocacy can insulate a child from the juvenile court, re-establish the child in school, and help to stabilize a family in crisis.⁹

This article aims to provide a practical and theoretical guide to attorneys representing status offenders who have education-related disabilities. Part II examines how the failure to follow federal special education law creates some of the plumbing in the school-to-prison pipeline. Part II examines how child advocates and their clients can use special education law to extricate children from the status offense system and begin to reverse and ultimately help shut down the pipeline.¹⁰ Toward this end, Part III also provides advocates with a broad overview of federal special

8. See 20 U.S.C. § 1412(a)(3)(A) (2006); 34 C.F.R. § 300.111(a)(1) (2009) (“child find” provision); 20 U.S.C. § 1401(9) (2006) (defining free appropriate education).

9. Another, more literal pay-off is that a prevailing parent in a special education matter is entitled to attorneys' fees at a reasonable (i.e., market) rate. Court-appointed attorneys who represent low-income clients in status offense cases, therefore, might find that special education advocacy better serves their clients' interests, as well as their own. See 20 U.S.C. § 1415(i)(3)(B)–(C) (2006); 34 C.F.R. § 300.517(a)(1)(i), (c) (2006) (describing circumstances in which parents of children with disabilities or state agencies can receive reasonable attorneys' fees in the court's discretion).

10. For a detailed description of how the failure of adults to follow special education law leads to the disproportionate representation of children with disabilities in the delinquency system, see Tulman, *Disability and Delinquency*, *supra* note 2; see also Dean H. Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 266–69 (2008) (describing the many ways in which schools exclude students, including students with education-related disabilities). See generally *supra* note 2.

education law and policy and its relationship with the state statutory requirements of the juvenile court. Finally, Part IV describes the extensive services and behavioral interventions that are available through special education law in contrast with the interventions available through the juvenile court. Part IV will show that the only intervention not available through special education law is incarceration and that problems that potentially lead to status offense cases are most effectively addressed with special education services rather than through the juvenile court.

II. STATUS OFFENDERS WITH UNMET SPECIAL EDUCATION NEEDS AND THE SCHOOL-TO-PRISON PIPELINE

The idea behind the youth-specific jurisdiction over status offenses is that states have a *parens patriae* interest in protecting youth who are on a slippery decline toward delinquency.¹¹ Status offenses are a special category of noncriminal misbehaviors, including truancy, running away, curfew violations, underage drinking, ungovernability, and other violations of rules that apply only to children.¹²

According to the Juvenile Justice and Delinquency Prevention Act (“JJJDP”), since the 1970s, federal policy has been to “deinstitutionalize” status offenders.¹³ Status offenders were no longer to be incarcerated in juvenile institutions but diverted into alternative community-based programs.¹⁴ The reason for this is clear: Congress believed that status offenders were best rehabilitated in the community, that the juvenile justice system could best spend its resources on more serious offenders, and that juvenile court jurisdiction had a significant potential to exacerbate the underlying circumstances of status offenders.¹⁵ While the incarceration of status offenders has declined since this time, 4824 status offenders were incarcerated in public and private juvenile facilities in 2003.¹⁶ Most of the incarcerated youth were found ungovernable (1825), followed by runaways (997), and truants (841).¹⁷

11. See Peter D. Garlock, “Wayward” Children and the Law, 1820–1900: The Genesis of the Status Offense Jurisdiction of the Juvenile Court, 13 GA. L. REV. 341 (1979) (explaining the genesis of the juvenile court’s status offense jurisdiction); George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 896–98 (1976) (providing an account of *parens patriae* jurisdiction generally).

12. Status offenders have different names in different jurisdictions. Common examples are CHINS, PINS, and MINS (child/person/minor in need of supervision), BLACK’S LAW DICTIONARY 1110 (8th ed. 2004).

13. See *supra* note 7.

14. The JJJDP requires that states that accept JJJDP funds progress toward removing status offenders from juvenile institutions and develop non-secure alternative programs to address the needs of status offenders. Pub. L. No. 93-415, § 223 (a)(12), 88 Stat. 1109 (codified at 42 U.S.C. § 5633 (a)(11)(A)) (“[J]uveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities . . .”).

15. See *supra* note 7.

16. See OJJDP, NATIONAL REPORT, *supra* note 1, at 198 (noting that a majority of status offenders were detained in private facilities rather than public facilities).

17. *Id.*

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These numbers, however, do not represent the full extent to which status offenders are incarcerated. In 1980, Congress amended the JJDP to allow juvenile courts to incarcerate children “charged with or who have committed a violation of a valid court order.”¹⁸ This expanded authority means many of the 14,135 children incarcerated in secure facilities for “technical violations” may be status offenders.¹⁹ In some states, technical violations comprise upward of one-third of the in-custody juvenile population.²⁰ Reports also indicate that status offenders are often relabeled as “delinquent” to keep them housed in secure facilities.²¹ Some status offenders are even committed to mental health facilities.²² Nonetheless, in most adjudicated status offense cases countrywide, the juvenile court ordered probation; residential placement was the second most-frequent dispositional outcome.²³ Those adjudicated ungovernable were the most likely to be placed in a residential facility, while truants were the most likely of status offenders to be placed on probation.²⁴ Since a significant and potentially large number of status offenders are still entering secure facilities, much is at stake for a child facing a status offense charge.

18. 42 U.S.C. § 5633(a)(11)(A)(ii) (2006).

19. See OJJDP, NATIONAL REPORT, *supra* note 1, at 198.

20. *Id.* at 205. In Alabama, Alaska, Hawaii, Illinois, New Jersey, South Carolina, Utah, and Wyoming at least 25% of offenders in custody were in custody for technical violations of probation, parole, or valid court orders (“VCO”). *Id.* at 203. All of these states except New Jersey and Utah have valid court order exceptions. See NATIONAL YOUTH RIGHTS ASSOCIATION, SURVEY OF STATE LAWS ON THE VALID COURT ORDER EXCEPTION TO SECURE DETENTION FOR STATUS OFFENDERS 1 (2008), available at <http://www.youthrights.org/forums/downloads.php?do=file&id=374&act=down> (summarizing the VCO exception rules for each state). The likelihood of status offenders being part of the in-custody technical violator population can also be gleaned from a brief glance at the data for states that *do not* have a VCO exception. States without a VCO exception have high status offender populations, while states that have low status offender populations have high technical violator populations. For example, New York does not have a VCO exception, and 20% of its custody population is status offenders. OJJDP, NATIONAL REPORT, *supra* note 1, at 203.

21. See Malcolm W. Klein, *Deinstitutionalization and Diversion of Juvenile Offenders: A Litany of Impediments*, 1 CRIME & JUST. 145, 176–77 (1979) (“In California, the new 1977 law prohibiting secure detention of status offenders led to a dramatic police response: up to 50 percent of status offenders formerly arrested and dealt with by release, referral, or petition were now ignored by the police, while a small percentage of others were relabeled as dependent or delinquent in order to obtain secure detention.”); W. Krause & M.D. McShane, *A Deinstitutionalization Retrospective: Relabeling the Status Offender*, 17 J. CRIME & JUST. 45 (1994) (finding that girls are more likely than boys to be relabeled, formally processed, and incarcerated); David J. Steinhart, *Status Offenses*, 6 FUTURE OF CHILDREN 86, 91 (1996) (noting that relabeling began after deinstitutionalization).

22. See Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 798–808 (1988) (arguing that there is an increase in the use of hospitalization to control troublesome youth even though they do not suffer from severe mental disorders).

23. See OJJDP, NATIONAL REPORT, *supra* note 1, at 191 (“From 1985 through 2002, among adjudicated runaway, truancy, ungovernability, and liquor law violation cases, formal probation was the most likely disposition.”).

24. See *id.* at 192 (finding that 160 out of 625 status offenders adjudicated ungovernable were placed in a facility).

Following the JJDP, some jurisdictions have implemented community-based diversion programs to address status offenses. This development, however, should not suggest that diversion is much less serious than the potential for secure detention: “Instead of reducing the number of youth formally processed through the juvenile justice system, these prevention and early intervention policies actually subject more youths to formal justice system intervention.”²⁵ With this formal intervention in mind, the Institute for Judicial Administration of the American Bar Association (“IJA-ABA”) noted the “corrosive effects of treating non-criminal youth as those that had committed crimes”²⁶ Consequently, youth who are formally processed or adjudicated under the status offense jurisdiction face, at best, probationary supervision within the community and, at worst, incarceration.

A. Status Offenders with Unmet Special Education Needs

Status offenders are likely to be children with undiagnosed and unmet special education needs. Any child between the ages of three and twenty-one,²⁷ inclusive, is eligible for special education services if the child has a disability and the child requires special education and related services due to the disability.²⁸ Moreover, eligibility

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25. CTR. ON JUVENILE AND CRIMINAL JUSTICE, WIDENING THE NET IN JUVENILE JUSTICE AND THE DANGERS OF PREVENTION AND EARLY INTERVENTION 1 (2001), available at www.cjcj.org/files/widening.pdf. Worries about formally processing more status offenders are also connected with worries about diverting precious public safety and welfare resources from youth in need of intervention to youth who are not in need of intervention. *See id.*
26. AIDAN R GOUGH, AM.BAR.ASS'N., INST. OF JUDICIAL ADMIN., JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 7 (1982), available at <http://www.ncjrs.gov/pdffiles1/ojdp/83576.pdf>. The IJA-ABA also noted: “On common sense grounds, given the lack of conclusive empiric data, it seems likely that (1) coercive judicial intervention in unruly child cases produces some degree of labeling and stigmatization; and (2) whatever effect this has on the child’s self-perception and future behavior will be adverse.” *Id.* The fact that status offense cases are treated similarly to delinquency cases is also supported by the data. For example, in 2002, 23% of petitioned delinquency cases resulted in residential placement, while 62% resulted in probation. OJJDP, NATIONAL REPORT, *supra* note 1, at 174. In comparison, between 1985 and 2002, 26% of petitioned ungovernability cases resulted in residential placement, while 66% resulted in probation. *Id.* at 192. Consequently, ungovernability dispositions are strikingly similar to delinquency dispositions. The numbers are similar for runaway cases. *See id.* However, truancy cases and liquor law violation cases follow a different pattern. *See id.*; *cf. In re Gault*, 387 U.S. 1, 29 (1967) (“If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings. For [using vulgar language in the presence of a woman], the maximum punishment would have been a fine of \$5 to \$50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years.”).
27. One should keep in mind that the way in which special education law defines “children” is different from how juvenile justice statutes define “children” or “juveniles.” However, there will be significant overlap. *See, e.g., CAL. WELF. & INST. CODE* § 601 (West 2008) (defining “minor” as an individual under the age of eighteen). Thus, individuals through the age of twenty-one (i.e., until the twenty-second birthday) who are under the jurisdiction of the adult criminal court may have special education rights. *See, e.g., 34 C.F.R.* §§ 300.101(a), 300.102(a)(1)–(2) (2009).
28. *See* 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a). For limitations on the age coverage of Part B, see 20 U.S.C. § 1412(a)(1)(B) and 34 C.F.R. § 300.102. For example, a state also can constrict the ages of eligibility. *See* 34 C.F.R. § 300.102(a)(1) (allowing constriction for certain ages where inconsistent with state policy or a court order). Nothing in the IDEA limits a state or local government from extending

