

**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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I. Introduction

This monograph is an attempt to understand at what points and in what ways school system and delinquency system personnel fail -- in making decisions that affect children -- to recognize and respond appropriately to children's education-related disabilities. In order to consider those decisions and the roles of the decision-makers in a meaningful context, the monograph introduces and briefly reviews laws that entitle people with disabilities to services and accommodations and laws that proscribe discrimination against people with disabilities. In that regard, the analysis begins with an application of those laws to the question of preventive detention. The following section presents an overview of ways in which systemic failures to accommodate children with disabilities in the school system lead to disproportionate representation in the delinquency system. Next, turning to the principal focus, the monograph presents illustrative decisions made by, respectively, defense attorneys, intake probation officers, police officers, prosecutors, and judges. Thus, 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.¹ Speaking with delinquency system probation officers, one is likely to hear that no children in the caseloads are functioning at or above grade level. Reviewing educational records of children at juvenile incarceration facilities, one rarely sees evidence of academic success.

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.² The delinquency system disproportionately attracts children with education-related disabilities 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.

Poor educational outcomes that are pervasive among children in the delinquency system constitute, in several respects, compelling evidence that school system and delinquency system personnel are failing to deliver appropriate educational services and failing to accommodate children with disabilities. The outcomes also, however, often reflect failure by school system and delinquency system personnel even to recognize education-related disabilities. These outcomes suggest, furthermore, that decision-makers guarding the gates to the delinquency system generally, and to incarceration facilities particularly, treat children with education-related disabilities differently than children who are not disabled.

In vastly disproportionate numbers, children who are poor and who are members of racial and ethnic minority groups populate the delinquency system.³ The disproportionate numbers, moreover, reflect the harsh reality that society imposes unequal and discriminatory treatment upon poor children of color. Researchers and journalists have documented the disproportionate representation and disparate, discriminatory treatment of children based upon race and class. In contrast, disproportionate representation and disparate, discriminatory treatment within the delinquency system of children with disabilities has not been sufficiently studied and documented. Estimates of the correlation between delinquency and disabilities vary widely.⁴ See *Youth with Disabilities in the Corrections System: Prevalence Rates and Identification Issues* (Rutherford, Bullis, Wheeler, and Griller-Clark, this series) for a discussion on prevalence rates.

Commentators and analysts have propounded various theories to explain why and how children with education-related disabilities are over-represented in the delinquency system and, particularly, in incarceration facilities.⁵ "Examples include the school failure theory,⁶ the susceptibility theory,⁷ the differential treatment theory,⁸ and the metacognitive deficits hypothesis.⁹ [T]he school failure, susceptibility, and metacognitive explanations suggest that learning and behavioral characteristics of certain youths directly or indirectly lead to delinquent behavior..."^[10] In contrast, the differential treatment thesis rests upon the premise that -- in processing and adjudicating children through the delinquency system -- people with official or legal authority make decisions that result in a disparate and more-punitive treatment of children who are disabled.¹¹

People in positions of authority who make decisions that affect the categorization and treatment of children in the delinquency system are typically not sufficiently aware of the existence and nature of education-related disabilities. Compounding the problem, these same officials in many instances are not aware of their legal obligations to identify and accommodate children with disabilities. Thus, government officials in the school system and in the delinquency system uniformly fail to develop policies and programs aimed at identifying and serving children with disabilities.

Advocates and public officials have made substantial progress in recent years in reducing reliance on institutionalizing people in mental health and mental retardation systems; at the same time, the rate of incarceration in adult criminal and juvenile delinquency systems has soared, and the people incarcerated are predominantly people with disabilities. Thus, an irony of *shifting institutionalization* characterizes the current era. Part of the increase in incarceration is a shifting

or indirect transferring -- presumably unintentional -- of people with severe and incapacitating disabilities from mental hospitals and mental retardation institutions to juvenile and adult incarceration facilities. Another significant component of the burgeoning incarceration population, however, is children and adults who have disabilities that are relatively less severe and incapacitating than persons institutionalized traditionally in the mental health and mental retardation systems.

Senator Paul Wellstone recently made the following comments on the floor of the U.S. Senate:

Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.

Jails and detention centers often find they are unprepared to deal with these kids. For instance, medication which should be given is not given; medication that should be properly monitored is not properly monitored; and guards may not even know how to respond to some of these kids.

Why do so many youth with mental illness end up in the juvenile justice system? The truth of the matter is, we ought to, on the front end, do a much better job of assessing the problems of these kids and, for those who should not be incarcerated -- some should -- but for those who should not be incarcerated, look to alternatives.

We have not invested as a country -- you could talk to anybody down in the trenches doing this work -- adequately in the service programs and community prevention programs that will reduce the need for incarceration. Therefore, many of these kids wind up in these facilities. They are incredibly vulnerable. They do not get the care they absolutely have to get, and the consequences are tragic.

....

In some cases, abusive treatment of these children results directly from their being emotionally disturbed. Staff in the juvenile facilities fail to recognize the problem and, in fact, punish these children for the symptoms of their disorders. Children have been punished for requesting treatment or put in isolation when they refuse to accept treatment. One child in a boot camp was punished for making involuntary noises that were symptoms of Tourette's syndrom. Mental disorders are being handled almost solely through discipline, isolation, and restraints, according to investigations by the U.S. Department of Justice and human rights groups."^[12]

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

A. The Individuals with Disabilities Education Act

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.¹³ 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.¹⁴ 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."¹⁵ 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."¹⁶ The law also requires that school personnel provide, for any student fourteen years of age and older, "transition services" to assist the student with a disability to prepare for productive "post-school activities."¹⁷

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."¹⁸ Advocates and commentators commonly refer to the provisions regarding identifying and locating children as the "child find" requirement. Once identified, the child must be evaluated to determine whether the child has a disability and, if so, to determine the child's educational needs.¹⁹

The evaluation procedures must meet statutory criteria for fairness, accuracy, and completeness.²⁰ Indeed, a parent is entitled to receive through the school system free evaluations of the child that cover any area of suspected disability.²¹ The parent also may seek an independent evaluation of the child at the school system's expense.²² Evaluations must be conducted in the child's primary language.²³

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 with the child, must develop an Individualized Education Program (IEP) to remediate the child's weaknesses.²⁴ The IEP is a written document which states the specific special education, related services, and transition services to which the child is entitled.²⁵ The Supreme Court has held that an IEP must both (1) comply with the procedures under the Act and (2) be substantively sufficient to confer some educational benefit to the child in order to be "appropriate" within the meaning of the Act.²⁶ "Educational benefit" ordinarily should be interpreted to mean that a child makes standard progress from grade to grade toward the normal goal of timely graduation from high school. The team must re-convene and draft an IEP at least annually.²⁷

Once the team members have developed an appropriate IEP, the team must consider, and school personnel must propose, an educational placement for the child.²⁸ The placement decision must be made annually, must be based on the child's IEP, and must be as close to the child's home as possible.²⁹ In determining the placement, school personnel must ensure that the child is, to the maximum extent appropriate, educated with children who are not disabled.³⁰ Taken together, these two requirements (educating with non-disabled peers to the greatest extent possible and educating close to home) form the core of the right to receive an education in the

"least restrictive environment". School system officials also must ensure that a "continuum of alternative placements is available to meet the needs of children with disabilities."³¹

The IDEA is a civil rights statute that emanated and evolved from the history and precedents of racial desegregation of public schools. Rules that are explicit in the IDEA or that appear in caselaw interpreting the IDEA preclude most expulsions and suspensions of children with disabilities from school. These rules reflect the fact that, historically, school authorities routinely excluded children with disabilities from public schools.

Before excluding a child from school as a response to allegedly-improper conduct, school officials must "prove the case" against the child (*i.e.*, conduct a constitutionally-adequate hearing establishing that the child did the bad act(s), that the conduct violated the school's rules, and that the conduct is sanctionable). If the child has been identified as eligible for special education, school personnel who are considering whether to exclude the child from school through school discipline proceedings also must explore with the parents, teachers, and experts whether the child's allegedly improper behavior is a manifestation of the child's disability.

If the behavior is a manifestation, then the school system personnel must find a way to address that behavior rather than to exclude the child from school or remove the child to a different educational placement. If the behavior is a manifestation of the disability and also falls into one of the statutorily-defined categories that demonstrate dangerousness or otherwise justifies exclusion (drug offenses, weapons and other dangerous offenses), school system personnel may be authorized to place the child temporarily (a period not to exceed forty-five calendar days) in an alternative placement. The child, nonetheless, must receive appropriate special education services -- as designated in the child's IEP -- in the alternative placement.

If the behavior is not a manifestation of the child's disability, the child may be subject to the same disciplinary exclusion as a non-disabled child; on the other hand, the child with a disability still must receive during the period of exclusion a free appropriate public education. Furthermore, a removal for more than ten days is a "change in placement" under special education law and, as such, triggers a number of procedural protections.

If school system personnel do not meet the obligations under the Act to appropriately identify, evaluate, program for, or place a child with a disability, the parent can pursue private special education and related services at public expense. Thus, under a Supreme Court case, *Burlington v. Massachusetts Department of Education*,³² a parent may have a right to reimbursement from the public school system for private school tuition and for payments for privately-provided related and transition services. Furthermore, a parent who prevails in a challenge to the school system's identification, evaluation, program or placement of the child may recover attorneys' fees from the school system.³³ In addition to private services, the parents may seek "compensatory education" to redress any period of time that the child was eligible for, but did not receive, special education services.³⁴

Under the IDEA, the parents are entitled to enforce the procedural and substantive rights regarding a child's education, but a child who is eighteen years old or above may independently assert IDEA rights. When a parent inquires about a child's lack of progress in school, school system personnel should inform the parent of these special education rights (including the right to have the child evaluated).

B. Section 504 of The Rehabilitation Act

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.³⁵

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.

C. The Americans with Disabilities Act

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.³⁶ The principal purposes of the ADA are "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities... [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities..."³⁷ The ADA reinforces and vastly extends § 504 of the Rehabilitation Act by covering entities that receive federal funds, as well as entities that do not receive federal funds; the ADA specifically covers businesses and public accommodations that engage in inter-state commerce, as well as providers of public transportation.

