Disability and Delinquency:

How Failures To Identify, Accommodate, and Serve
Youth with Education-Related Disabilities
Leads to Their Disproportionate Representation

In the Delinquency System

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Introduction

This bulletin seeks to identify and clarify the ways in which personnel in school systems and delinquency systems fail -- in making decisions that affect children -- to recognize and respond appropriately to children's education-related disabilities. The reader is encouraged to consider whether disability rights laws require adults to alter their treatment of children with disabilities; and, whether those laws require different outcomes for children with disabilities in the delinquency system.

Large percentages of children in the delinquency system -- as well as adults in the criminal system -- are severely undereducated, and literacy skills in these populations are strikingly low. Poor educational performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that system who have education-related disabilities and who, more particularly, have not received the benefit of appropriate, effective special education services. Indeed, the majority of children in the juvenile delinquency system are children with education-related disabilities. Children with education-related disabilities are disproportionately involved in the delinquency system both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent.

Laws that Define and Uphold Rights of Children with Education-Related Disabilities

Under the Individuals with Disabilities Education Act (IDEA), each state must provide a "free appropriate public education" to all children between the ages of three and twenty-one, inclusive, who have disabilities and who reside within the state. To be eligible under the IDEA to receive services, a child (1) must have a disability specifically enumerated in the Act and (2) must require, as a result of that disability, special education. The term "free appropriate public education" means "special education," provided without cost to the parent, designed to meet "the unique needs of a child with a disability." In addition to academic instruction, the child may be entitled to "related services," i.e., services necessary to "assist a child with a disability to benefit from special education." The law also requires that school personnel provide, for students with disabilities who are fourteen years of age and older, "transition services" to help them prepare for productive "post-
school activities.\textsuperscript{7}

The special education process involves several discrete steps, including identification, evaluation, programming and placement. First, states are obligated to have a system by which all children with disabilities residing within the state are "identified, located and evaluated."\textsuperscript{8} The evaluation procedures must meet statutory criteria for fairness, accuracy, and completeness.\textsuperscript{9}

If the evaluations establish that the child is eligible for special education and related services, school personnel, including teachers and evaluators, together with the parent and the child, must develop an Individualized Education Program (IEP) to remediate the child's weaknesses.\textsuperscript{10} The IEP is a written document stating the specific special education, related services, and transition services to which the child is entitled.\textsuperscript{11} Once the team members have developed an appropriate IEP, the team must consider, and school personnel must propose, an educational placement for the child.\textsuperscript{12} In determining the placement, school personnel must ensure that the child is, to the maximum extent appropriate, educated with children who are not disabled.\textsuperscript{13}

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability within any program that receives Federal funding. The fundamental elements of a claim under the Rehabilitation Act are that: (1) the plaintiffs are disabled as defined by the statute; (2) they are otherwise qualified for the program, activity, or benefit at issue; (3) they have been excluded from the program, activity or benefit solely by reason of their disabilities; and (4) the program, activity or benefit is funded by Federal financial assistance.\textsuperscript{14} Children with disabilities who are not necessarily eligible under the IDEA (because the disability does not substantially affect the child's academic functioning or because the disability is not listed under the IDEA) may qualify for protection in the school setting under Section 504. Section 504 also applies to state and local government delinquency facilities that receive Federal funding.

In 1990, Congress passed the Americans with Disabilities Act (ADA), a comprehensive anti-discrimination package that is commonly regarded as the most important civil rights enactment in a generation.\textsuperscript{15} The ADA reinforces and vastly extends Section 504 of the Rehabilitation Act by covering entities that receive Federal funds, as well as entities that do not receive Federal funds. In
relation to the accountability and responsibility of decision-makers in juvenile delinquency systems and in the public school systems, the most important provisions of the ADA are in Title II. Title II of the ADA makes the Act applicable to all state and local governments, including all sub-divisions -- departments, agencies, and authorities -- of state and local governments.\textsuperscript{16} Specifically, the Act contains the following provision: "[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."\textsuperscript{17}

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Application of the Law to Decisions to Preventively Detain Children with Disabilities
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In the context of an action challenging pre-trial detention, children with disabilities who are either receiving special education services or who claim to be in need of special education services should be considered "disabled" within the meaning of the ADA and Section 504. Eligibility for special education and related services is premised on the student's having both a specific disability and the disability "adversely affecting" the student's ability to learn.\textsuperscript{18}

In \textit{Olmstead v. L.C.},\textsuperscript{19} the U.S. Supreme Court found that the ADA requires a state to place persons with mental disabilities in community settings rather than in institutions when, as under the facts of that case, the state's own treatment professionals had acknowledged that the less restrictive placement was appropriate and the individuals affected did not oppose the transfer to the less restrictive placement.