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explicitly “include[s] children with disabilities who have been suspended or expelled from school.”²⁹ The Individuals with Disabilities Education Act (IDEA) covers any disability that significantly affects a child’s learning and adjustment in school.³⁰

Children swept into the juvenile justice system are likely to be children with unmet special education needs. Studies estimate that the prevalence of youth with disabilities in juvenile corrections is between 30% and 70%,³¹ while only 8.8% of public school students have been identified as having disabilities that qualify them for special education services.³² Children with disabilities and emotional disturbance also have higher arrest rates than their non-disabled peers.³³ Moreover, youth in the

eligibility to cover students past the twenty-second birthday. Michigan, for example, covers students with disabilities (who have not graduated from high school) until the age of twenty-five. *See* MICH. COMP. LAWS §§ 380.1711, 380.1701, 380.1751 (2008). Special education attorneys should check state laws and school district regulations to determine whether the state legislature or local education agency has extended eligibility to cover students past the twenty-second birthday. Part B of the IDEA, 20 U.S.C. §§ 1411–1419, covers students between the ages of three and twenty-one. Part C of the act, 20 U.S.C. §§ 1431–1445, covers early intervention for children under three years of age and for their families.

29. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a). Generally speaking, the IDEA covers students until they graduate from high school or until they turn twenty-two, whichever occurs first, and obtaining a high school equivalency degree, such as a G.E.D., does not terminate eligibility. *See* 34 C.F.R. § 300.102(a)(3)(i)–(iv) (describing specific exceptions, including retaining eligibility for coverage when a student is suspended, expelled, or obtains a high school equivalency degree). It is also important to know that a child who is advancing from grade to grade and is not failing can be, nonetheless, a “child with a disability” covered under the IDEA. 34 C.F.R. § 300.101(c).
30. A “child with a disability” is a child with “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.” 20 U.S.C. § 1401(3)(A)(i)–(ii). States may define a category of “developmental delay” for children between the ages of three and nine. *Id.* § 1401(3)(B). For a child with a disability that does not affect academic performance and adjustment in school—a child, for example, with a physical disability or with a chronic illness—section 504 of the Rehabilitation Act likely protects the child from discrimination and affords the child a right to reasonable accommodations in the school setting. *See generally* 34 C.F.R. §§ 104.31–104.39 (listing the responsibilities of schools with respect to students with handicaps generally).
31. *See* ROBERT B. RUTHERFORD, JR. ET AL., *YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 10–19* (2002) [hereinafter RUTHERFORD, *PREVALENCE RATES*]; P. Casey & I. Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-analysis*, in *UNDERSTANDING TROUBLED AND TROUBLING YOUTH* 82 (Peter E. Leone ed., 1990); Donna M. Murphy, *The Prevalence of Handicapping Conditions Among Juvenile Delinquents*, 7 *REMEDIATION & SPECIAL EDUC.* 7 (1986); Robert B. Rutherford et al., *Special Education in the Most Restrictive Environment: Correctional/Special Education*, 19 *J. SPECIAL EDUC.* 59 (1985). The most recent and comprehensive study estimates that 33.4% of youth in state juvenile correctional systems have a disability. *See* Mary M. Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 *EXCEPTIONAL CHILD.* 339, 342 (2005) [hereinafter Quinn, *Youth with Disabilities*]. However, the disability prevalence rates for individual states ranged from 9.1% to 77.5%. *See id.*
32. *See* U.S. DEP’T. OF EDUC., *TWENTY-THIRD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT II-21* (2001), available at <http://www2.ed.gov/about/reports/annual/osep/2001/section-ii.pdf>.
33. *See* CHESAPEAKE INSTITUTE, *NATIONAL AGENDA FOR ACHIEVING BETTER RESULTS FOR CHILDREN AND YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE* (1994), available at <http://cecp.air.org/resources/>

juvenile justice system are more likely to have *unidentified* disabilities and *unmet* special education needs.³⁴

Although no data exists regarding the prevalence of disability in status offenders as a distinct group, the connection is quite clear. Students with disabilities are more likely to be unsuccessful in school and engage in undesirable behavior than their non-disabled counterparts; therefore, they are more likely to be charged with ungovernability.³⁵ Students who struggle in school because of an education-related disability are more likely to be truant, and students with poor school attendance are more likely to not be identified as needing special education services when they in fact need special education services.³⁶

The disabilities that a defense attorney will likely find within a status offense caseload include specific learning disabilities, speech or language impairments, and emotional disturbance. Attention deficit hyperactivity disorder (“ADHD”) is also common and is covered under the IDEA’s definition of “Other Health Impairment.”³⁷

B. Youth with Education-Related Disabilities Flushed Down the Pipeline

Congress passed the initial, federal special education law, the Education for All Handicapped Children Act (“EAHCA”) in 1975.³⁸ Two groundbreaking cases, *Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)*,³⁹ and *Mills v. Board of Education*,⁴⁰ paved the way for this Congressional action.⁴¹ *PARC* resulted in

ntlagend.asp; WAGNER ET AL., *YOUTH WITH DISABILITIES: A CHANGING POPULATION* (2003), available at http://www.nlts2.org/reports/2003_04-1/nlts2_report_2003_04-1_execsum.pdf.

34. See Quinn, *Youth with Disabilities*, *supra* note 31, at 342 (“Although the present investigation is a marked improvement over earlier studies, in all likelihood the number of students with disabilities in juvenile corrections . . . who are actually eligible for special education services is underestimated.”); Burrell & Warboys, *Special Education and the Juvenile Justice System*, *supra* note 2, at 1 (“[Y]outh in the juvenile justice system are much more likely to have both identified and *undiscovered* disabilities.”) (emphasis added).
35. PETER E. LEONE ET AL., NAT’L. CTR. ON EDUC., DISABILITY & JUVENILE JUSTICE., *SCHOOL FAILURE, RACE, AND DISABILITY: PROMOTING POSITIVE OUTCOMES, DECREASING VULNERABILITY FOR INVOLVEMENT WITH THE JUVENILE DELINQUENCY SYSTEM 3* (2003), available at http://www.edjj.org/Publications/list/leone_et_al-2003.pdf [hereinafter LEONE, PROMOTING POSITIVE OUTCOMES] (“Students with disabilities display higher rates of problem behavior and disciplinary referrals than their schoolmates.”).
36. See RUTHERFORD, *PREVALENCE RATES*, *supra* note 31, at 8 (“[M]any [youth in the juvenile justice system] may not be identified and labeled by public schools for the simple reason that they seldom, or at least sporadically, attend school and complete the special education procedures necessary to receive a special education label.”).
37. 34 C.F.R. § 300.8(c)(9)(i)–(ii) (2009).
38. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§1400–1487 (2005)). The EAHCA was the initial version of the IDEA. See William D. White, *Where to Place the Burden: Individuals with Disabilities Education Act Administrative Due Process Hearings*, 84 N.C. L. REV. 1013, 1014 (2006).
39. 343 F. Supp. 279 (E.D. Pa. 1972).
40. 348 F. Supp. 866 (D.D.C. 1972).
41. See White, *supra* note 38, at 1015.

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a consent order;⁴² *Mills*, a class action in the District of Columbia, resulted in a grant of summary judgment for the “exceptional” children excluded from education.⁴³ Judge Waddy’s description of the problem in *Mills* left no doubt that the overwhelming majority of children with education-related disabilities received no educational services from the school system.⁴⁴ A pervasive part of the problem in *Mills* was the practice of using the pretext of behavior as an excuse for excluding children with disabilities from public education.⁴⁵ Relying on *Brown v. Board of Education* for the proposition that access to education is of central importance,⁴⁶ Judge Waddy ruled that the exclusion of children with disabilities violated equal protection.⁴⁷ The court’s final judgment mandated a number of provisions—substantive rights and procedural protections—that later appeared in the EAHCA and the IDEA.⁴⁸

In passing the federal special education law, Congress intended to address this historical canard of failing to identify and serve children with education-related disabilities and using the children’s behavior as a justification for their exclusion. As the United States Supreme Court stated in *Honig v. Doe*,

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. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to “self-help,” and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.⁴⁹

The Court noted that one in eight disabled students had been excluded from the public school system and many others were warehoused in special programs that were ineffective in addressing their education needs.⁵⁰ This practice is still all too common as the data supports the conclusion that students with disabilities are disproportionately suspended from schools.⁵¹ In particular, students with learning disabilities and

42. *Id.* at 1016.

43. *Id.*; *Mills*, 348 F. Supp. at 873.

44. *See Mills*, 348 F. Supp. at 868–69.

45. *See, e.g., id.* at 869 (describing the first two named plaintiffs and how they were excluded, without procedural protections, as “behavior problem[s]”); *see also id.* at 878 (describing procedural protections against suspensions and requirement for educational services during period of suspension).

46. White, *supra* note 38, at 1016 (citing *Mills*, 348 F. Supp. at 874, quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

47. *Mills*, 348 F. Supp. at 874–75.