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. This title or subchapter of the ADA addresses public services and prohibits, in that context, discrimination against people with disabilities. 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."³⁸

Regulations promulgated by the Department of Justice pursuant to the ADA provide further detail, clarifying that the Act prohibits public entities from denying participation or offering unequal participation based upon disability.³⁹ Similarly, the regulations prohibit providing to a qualified person with a disability an aid, benefit, or services that is "not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others[.]"⁴⁰ The regulations prohibit the use of "criteria or methods of administration" that have the effect of excluding or otherwise discriminating.⁴¹

The regulations prohibition discrimination by a public entity not only in its own operation but also in conjunction with another public entity.⁴² These regulations clarify, in addition, that public entities are subject to the anti-discrimination mandate of the Act in providing aid, benefit, or service either *directly* or *indirectly*. State and local governments, therefore, cannot -- by contracting, licensing, and or making other arrangements -- sidestep their obligations to accommodate people with disabilities and to avoid discrimination based on disability.⁴³ Significantly, the regulations require the administration of "services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."⁴⁴

Public entities are required, under the regulations, to evaluate and modify services, policies, and practices that do not or may not meet the non-discrimination mandates of the ADA.⁴⁵ The requirement to evaluate became effective one year after January 26, 1992, the effective date of the regulations. The regulations require that the public entity "make the necessary modifications" to come into compliance.⁴⁶

As to communications, the regulations require that a public entity accommodate persons with disabilities in order to ensure communications that are essentially equally effective with communications with non-disabled participants, applicants, and members of the public.⁴⁷ The accommodations might necessarily include providing auxiliary aids and services.⁴⁸

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.⁴⁹ The governmental entity need not be receiving federal funds to be covered under the ADA. Thus, the ADA proscribes discrimination by, for example, all police departments, probation departments, prosecutors, school boards, and courts.⁵⁰

Substantive actions taken or decisions made by judges are likely governed by the ADA's anti-discrimination mandates,⁵¹ yet judicial actions -- much like those of legislators -- engender specific concerns and might raise some specific exceptions.

Since the statutory language does not limit its application to *executive* activities of state and local governments, judicial and legislative actions may also be subject to the nondiscrimination requirements of the Act. For example if a jurisdiction

refuses to permit deaf individuals to serve on juries, or if a legislative committee has a policy against allowing people with cerebral palsy or mental retardation to testify as witnesses at its hearings, these practices may be subject to scrutiny under the ADA as activities of an agency or instrumentality of state or local government. Arguably, the coverage of the Act may extend even to substantive legislative and judicial actions of state and local governments. A state law or local ordinance that blatantly discriminates against a class of individuals with disabilities presumably would be subject to challenge under the statute. Likewise, a judge whose rulings evince prejudice or malice against litigants on account of their disability would be within the purview of the statute. Of course, such scrutiny of judicial and legislative acts must be tempered by constraints of federalism inherent in the Constitution of the United States, and must be carried out with due regard for principles of legislative and judicial immunity where applicable.^[52]

The ADA provides for federal oversight of state and local compliance with standards prohibiting discrimination based upon disability.⁵³ The Act also ensures that state and local government entities cannot claim immunity against ADA-based lawsuits that are properly filed in federal or state courts.⁵⁴ In addition, the Act provides for private causes of action⁵⁵ and, at 42 U.S.C. § 12205, allows courts or agencies to award to prevailing parties in a lawsuit or administrative action "a reasonable attorney's fee, including litigation expenses, and costs."⁵⁶

Title II prohibits discrimination by state and local government personnel against an individual with a disability (1) if the individual is "qualified", in the sense that, absent discrimination, the person would qualify for the governmental program, service, benefit, or treatment and (2) if the discrimination is "by reason of such disability."⁵⁷ The ADA definition of "disability" covers "(A) a physical or mental impairment that substantially limits one or more of the major life activities...; (B) a record of such an impairment; or (C) being regarded as having such an impairment."⁵⁸ This definition protects people with a wide range of physical and mental impairments. Specific conditions covered include, for example, visual, speech, and hearing impairments, as well as mental retardation and emotional illness.⁵⁹ "[C]aring for one's self, ... seeing, hearing, speaking, learning, and working" are among the major life activities to which the definition of "disability" refers.⁶⁰ The denial of opportunities may be the result of other people's attitudes towards the disability rather than as an inherently limiting quality of the disability.⁶¹

Title II prohibits exclusion of people with disabilities, denial of benefits to people with disabilities, and discrimination against people with disabilities.⁶² Thus, the ADA protects the right of access of persons with disabilities to state and local government activities, programs, and services.⁶³ State and local governments are responsible for providing auxiliary aids and services and for otherwise making reasonable modifications to rules, policies, and practices in order to remove architectural, communication, or transportation barriers to facilities, services, and communications for people with disabilities.⁶⁴

III. Application of the Law to Decisions to Preventively Detain Children with Disabilities

To illustrate the application of laws that define and uphold rights of children with education-related disabilities, this section presents a consideration of whether disproportionate pre-trial (preventive) detention of children with disabilities constitutes discrimination. This brief analysis illustrates how the law might address a wide array of issues regarding whether people in the school system and delinquency system make decisions that affect children with education-related disabilities in a manner that is discriminatory.

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 §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.⁶⁵ In the context of class actions challenging the conditions of detention (rather than the fact of detention itself), courts have had little trouble certifying that the class of juveniles claiming to be eligible for special education services under the IDEA also have "disabilities" within the meaning of the Rehabilitation Act.⁶⁶

The phrase "otherwise qualified" has been the subject of extensive interpretation and litigation even prior to the passage of the ADA. The regulations under the ADA provide that the term "qualified" (dropping the unnecessary adjective "otherwise") means a person with a disability who, with or without reasonable modifications to the program, "meets the essential eligibility requirements for the receipt of services or the participation in program or activities..."⁶⁷ Similar regulations exist under the Rehabilitation Act. Much of the litigation on this subject has centered around discrimination in employment and education decisions; the critical elements of the phrase, however, are applicable to any context.

The U.S. Supreme Court, in *Olmstead v. L.C.*,⁶⁸ addressed the question whether unwarranted institutionalization of people with mental disabilities violates Title II of the ADA. A majority of the justices answered with a "qualified 'yes'",⁶⁹ finding 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. As primary support, the majority cited the Congressional intention in the ADA to stop the serious and pervasive discrimination of isolation and segregation of people with disabilities.⁷⁰ "The Supreme Court opinion also balances the requirement that a state provide reasonable accommodations to persons with disabilities with the limitation that, in complying with the ADA, a state need not fundamentally alter the nature of a program. Thus, based on this "fundamental alteration" limitation, the Supreme Court in *Olmstead v. L.C.* struck a balance that fell short of mandating that states close large institutions.

The Court tacitly recognized, in effect, that state government officials and legislators in many states will continue to fund an array of services that includes both institutions and community-based residential and non-residential services.

Without a doubt, the ADA does apply to prisons and to access by people with disabilities to programs, services, and benefits that allow for a person to shorten incarceration time. The Supreme Court in *Pennsylvania Department of Corrections v. Yeskey*,⁷¹ answered these questions directly. Title II of the ADA covers prisons⁷² and benefits, programs, and services potentially available to prisoners.⁷³ Mr. Yeskey sought admission to a boot camp program, the successful completion of which could have reduced significantly his incarceration time. State government officials rejected his request based upon his having a medical condition (hypertension). The Supreme Court found that this state action violated the ADA.

The *Yeskey* ruling, under any reasonable interpretation, requires 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. Similarly, by declaring prisoners covered by the ADA, *Yeskey* necessarily means that the ADA covers children who face incarceration in juvenile facilities. Certainly, litigators will now seek, using the recent *L.C. v. Olmstead* and *Yeskey* rulings, 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.

Few, if any, cases prior to *L.C. v. Olmstead* and *Yeskey* directly address whether a juvenile with a disability is, but for the disability, "qualified" for pre-trial release. Cases arising in analogous contexts will be instructive regarding whether the detention and incarceration of particular children with disabilities in delinquency institutions violates the ADA and §504. In the case of children with disabilities committed to the state as foster children, for example, one court has ruled that the state's practice of institutionalizing these children, rather than giving them access to the community placements available to their non-disabled peers, might constitute discrimination under the Rehabilitation Act and Americans with Disabilities Act.⁷⁴ Specifically, in denying the State's motion to dismiss, the Court stated that the sub-class of foster children with disabilities stated a claim against the local youth services agency by alleging that the agency "discriminates against these children by segregating them in institutions which isolate them from non-disabled children, and by denying them services and placement opportunities comparable to those available to non-disabled children."⁷⁵ At this stage in the *Eric L.* case, the State had not advanced any argument that the children's disabilities somehow rendered them unqualified for less restrictive and community placements. While a complaint alleging that juveniles with disabilities who are qualified, with reasonable accommodations, for release are being detained in violation of the ADA would survive a motion to dismiss, one can anticipate that representatives of the state would claim that these children are not, in fact, qualified for release.

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.⁷⁶ 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. For example, a youth who has been diagnosed as having a serious emotional disturbance characterized by violent outbursts might well be dangerous, and thus subject to detention under local statutes and rules. Similarly, a youth with mental retardation might be susceptible to peer pressure to participate in criminal activity and might also be considered dangerous, and thus subject to detention. A youth with a severe learning disability might not fully apprehend the nature and consequences of the delinquent behavior, and thus might pose a dangerous risk for repeating such behavior in the community. Even if these characterizations are true or can be proven in a particular case, the children would be "qualified" for release if a reasonable accommodation can be made so that they can remain in the community.⁷⁷ Thus, appropriate special education and related services might be a reasonable accommodation that would enable qualified youth with disabilities to remain in the community. One means of accomplishing such an accommodation on a broad scale would be for the Court to modify its intake procedure to screen children for disabilities as they enter the juvenile system and to refer them to the responsible local agencies for services. Such a procedure would be consistent with the requirements of Rehabilitation Act and the ADA, as well as with the IDEA and, most likely, with local court rules.