The Supreme Court in \textit{Pennsylvania Department of Corrections v. Yeskey},\textsuperscript{20} extended the protections of the ADA to prisoners and required that a state must not discriminate in providing programs, services, and benefits that allow a person not only to shorten, but also to avoid incarceration altogether. By declaring prisoners covered by the ADA, Yeskey necessarily means that the ADA covers children who face incarceration in juvenile facilities. Using the recent \textit{Olmstead v. L.C.} and Yeskey rulings, litigators will now seek to challenge the placement of young people with disabilities in incarceration facilities and, more specifically, to argue that children are "qualified" for release based upon reasonable accommodations that include participation in programs and services.

With regard to pre-trial detention, a prosecutor certainly could argue, and a judge might
legitimately find, that a child who is disabled is not qualified for release.\textsuperscript{21} Researchers have advanced, among other theories, a theory that children with disabilities are over-represented in the delinquency system because they are more susceptible to committing delinquent acts than their non-disabled peers. The children would be "qualified" for release if a reasonable accommodation can be made so that they can remain in the community. Thus, appropriate special education and related services might be a reasonable accommodation that would enable qualified youth with disabilities to remain in the community.

In the context of pre-trial detention, the only legitimate justifications for the disparate impact of the disproportionate pre-trial detention of juveniles with disabilities are that the children with disabilities present, proportionately, a greater risk of flight and are more dangerous. A review of the most recent evidence suggests that a greater risk of flight or greater level of dangerousness among children with disabilities may not, in fact, be the basis for the disparity in detention rates. Instead, the possibility of parental neglect, homelessness, or the child's use of illegal substances (however slight) may be the more prevalent factors in the decision to detain youth. Understandable as the court's urge to protect these "at-risk" children may be, these factors cannot justify detention and cannot be used to counter a finding of discrimination in detention decisions concerning children with disabilities.

Decision-Making that Results in Over-Representation in the Delinquency System of Children with Education-Related Disabilities

School System Personnel

A factor fueling the disproportionate representation of children with education-related disabilities in the delinquency system is the failure of some school system personnel to find, evaluate, and serve children with disabilities. State law (in every state) requires that school personnel identify and serve children who are eligible, based upon disabilities, for special education services. An unfortunate yet typical pattern for a child with disabilities who is enmeshed in the delinquency system is as follows: school personnel failed to identify the child for a number of years, and the child increasingly fell behind in academic achievement and repeated several grades. Also typical is the
failure by school personnel, even after identifying the child as eligible for special education, to provide required services and to arrange appropriate placements.

Children with education-related disabilities who are in delinquency placements face a cluster of related and corresponding problems. Even if the children have been identified and have previously obtained IEPs, those IEPs often do not follow them to the delinquency placements. Because of past experiences of being unable to manage the student’s behavior, school system personnel frequently frustrate efforts to reintegrate children with disabilities from delinquency placements back into the public school system many times.
Delinquency System Personnel

Defense Attorney. Defense attorneys make numerous decisions with, and on behalf of, the children they represent in delinquency matters. Generally speaking, however, defense attorneys are unaware that many of their clients have education-related disabilities and that those disabilities (or the lawyer's ignorance of the disabilities) may influence that decision-making and, indeed, influence the very essence of the lawyer-client relationship.

Compounding common communications problems between lawyers and teenage clients are language-based disabilities and impairments (i.e., hearing and vision impairments) that affect the clients' abilities to communicate. Language-based learning disabilities, and particularly, expressive and receptive language disorders, are common among children in the delinquency system. The failure of defense attorneys to recognize the significance of their clients’ education-related disabilities, particularly language-based disorders, and the attorneys’ routine failure to raise those disabilities when relevant to a defense or as mitigation, constitutes incompetent, and perhaps even discriminatory, representation.