48. White, *supra* note 38, at 1016 (citing *Mills*, 348 F. Supp. at 877–83).

49. 484 U.S. 305, 323–24 (1988). As originally passed, the law created no exception to “stay put” for a child who is allegedly dangerous. *Id.* at 323. School officials, however, could appeal to a court for a preliminary injunction to seek removal of an allegedly dangerous child. *See id.*

50. *See id.* at 323–24.

51. *See* Peter E. Leone et al., *School Violence and Disruption: Rhetoric, Reality, and Reasonable Balance*, 33 *FOCUS ON EXCEPTIONAL CHILD*. 1 (2000) [hereinafter Leone, *School Violence*] (“Mounting evidence suggests that

emotional disturbance are overrepresented within the class of students with disabilities who are suspended.⁵² The behaviors for which these students are suspended, moreover, are primarily non-violent and do not result in harm to others.⁵³ Consequently, these students would be more likely to fall under the status offense system, perhaps by receiving a charge of ungovernability, rather than the delinquency system.

Against this backdrop, one can begin to interpret the increasing prevalence of school administrators referring children to juvenile courts for alleged disruptive conduct (whether that conduct is classified as a status offense or as a delinquency matter).⁵⁴ Schools referred 73% of the petitioned truancy cases in 2005, and approximately 28% of all status offense cases.⁵⁵ Truancy cases increased by 60% between 1995 and 2005.⁵⁶ So, attorneys defending youth against status offense charges continue to encounter schools that fail to address the needs of children with education-related disabilities and then attempt to pass these unserved children to the juvenile court. Fortunately, federal special education law and state law provide advocates with tools to address the growing number of children with undiagnosed and unmet special education needs making contact with the juvenile court.

III. AGGRESSIVE SPECIAL EDUCATION ADVOCACY IN THE FACE OF A STATUS OFFENSE CHARGE

Federal special education and status offender policy, in conjunction with state statutory requirements, make possible effective procedural and substantive challenges to status offense petitions.⁵⁷ Federal and state law and policy create a presumption in

a disproportionately high percentage (possibly close to 20%) of suspended students are students with disabilities, compared to a national proportion of about 11% of students ages 6–21 receiving services under IDEA.”). Disproportionate representation is even more pronounced for black, male disabled students. *See* LEONE, PROMOTING POSITIVE OUTCOMES, *supra* note 35, at 2 (“[B]lack, male students with disabilities were punished more severely than others for commission of the same offense.”).

52. *See* Leone, *School Violence*, *supra* note 51, at 13 (“Several studies demonstrate that students with learning disabilities and emotional disturbance are overrepresented among suspended students with disabilities.”).
53. *See id.* (“Several studies have found that the majority of suspension-related behaviors seem to be nonviolent and generally do not result in injuries to others.”).
54. *See* DAVID RICHART ET AL., BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF “ZERO TOLERANCE” AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY STUDENTS 26 (2003), available at <http://www.buildingblocksforyouth.org/kentucky/kentucky.pdf>; CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 15 (2000), available at http://www.civilrightsproject.ucla.edu/research/discipline/final_report.pdf.
55. *See* CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005 82 (2005), available at www.ojjdp.ncjrs.gov/ojstatbb/njcda/pdf/jcs2005.pdf.
56. *Id.* at 72. “Between 1995 and 2005, the petitioned truancy case rate increased steadily (45%).” *Id.* at 73.
57. This holds true for attorneys representing children charged with delinquency as well. *See generally* Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases*, 9 UDC/DCSL L. REV. 53 (2007); Tulman, *Disability and Delinquency*, *supra* note 2.

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favor of addressing the needs of a significant proportion of status offenders through the special education system rather than the juvenile justice system.⁵⁸ What follows is a roadmap for attorneys concerned with preventing children with unmet special education needs from being sent down the school-to-prison pipeline via the status offense system. But first, a brief overview of the responsibilities that school officials have under federal special education law is in order.

A. IDEA Obligations

1. Free and Appropriate Education

The substantive entitlement in the IDEA is the right to a free appropriate public education (“FAPE”).⁵⁹ FAPE means “special education and related services” that meet state standards, in an appropriate school setting, and in accordance with the child’s individualized education program (“IEP”).⁶⁰ The word “free” means that the parent does not pay for the child’s services.⁶¹ The word “appropriate” is more difficult to define and is the focus of a key Supreme Court case, *Board of Education v. Rowley*.⁶² According to the Court, the instruction must be individualized to meet the child’s unique needs⁶³ with supportive services necessary to ensure that the child benefits,⁶⁴ but “appropriateness” does not require maximizing the child’s educational

58. Advocates who worry about disproportionate identification of minority students as special education students might worry that this article advocates inappropriately casting a child client as in need of special services when in fact the child client is not disabled. The article is not advocating this. Instead, the article advocates a strategy that addresses unidentified and unmet special education needs that are manifest in a status offense charge. Thus, the objective is quite the opposite since it is often a lack of special education advocacy and defense that results in poor minority youth moving into the juvenile system while their white counterparts, particularly those from upper-income families, do not reach the delinquency court or are diverted based on special education considerations.

59. 20 U.S.C. § 1401(9) (defining “free appropriate public education”).

60. *Id.* § 1401(9)(B)–(D).

61. Section 1401(9)(A) provides that the services must be “provided at public expense, under public supervision and without charge.” 20 U.S.C. § 1401(9)(A). This right to appropriate services at no charge to the parent leads to an important remedy: if the public school placement or services are not appropriate, the parent may be entitled to a private school placement or services at government expense. *See* 34 C.F.R. § 300.148 (2009).

62. 458 U.S. 176 (1982). In *Rowley*, the Court also underscored the law’s procedural requirement that school administrators include the parents in all special education decision making. *Id.* at 205–06 (“Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.”).

63. *Id.* at 207. Toward this end, a child with a special education need will be given an IEP, which is a written blueprint of the specialized instruction and other services—e.g., related services, transition services, assistive technology, program modifications—that are appropriate for the child. *See* 20 U.S.C. §§ 1401(14), 1414(d). For a more detailed explication of IEPs and services available see *infra* Part IV.A.

64. *Rowley*, 458 U.S. at 201 (“We therefore conclude that the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are *individually designed* to provide educational benefit to the handicapped child.”) (emphasis added).

opportunities.⁶⁵ In assessing educational benefit, the inquiry should include not only academic progress, but also the child's adjustment and preparation for life after high school.⁶⁶

2. *Child Find and Evaluation*

The "child find" provision of special education law mandates that school district administrators and personnel identify, locate, and evaluate all children with disabilities, including homeless children and children who are wards of the state.⁶⁷

To determine whether the student has an education-related disability, the law provides for an evaluation process⁶⁸ that addresses "all areas of suspected disability."⁶⁹ A parent can initiate an evaluation by requesting it, or a state or local education agency, or other state agency, may initiate a request for an initial evaluation.⁷⁰ A state court meets the criterion of "other state agency," and, accordingly, a juvenile court

65. *See id.* at 198–201 (“[T]o require . . . the furnishing of every special service necessary to maximize each handicapped child’s potential is . . . further than Congress intended to go.”). The fact that a mainstreamed child is achieving adequate grades and advancing from grade to grade is a significant, but not necessarily dispositive, factor in determining “educational benefit.” *Id.* at 202–03. For a child in a regular classroom, the IEP and individualized instruction should be “reasonably calculated” to facilitate the child achieving passing grades and advancing from grade to grade. *Id.* at 203–04.

66. 20 U.S.C. § 1400(d)(1)(A).

67. *Id.* § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1) (2009).

68. *See* 20 U.S.C. § 1414(a)–(c) (mandating a “full and individual” evaluation); 34 C.F.R. §§ 300.300–311 (detailing all aspects of the evaluation process).

69. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). The evaluation must also be, among other criteria, comprehensive, 34 C.F.R. § 300.304(c)(6), nondiscriminatory, *id.* § 300.304(c)(1)(i), properly administered, *id.* § 300.304(c)(1)(iii)–(v), and in the child’s native language or other mode of communication, *id.* § 300.304(c)(1)(ii). Under the 2004 amendments, a state must permit, and a school district may use, a “response-to-intervention” (“RTI”) approach for determining whether a student is learning disabled. *See id.* §§ 300.307(a)(2), 300.309(a)(2)(i), 300.311(a)(7). Through RTI, school personnel use interventions with research-based demonstrated effectiveness to address a student’s academic deficits. This approach allows early intervention and can help avoid unnecessarily applying the “special education” label. A parent is entitled to have the child evaluated for special education eligibility and is not required to wait for pre-referral services like RTI. *See, e.g., id.* § 300.311(a)(7)(ii)(C) (requiring that parents be notified that they may request an evaluation).

70. 20 U.S.C. § 1414(a)(1)(B). Attorneys and juvenile court officials should appropriately point out this option to a parent who files an ungovernability petition against his or her own child. In many cases, parents file juvenile court petitions because they have already been rebuffed by schools that resist providing behavior and mental health services to children who are entitled to them. *See* U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES 30 (2003), *available at* <http://www.gao.gov/new.items/d03397.pdf> [hereinafter U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE AND JUVENILE JUSTICE] (“Some parents bypass eligibility restrictions for special education services and procedures for receiving child welfare, mental health, and juvenile justice services by petitioning the court to provide mental health and specific education services for their child.”).

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judge may request an evaluation.⁷¹ Following an initial evaluation and a determination of eligibility,⁷² the school system must reevaluate the child—referred to as a “triennial evaluation”—at least once every three years.⁷³ A reevaluation must occur sooner if school district personnel determine that the child’s educational or related service needs require reevaluation, or if the parent or teacher requests reevaluation.⁷⁴ Upon identifying a child with special education needs, the school must then provide appropriate supportive services in the “least restrictive environment.”⁷⁵

3. *Least Restrictive Environment*

Special education law emphasizes keeping children in, or returning children to, the educational mainstream.⁷⁶ The IDEA’s emphasis on placement in the least restrictive environment recognizes that education is meant to integrate students and, ultimately, to prepare students to graduate from high school and enter mainstream society through post-secondary education or the work world.⁷⁷ Ideally, therefore, schools should place students in integrated schools and in mainstream, regular education classes, and may only remove children from regular education settings “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁷⁸

71. An evaluation requires both written notice to the parent of the evaluations to be conducted, 20 U.S.C. § 1414(b)(1), and informed consent from the parent, *id.* § 1414(a)(1)(D)(i)(I). Generally, the initial evaluation must be completed within sixty days of parental consent. *Id.* § 1414(a)(1)(C)(i)(I)–(II).