Proving that otherwise qualified individuals with disabilities have been excluded from a program *by reason of their disabilities* creates a difficult issue of proof in actions under the Rehabilitation Act and the Americans with Disabilities Act. Plaintiffs need not establish discriminatory intent in order to make an initial showing of discrimination.⁷⁸ Courts have often recognized that discrimination based on disability may be less a product of malicious intent than of dated notions of disability and misunderstandings.⁷⁹ Conduct that results from these faulty understandings, nonetheless, may be discriminatory. Certainly, one would not likely be able to establish that judges, in rendering detention decisions, are motivated by discriminatory animosity against children with disabilities. Yet children with disabilities are consistently over-represented in the population that judges decide to detain. This disparate impact on children who are disabled -- as contrasted with an intent to discriminate -- may establish a violation of section 504 and the Americans with Disabilities Act. The Supreme Court's decision in *Alexander v. Choate* leaves unclear whether proof of a disparate impact will suffice to establish discrimination.⁸⁰

A complaint containing an allegation of this disparate impact may well survive a motion to dismiss. Once a disparate impact is established, the defendants must come forward with a legitimate, non-discriminatory reason for the disparate impact. Indeed, defendants who have been able to advance a plausible, non-discriminatory rationale for the disparate impact have been able to defeat claims of discrimination at later stages in the proceedings.

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.⁸¹ 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.

Courts have repeatedly held that local court policies which discriminate against persons with disabilities are prohibited by the Rehabilitation Act and, now, by the Americans with Disabilities Act, as well.⁸² While these decisions are generally directed at court administration, rather than individual judicial determinations, nothing in either statute suggests that judicial actions are exempt from scrutiny. To the contrary, while judicial immunity would bar a claim for monetary damages against judges for discriminatory decisions, the availability of equitable and declaratory relief is not precluded.⁸³ One author has argued that, based on this language, the reach of Title II extends to discriminatory animus of individual judges.⁸⁴

IV. Decision-Making by School-System Personnel that Results in Over-Representation in the Delinquency System of Children with Education-Related Disabilities

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.⁸⁵ Federal and 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:⁸⁶ 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. These children in most of the cases do not develop extreme behavioral problems and become truant until the seventh, eighth, and ninth grades. During these grades, children often begin to manifest significant substance abuse problems, as well. 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.

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[Case Study: Dale](#)

Dale's⁸⁷ history in the educational and delinquency/criminal systems conclude with unusually tragic results. In other respects, however, the history of educational neglect in Dale's case is representative of what one finds in a large percentage of delinquency cases. School system personnel failed for many years to identify Dale as needing a special education evaluation, notwithstanding his failing several grades and his failing to make significant academic progress. At the age of fifteen, Dale was arrested for the first time for an alleged armed assault.

At the initial delinquency hearing, Dale's mother refused to take Dale home, and the judge detained Dale based ostensibly upon a finding that Dale presented a serious risk to other people.

Dale's mother subsequently engaged a law school clinical professor and law student to represent her and Dale in the special education system. Feeling that she had assistance (from the law clinic professor and student) in locating services for her son, she reconsidered her prior refusal to take Dale home. The law student helped Dale's delinquency defense attorney to prepare a motion challenging the pre-trial detention order. Before the motion was heard, the government attorney dropped the case against Dale based on a lack of evidence.

Dale reportedly did not cooperate with the psychologist and others who attempted to perform the requisite, special education evaluations. The law student re-scheduled the evaluations and accompanied Dale to the sessions. With the law student helping Dale to recognize and remember his self-interest in cooperating with the evaluations, the evaluators succeeded in evaluating Dale.

Everyone concerned agreed based upon the evaluations that Dale was mildly mentally retarded and seriously emotionally disturbed. Based on each of those conditions, Dale qualified as "disabled" for purposes of IDEA eligibility. At the subsequent meeting to develop for Dale an individualized education program (the "I.E.P meeting"), everyone agreed to a set of objectives and appropriate services. School system personnel identified a public school program that was to provide sixteen hours per week of special education instruction and, in addition, appropriate related services (*e.g.*, counseling and speech therapy). Over the next year, however, school system personnel did not provide the services consistently. Dale also did not attend regularly, and, when he was at school, Dale did not participate actively and cooperatively in the educational program.

At the next I.E.P. meeting, school system personnel insisted that Dale needed a residential, therapeutic program in order to benefit from school. Dale did not want to go away from home and stay at a residential school, and his mother was not willing to assert a position contrary to Dale's. Dale eventually dropped out of school entirely.

Dale was arrested and charged in the adult criminal court with murder approximately one year later. Ultimately, he was convicted and sentenced to forty years to life. Dale's case is illustrative of the problems surrounding the lack of identification and placement at an appropriate, early point in a child's educational experience.⁸⁸

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School personnel fail not only to identify students with disabilities, but also they fail, with surprising frequency, to diagnose and address disabilities correctly. In many school districts, school personnel over-identify mental retardation and emotional disturbance and under-

identify learning disabilities. As a consequence of these failures, children with education-related disabilities do not receive needed special education services and important opportunities. This failure to diagnose and serve children correctly leads to an accelerated rate of delinquency for children with education-related disabilities and should be the subject of further study by researchers.

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[Case Study: Oliver](#)

Oliver's history⁸⁹ exemplifies the problem of delayed and inaccurate identification of disability. School system personnel failed to identify Oliver's special education needs in a timely manner and then failed to identify his needs accurately and, consequently, failed to address his needs appropriately. Oliver's circumstances also illustrate -- in a fashion that is unfortunately somewhat typical for children in the delinquency system -- that special education failures often occur within a gnarly nest of social problems in a child's family and community.

As a young child, Oliver changed schools often. He stuttered and had serious academic problems. He repeated the first grade; he was in the third grade for three and a half years; and he repeated the seventh grade. School system personnel also, however, "skipped" Oliver from the first grade to the third grade and from the fourth grade to the sixth grade, ostensibly to get him in classes with children closer to his age. Notwithstanding Oliver's telltale troubles, school system personnel did not initiate an evaluation to determine whether Oliver had an educational disability. Oliver's mother claims that she asked school personnel what could be done to help Oliver do better in school; she claims also that no one informed her of her rights to have Oliver evaluated for special education.

Early in his elementary school years, Oliver became what teachers sometimes refer to as "a behavior problem." He was suspended often, beginning during his first year in third grade. Truancy became pronounced when Oliver was in the third grade for the third time and was an entrenched problem by the time Oliver was in the seventh grade. He also experienced a number of personal traumas, including the death of his older brother. Oliver was an eyewitness at the murder of another teenager. Both of Oliver's parents struggled with drug use, and his father left the family not long after the death of Oliver's brother. Apparently, Oliver received no counseling or other services to help him to cope with these traumas and family problems. His drug use began when he was twelve or thirteen years old.

Oliver engaged in substantial delinquent conduct, leading to initial court involvement at the age of thirteen. His record includes adjudications for the possession and sale of drugs and for stealing cars. He also missed scheduled court dates and was incarcerated in a maximum-security juvenile facility for the first time when he was fourteen.

Coincident with incarcerating Oliver, the court ordered a referral for special education

testing. The testing did not occur for almost another year. The evaluators determined that Oliver was eligible for special education services based upon their diagnosing a disability of "serious emotional disturbance." School system personnel did not identify Oliver as having a learning disability or a speech/language disorder and did not address in an adequate manner Oliver's educational needs. No evidence suggests, moreover, that Oliver was assigned to a school program with adequate services for children who are seriously emotionally disturbed.

Oliver's parents did not participate in formulating the IEP, and Oliver did not have any other representation (*e.g.*, attorney or surrogate parent) in the special education process. Subsequently, when Oliver was sixteen, he and his mother engaged a special education attorney. At that time, Oliver was incarcerated in a six-month drug program at a maximum security juvenile facility. The attorney requested new evaluations from the public school system for Oliver and arranged also a private, Medicaid-funded, medical evaluation.

A speech pathologist tested Oliver and reported that Oliver exhibited a moderate-to-severe receptive language disorder and a mild-to-moderate expressive language disorder; that evaluator identified a possible language-related learning disability and recommended direct intervention in the form of speech/language therapy. In the same period, an educational psychologist tested Oliver and found, consistent with earlier testing, that Oliver was functioning in the borderline range cognitively. Significantly, however, Oliver's performance IQ was markedly higher than his verbal IQ. Subsequent testing of *non-verbal intelligence* demonstrated that, indeed, Oliver was functioning cognitively in the average range rather than in the borderline or mild-mental-retardation range. The educational psychologist also noted problems for Oliver with visual motor integration skills and fine-motor skills involving pencil and paper, as well as weakness in auditory perception. A clinical psychologist tested and interviewed Oliver and found evidence of chronic depression, evidence of a reading disorder and a disorder of written expression, and no evidence of psychosis.

Upon request of the mother and Oliver, the public school evaluators and other personnel met with Oliver and with the attorney at the juvenile incarceration facility to devise a new IEP. Everyone agreed to include in the IEP services to address Oliver's speech/language disorders and learning disabilities. The IEP also contained individual and group counseling for Oliver, as well as vocational training and other transition services.

The evaluation results and recommendations developed through the special education evaluation when Oliver was sixteen contrasted radically with the information generated through the delinquency system when Oliver was thirteen and fourteen years old. The probation officer who prepared the pre-disposition reports for the judges wrote only that Oliver had behaved poorly and scored poorly in school, that he was constantly truant, and that he had repeated several grades. Thus, the delinquency judges who had ordered Oliver's incarceration knew little about his school history and absolutely nothing about his education-related disabilities.