Few delinquency defense attorneys are knowledgeable about, or even aware of, the law of special education and disability rights; thus, delinquency defense attorneys commonly cannot advise clients regarding these rights and, for example, the possibility of substituting special education services for punitive handling in the delinquency system. The lesson for these defense attorneys, of course, is to study disability rights law and particularly ways in which to use special education and other rights to advance the cause of a disabled child who is charged with a delinquent act. The lesson for the disability community is to raise the awareness of the court and juvenile justice officials.

Probation Officers. The court uses probation officers at three different stages of a delinquency case: (1) intake, to determine whether a prosecution should proceed, and, if so, whether the court should detain the child until the trial; (2) pre-disposition, to prepare a report summarizing the child’s social history; and (3) post-disposition, to supervise the child.

In most jurisdictions, the intake worker is also provided various options for diverting cases prior to prosecution. An intake probation officer who perceives that a child has access to meaningful
services outside of the delinquency system will be likely to block a prosecution in that child’s case. If the probation officer is unaware that the child under consideration has a disability, the officer may actually have missed much information relevant to deciding whether the child’s prosecution should proceed. Even more troubling is the possibility that the probation officer interprets the child’s lack of fluency or failure to communicate as evidence of a negative attitude or an oppositional-defiant personality. The indirect effect, therefore, is that the manifestation of the disability actually increases the likelihood that the probation officer will find the need to proceed with the prosecution.

At the pre-disposition stage of a delinquency case, the probation officer who is unaware of education-related disabilities may report to the judge inaccurate and prejudicial conclusions. Probation officers are often unaware of special education rights and services and often do not know that the child is entitled to comprehensive evaluations through the school system. Thus, without access to critical evaluation information, the probation officer is not in a position to help explain to the child why school has been so frustrating; and, at the same time, the probation officer is not able to help the child understand what the child's disability is and that the child does have the potential and opportunity to succeed in school (with proper special education services).

At disposition, a child sentenced to probation must comply with all conditions of his or her probation. Failure by the child to follow the conditions of probation can result in an action to revoke probation, usually resulting in incarceration. The simple requirement that, as a condition of probation, a child attend school -- every day, every class -- is a challenge for many children with undiagnosed and unmet special education needs. It may even be an impossible condition. Many of these children have spent, prior to their delinquency involvement, years in inappropriate classrooms experiencing daily failure.

**Police Officers.** Police officers, like intake probation officers, perform a series of screening functions in the juvenile delinquency system. They often are not aware that some of the children who are the subject of these screening decisions have disabilities and that the children's disabilities may be relevant to the resolution of the screening decisions.

*Miranda v. Arizona* provides that, for a suspect in their custody whom they seek to
interrogate, police must inform the suspect of certain rights, including the right to remain silent and the right to counsel. The suspect, however, may waive the rights. Courts on occasion have suppressed statements made by children based on a finding that a *Miranda* waiver was invalid because the child was low-functioning or otherwise impaired. The passage of the ADA may require a pervasive re-evaluation by police of their obligations in undertaking the interrogation of children who may be disabled. Under Title II, regarding the duties of public entities, police departments may have an affirmative obligation to accommodate children with disabilities whom the police seek to interrogate.

**Juvenile Court Prosecutors.** Juvenile prosecutors make decisions about which children to prosecute and which charges to bring. Prosecutors in both criminal and juvenile systems have largely-unfettered discretion to make charging decisions. In addition to their obligation to protect the community from deviant offenders, juvenile court prosecutors have a common-law and, in many jurisdictions, a statutory duty to evaluate and promote the best interests of a child who is accused of committing, or adjudicated as having committed, a delinquent act. Delinquency prosecutors also must advance the position and interests of governmental agencies that deal with children charged with delinquent acts. Thus, the prosecutorial role, as currently constituted and executed, contains several potential conflicts.

One solution to the problem of prosecutorial conflicts is to separate the responsibilities, by requiring that attorneys for the state and local youth services agencies, rather than prosecutors, represent those agencies in delinquency court. Prosecutors could seek information from intake probation officers regarding whether children presented for prosecution are in, or may qualify for, special education. Based upon that information, prosecutors could raise questions about whether children with education-related disabilities are receiving appropriate special education services.