72. A parent has a right to obtain an independent educational evaluation (“IEE”) of the child, 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502, and the parent has a right to an IEE at public expense if the parent disagrees with an evaluation conducted by the school system, *id.* § 300.502(b). Remarkably, if a parent who disagrees with the school system’s evaluation requests an IEE at public expense, school system administrators, “without unnecessary delay,” either must grant the request or request a hearing to attempt to show that its evaluation is appropriate. *Id.* § 300.502(b)(2).

73. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

74. 20 U.S.C. § 1414(a)(2)(A)(i)–(ii); 34 C.F.R. § 300.303(a)(1)–(2). School administrators must also provide prior written notice, 20 U.S.C. § 1414(b)(1), and obtain informed consent from the parent, *id.* at § 1414(c)(3), before conducting a reevaluation.

75. *Id.* § 1412(a)(5).

76. *Id.* § 1412(a)(5)(A) (“To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled . . .”).

77. *See id.* § 1400(d)(1)(A) (requiring that special education students be prepared for “further education, employment, and independent living”).

78. *Id.* § 1412(a)(5)(A). Placement should be as close as possible to the child’s home and, ordinarily, should be in the school that the child would attend if not disabled. 34 C.F.R. § 300.116(b)–(c). The school district must also have available a “continuum of alternative placements” that includes special classes, special schools, home instruction, and the like. *Id.* § 300.115.

4. Discipline Protections

Any child, without regard to disability, who is facing even a short-term exclusion from school, has a right to due process.⁷⁹ When removal of a child with an education-related disability for ostensibly disciplinary reasons is for a longer period, and thus constitutes a “change in placement,” the procedural safeguards of the IDEA are activated.⁸⁰ Removal of a child with special education needs from school for more than ten days constitutes a “change in placement” under special education law.⁸¹ Such a “change in placement” triggers procedural protections⁸² to ensure that the authorities are not removing a child with a disability in a manner that is discriminatory⁸³ or for behavior that is a manifestation of the disability.⁸⁴ If the behavior is not a manifestation of a disability, school authorities may discipline a child with a disability as they would a non-disabled child,⁸⁵ except that the child nevertheless maintains the right to participate in the general education curriculum and progress toward meeting the goals their IEP, although perhaps in a different setting.⁸⁶ A child with a disability does not lose the entitlement to special education and related services, even if excluded from school.

A child with a disability sent to an interim alternative education setting or a child with a disability suspended or expelled for conduct that was not a manifestation of the disability has a right, as appropriate, to a functional behavioral assessment and a behavior intervention plan, as well as a right to modifications in the IEP to address the behavior that led to the disciplinary exclusion from the current educational placement.⁸⁷

79. *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (“Students facing temporary suspension have interests qualifying for protection of the Due Process Clause . . .”). Due process requires some kind of notice and hearing, as well as an explanation of the evidence and an opportunity to be heard. *Id.*

80. 34 C.F.R. §§ 300.504(a), 300.530(h).

81. 34 C.F.R. § 300.536(a)(1) (removal for more than ten consecutive days); *id.* § 300.536(a)(2) (removal for more than ten days that are not consecutive but that constitute a pattern creating a change in placement). Even a short suspension from school of ten days or less requires some due process protection. *Goss*, 419 U.S. at 581.

82. *E.g.*, 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h) (2009).

83. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

84. 20 U.S.C. § 1415(k)(1)(E)–(F); 34 C.F.R. § 300.530(e)–(f); *see also* 20 U.S.C. § 1415(K)(1)(E)(i)(I)–(II); 34 C.F.R. § 300.530(e)(1)(i)–(ii) (noting that conduct is a manifestation if the disability caused, or substantially and directly related to, the conduct; or the conduct is a manifestation if it directly resulted from failure to implement child’s IEP).

85. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).

86. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i). If the behavior is a manifestation of the child’s disability but the behavior was having a weapon or illegal drugs in school or if the behavior caused serious bodily injury to another person in school, school authorities may remove the child to an interim alternative educational setting for no more than forty-five days. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

87. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).

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Of course, the school can decide to include appropriate behavioral interventions in the IEP at any time to prevent or to address a child's behavioral problems. For a child with serious behavioral concerns, those that are manifesting in status offenses or delinquent offenses, schools are obligated, under federal law, to develop and adopt a protocol of individualized, positive behavioral interventions and supports.⁸⁸

For a child who has not previously been identified as eligible for special education and who is facing suspension or expulsion, a parent can successfully assert rights to procedural protection under the IDEA if school personnel "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."⁸⁹ The school personnel are deemed to have had knowledge if the parent previously raised concerns about the child's need for special education, if the parent previously requested an evaluation, or if the child's teacher or other school personnel expressed concerns about the child's pattern of behavior to supervisors.⁹⁰ Regarding a child not previously identified and about whom school personnel did not have knowledge that the child has a disability, a parent who requests a special education evaluation has a right to an expedited evaluation if the child is being subjected to disciplinary sanctions.⁹¹ If the team determines, based on the expedited evaluation and other input, that the child has an education-related disability, then the child is protected under the IDEA (including its discipline protections), and school system personnel must provide special education and related services.⁹²

B. Status Offenders and Schools Avoiding IDEA Obligations

In a small number of reported status offense and delinquency cases, attorneys have argued, successfully and unsuccessfully, that school personnel sought juvenile court intervention to circumvent or make an "end run" around their obligations under federal special education law.⁹³ Successful cases resemble *Honig*, except that they involve law enforcement and the juvenile court rather than exclusion only. Because the IDEA requires exhausting administrative remedies before appealing to a state or

88. If parents or attorneys are working with a school to address a child's behavior problems, the protocol should contain an explicit agreement to avoid, except in extreme circumstances, calling the police and referring the child to the juvenile court.

89. 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534.

90. 20 U.S.C. § 1415(k)(5)(B)(i)–(iii); 34 C.F.R. § 300.534(b)(1)–(3).

91. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(i).

92. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(iii). For challenges to special education decisions that involve a disciplinary change in placement, including a challenge to a manifestation determination, the law provides for an expedited hearing. 20 U.S.C. §§ 1415(k)(3), (4)(B); 34 C.F.R. §§ 300.532(a), (c)(2). School officials can seek an expedited hearing to seek to exclude from the current educational placement a child with a disability whom they allege to be a danger to self or others. 34 C.F.R. § 300.532(c)(2).

93. *See, e.g., In re Trent N.*, 569 N.W.2d 719, 738 (Wis. Ct. App. 1997) ("[I]f the school is truly engaging in an 'end run,' that concern can be addressed at the various investigative and referral levels within the juvenile court system which determine whether the case belongs in the juvenile system in the first instance, and, if so, how it should be processed.").

federal court,⁹⁴ the juvenile court is not the correct forum in which to litigate IDEA eligibility and denial of a FAPE, nor is it the right forum to challenge the propriety of suspending and expelling students with disabilities. However, an attorney should use a special education hearing to challenge a school administrator who fails to comply with the IDEA and then files a status offense petition against a child. *Morgan v. Chris L.* is such a case.⁹⁵

While schools can refer students to law enforcement, schools should not refer students to law enforcement for status offenses *as a substitute* for providing parents and students with the procedural and substantive protections of the IDEA.⁹⁶ In *Morgan v. Chris L.*, the Sixth Circuit upheld an administrative law judge's ("ALJ") decision that a school district violated the IDEA when it filed a juvenile court petition against a student with ADHD because he broke a school bathroom pipe.⁹⁷ The Sixth Circuit found that the school had violated the procedural requirements of the IDEA by filing a petition in the juvenile court before evaluating the student in a timely fashion, before initiating a special education team meeting to address the behavior, and before initiating what the court believed to be a "change in placement."⁹⁸ Consequently, the court upheld the ALJ's ruling directing the school to dismiss the juvenile court petition that it had filed.⁹⁹

Subsequent to the *Chris L.* case, Congress, in the 1997 IDEA amendments, clarified that federal special education law does not constrain agencies (including schools) from referring alleged criminal activity by a child with a disability to proper authorities, nor does the law keep police and courts from handling such matters:

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.¹⁰⁰

94. See 20 U.S.C. § 1415(i)(2), (l); 34 C.F.R. § 300.516(a), (e).

95. 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd*, 106 F.3d 401 (6th Cir. 1997). A distinguishing feature of *Morgan v. Chris L.* is that Tennessee's statutes authorize school-initiated petitions in the juvenile court, whereas in most states, school officials must rely upon juvenile court personnel to file a petition. See *Trent N.*, 569 N.W.2d at 725; *accord* *Commonwealth v. Nathaniel N.*, 764 N.E.2d 883, 886–87 (Mass. App. Ct. 2002). Tennessee now prohibits school officials from filing a petition against a special education student unless they first find that the alleged behavior was not a manifestation of the child's disability. TENN. CODE ANN. § 49-10-1304(b)(3)(B) (2008).

96. See *infra* notes 120–22 and accompanying text.

97. No. 94-6561, 1997 WL 22714, at *6 (6th Cir. Jan. 21, 1997). Not all cases of this sort, in particular *Chris L.*, involve status offense. But the form of the violation of the IDEA is the same, as well as the form of argument that defense attorneys should use.

98. See *id.* at *4–6.

99. *Id.* at *1.