Oliver's circumstances and reactions typify in several respects the circumstances and

reactions of many children who are in serious trouble in the delinquency system and who are incarcerated. First, Oliver's parents did not provide a stable home for him. Second, Oliver has, and has always had, learning disabilities. No one diagnosed or addressed those disabilities throughout his elementary school years. Third, he experienced multiple traumas and received no noteworthy services to address his serious emotional problems. Fourth, Oliver's school failure began early, and he continued to fail in school without any meaningful intervention. Fifth, after years of failure in school, Oliver began to skip school and run away from home. Once in the delinquency system, he also ran away from halfway houses and other non-secure placements. Sixth, Oliver used drugs and sold drugs. Seventh, although Oliver has no history of violent conduct, he was incarcerated at a young age (fourteen) and thereafter spent much time incarcerated. Eighth, Oliver's defense attorney did not address the possibility, given Oliver's school records, that he had an education-related disability. Fundamentally, Oliver consistently made terrible choices and did not control his behavior. Personnel from various governmental agencies did not initiate or coordinate efforts in response to Oliver's deviant and maladaptive behavior, and Oliver's parents were not available to request or to benefit from services.

[End Sidebar](#)

School system personnel push and keep children with disabilities out of schools, as well. Teachers and administrators sometimes employ school discipline procedures illegally to exclude children with disabilities. If the child has not been evaluated for special education eligibility, yet school personnel are aware that the child might be disabled, then school personnel should not attempt to suspend or expel the child without initiating an evaluation and without informing the parent that an evaluation should occur. (Thus, for example, before suspending Oliver when he was in the third grade, school personnel should have initiated the process to evaluate Oliver, [see sidebar: Case Study: Oliver](#).)

One can surmise that some school authorities illegally exclude children with disabilities from school in a significant percentage of school discipline actions. School personnel commonly exclude children without hearings (or without constitutionally-adequate hearings) regarding "guilt" and without the team (teachers, experts, parent, student, and administrators) making "manifestation determinations" (*i.e.*, determining whether the behavior was a manifestation of the child's disability). Children with disabilities who are excluded (either legally or illegally) also commonly do not receive the free appropriate public education to which they are entitled during the period of exclusion.

To establish, as a matter of fact, whether school authorities disproportionately target children with disabilities for discipline actions is a matter for additional research by scholars, school officials, politicians, and advocates in each affected jurisdiction. Certainly, children who are not in school -- as a consequence of disciplinary action (suspension or expulsion) -- are subjected to a greater risk of becoming involved in delinquent conduct and to being arrested based upon allegations of delinquent conduct.

Parents and children's advocates in many jurisdictions complain that, in lieu of designing and implementing behavior management programs for children who are emotionally disturbed or who have other relevant disabilities, school officials resort to calling the police and filing delinquency petitions. The *Morgan v. Chris L.*⁹⁰ case documents a clear example of this improper and misguided approach. That case involved a child with attention deficit hyperactivity disorder (ADHD) who had exhibited, over a significant time, academic and behavioral difficulties. Notwithstanding requests from Chris L.'s parents for special education services, school system personnel reacted to the child's problems by subjecting him to punitive disciplinary actions. Ultimately, when Chris allegedly destroyed school property, school personnel initiated a delinquency petition in court.

Chris' parents requested a special education due process hearing and obtained a ruling from the hearing officer that the school officials had side-stepped their responsibilities to serve Chris and that their use of the delinquency system was, in essence, an illegal effort to change his school placement. The hearing officer, accordingly, ordered school officials to arrange for the withdrawal of the delinquency petition. The federal trial and appellate courts endorsed the hearing officer's analysis and upheld the order. The United States Supreme Court declined to hear a further appeal by the school system officials.

Nothing in the IDEA prohibits the referral of allegedly delinquent conduct to law enforcement officials and to the courts. Indeed, Senator Harkin clarified that "[t]he bill also authorizes...proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals do not circumvent the school's responsibilities under IDEA."⁹¹ Ordinarily, intake workers and prosecutors in the delinquency court are expected, in their exercise of discretion, to screen out inappropriate cases, including cases in which school personnel are attempting to avoid IDEA requirements by pushing children into the delinquency system.⁹² Juvenile court judges also typically have the authority to dismiss cases that should not be in court and cases in which the child has access to appropriate services in school and elsewhere outside of the delinquency system.⁹³

Further research is necessary in individual jurisdictions, of course, to establish whether school officials involve the delinquency system (*i.e.*, call the police and refer matters to prosecutors) relatively more often in incidents involving children with disabilities than in incidents involving children who are not disabled. Where it can be established as a matter of fact, the disproportionate referral to delinquency court by school officials of children with disabilities is likely to violate § 504 and the Americans with Disabilities Act. One might anticipate class action challenges around the country in such circumstances.

Authorities in the public school system and the delinquency system often fail to adequately accommodate and serve children with disabilities who are already in the delinquency system and in delinquency placements, thus resulting in longer and deeper entrenchment for children in the delinquency system. Those authorities, specifically, fail to identify and evaluate children with disabilities. Further, they tend not to design policies nor execute arrangements

aimed at tracking and implementing the individualized educational programs of children with disabilities, previously identified within the public school system, who enter delinquency placements.

One specific and pervasive failure is the placement of children with emotional disabilities in delinquency placements that are by their nature counter-therapeutic. Any placement that commonly features, for example, fighting between children and harsh or aversive forms of control over children is not conducive to a child's overcoming emotional disturbance. Virtually any thoughtful and honest description of a large juvenile incarceration facility contains sufficient information regarding institutional abuse and neglect to establish that a child with significant emotional problems cannot receive "educational benefit" (as that phrase is defined by the U.S. Supreme Court) in such a facility. Moreover, the "treatment" provided in such a facility is not consistent with a child's right in the delinquency law to receive "care and rehabilitation".

The net result -- described as a disproportionate referral to the delinquency system of children with disabilities -- is that school system and delinquency system authorities allow children to enter delinquency placements rather than helping to obtain and maintain for the children appropriate special education placements and services. The requirement in the special education law to provide for a child who is disabled a free appropriate public education (FAPE) in the least restrictive environment (LRE) does not legally control and override, generally speaking, standards regarding the imposition of delinquency incarceration. Some states do maintain in the delinquency statutes an explicit least-restrictive-environment standard that can be equated, in appropriate circumstances, with the LRE standard in the special education law. Virtually all states have standards that prohibit incarcerating children unless no reasonable alternative exists that is consistent with public safety and with the child's likelihood of appearing at subsequent court hearings. By assiduously protecting the right to an educational placement in the least restrictive environment and providing an appropriate educational placement and set of services, educators could preempt incarceration in a large percentage of delinquency cases.

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. Even if an IEP follows a child, the educational, related, and transition services outlined in the IEP likely will not be available and provided in the delinquency placement. Even if a particular service is available in a delinquency placement, there will almost necessarily be a lack of continuity. The very lack of continuity may negate the validity of the service. For example, a child who is receiving psychological counseling in the school setting may not derive any demonstrable benefit from counseling provided by a new psychologist during the child's stay at a delinquency facility. Indeed, the lack of continuity could constitute a breach of trust and trigger a therapeutic setback.

School system personnel frequently frustrate efforts to reintegrate children with disabilities from delinquency placements back into the public school system. The administrators

typically do not arrange to bring teachers and evaluators who know the child to the IEP meeting when the child is incarcerated or when the child is otherwise, due to delinquency involvement, not in the usual school placement. Thus, the child misses or loses educational services and is not prepared to re-enter the usual placement. Furthermore, principals and other administrators often simply refuse to re-admit to the public school a child who has been incarcerated or who otherwise has been "in trouble with the delinquency system".

School administrators, teachers, and guidance counselors, as well as school-based specialists who provide related and transition services, often face daunting challenges in attempting to re-integrate into the school system children with education-related disabilities. The budgets for individual schools do not expand to accommodate the return of a particular child, even if the child has substantial needs for services. Particularly during the middle of a school year, administrators at a school may find that they cannot garner any additional personnel or other resources to accommodate children re-entering the school from delinquency placements. Similarly, counselors, speech therapists, and other service providers are required to add another child to their often-heavy workload.

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

A. Introduction

As an entity created by and embodied within the law, the delinquency system may be described as a complex network of procedures and substantive standards. The primary purpose of the procedures is to control and regulate decision making so that police officers, prosecutors, probation officers, judges and others make decisions that are accurate. The substantive standards establish what is fair and just as a matter of fact.

In order to detain a child prior to a trial, a judge must make a finding by "clear and convincing evidence". The right to a judicial determination and this standard of proof ("clear and convincing") constitute part of an overall procedure for making detention determinations. The substantive standard that applies to the detention determination is "dangerousness" (to self or others) and "risk of non-appearance" (at subsequent hearings). In other words, a judge should detain a child prior to trial if the child would be demonstrably unsafe (*i.e.*, dangerous) if left in the community or if the child most likely would fail to appear at trial if left in the community.

For some children, the delinquency system network of procedures and substantive standards acts as an expansive and entangling web. For others, however, the network is a negotiable maze with discernible release routes from the maze's ensnaring center, plain paths to the maze's safe finish line, and even clear channels for circumnavigating the maze entirely.⁹⁴

B. Examining the Role of the Defense Attorney Representing a Child with

Education-Related Disabilities

As a fundamental function of their role, defense attorneys make numerous decisions with, and on behalf of, the children whom 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.

Most lawyers do not communicate effectively with child clients. Class, race, age, and cultural differences impede communication. The circumstances of cases also create a formidable barrier: lawyers are required by the circumstances of cases to attempt to translate layered legalisms and jumbled jargon. The lawyers, moreover, are not trained to listen empathetically and non-judgmentally, and they particularly do not listen to allegedly-delinquent children. Moreover, public defenders around the country commonly carry caseloads ranging from 300 to 700 per year. Thus, they simply do not have time to communicate with troubled teens whom they are assigned to represent.

Teenaged clients bring communications problems to the relationship with their lawyers, as well. The nature of "teenhood" itself compounds the communication problem. Indeed, the teenage years are arguably life's low-point for liking or listening to adults. A high percentage of children in the delinquency system, moreover, come from backgrounds in which they have been neglected, abused, and abandoned; they are, as a result, probably the least likely group of teenagers to open up to adults and to listen with patience and trust to adults.