**Juvenile Court Judges.** In order to detain a child prior to a trial, a judge must make a finding by “clear and convincing evidence” that the child would be demonstrably dangerous if left in the community or most likely would fail to appear at trial. Juvenile court judges detain children who *appear* to be dangerous or who *appear* to present a risk of flight. Appearances, of course, can be
deceiving. An objective assessment of dangerousness begins with a child's record of prior, demonstrably dangerous acts. Judges commonly consider failure to attend school as a factor that supports, along with other facts and circumstances, a finding of dangerousness or even of likely non-appearance by a child at a subsequent court hearing. To the extent, however, that children with disabilities may be disproportionately out of school, consideration of this factor may have a discriminatory impact.

In the process of accepting a guilty plea from a child, a judge must be satisfied that the child is knowingly waiving the various rights that surround a delinquency trial. Ostensibly to ensure that the child is exercising decision-making that meets that knowing-waiver standard, the judge is required to engage the child in a colloquy or dialogue. Without special training regarding the ADA and regarding the nature of expressive and receptive language disorders, a judge is unlikely to be aware of the need to accommodate children with language-based disabilities.

Conclusion

This bulletin does not provide a social scientific defense of the conclusions that decision making by school personnel, police officers, probation officers, lawyers, and judges is discriminatory. Nor does the bulletin prove that decision makers are ignorant regarding disability laws and the existence and prevalence of disabilities among children in the delinquency system. Indeed, one purpose for this bulletin is to encourage and perhaps motivate social scientists to generate survey data and other research leading to scholarship that defines and documents the degree to which these problems exist. By presenting with some degree of precision the points at which potentially discriminatory decisions are made, this bulletin should facilitate such studies and encourage a change in policies and practices.

Adults who are responsible for the functioning of the delinquency system remain generally unaware of the existence and impact of education-related disabilities and have not yet begun to comply with the Federal law that prohibits disability discrimination. This bulletin suggests that much of the decision-making relating to children in the delinquency system has a discriminatory impact and violates Federal laws. These discriminatory violations of the law often occur due to ignorance of
disabilities and of the governing law, neglect of specific duties, and failure to establish policies and practices (including training). In turn, many school system and delinquency system personnel and officials routinely violate the Individuals with Disabilities Education Act, section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act.

Unmasking the discriminatory impact against children with disabilities in the school system and in the delinquency system presents the potential for significant changes in both systems. By meeting with greater regularity the objective of educating children appropriately, in accordance with the law, school system and delinquency system personnel can reduce the flow of children with disabilities into the delinquency system. Ultimately, those changes should lead, to obtaining a broader goal: a society that nurtures and promotes productive young adults.

5. Individuals with Disabilities Education Act, P.L. 105-17, Sec. 612 (a)(1)(A); 34 C.F.R. 300.121, 300(a).
6. Individuals with Disabilities Education Act, P.L. 105-17 Sec. 602 (3)(A) 34 C.F.R. 300.7(a)(1).
7. Individuals with Disabilities Education Act, P.L. 105-17 Sec. 602 (8), (25).
8. Individuals with Disabilities Education Act, P.L. 105-17 Sec. 602 (22); 34 C.F.R. 300.22(b).
10. Individuals with Disabilities Education Act, P.L. 105-17 Sec. 612 (a)(3); 34 C.F.R. 300.125.
11. Individuals with Disabilities Education Act, P.L. 105-17 Sec. 612 (a), (b), (c).
12. Individuals with Disabilities Education Act, P.L. 105-17, § 614 (d)(2)(A); 34 C.F.R. § 300.342.
300.340(a).
12 Individuals with Disabilities Education Act, P.L. 105-17, § 614 (f).
13 Individuals with Disabilities Education Act, P.L. 105-17, §§ 612 (a)(5), 602(29); 34 C.F.R. § 300.26.
15 Burgdorf, XX. The ADA: Analysis and implications. 413-14.
18 34 C.F.R. § 300.7(a)(1).
21 Easley v. Snider, 36 F.3d 297 (3rd Cir. 1994)