100. 20 U.S.C. § 1415(k)(6)(A) (this provision was originally codified, following the 1997 amendments, at 1415(k)(9)(A)). One might presume that Congress meant for subsection 1415(k)(6)(A) to cover "delinquent acts" and "status offenses," as well as "crimes." The language is significant considering

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Courts and commentators have misunderstood the relationship between the 1997 amendments and *Chris L.*-like cases, believing that the amendments “implicitly rejected” the reasoning of *Chris L.*¹⁰¹ and that *Chris L.* was “effectively overruled.”¹⁰² This view reflects a misunderstanding of the procedural history of *Chris L.* Nothing in the federal special education law before or after 1997 suggests that Congress intended to restrict or otherwise interfere with the work of police officers,¹⁰³ probation officers, prosecutors, and judges.¹⁰⁴ In passing the 1997 amendments, Congress was not changing the substance of the law, nor was it overruling the reasoning behind *Chris L.* Rather, Congress was reaffirming the central holding of *Honig*—that schools cannot unilaterally exclude troublesome students as a substitute for meeting their substantive and procedural obligations under federal special education law.

Chris L. was a special kind of case. At the time, Tennessee school officials were able to directly file a “petition” against a child in juvenile court.¹⁰⁵ This power is distinct from the mere power to report a crime, and instead is akin to pressing charges against a child and initiating juvenile court jurisdiction over the matter. Thus, in *Chris L.* there are two important and related points. First, *Chris L.* focused on whether an ALJ can order school officials to seek dismissal of a juvenile court petition initiated by the very same school officials. Consequently, *Chris L.* did not

federal status offender policy generally. Whether to argue that the omission of these terms is significant, on the other hand, is left, for present purposes, to the judgment of the individual attorney.

101. *Nathaniel N.*, 764 N.E.2d at 887.

102. *Joseph M. ex rel. Kimberly F. v. Se. Delco Sch. Dist.*, No. CIV. A. 99-4645, 2001 WL 283154, at *6 (E.D. Pa. Mar. 19, 2001).

103. The role of police officers—particularly those assigned to public schools and “school resource officers”—presents issues that are beyond the scope of this article. Minimally, attorneys should consider the possibility of negotiating agreements within IEP meetings that would preclude school administrators from summoning or countenancing police intervention concerning behaviors that are manifestations of the child’s disability, and that should be addressed with behavioral plans and IDEA related services. Obviously, such agreements should explicitly exclude serious and violent delinquent or criminal behavior.

104. As noted above, the Supreme Court ruled in *Honig* that Congress meant to end the practice of schools unilaterally excluding children with disabilities, and particularly children with emotional and behavioral issues, under pretextual and unfair applications of school discipline procedures. *Honig*, 484 U.S. at 323–24. Congress has not retreated fundamentally from its intention to prohibit school administrators from unilaterally excluding children with disabilities. *Accord* Gun-Free Schools Act, 20 U.S.C. § 7151(b)(1) (2006) (requiring states that receive federal education money to have a state law requiring local education agencies (“LEAs”) to expel any student bringing a firearm to school or possessing a firearm in school; the state law, however, can allow the chief of a LEA to modify expulsion on a case-by-case basis). Subsection (c), furthermore, is a “special rule” providing that “[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act” *Id.* § 7151(c). In this regard, the more significant amendment to the IDEA in 1997 was the addition of a “dangerousness” exception that allows school administrators, in three specific circumstances, to place a student with a disability in an interim alternative educational setting for up to forty-five days. *Id.* § 1415(k)(1)(G); 34 C.F.R. § 300.530(g). If the behavior, though, is not a manifestation of the disability, then school administrators can discipline the student as they would discipline a student who is not disabled, except that the special education student continues to have a right to receive a FAPE. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

105. *See Chris L.*, 927 F. Supp. at 269.

address whether schools could *report* crimes to law enforcement. Thus, *Chris L.* is consistent with the final outcome of the 1997 amendments to the IDEA. While the amendments permit reporting a crime, the Department of Education explained that this is distinct from what took place in *Chris L.*: “[t]he Act does not address whether school officials may press charges against a [child with disabilities] when they have reported a crime by that student.”¹⁰⁶ Accordingly, the *Chris L.* court was merely reiterating the prohibition articulated in *Honig* against the practice of schools unilaterally excluding children with disabilities for reasons related to the school’s failure, under federal special education law. School administrators cannot “end run” their special education responsibilities.

Even if a school refers a student to the juvenile court, they are still required to satisfy their procedural and substantive obligations under the IDEA.¹⁰⁷ In specific instances, an ALJ should order school officials to seek dismissal and work within the framework of the IDEA. To serve a child charged with a status offense adequately, therefore, the attorney—in addition to defending the child in juvenile court—should assert rights affirmatively in a special education administrative due process hearing and, if necessary, in a subsequent civil litigation.¹⁰⁸ One might think of this strategy as turning a defendant into a plaintiff.¹⁰⁹

The second point addressed by *Chris L.* is that a school that has the ability to directly file a petition in juvenile court essentially has the power to bypass the gatekeeping function of an intake officer and a juvenile prosecutor. In this way, the power to file a juvenile court petition is the power to manipulate the jurisdiction of the juvenile court. This distinguishes *Chris L.* from other cases involving whether the juvenile court could exercise jurisdiction before the IDEA due process review is completed. For example, in *Trent N.*, a state appellate court pointed out that the IDEA does not generally circumscribe the jurisdiction of the juvenile court but instead is directed at school action.¹¹⁰ Thus, the IDEA due process requirements operate “parallel” to juvenile court jurisdiction.¹¹¹

106. Larry D. Bartlett, *Special Education Students and the Police: Many Questions Unanswered*, 185 *EDUC. L. REP.* 1, 4 (2004)(citing and quoting from Attachment 1—Analysis of Comments and Changes, 64 *Fed. Reg.* 12537, 12631 (Mar. 12, 1999)).

107. *See, e.g., Trent N.*, 569 N.W.2d at 724 (“The school’s responsibility under the IDEA, to provide disabled children with an appropriate education, does not end when a child enters the juvenile system. Both case law and statutes support the proposition that the IDEA continues to work even when a child is involved in juvenile court proceedings.”).

108. The juvenile defense attorney can learn special education law and practice, or, alternatively, the defense attorney can help the child’s parent locate a capable special education attorney who is willing to provide the representation. Assuming that the family is indigent or has little income, the special education attorney should be prepared to provide representation based upon a retainer agreement through which—consistent with legal ethics—the attorney and client identify the attorney’s hourly rate, but, nevertheless, rely upon the fee-shifting provision of the IDEA.

109. *See generally* Joseph B. Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law into Delinquency Representation in the Juvenile Law Clinic*, 42 *WASH. U. J. URB. & CONTEMP. L.* 223 (1992).

110. *See Trent N.*, 569 N.W.2d at 724.

111. Bartlett, *supra* note 106, at 2.

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However, the *Trent N.* court rightly observed that cases in which schools can directly petition the juvenile court are distinct.¹¹² In *Trent N.*, only the district attorney could invoke jurisdiction by initiating proceedings.¹¹³ This jurisdiction, furthermore, is only exercised after the juvenile court, and the district attorney in particular, have complied with their statutory investigative and referral requirements.¹¹⁴ Consequently, a school administrator who, in regard to a particular student, fails to comply with the IDEA and then files a status offense petition against that child is arguably warping the jurisdictional balance struck between the juvenile court and the IDEA administrative review. In this way they are abusing their petitioning authority.

Although attorneys likely will not encounter binding case law authority on this question, one fair interpretation of section 1415(k)(6)(A) of the IDEA is that a special education hearing officer cannot prohibit a school administrator from *referring* a child to the juvenile court. On the other hand, a hearing officer in a special education matter is absolutely empowered to rule upon whether school personnel failed to serve the child appropriately and failed to follow the IDEA's procedural requirements, as well as on whether the alleged behavior is a manifestation of the child's disability.

The juvenile court, of course, can obtain and maintain jurisdiction over a child in a status offense matter notwithstanding the fact that school officials are satisfying their obligations under the IDEA but nonetheless refer a special education student to the juvenile court. Such a case, however, should be rare. In passing the IDEA, Congress did not intend to supplant the states' "general welfare and supportive services for children."¹¹⁵ Recognizing that Congress sought to protect children with disabilities from school removal, the New York Court of Appeals in *In re Beau II* found no evidence that school authorities sought to change a child's placement by filing a status offense petition; rather, the court found that the school sought to reinforce the child's participation in the school's IEP.¹¹⁶ The student was not attending school, and, therefore, school officials were having difficulty successfully implementing his IEP. The court found that, in regard to the child's special education needs, the status offense action was "compatible and supportive."¹¹⁷ It is important, consequently, to recognize that in some cases the juvenile court has an interest in the welfare of children that is coextensive with the interest that Congress and well-meaning school officials have in the welfare of a child.

112. *See Trent N.*, 569 N.W.2d at 725 ("Wisconsin schools do not have statutory authority to initiate juvenile petitions.").

113. *See id.*

114. *See id.* at 725 n.9 ("A juvenile referral may be subject to various levels of review before and after a petition is filed.").

115. *In re Beau II*, 95 N.Y.2d 234, 240 (2000) (citing *Rowley*, 458 U.S. at 176) (habitual school tardiness).

116. *See id.* at 239–40.

117. *Id.* at 240. It has also been found that a status offense case was not an improper effort to change the educational placement of a suicidal child where there was an IEP meeting to evaluate placement needs. *In re Charles U.*, 837 N.Y.S.2d 356 (3d Dep't 2007).

Along these lines we can begin to understand the proper relationship between schools and the juvenile court with respect to status offenders. While schools can refer students to the juvenile court, schools cannot initiate juvenile court jurisdiction as a substitute for their own IDEA obligations. Schools, despite referring students with disabilities to law enforcement, are still obligated to satisfy the procedural and substantive requirements of the IDEA. Finally, schools should be encouraged, and perhaps are obligated, to seek juvenile court intervention when juvenile court intervention is necessary for successful implementation of the school's obligations under the IDEA, for example, in cases where children are not attending school and the school has identified and attempted to implement robust interventions to address the student's education needs, including addressing why the student is not attending school.¹¹⁸

The defense attorney typically is appointed to represent the child *after* the filing of a status offense petition (or even after the child's failure in a status offense diversion program). In order to negotiate a dismissal of the petition or to effectively challenge the intake process, the attorney must rapidly uncover the facts and legal claims that are germane to both the status offense matter and the parallel special education case. The special education advocacy process, however, often will require several months, particularly if the child was not previously evaluated and identified as eligible for special education. For this reason, the defense attorney is not usually in a position early in the defense of a status offense case to present to the juvenile court a hearing officer's determination establishing a denial of a FAPE.