Compounding common communications problems between lawyers and teenaged clients are language-based disabilities and impairments that affect the teenaged clients' abilities to communicate. The simplest and perhaps clearest examples of the problem arise in the context of the most common and most-easily understood limitations: hearing and vision impairments. Although people immediately recognize deafness, blindness, and other extreme limitations, they do not tend to expect that children may have hearing problems or uncorrected vision problems. Defense attorneys rarely ask their clients whether they have had a hearing examination or whether they need to wear glasses. A remarkably high number of poor children (including, of course, poor children in the delinquency system) have not been screened or adequately tested for hearing impairments. In addition, a significant number of poor children need glasses and simply do not have them.

Language-based learning disabilities, and particularly, expressive and receptive language disorders, are common among teenagers in the delinquency system. Yet these problems go undetected, and the problems are utterly unexpected by defense attorneys. Although a term like "learning disabled" may be familiar to most people (including attorneys), one rarely finds a defense attorney who understands something as basic as how a child's disability may affect communication between that client and the attorney.

The process of prompting guilty pleas provides a prime example of non-communication and miscommunication between attorneys and delinquency clients. The vast majority of delinquency cases result in the child's pleading guilty and, as part of that guilty plea, waiving a set of constitutional rights (*e.g.*, the right to a trial, the presumption of innocence, the privilege against self-incrimination, the burden on the government to prove the charges beyond a reasonable doubt, the right to appeal). In the process of deciding to plead guilty (or, alternatively, deciding to go to trial), the child must understand and consider the impact of the Constitutional protections that surround a delinquency trial.

The defense attorney, in anticipation of a plea (or, alternatively, in preparing for trial), must advise the client of those rights. Typically an attorney articulates the rights and then simply asks the child whether the child has understood. A more-accurate approach would be to have the child explain the rights and explain what the child is giving up in pleading guilty.

The law recognizes, as a matter of due process, a right for a child who is deaf and facing a delinquency charge to have a court-appointed interpreter; this requirement is not surprising to people. Do section 504 and Title II of the ADA require some similar form of accommodation for children who have less obvious language-processing disorders? Is the child's attorney obligated, as part of a zealous defense, to recognize the disability-based problem of communication with the client and advise the client, accordingly, of the right to request an accommodation?

The problem extends beyond the epidemic of attorneys' misunderstanding their clients and, conversely, not understanding that their clients do not understand them. Attorneys for children rarely recognize that the child's disability may be relevant to, for example, establishing a *Miranda* violation by police, defending against a motion to transfer the child to adult criminal court, formulating a substantive defense to a delinquency charge, identifying alternatives to detention, and advocating for appropriate dispositional services in lieu of incarceration.

The majority of children facing delinquency charges are indigent and, therefore, have a right to receive the services of competent court-appointed counsel without charge. One can assert, however, that the courts are operating systems that lead uniformly to indigent children who are disabled receiving services from attorneys who are not aware of the impact of the children's disabilities on the outcome of motions, pleas, trials, and dispositions. One can posit, in addition, that the lack of awareness by those attorneys of the impact of the children's disabilities is critical, in a negative sense, to the outcome of many of those delinquency proceedings. Thus, one can surmise that, under the cases regarding adequacy of waivers and under section 504 and Title II of the ADA, as well, the courts are obligated to train those attorneys regarding the impact of disabilities on the children in delinquency cases. One can surmise, furthermore, that the courts are obligated to accommodate those children by providing -- among other services -- the equivalent of interpreters, specially-trained instructors, and assistive technology to portray and explain rights to children.

In addition to ensuring that children know their procedural and substantive rights in the

delinquency system and are not waiving those rights indiscriminately, defense attorneys should be aware of rights of children with disabilities (and their parents) regarding educational services. Indeed, for children who have independent access to rehabilitative and educational services, entering or remaining in the delinquency system is essentially a negotiable matter. The availability of services and placements outside of the delinquency system often is sufficient to convince delinquency system decision-makers that maintaining jurisdiction over the child is unnecessary or that, if jurisdiction is maintained, probation, rather than incarceration, will suffice. In some instances, the services are as commonplace as psychological counseling or family counseling provided by virtue of private health insurance. For children with more seriously deviant conduct, the level of services or structure necessary to substitute for "'treatment' as a delinquent" may be boarding school or even short-term, private hospitalization.⁹⁵

A defense attorney advocating in the delinquency system for a child who is eligible for special education services can argue that the availability of those services satisfies the need, under the relevant substantive standards in the delinquency system, for supervision. Thus, for example, the defense attorney may argue that the child does not need the care and rehabilitation of the delinquency system or, in the alternative, that the children can be maintained safely on probation rather than in a secure setting.

"Delinquency", by definition in some jurisdictions, requires proof by the government beyond a reasonable doubt that a child committed an offense *and* that the child be "in need of care and rehabilitation".⁹⁶ A child for whom public or private school services are available through the school system may legitimately claim not to be in need of care and rehabilitation (from within the delinquency system). In such a case, by presenting evidence regarding the private services or placements available to the child, the child's attorney may be able to rebut the presumption that a child who commits an offense is in need of care and rehabilitation.

The examples provided above illustrate situations in which a defense attorney in a delinquency matter can argue, based on the availability of private services or placements, that the court or a probation officer should not exert jurisdiction or handle the child in a restrictive manner. The services or placements that provide the "magic" that releases the child from the delinquency system (or from restrictive handling within the system) need not be private services. Special education services, including "related services" and "transition services", available free to the parent (at public expense) for a child with a documented disability, can also substitute for delinquency treatment.⁹⁷

One might expect that, notwithstanding general ignorance of relevant disability rights issues and applications, delinquency defense attorneys would be aware of the impact and importance of education-related disabilities in the specific context of a child's exercising or waiving rights under the case of *Miranda v. Arizona*. Under this prominent Supreme Court decision, a suspect has rights that include, principally, the right to remain silent and not answer questions posed by police or prosecutors, the right to have an attorney and to have an attorney appointed without charge if the suspect is indigent. The most-litigated *Miranda* issue is whether

the suspect “knowingly, intelligently, and voluntarily” waived the “*Miranda*” rights. A child with demonstrable language-based disabilities typically cannot understand the *Miranda* warnings. The child is not able to read and comprehend the warnings, and the child also cannot understand the warnings when a police officer reads the warnings to the child. Thus, as a matter of law and fact, the child is not able to “knowingly, intelligently, and voluntarily” waive the *Miranda* rights. Teachers and educational experts who have taught and evaluated the child are potentially critical witnesses in that they can attest to the child’s inability to read and to understand language presented at the level of complexity of the *Miranda* warnings. Delinquency defense attorneys facing ostensibly-*Mirandized* confessions by clients who are children almost never recognize the need to interview the teachers and evaluators, these potentially critical witnesses. More generally, delinquency defense attorneys are, with only rare exceptions, not aware of the interplay of education-related disabilities and the law of confession suppression under *Miranda*.

Defense attorneys representing young people also do not recognize the relevance and impact of disability in the context of defending against an attempt by the prosecution to transfer the young person’s case from the delinquency court to the adult criminal court. Typically, the substantive standard for transfer revolves around the need to protect the community from the allegedly-dangerous child and, correspondingly, the child’s amenability to rehabilitation in the juvenile system. The government will prevail in its motion to transfer if it can prove, by a preponderance of the evidence, that the child is not amenable to treatment and, consequently, that the community’s safety will be compromised if the child is not transferred. The prosecutor often has the benefit of a statutorily-created presumption that the child is not amenable to rehabilitation if the charge is terribly serious (*e.g.*, murder, rape, armed robbery). As evidence that a child is not amenable to rehabilitation, a prosecutor typically presents to the judge making the transfer decision a list of programs and facilities in which the child has failed to succeed. The prosecutor also might unearth -- and present as further evidence of incorrigibility -- the child’s history of school failure and truancy.

The defense attorney commonly submits to this evidence, accepting -- literally without question -- the legitimacy of these programmatic efforts to serve the child. Typically, the attorney will attempt to mitigate, suggesting that the child somehow was previously misguided but is now amenable to change. This type of presentation is predictably ineffective. Judges view with a cynical eye any variant of an “eve-of-execution” conversion.

The reality, almost unfailingly, is that the schools and the programs were not appropriate in light of the child’s diagnosed or undiagnosed disabilities. By excavating a child’s school history and presenting that history -- along with accurate, current evaluation information, an advocate can demonstrate that a child has clear needs that were never addressed and for which the child has a clear legal right to services. Those services, as noted above, include special education *per se*, as well as related services (including, for example, counseling, therapeutic recreation, speech and language therapy) and transition services (including, for example, preparation for employment and for independent living). Thus, a defense attorney who is aware of disability rights can discredit, disprove, and dismantle the parade of “horribles” contained in the child’s

previous history in the delinquency and school systems. A defense attorney should be able to defeat a transfer motion by using both public school employees and evaluators, as well as private expert witnesses, to demonstrate that the adults charged with the child's previous treatment actually deprived the child of required services and, in so doing, routinely violated federal, state, and local law (including the "child find" requirement).

Issues surrounding disabilities also affect whether the child is competent to stand trial. "Incompetency" requires a finding that the accused is unable to understand the nature of the proceedings and is unable to assist defense counsel. A finding of incompetency is rare. More common, however, are situations in which, although competent, the child is not able, as a practical matter, to assist the defense attorney due to the effects of education-related disabilities. A clear example, again, is the circumstance of a child with an expressive and receptive language disorder who cannot understand much of what the defense attorney is saying and who, conversely, cannot be understood by the defense attorney.

An attorney who does not understand the juvenile client and who does not recognize the existence of the language-based disability likely will fail to obtain information from the client that is relevant and even vital to the investigation. The attorney may determine, furthermore, that the child is not believable; whether the attorney believes the client or not, the attorney likely will tell (or advise) the child not to testify because the attorney has determined that the child will not be a convincing or credible witness. The accused in a criminal or delinquency case has a legal right to make the decision whether to testify. That right to decide often is meaningless, however, because the attorney is unable to communicate with the client, and the attorney insists that the client must not testify.