Given time constraints, a more manageable strategy is to negotiate a continuance of the status offense matter to help the parent use special education processes—e.g., an IEP meeting or a due process hearing—to line up appropriate services for the child and for the family that will supersede the perceived need for the status offense proceeding.¹¹⁹ A defense attorney would be well-advised, therefore, to present a hearing officer's findings and rulings in the child's favor on these particular issues to probation officers, prosecutors, and judges in the juvenile system for the purpose of having the charges dropped, the argument being that the child should not be

118. *Cf.* N.Y. FAM. CT. ACT § 735(d)(iii) (McKinney 2009).

[W]here the entity seeking to file a petition is a school district or local educational agency, the designated lead agency shall review the steps taken by the school district or local educational agency to improve the youth's attendance and/or conduct in school and attempt to engage the school district or local educational agency in further diversion attempts, if it appears from review that such attempts will be beneficial to the youth.

Id.

119. *See* ACLU OF WASHINGTON & TEAMCHILD, DEFENDING YOUTH IN TRUANCY PROCEEDINGS: A PRACTICE MANUAL FOR ATTORNEYS 75 (2008), available at <http://www.teamchild.org/pdf/Truancy%20Manual%202008.pdf> [hereinafter DEFENDING YOUTH] (recommending that defense counsel file motion for stay or seek a joint request for continuance of status offense matter in order to address reasons for truancy); *cf. In re Ruffel P.*, 582 N.Y.S.2d 631, 632 (N.Y. Fam. Ct. 1992) (permitting two continuances on a hearing on defense counsel's motion to dismiss in order to await special education decision making by the IEP team). *But cf. In re C.S.*, 804 A.2d 307, 309 (D.C. 2002) (noting that trial court that first ordered and awaited submission of IEP did not abuse its discretion by conducting disposition hearing without receiving or considering the IEP).

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responsible for the failings of school officials and that the child's best interest is served by seeking the IDEA services.

C. Discriminatory Actions Prohibited by the A.D.A. and the Rehabilitation Act

If evidence shows that school officials are referring children with disabilities to the juvenile court on the basis of behavior for which officials are not referring non-disabled children, the defense attorney should consider advancing an argument, under Title II of the Americans with Disabilities Act ("ADA")¹²⁰ or section 504 of the Rehabilitation Act,¹²¹ that the status offense prosecution is discriminatory:

Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (e.g., if they were only reporting crimes committed by children with disabilities and not [those] committed by nondisabled students).¹²²

Schools would effectively be tainting the jurisdiction of the juvenile court with schools' own discriminatory actions. Juvenile court officials should be worried about this given that a state court or local law enforcement can be considered to be a "program or activity receiving federal financial assistance" for purposes of section 504 of the Rehabilitation Act.¹²³ Consequently, if the juvenile court does a proper investigation of the status offense complaint and finds evidence of discriminatory practices, it should be wary about continuing with a status offense petition for fear of itself engaging in a discriminatory practice. If the court does not do a sufficient investigation, it is failing to satisfy its own state law investigatory obligations.

If the court investigates and there is evidence that school officials are not satisfying their IDEA obligations toward a child before the court, in some states, the court may order school officials to comply with their obligations under the IDEA.¹²⁴

120. *See* 42 U.S.C. § 12132 (2006) ("[N]o 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.").

121. Rehabilitation Act of 1976, 29 U.S.C. § 794 (2006) ("No otherwise qualified individual with a disability in the United States . . . 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 . . .").

122. 64 Fed. Reg. 12406, 12631 (Mar. 12, 1999).

123. *See, e.g., Doe v. Chicago*, 883 F. Supp. 1126, 1136–37 (N.D. Ill. 1994) (finding that a police department fell under section 504 in an action alleging discrimination based on HIV status); *Greater Los Angeles Council of Deafness, Inc. v. Zolin*, 607 F. Supp. 175, 179–81 (C.D. Cal. 1984) (holding that a judicial system could be considered a recipient of federal financial assistance under section 504).

124. The way in which the juvenile court exercises jurisdiction over school officials seems to vary by jurisdiction. In some jurisdictions, the court may, following notice and an opportunity to be heard, join school officials as party to the juvenile court proceedings. *E.g., CAL. WELF. & INST. CODE* § 727(a) (2008) ("To facilitate coordination and cooperation among governmental agencies, the court may, after giving notice and an opportunity to be heard, join in the juvenile court proceedings any agency that the court determines has failed to meet a legal obligation to provide services to the minor."). In some jurisdictions, it seems, the court can exercise jurisdiction merely by ordering school officials to do

This may include an order to evaluate a child,¹²⁵ or an order to provide appropriate services.¹²⁶ Unfortunately, in some jurisdictions, the juvenile court may only exercise jurisdiction over school officials *after* the child is adjudicated a status offender.¹²⁷ In these jurisdictions, attorneys should negotiate a continuance of the status offense proceeding to help the parent use special education processes to put in place appropriate services for the child that will supersede the need for a status offense adjudication.

D. State Statutory Obligations of Intake Officers

A primary purpose of the juvenile court is to divert children away from being processed through the *criminal* justice system.¹²⁸ One unique feature of the juvenile court is often unrecognized: the duty and ability of intake probation officers to divert youth away from being processed by the *juvenile* justice system.¹²⁹

State statutes generally reflect the historical importance of the intake process in at least one of two ways. First, intake officers are generally charged with a duty to

something. *See, e.g.*, FLA. STAT. ANN. § 985.18(1) (West 2006) (“After . . . a petition for delinquency has been filed, the court may order the child . . . to be evaluated by a psychiatrist or a psychologist, by a district school board educational needs assessment team, or, if a developmental disability is suspected or alleged, by a developmental disabilities diagnostic and evaluation team . . .”).

125. *See* 20 U.S.C. § 1414(a)(1)(B) (“[A] State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.”). The power to order evaluation does not vary by jurisdiction.

126. *See* CAL. WELF. & INST. CODE § 727 (2008) (“The court has no authority to order services unless it has been determined through the administrative process of an agency that has been joined as a party, that the minor is eligible for those services.”).

127. *See* LA. CHILD. CODE ANN. art. 779(C) (2004) (“In any case in which the family has been adjudicated to be in need of services, the court may order any public institution or agency and its representatives to . . . [p]rovide any services specified in its order as necessary to improve the family relationships or reunite the family in the best interests of the child . . .”).

128. *See* Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477, 2479 (2000) (“This promotion of juvenile court as a diversion from criminal justice is distinct from more ambitious programs of ‘child saving’ intervention because avoiding harm can be achieved even if no effective crime prevention treatments are available.”).

129. *See* Charles Lindner, *Probation Intake: Gatekeeper to the Family Court*, 72 FED. PROBATION 48 (2008), available at http://www.uscourts.gov/fedprob/June_2008/13_probation_intake.html [hereinafter Lindner, *Probation Intake*]. Judge Julien W. Mack stated that:

It is the last thing to do with the wayward child to bring him into any court. The wise probation officer will save him from the court Of course in the end some will have to be brought into court. That court is successful in its work that has the least number of cases.

Id. at 49 (internal citation omitted). Judge W. Waalkes wrote that:

Intake is a permissive tool of potentially great value to the juvenile court. It is unique because it permits the court to screen its own cases It can cull out cases which should not be dignified with further court process. It can save the court from subsequent time consuming procedures to dismiss a case It provides machinery for referral of cases to other agencies when appropriate and beneficial to the child.

Id. (internal citation omitted).

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investigate complaints. Second, upon investigating, intake officers are charged with a duty to use discretion in weighing whether to recommend that a formal petition be filed, that the case be diverted to another agency, or that the case be dismissed. Federal special education policy should meld with these requirements to make special education considerations centrally important at the intake and referral stages of the juvenile court process.

1. *Investigative Requirements*

Probation officers in most jurisdictions are charged with a statutory duty to investigate status offense referrals. The investigative duty is articulated differently throughout jurisdictions. Some jurisdictions require that a probation officer conduct a “preliminary inquiry.”¹³⁰ Other jurisdictions impose a legal obligation on the intake officer to “examine complaints,”¹³¹ “[i]nvestigate all cases referred,”¹³² and “[r]eceive and examine written complaints.”¹³³

Some jurisdictions are very specific about the required extent of an intake officer’s investigation. Florida, for example, requires that youth be “screened” for “[t]he presence of medical, psychiatric, psychological, substance abuse, educational, or vocational problems, or other conditions that may have caused the child to come to the attention of law enforcement or the department” and for “whether the child poses a danger to himself or herself or others in the community.”¹³⁴ Some jurisdictions, however, are not specific about the investigative requirements for intake officers.¹³⁵

Experience strongly suggests that probation officers are not fully, or even seriously, investigating status offense referrals from schools to determine whether school officials have failed to provide appropriate special education services.¹³⁶ Similarly, probation officers rarely, if ever, contemplate the applicability and potentially salutary effects of appropriate special education services for a child with disabilities who is the subject of a status offense referral for ungovernability vis-à-vis the child’s parents. Most probation officers are not even aware of the vast services that are potentially available to children with special education needs.

Whether school administrators are attempting an “end run” of their special education responsibilities and whether the child facing charges has an undiagnosed education-related disability should be considered at the “investigative and referral

130. MASS. GEN. LAWS ch. 119, § 39E (2008); NEV. REV. STAT. § 62C.100(1)(b) (2007); UTAH R. JUD. ADMIN. 7-301 (2006).

131. GA. CODE ANN. § 15-11-24.2(2) (2008).

132. VA. CODE ANN. § 16.1-237(A) (2008).

133. ALA. CODE § 12-15-118(1) (2005).

134. FLA. STAT. § 985.145(1)(c)(2) (West 2006).

135. See, e.g., GA. CODE ANN. § 15-11-24.2 (specifying no specific investigatory requirements).

136. For example, as one scholar has noted, “[i]ntake dispositions are often determined by the previous offense.” Lindner, *Probation Intake*, *supra* note 129, at 49.

levels” of the delinquency process.¹³⁷ Intake probation officers therefore should be investigating whether a school is failing, intentionally or not, to meet its obligations under the IDEA, and whether the juvenile court is the best place for a child referred for a status offense. Recognizing the responsibility of intake officers to investigate, Congress required that agencies referring children to the juvenile court should transmit special education and disciplinary records.¹³⁸ At the point of intake, state law—requiring probation officers to screen out inappropriate cases¹³⁹—meshes with the congressional mandate that school authorities provide relevant school records to the court.