A child with a language-based disability who cannot orally provide a clear and orderly accounting of events, indeed, may present as a "bad" or incredible witness. In order to avoid prejudice based upon the child's disability, a defense attorney representing such a client may need to present to the factfinder (*i.e.*, usually the judge, in a delinquency hearing) separate evidence that explains the child's disability. Further, the actual events surrounding allegedly delinquent conduct often involve discussion and the interpretation of language. A child may be charged as an accomplice who, in the prosecutor's theory of the case, took few actions (*e.g.*, a look-out). Testimony regarding what the child said or what was said to the child by the principal perpetrator or by victims may be the essential evidence upon which guilt or innocence hangs. A trier of fact may not be able to judge fairly the meaning of those verbal exchanges without knowing that the accused child has a language-based disability and without knowing the nature of that disability.

Children with language-based disorders may be struggling to respond honestly yet appear to be deceiving or concealing in response to cross-examination and even to direct examination. Judges and lawyers, employing highly-refined oral communication skills, can confound witnesses. The judgment of what is fair, however, should take into account -- as an accommodation -- the disability of the witness. The need to accommodate in this context is similar to the need to

protect a young witness from confusing questioning and the need to provide an interpreter for a foreign-language speaker.

The right to counsel under the Sixth Amendment for an accused person does not guarantee excellent, or even high-quality, representation. To establish a violation of the Sixth Amendment right to counsel, one must prove “ineffective assistance of counsel”. “Ineffective assistance” means not only that the representation provided fell below the standard of practice in the community, but also that the deprivation resulting from the inadequate representation probably affected the outcome of the case. In addition to challenging the quality of representation under the Sixth Amendment, an accused also -- at least in theory -- can challenge the fundamental fairness of the court process under the Fifth and Fourteenth Amendments’ guarantees of due process if, for example, the defense attorney’s failure to communicate with or otherwise accommodate the accused compromises the case in a critical way. Although malpractice suits against delinquency defense lawyers are a theoretical possibility, they rarely occur.

Standards that define acceptably-competent representation are low; barriers that impede challenges to incompetence are high. Paradoxically, in order to challenge the quality of representation, an indigent person accused of a delinquent act or a crime must have a frame of reference for comparing and evaluating the quality of representation. An accused person who feels aggrieved by the quality of representation and wants to challenge the representation must then find another attorney to raise the challenge. Judges ordinarily resist requests by accused persons even for the appointment of substitute defense counsel. Children, and particularly poor children who are educationally disabled, are not likely to have the knowledge, skill, and resources to challenge the quality of the representation that they have received.

As outlined above, 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 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. Most fundamental of all, perhaps, is the routine failure of attorneys to communicate meaningfully with their own clients. Often this lack of communication is attributable, in large part, to the client's language-based disability and the attorney's ignorance of the disability and of means to overcome the communications barriers. The lesson for individual defense attorneys, of course, is to study disability rights law and particularly study ways in which to use special education and other rights to advance the cause of an individual child who is charged with a delinquent act and who is disabled.

A significant rise in the number of ineffective-assistance and malpractice challenges is unlikely; one might anticipate, however, a rise in systemic challenges against courts for administering programs for appointing delinquency defense attorneys who are not aware of

disability rights and who do not accommodate clients who are disabled. The courts might be held liable under the ADA for failing to screen those attorneys for competency and for failing to provide training to enable them to more effectively recognize and accommodate children who are disabled. One might also anticipate successful challenges based on complaints of discrimination against children with disabilities arising from examination of the roles and actions of other decision-makers in the delinquency system, principally probation officers and police officers, and, secondarily, prosecutors and judges.

C. Examining the Role of the Probation Officer in Relation to a Child with Education-Related Disabilities

The court uses probation officers (or some equivalent functionary, *e.g.*, caseworker) at three different stages of a delinquency case: (1) intake; (2) pre-disposition; and (3) post-disposition. An intake probation officer determines, among other things, whether to recommend that the case go forward and, if so, whether the court should detain the child until the trial. At the pre-disposition stage, the function of a probation officer vis-a-vis the child and the judge is to prepare a report summarizing the child's social history. In that report, the probation provides recommendations to the judge regarding what services the child should receive and what should happen to the child at disposition. More to the point, the probation officer recommends whether to incarcerate the child. After the disposition, if the judge orders probation, a probation officer assumes the duty of supervising the child. If the child commits a new offense or otherwise violates the conditions of probation, the probation officer can initiate a revocation of the probation; probation revocation can lead, of course, to incarceration.

Intake probation officers are empowered by statute to determine, shortly after a child's arrest, whether a prosecution should proceed.⁹⁸ In some jurisdictions, this power to abort the prosecution is called "adjustment". In most jurisdictions, the intake worker is also provided various options for diverting cases prior to prosecution. Typically, the child's successful completion of a diversion program or of conditions of diversion occasion a final dismissal of the charges. In some jurisdictions, the intake worker's authority to block a prosecution is in the form of a power to recommend (or to refuse to recommend) the filing of a petition.⁹⁹ Barring an appeal by a complainant to the prosecutor, a decision by the intake probation officer not to recommend the filing of a petition is, arguably, a binding decision.¹⁰⁰ The standards require that, in making the petitioning recommendation, the intake probation officer consider "the nature and circumstances of the alleged offense", as well as the child's family situation and the child's access to services.

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. In essence, the probation officer is considering whether, with appropriate services (other than services from the delinquency system), the parent will be able to control the child and keep the child from running afoul of the law. The probation officer is also considering, of course, whether

the child – with access to services outside the delinquency system – will control himself or herself.

If the probation officer is unaware that the child under consideration has a disability, several consequences are likely to follow. One likely consequence is that the probation officer may not be able to understand the child's behavior and may not be able to judge accurately whether the parent can control the child and whether the child can be self-controlling.¹⁰¹ If, for example, the child has a receptive language disorder, the child may not understand the questions that the probation officer is asking. Conversely, if the child has an expressive language disorder, the probation officer may not be able to understand the child's responses or, more to the point, may not understand that the child is unable to convey critically-important information. Thus, without realizing a problem, the intake probation 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.

Another likely consequence of an intake probation officer's being unaware that a child has a disability is that the probation officer will not determine what services the child is receiving, or what services the child may have a right to receive, outside of the delinquency system. Thus, a probation officer may not think to ask about special education services the child is (or should be) receiving in school. Similarly, the child and the parent may not realize that they have a right to receive the special education services and may not independently recognize a self-interest in providing such information to the probation officer. If, moreover, the probation officer has an affirmative duty to seek outside public services and to make such referrals in lieu of initiating a prosecution, the probation officer's very failure to consider and to recognize that a child has a disability will likely result in an improper prosecution.

As noted above, the function of a probation officer at the pre-disposition (pre-sentencing) stage of a delinquency case is to study the child's situation and to prepare for the judge a report that contains recommendations for how to "dispose" of the child's case. In preparing the report, the probation officer should examine the child's social history, including the circumstances of the child's family. The probation officer will report, as well, on the child's previous history of maladaptive behavior, including, most notably, prior adjudications. One would expect an accounting of the child's adjustment in previous delinquency-system programs. The report should contain also a description of the child's school history.

One does not often see in pre-disposition reports specific information regarding the child's eligibility for special education services and the child's parallel entitlement to extensive related and transition services. Probation officers are remarkably unaware of special education rights and services. Even more rare is an accounting of the child's academic, vocational, and artistic strengths and associated opportunities for success. In this regard, probation officers

reflect in their pre-disposition reports the pervasive (and perverse) mindset of the delinquency system that emphasizes containing, rather than empowering, children. Ironically, probation officers usually overlook the child's need to experience success and to develop a productive and "legitimate" self image.

If the child has experienced dramatic and continuous failure in school and if that failure is a function of undiagnosed and unmet education-related disabilities, the probation officer -- at the pre-disposition stage of a delinquency proceeding -- could assist the child and the family to arrange for evaluation and for appropriate services. Nearly universally, probation officers do not know that the child is entitled to comprehensive evaluations, at no charge to the family (or to the delinquency system), through the school system. Pre-disposition evaluations undertaken within the delinquency system tend to be cursory clinical evaluations that do not address psycho-educational issues, speech/language, psycho-neurological, and other relevant areas. 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).

Probation officers, in preparing pre-disposition reports, often look for indices of remorse. The child may be developmentally delayed or may have speech-language problems that preclude the child's responding in the fashion that the probation officer expects. The child's inability to respond does not, however, necessarily mean that the child is less amenable to rehabilitation or more dangerous than another child. A probation officer who is unaware of education-related disabilities, therefore, may provide in the pre-disposition report to the judge inaccurate and prejudicial conclusions.

If the judge orders at disposition that a child be placed "on probation", the child will remain in (or be returned to) the community. A probation officer supervises the probation (unless, of course, the probation is "unsupervised"), and the child is ordered by the judge to comply with a set of probationary conditions. Standard conditions of probation include avoiding any additional violations of the law, attending school every day and attending every class, maintaining a curfew, refraining from the use of illegal drugs, reporting regularly to the probation officer, and participating in counseling or in other programs. The judge also might order the child to comply with any other conditions set by the probation officer.

Failure by the child to follow the conditions of probation can result in an action to revoke probation. The probation officer is charged with initiating probation revocation, and the prosecutor is charged with proving in court that the child violated probation. Although a judge could re-set conditions of probation and order another period of probation, a child whose probation is revoked ordinarily faces incarceration.

The simple requirement that, as a condition of probation, a child attend school -- every day, every class -- is, for many children with undiagnosed and unmet special education needs, an

unfair and perhaps impossible condition. In essence, putting a child in an inappropriate classroom may subject the child to unbridled humiliation and uninterrupted frustration. To expect a child to be able to endure that kind of inappropriate placement is often unrealistic. Many children in the delinquency system who have undiagnosed and unmet special education needs have spent, prior to their delinquency involvement, years in inappropriate classrooms experiencing daily failure. Often they have repeated several grades in school without having any explanation for the failure. They assume, usually incorrectly, that they lack the cognitive ability to succeed. In other words, they assume that they are stupid. For adults in the delinquency system to order children in that kind of circumstance to return to school and to attend every class is unconscionable and, perhaps, a violation of the Americans with Disabilities Act.