If an intake officer fails to investigate properly and fails to recognize the significance of special education violations by school personnel, the attorney can provide school records and explain to the intake officer—and subsequently, if necessary, to the prosecutor—that the case is really an unfair attempt by school officials to transform a failure to evaluate and to provide special education services into a dispute in the juvenile court. Moreover, given the explicit congressional mandate to provide relevant school records, even if not required *explicitly* by the state investigative requirements, a sufficient investigation should require that intake officers investigate school records. In the event that an intake officer does not, an attorney should file a motion to dismiss the petition based on violations of the statutory investigative process.

2. *Failure to Exercise Discretion*

Intake probation officers typically are also empowered by statute to examine complaints to *consider* whether to commence a proceeding against a child.¹⁴⁰ The legal duty for intake officers to exercise discretion also comes in many forms depending on the jurisdiction. Intake officers are required to determine the “appropriateness”¹⁴¹ of

137. *Trent N.*, 569 N.W.2d at 724.

138. 20 U.S.C. § 1415(k)(6)(B) provides: “An agency reporting a crime committed by a child with a disability shall 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.” *Id.* The transfer of records is subject to the protections of the Family Educational Rights and Privacy Act (“FERPA”). See *Nathaniel N.*, 764 N.E.2d at 888 (holding that transfer is permitted by FERPA).

139. See generally *Schall v. Martin*, 467 U.S. 253, 284 (1984) (describing New York’s intake process).

140. See MODEL ACT, *supra* note 5, § 6 (withdrawn from recommendation for enactment as obsolete) (specifying that the “[p]owers of the probation officer” include “mak[ing] investigations, reports, and recommendations to the juvenile court; receiv[ing] and examin[ing] complaints and charges of delinquency, unruly conduct or deprivation of a child for the purpose of considering the commencement of proceedings . . . [and] mak[ing] appropriate referrals to other private or public agencies of the community if their assistance appears to be needed or desirable”); D.C. CODE § 16-2305 (2009) (requiring that intake probation officer recommends whether to file petition; notifies complainant of recommendation not to file, and that complainant may appeal to the prosecutor). Thus, the intake probation officer can delay, block, or divert a complaint and, essentially, refer the matter to the public agency—the school system—that sent it to the court.

141. FLA. STAT. ANN. § 985.145.

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juvenile court actions taken and to make only “appropriate”¹⁴² referrals. Implicit in these requirements is that intake officers, beyond their investigative duties, exercise judgment based on their investigative findings with respect to a case.

Some jurisdictions are more explicit and specific about what is required of an intake officer exercising discretion. For example, Pennsylvania requires that intake officers “should *balance the interests* of the victim and protection of the community, imposition of accountability on the juvenile for offenses committed, and the development of competencies for the juvenile.”¹⁴³ Nevada requires that intake officers “determine whether the best interests of the child or of the public” require formal processing or informal adjustment.¹⁴⁴ Accordingly, through investigation and decision-making requirements, probation officers are required to function as gatekeepers to the juvenile court, screening out cases that are inappropriate for juvenile court intervention.

Despite being charged with statutory obligations to investigate and exercise discretion, intake officers do not exercise, or exercise only in a limited fashion, this decision-making role.¹⁴⁵ Rather than pushing back, probation officers tend to “go with the flow” of the school-to-prison pipeline.¹⁴⁶ Evidence of this increasing derogation is found in the fact that the number of petitioned status offense cases increased 29% between 1995 and 2005.¹⁴⁷

Congress, recognizing the gatekeeping function of the juvenile court, intended for the special education needs of a child to be a factor in the decision-making of juvenile court officials. For this reason, Congress mandated that a child’s educational records be forwarded to the court. In light of the federal policy to deinstitutionalize status offenders, to address the needs of students with disabilities in the least restrictive environment, and to stop school officials from unilaterally excluding children with disabilities from school, one should conclude that Congress also intended that a child’s special education needs would be a significant, and perhaps determining factor at the intake stage of a status offense matter.

While a court will not assume that intake probation officers and prosecutors will “rubber stamp” a referral by school authorities, the court can use its supervisory authority to correct the error if intake probation officers and prosecutors misuse or

142. ARK. CODE ANN. § 9-27-308 (2009); GA. CODE ANN. § 15-11-24.2.

143. 33 PA.B. 1581 (emphasis added).

144. NEV. REV. STAT. § 62C.100.

145. *See, e.g.,* Lindner, *Probation Intake*, *supra* note 129.

146. A nearly identical analysis applies, of course, to prosecutorial decision making. Prosecutors are charged with determining whether the child’s and the community’s interest weigh in favor of proceeding with a status offense case. The prosecutor should be acting to ensure the accountability of school administrators who seek to refer special education students for status offense prosecutions.

147. PUZZANCHERA & SICKMUND, *supra* note 55, at 72. Status offense petitions formally processed by the juvenile court also rose from 4.1% to 4.8%. Total petitioned status offense case rate increased 17% between 1995 and 2005. *Id.* at 73.

abuse their discretion.¹⁴⁸ As appropriate, based upon the specific facts of a case, defense attorneys should use special education considerations to convince (1) probation officers to recommend against petitioning or to divert the child from prosecution; (2) prosecutors to refuse to charge or to agree to divert; or (3) judges to dismiss or divert cases at the outset, to refuse to take a plea, to find the child “not guilty” at trial, or to dismiss at disposition.

An intake probation officer who is fully informed of special education entitlements should rarely recommend petitioning a status offense case against a child who is eligible for special education. Nevertheless, the defense attorney must be prepared to challenge the decision making of, or failure to exercise discretion by, the intake officer.¹⁴⁹ The attorney can file a motion to dismiss the petition based on violations of the statutory intake process.

E. Substantive Judicial Rulings

1. In Need of Rehabilitation

Like probation officers and prosecutors, judges ultimately must determine whether a child—even if unruly or truant—is “in need of treatment or rehabilitation.” For example, in the Model Juvenile Court Act, the definition of “unruly child” (like the definition of “delinquent child”) requires both the deviant conduct and a separate finding of a “need for treatment and rehabilitation.”¹⁵⁰ The definition is conjunctive, and the prosecutor must prove both elements.

Representing a child who has access to appropriate and comprehensive services within the special education system, a defense attorney will be in a strong position to rebut any presumption that the child is in need of treatment through the juvenile court. The availability of appropriate services from the special education system, which are summarized below, signifies that the child is not in need of treatment or rehabilitation from the juvenile system or through the court’s auspices. In many cases, if school officials were acting with fidelity in regard to the child’s IDEA rights, the child would not present as having an unmet need for treatment or rehabilitation. On this basis, the attorney can move at any point during the proceedings to dismiss the petition or move at trial for a judgment of acquittal.¹⁵¹

148. *See Trent N.*, 569 N.W.2d at 724

149. *See generally* Joseph B. Tulman, *The Role of the Probation Officer in Intake: Stories from Before During and After the Delinquency Initial Hearing*, 3 UDC/DCSL L. REV. 235, 235–50 (1995) (discussing responsibilities of an intake officer prior to an initial hearing).

150. MODEL ACT, *supra* note 5, § 2(4). *But cf. In re M.C.F.*, 293 A.2d 874, 877 (D.C. 1972) (finding rebuttable presumption that delinquency adjudication establishes need for care and rehabilitation).

151. This is consistent with recent recommendations of the United States General Accounting Office to Congress regarding how better to reduce state juvenile court costs associated with placing juveniles for purposes of receiving mental health services, which must be provided in appropriate circumstances by schools under the IDEA. *See* U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE AND JUVENILE JUSTICE, *supra* note 70, at 31 (identifying misunderstanding of school IDEA obligations as one reason why juvenile courts are burdened with inappropriate and costly cases).

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2. *Best Interests of the Child*

Beyond substantive requirements to prove the need for rehabilitation, judges, like probation officers and prosecutors, have inherent authority to consider the best interests of the child—as well as safety of the community—in handling status offense cases.¹⁵² In some states, a juvenile court judge can grant a motion to dismiss in the interest of justice and in the best interest of the child, assuming that the judge finds that the dismissal does not jeopardize the safety of the community.¹⁵³ A judge who is aware of the special education needs of a child and who is aware of the extensive services available for that child should find that the best interests of the child are served by the special education system rather than the juvenile court.

Services available through special education law are extensive, while the services available through the juvenile court are limited. Attorneys with knowledge of the services available under the IDEA can argue that a status offender is not in need of rehabilitation from the juvenile court because appropriate rehabilitative services are available within the community, or that the best interests of the child are better served through the special education system. What follows is an extensive summary of the services available under the IDEA.

IV. SERVICES THROUGH THE IDEA IN CONTRAST WITH SERVICES THROUGH THE JUVENILE COURT

The range of mandatory, when appropriate, services available through the special education system is greater and superior to the range of interventions currently available through the juvenile court. In the special education system, services are specialized, regularly evaluated, collaborative, preventative, and cost efficient. Moreover, responsibility for improvement is not placed solely on the shoulders of children; rather, responsibility is distributed between those giving and those receiving the services. Juvenile court intervention should be sought only when needed to effectively implement the services available under the IDEA.

152. Essentially, judges are required “to provide a simple judicial procedure . . . in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced . . .” MODEL ACT, *supra* note 5, § 1(4). Other legal rights include special education rights, and the simplest and fairest process often would be to eschew status offense proceedings and to ensure that the child is receiving appropriate services through the school system and other public agencies in order to succeed at school and at home.

153. *See, e.g., In re Robert T. Doe*, 753 N.Y.S.2d 656, 658 (N.Y. Fam. Ct. 2002) (relying upon juvenile court’s inherent authority to dismiss status offense matter in the interest of justice); *Trent N.*, 569 N.W.2d at 725 (recognizing, in dictum, that trial court could have dismissed the petition in the best interest of the child but holding that trial court ruled on legal grounds instead). This inherent authority is also articulated in the purpose clauses of many state juvenile court acts. *See, e.g.,* LA. CHILD. CODE ANN. art. 801 (2004) (“The purpose of this Title is to accord due process to each child who is accused of having committed a delinquent act and . . . to insure that he shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare and the best interests of the state . . .”); MASS. GEN. LAWS ch. 119, § 53 (2008) (“Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance.”).

A. Individualized Education Programs

An IEP is a written blueprint of the specialized instruction and other services—e.g., related services, transition services, assistive technology, program modifications—that are appropriate for a particular special education student.¹⁵⁴ The IEP must present the child’s current academic levels and functional performance, include annual goals, and specify how the child’s progress toward the goals will be measured.¹⁵⁵ An IEP team consists of the child’s parents, the child’s regular education teacher and special education teacher, a school district representative, a person qualified to interpret evaluation results, other individuals with knowledge of special education or the child whom the parents or school system representatives invite, and, whenever appropriate, the child.¹⁵⁶ The IEP team must review and revise the IEP at least annually.¹⁵⁷ Notably, the law specifically charges the IEP team with considering services to address a child’s disruptive behavior: “The IEP Team shall . . . [.] in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior”¹⁵⁸ The IEP team must also consider strengths of the child, evaluations of the child, concerns of the parents, and, of course, “the academic, developmental, and functional needs of the child.”¹⁵⁹

B. Positive Behavioral Interventions and Supports

Congress found that, based upon almost three decades of research and experience, the effectiveness of education for children with disabilities improves with the provision of whole-school approaches, including positive behavioral interventions and supports.¹⁶⁰ The IEP Team can order a functional behavioral assessment, leading to the design and implementation of a behavioral intervention plan.¹⁶¹

C. Related Services

A related service is “transportation and such developmental, corrective, and other supportive services as [are] required to assist a child with a disability to benefit from

154. 20 U.S.C. §§ 1401(14), 1414(d).

155. *Id.* § 1414(d)(1)(A)(i).

156. *Id.* § 1414(d)(1)(B).

157. *Id.* § 1414(d)(4); *see also id.* § 1414(d)(2)(A) (requiring that an IEP be in place at the start of the school year).

158. *Id.* § 1414(d)(3)(B)(i).

159. *Id.* § 1414(d)(3)(A)(i)–(iv).

160. *See id.* § 1400(c)(5)(F).

161. *See id.* § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (IEP Team shall consider positive behavioral interventions and supports); *see also* 20 U.S.C. § 1415(k)(1)(D)(ii) (functional behavioral assessment and behavioral intervention services for child removed to interim alternative educational setting).

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special education,”¹⁶² and includes, in essence, anything that supports the student’s ability to learn and to benefit from education. The federal regulations specifically identify, among other things, speech-language pathology¹⁶³ and audiology services,¹⁶⁴ and physical¹⁶⁵ and occupational therapy.¹⁶⁶ Of particular relevance for children facing status offenses and for their families are the following related services:

- Recreation—assessing leisure function; providing therapeutic recreation services; providing recreation both in schools and arranging recreation through community agencies; and educating the child regarding appropriate leisure activity;¹⁶⁷
- Counseling Services—providing services from “qualified social workers, psychologists, guidance counselors, or other qualified personnel . . . ;”¹⁶⁸
- Parent Counseling and Training—helping parents to understand their child’s special needs, informing parents about child development, and assisting parents to acquire skills necessary to support implementation of the IEP;¹⁶⁹
- Psychological Services—evaluating the child, planning and managing a program of psychological counseling for the child and the parents, and helping to develop positive behavioral intervention strategies;¹⁷⁰ and
- Social Work Services in Schools—studying the child’s social or developmental history; conducting group and individual counseling with the child and family; addressing, along with the parents and others, all aspects of the child’s life that affect performance in school; engaging school and community resources to enhance the child’s ability to benefit from the educational

162. 20 U.S.C. § 1401(26); *see* 34 C.F.R. § 300.34 (specifying further “related services”). The requirement to provide related services includes medical services by a licensed physician only for purposes of diagnosis or evaluation. *See* *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891–92 (1984) (holding that catheterization is not covered because it is not diagnostic or evaluative). Moreover, the statute excludes from coverage “a medical device that is surgically implanted” 20 U.S.C. § 1401(26)(B).

163. 34 C.F.R. § 300.34(c)(15).

164. *Id.* § 300.34(c)(1).

165. *Id.* § 300.34(c)(9).

166. *Id.* § 300.34(c)(6).

167. *Id.* § 300.34(c)(11).

168. *Id.* § 300.34(c)(2).

169. *Id.* § 300.34(c)(8).

170. *Id.* § 300.34(c)(10).

program; and helping to develop positive behavioral intervention strategies.¹⁷¹

Under special education law, any of these services that are appropriate for a particular child with a disability must be provided, at no charge to the parent, by or through the public school system.¹⁷²

D. Transition Services

For students turning sixteen years old and older, the IEP team must consider and include transition services in the IEP.¹⁷³ Special education law requires school personnel to prepare students with disabilities for success after completing high school,¹⁷⁴ and, by definition, “transition services” must be:

[A] coordinated set of activities . . . within a results-oriented process . . . focused on improving the academic and functional achievement . . . 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 . . .¹⁷⁵

Further, transition services must be individualized according to the child’s needs and in consideration of “the child’s strengths, preferences, and interests . . .”¹⁷⁶ School personnel must facilitate the development of work and other post-school objectives, and must provide specialized instruction, related services, and community experiences that facilitate the transition objectives.¹⁷⁷ Accordingly, although school personnel can engage other agencies to provide transition services, the school personnel must reconvene the IEP team to develop alternative strategies if other agencies fail to provide transition services.¹⁷⁸

171. *Id.* § 300.34(c)(14).

172. The IDEA also requires the provision of assistive technology devices and services when appropriate to increase, maintain, or improve the child’s functional capabilities. *Id.* at § 300.324(a)(2)(v); *see also* 20 U.S.C. § 1401(1)–(2).

173. *See* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII) (requiring a plan for transition services, including annual updates); 34 C.F.R. § 300.320(b) (mandating IEP team to include transition services for children younger than sixteen, if appropriate).

174. 20 U.S.C. § 1400(d)(1)(A) (characterizing the purposes of IDEA to include preparing children with disabilities “for further education, employment, and independent living”).

175. 34 C.F.R. § 300.43(a)(1).

176. *Id.* § 300.43(a)(2).

177. *Id.* § 300.43(a)(1)–(2). Transition services also include, in appropriate circumstances (e.g., students with cognitive impairments), training in daily living skills and providing a functional vocational evaluation. *Id.* § 300.43(a)(2)(v).

178. *Id.* § 300.324(c)(1).

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E. Limited Services are Available through the Juvenile Court

The juvenile justice system has limited and typically ineffective services to address the behavior and needs of status offenders. In most adjudicated status offense cases, the court orders probation; residential placement is the second most frequent dispositional outcome.¹⁷⁹ Of all status offenders, those adjudicated ungovernable are the most likely to be placed in a residential facility, while truants are the most likely of status offenders to be placed on probation.¹⁸⁰ An honest appraisal of probation, however, is that it generally provides minimal services to youth and is a mechanism by which status offenders can be set up to commit a technical violation. The primary intervention available through the juvenile court seems to be the threat of incarceration and incarceration itself.

Admittedly, nothing in the IDEA excludes from coverage, or diminishes the rights of, children with education-related disabilities who are detained or incarcerated in delinquency facilities. However, using incarceration to provide status offenders with IDEA services offends federal policy of deinstitutionalizing status offenders, mainstreaming students with disabilities in the least-restrictive environment, and limiting the authority of school officials to unilaterally exclude students with disabilities.

A defense attorney with knowledge of the range of available services available through the IDEA can bring this information to the attention of the juvenile court judge and ask for a continuance to help the parent use special education processes to line up appropriate services for the child and for the family that will supersede the perceived need for the status offense proceeding. The defense attorney can later present the services provided for in the IEP as superior to any intervention that the juvenile court could provide. In this way, the attorney should be able to rebut the presumption that the child's rehabilitation is contingent upon the intervention of the juvenile court. The juvenile court, however, should appropriately intervene where intervention can help school officials and parents achieve the goals of an IEP.

Based upon success in the special education due process hearing, including arranging an appropriate placement and any of the above services, one can anticipate that the prosecutor or judge will agree to dismiss the status offense matter. If not, the defense attorney can introduce into the status offense proceeding the findings of fact and conclusions of law by the special education hearing officer, which may demonstrate that school personnel have violated the IDEA, that the child's behavior underlying the status offense charge is a manifestation of the child's disability, and that the hearing officer has ordered appropriate school-based services for the child. If the juvenile court judge maintains, in the face of the special education findings, that the child is "guilty" of the status offense charges and is in need of treatment and rehabilitation from the juvenile system or that a disposition is in the best interests of a child, the defense attorney—having introduced the special education findings and order—will be in a strong position to appeal.

179. See OJJDP, NATIONAL REPORT, *supra* note 1, at 192.

180. See *id.*

V. CONCLUSION

A status offense charge suggests that the child is in a crisis situation at school, at home, or both. For children with disabilities that affect education, the IDEA services should be sufficient to address the conditions that lead to a status offense referral for truancy or disruptiveness at school. Further, with regard to a child whose education-related disabilities also affect relationships at home, special education services should be in place to ameliorate the behaviors underlying a status offense referral for ungovernability. A juvenile defense attorney who provides special education representation can obtain appropriate services for clients and often extricate those clients from juvenile court. Problems that developed over a period of years will not recede and dissipate immediately. The attorney should maintain the special education representation until the child is making satisfactory progress academically and emotionally. To be sure, the attorney also has to be keen to the possibility of schools merely paying lip service to their special education responsibilities and continuing to provide ineffective services. Through effective special education advocacy, attorneys can help prevent students with education-related disabilities from being flushed down the school-to-prison pipeline.