Children with disabilities, particularly children who are in the delinquency system, may also be subjected to improper and illegal suspensions or expulsions from school. As described above, separating a child with a disability from school for behavior that is a manifestation of the disability is probably illegal. If a probation officer initiates a probation revocation based upon an illegal suspension or expulsion, the revocation may itself be illegal. Typically, however, probation officers, prosecutors, defense attorneys, and judges are not aware that certain suspensions and expulsions are illegal.

Huge numbers of children are revoked from probation for violating routine conditions of probation. Children miss appointments with probation officers; they miss drug testing; they miss counseling; they miss probation review hearings in court. Probation officers often assume that the child's failure to attend these various appointments and sessions demonstrates a non-cooperative attitude. Probation officers typically do not consider the possibility -- indeed, they are not aware of the possibility -- that the child is, by virtue of an education-related disability, not able to follow the directions provided by the probation officer in the manner that the directions were provided.

Here's an example: Johnny has a receptive language disorder. He does not accurately interpret much of what people say to him. Often he is not aware that he has missed or misinterpreted what was said. The probation officer, unaware of Johnny's disability, provides the following directions: "Johnny, every other Tuesday, beginning next week, you need to go down to the court and report to room 309 for urine screening, you know, for drugs. If you fail to report, you can be subject to probation revocation for violating the terms of probation. Do you follow me?" Johnny may nod his agreement, indicating that he understood. But he did not understand. Johnny cannot auditorily decipher a sentence that contains twenty-seven words and multiple phrases. He may understand little or nothing of what the probation officer said. He may have misinterpreted, understanding only that he eventually has to return to court and that he is not allowed to use illegal drugs.

Studies apparently do not exist to document the frequency with which children with language-based disabilities who are on probation are revoked and incarcerated. Probation revocation (for violating conditions of probation *other than for committing new offenses*) accounts

for an astoundingly high percentage of incarceration beds in delinquency facilities around the country; a fair estimate is that conditions violations account for between fifteen and twenty-five percent of all juvenile incarceration beds. A fair estimate is that between ten and twenty percent of all juvenile incarceration is, however, the result of discriminatory probation revocation pertaining to children with language-based disabilities.

Delinquency law contains an often-overlooked set of duties that require probation officers to arrange and advocate for placing children in the least restrictive environment and for keeping children out of the delinquency system. These duties emanate in many states from explicit statutory requirements favoring the "least restrictive environment" or from statutory preferences for maintaining children at home. Delinquency caselaw, furthermore, recognizes that labeling a child "delinquent" is not desirable if options consistent with community safety are available outside of the delinquency system. To the extent, therefore, that a child's eligibility for special education services could result in keeping the child out of a delinquency placement or out of the delinquency system altogether, a probation officer may be required -- as a matter of delinquency law -- to assist the child and the child's family to arrange and advocate for those services.

Delinquency law is rooted in the *parens patriae* responsibility of the court. This responsibility extends to probation officers who are, in most jurisdictions, court employees and agents of the court. Essentially, the *parens patriae* responsibility is to determine and implement, at each point of a delinquency proceeding, whatever is in the best interest of the child. A child's primary legitimate activity is, of course, school. In determining a child's overall status and needs, a probation officer necessarily must consider the child's schooling. For a child who apparently has undiagnosed and unmet special education needs, the best interest standard arguably obligates a probation officer to refer the child for a comprehensive evaluation through the school system.

These duties of the probation officer to determine and advocate for placement in the least restrictive environment have not been self-enforcing. Absent assertive advocacy by a defense attorney, a delinquency judge typically will not require proactive work by a probation officer to determine whether, for example, special education or other services may be available for a child and, if so, whether those services will make continued placement at home a possibility for the child.

The advent of the Americans with Disabilities Act, however, may lead courts to recognize and impose an affirmative duty to train probation officers to find services for children who are disabled in order to avoid disproportionate incarceration of those children. Indeed, a principal goal of the ADA is to reduce the over-reliance on institutionalization for people with disabilities, and, as noted above, Title II of the ADA covers state and local agencies, including courts. Thus, one can reasonably conclude that the ADA affirmatively requires delinquency judges and probation officers, consistent with the *parens patriae* imperative, to avoid unnecessary incarceration of children with disabilities.

A duty to train probation officers to pursue services for children with disabilities and to

avoid over-reliance on incarceration should lead to a number of striking changes in the daily operation of the delinquency court. For example, for a child who is eligible for school-based positive behavioral interventions and supports by virtue of a disability recognized under the Individuals with Disabilities Education Act, the probation officer would be trained to support the child's family in their efforts to arrange for that program through the school system. Conversely, if personnel at a juvenile incarceration facility cannot implement the child's behavior management program (or any other facet of the child's IEP), the probation officer should arrange and advocate for an alternative that is in the child's best interest (*i.e.*, a set of services -- and an out-of-home placement, if necessary -- that provides for the child's special education as well as for the safety of the community).

Under the ADA, the delinquency system should have policies and, as noted above, training of probation officers to accommodate children with disabilities. Because probation officers at the various stages of delinquency proceedings are obligated by statute to investigate the child's circumstances, the burden is not on the child or on the child's parents to announce that the child is disabled and that they are requesting accommodations. On the contrary, probation officers are charged with determining the child's needs and arranging for services that meet those needs. Thus, examining the *parens patriae* obligation of the delinquency court in light of the requirements of the ADA, one might conclude that probation officers have a duty that is, in essence, analogous to the "child find" provision of the IDEA. Although the court always has been allowed under the IDEA to refer a child to the school system for special education evaluation, the ADA should now make that duty clear. The ADA, furthermore, solidifies for courts and for probation officers a comprehensive duty to accommodate children with disabilities in order to avoid discriminatory treatment generally and over-reliance on incarceration specifically.

D. Examining the Role of the Police Officer in Processing Children with Education-Related Disabilities

A key aspect of a police officer's job is to investigate alleged crimes or delinquent acts. Along with observing, collecting, and examining physical evidence, investigation involves interviewing witnesses and suspects and, in part, gauging credibility. Based upon interviews and credibility determinations, police officers may decide that a witness is also a suspect or, conversely, that a suspect is merely a witness.

Police officers often are not aware that some of the children whom they interview have disabilities and that the children's disabilities may be relevant to gauging credibility and to determining who should be a suspect. A child with a speech-language disability may not be able to relate facts in a linear and comprehensible fashion. The child's ability to communicate effectively may be particularly compromised if the child is under stress and if the person asking questions is not trained to recognize disabilities and to communicate in an appropriate way.

Police officers, like intake probation officers, perform a series of screening functions in the juvenile delinquency system. For certain categories of delinquent conduct, for example, police officers may have a grant of discretion either to arrest or simply to take the child home. In some circumstances, police officers may be authorized to overlook particular types of delinquent conduct altogether. Even after deciding to charge a child with a delinquent act, police officers also have the authority in many jurisdictions to release the child from detention prior to the initial court hearing. In addition, police departments in some jurisdictions administer delinquency diversion programs.

Police officers 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. The unintended or otherwise disparate effects may be particularly pronounced in the context of allegedly delinquent conduct that occurs in the school setting.

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[Case Study: Darryl](#)

The other boys ran away without telling Darryl that they were leaving. Consequently, Darryl, a fourteen-year-old, was the only child left in the neighborhood drug store at 1:30 A.M. on Sunday when the police arrived with the police dogs. Darryl did not realize that the other boys had gone, and he thought that he should continue to collect candy bars from the shelves until someone told him that it was time to go. The dogs bit him, mostly on his arms, until the officers took the dogs off. The police arrested Darryl and kept him locked up for a day and a half, until court on Monday morning. Darryl told the police everything that had happened prior to the burglary, and he gave the police the names of the other boys who had planned the burglary and who had told him what to do. The police did not arrest anyone else. In evaluations at school, Darryl had tested cognitively in the mild mental retardation range. At the time of this arrest, he had no prior adjudications.

The police officers obviously did nothing wrong in arresting Darryl. Indeed, he was caught in the act of committing a burglary, and the police officers acted in the public interest when they entered the drug store and subdued him. Darryl may be malleable and easily subjected to the control of others in part as a function of his cognitive impairment. That possibility, however, does not suggest that the police in any way discriminated by arresting Darryl. This scenario also does not suggest that the police would be discriminating if they did not seek to apprehend the other perpetrators of the burglary.

The law requires, on the other hand, that the police provide opportunities for Darryl that are available to others who are not disabled. The police may be required, for example, to release Darryl prior to the initial hearing; to consider a police diversion program for Darryl; to work with other agencies (including the probation department, the prosecutor's office, and the school

system) to ensure that Darryl is not denied opportunities for programs and services that others obtain. If other children who are intellectually higher functioning than Darryl exchange information (*e.g.*, who the other perpetrators were) only upon securing a promise for more lenient treatment, then perhaps the police are required to provide the same type of deal to Darryl, as well.

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[Case Study: Anna](#)

The police stopped Anna on a Monday morning. She was fifteen, and the police had stopped her many times during the preceding three years. She seemed never to be in school, and they could find her most days hanging out in the courtyard beside her mother's apartment or in the video arcade down the street. On this occasion, Anna again explained to the police that the principal and the guidance counselor at her school had not assigned her to any classes and that, when she was in school, she just stayed at the gym or in the office all day. Rather than take her back to school or home yet again, the police took Anna to the court in order to request that the prosecutor file a truancy charge.

One should consider the significance of Anna's report to the police and the possibility that Anna has an education-related disability. If, in fact, she hangs out in the office and in the gym at school and school personnel failed to assign her to classes and if, in addition, she has a disability that substantially limits her learning, she is the victim of discrimination based upon disability. School system personnel are obligated under the Individuals with Disabilities Education Act to provide a free appropriate public education. Under the ADA, the police department, as a public entity, must not act in a way that allows the deprivation of services, opportunities, and benefits. Furthermore, the police must modify policies, practices, or procedures in order to avoid discrimination on the basis of disability.¹⁰² In this instance, the act of introducing Anna to the delinquency system may be discriminatory. Regulations promulgated by the Department of Justice to uphold the ADA prohibit perpetuating the discrimination of another agency.¹⁰³

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[Case Study: Anthony](#)

Anthony, aged sixteen, spent eight months in the juvenile incarceration facility following an adjudication for possession of cocaine. He was released from the juvenile incarceration facility to a privately-run, publicly-funded halfway house. Approximately two days after Anthony

arrived, another boy at the halfway house, Jackie, tried to take Anthony's coat. Anthony resisted, and the two boys started pushing each other. Three of the other boys jumped Anthony and helped Jackie beat up Anthony and take his coat. The counselors were upstairs watching television. They did respond and did not do anything. Anthony figured that he could not rely on the counselors. He also figured that, if he stayed at the halfway house, he would get jumped again and people would continue to take his stuff. Anthony left. The halfway house counselors filled out a form, and Anthony's caseworker requested a custody order (arrest warrant). The police arrested Anthony at his grandmother's house two days later and took him back to the juvenile incarceration facility.

In executing the custody order, the police have an opportunity and perhaps an obligation to investigate the circumstances surrounding Anthony's leaving the group home. Anthony was the victim at the group home of a robbery or, at least, an assault. The failure of personnel at the halfway house to supervise the boys, to investigate the taking of the coat and the fight, and to remedy the situation led to Anthony's leaving. They compounded the problem by reporting Anthony's absence without reporting the other events that led to his leaving. Anthony may be a child with an emotional, speech-language, or other disability. The police department should have policies and practices that account for the possibility that a child in Anthony's circumstances is a child with disabilities. (The public youth services agency that contracts with the privately-run halfway house must also be responsible for ensuring that the contractor does not discriminate.) Ultimately, Anthony's return to incarceration is discriminatory if his victimization is the cause of his flight and his victimization or his inability to report the victimization is, at least in part, a function of his disability.

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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. The presence of an attorney who is demanding to see the suspect has no effect, according to Supreme Court precedent, if the suspect (who does not know of the attorney's presence) has waived the right to counsel.¹⁰⁴ Similarly, the Supreme Court has held that a waiver of *Miranda* rights by a suspect who is mentally ill may be voluntary if the police did not act improperly or coercively in obtaining the waiver.¹⁰⁵

Some cases have addressed whether children, unlike adults, should have a right to have a parent or an attorney with them during police interrogation. Also, many cases and articles have addressed whether children, particularly children who are very young or disabled, are capable of knowingly, voluntarily, and intelligently waiving *Miranda* 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 [\(see Sidebar: Case Study: Julian\)](#).

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[Case Study: Julian](#)

Police responded to a report of a sodomy; a young man alleged that four boys took him across the school playground after track practice and made him perform oral sex on them. Julian was one of the four boys arrested. He was sixteen. The police took him to the station. Julian's parents learned from the school vice principal that Julian had been arrested. They called their special education attorney. That attorney went to the police station and requested permission to see Julian. The detective in charge of the sodomy investigation told the attorney that Julian had waived his *Miranda* rights and had not asked to see an attorney. Further, the detective told the attorney that Julian was making a statement and that the police were not going to allow the attorney to see Julian. The attorney then informed the detective in charge of the investigation that Julian is a child with an emotional disturbance. Although Julian's reading skills are good and his auditory comprehension skills are good, in a stressful situation, Julian will not be able to process what people are saying to him and, without assistance, will not be able to make reliable judgments. The detective refused to let the attorney speak with Julian.

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The passage of the Americans with Disabilities Act 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. Police department policies should no longer reflect an assumption that Supreme Court case law that pre-dated the ADA allows for interrogation -- without the presence of an attorney of children -- who may be disabled. In Julian's situation, the attorney informed the detective that Julian had a disability that required an accommodation. Certainly, in that circumstance, the police should have considered the possibility that the lawyer was providing accurate information. Accordingly, they either should have stopped the questioning or accommodated by granting the request by the attorney to see and advise Julian.

E. Examining the Role of the Juvenile Court Prosecutor in Processing Children with Education-Related Disabilities

Juvenile prosecutors make decisions about which children to prosecute and what charges to bring. Prosecutors in both criminal and juvenile systems have largely-unfettered discretion to make charging decisions. Indeed, under existing precedents, most prosecutorial decision-making is unreviewable (*i.e.*, courts have ruled in many contexts that defendants cannot challenge the exercise of prosecutorial discretion). Noteworthy exceptions include challenges to prosecutorial decision-making that is discriminatorily selective (*i.e.*, decisions that are allegedly based on racial or other forms of discrimination) and challenges to prosecutorial decision-making that is vindictiveness (*i.e.*, decisions that are allegedly aimed at chilling the accused's exercise of a

constitutional or other protected legal right).

Prosecutors of delinquency matters are subject to different influences in making charging decisions than prosecutors in criminal cases. Prosecutors litigating adult felony criminal cases, for example, are bound by the Constitution to seek an indictment from a grand jury. This Constitutional requirement of filtering charging decisions through a grand jury of laypeople arguably provides a moderating influence on prosecutorial decision-making. Prosecutors in juvenile delinquency matters are not required to seek indictments through the grand jury process and do not, consequently, encounter the same moderating influence in their charging decisions.

Delinquency prosecutors have a significant set of obligations, on the other hand, that criminal prosecutors do not. Like judges, 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. This requirement is remarkable, clearly differentiating the job of the juvenile prosecutor from the job of the criminal prosecutor. As a practical matter, on the other hand, this duty is not commonly referenced and discussed -- much less enforced -- in the delinquency court.

In addition to their theoretical obligation to guard the best interests of the accused child, prosecutors in delinquency court are responsible, of course, for protecting the community from deviant offenders. Less well known, but also common, is the prosecutorial responsibility to advance the position and interests of governmental agencies that deal with children charged with delinquent acts. To the extent that a juvenile prosecutor also represents governmental agencies charged with detaining and treating children, the prosecutor may have a conflict of interest and, moreover, may be running afoul of federal laws passed to protect people -- including children -- with disabilities. Indeed, if the governmental agencies are not serving the child adequately due to, for example, insufficient resources, the prosecutor may be concurrently defending the agencies' actions or inactions while also, in theory, promoting the child's best interest (*e.g.*, a need for more services). The failure to provide prevention and treatment also has a negative impact upon the safety of the community. 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. Separating the roles in that fashion would free the prosecutor to advocate for preventive and treatment services that would be in the child's interest and that would serve also the community's interest in promoting safety. Similarly, 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.

As suggested above in the overview presentation regarding coverage of the Americans

with Disabilities Act, all state and local governmental entities are subject under Title II of the ADA to the requirements of non-discrimination and reasonable accommodation of people with disabilities. Prosecutors, therefore, must not discriminate against people with disabilities in making charging and other decisions. Further, prosecutors have an affirmative duty to provide equal access for people with disabilities to governmental benefits, services, and programs.

To comply with this broad mandate, persons who direct state and local prosecutorial offices should consider options for training regarding disabilities. Fundamentally, prosecutors should become aware through such training that, among the people whom police present for possible prosecution, a high percentage are people with disabilities. In addition, training should address with particularity ways in which the decisions to arrest and to charge may affect people with disabilities unfairly.

Prosecutors should avoid prosecuting children with disabilities for school-based offenses (*e.g.*, assaults, property crimes, drug possession offenses) at a rate that is disproportionate when compared with children who are not disabled. Indeed, in some circumstances, a prosecutor arguably should not pursue a case arising from a school-based incident regarding a child with education-related disabilities. If, for example, a child who is learning disabled and emotionally disturbed is entitled to receive through the school, but is not receiving, psychological counseling and an appropriate behavior management plan, a prosecutor might be well-advised to hesitate to pursue a misdemeanor delinquency case of destruction of school property.

Based upon the obligations imposed by the ADA to avoid discrimination against children with disabilities who may be subject to delinquency prosecution, prosecutors may need to re-think applications of case law regarding many facets of criminal procedure and the operation of the delinquency court. In light of the ADA, for example, prosecutors might consider what would constitute selective prosecution of people with disabilities (*e.g.*, disproportionately charging children with disabilities in school-based incidents). Similarly, prior to deciding whether to prosecute a child with disabilities for a school-based incident, a prosecutor might investigate whether school personnel neglected to provide special education services requested by the child and by the child's parents; prosecutors might research whether prosecuting the child in such circumstances would constitute vindictiveness.

Other areas of delinquency or criminal procedure implicate the prosecutor's responsibility to re-examine assumptions regarding the meaning of existing precedents. The application of the law regarding waiver of rights by children is one such area. A prosecutor, mindful of the ADA, might challenge the ordinary application of case law regarding a child's apparent decision to waive the right to defense counsel. Similarly, a prosecutor might analyze in a different light, considering the ADA, whether a child's apparent waiver of the right to trial is an informed waiver of a known right.

As discussed above in the section regarding how police officers handle *Miranda* waivers, several U.S. Supreme Court rulings are based upon assumptions that may require re-examination

in light of the dictates of the ADA. This duty to re-examine is the province of defense attorneys, prosecutors, and judges. The holding in *Colorado v. Connelly*, for example, is that a *Miranda* waiver made by a man with mental illness was not "involuntary", in that police officers did not coerce the waiver. Prosecutors may need to re-visit their application of that holding and consider whether police officers must accommodate -- by discontinuing the *Miranda* warnings and the interrogation process -- an accused person who, due to an apparent or perhaps obvious mental illness, is hallucinating.

Prosecutors could address their obligation to promote the best interest of children by, among other things, keeping records of their cases and by matching, on the one hand, information regarding which children are disabled with, on the other hand, what decisions are made by the prosecution. For example, prosecutors could record which children facing prosecution are disabled and correlate that information with whom the prosecutors ultimately decide to charge. Prosecutors could keep track also of their responses to pre-trial motions to suppress statements, enquiring of intake probation officers and defense attorneys -- and then recording -- whether the child who allegedly waived *Miranda* rights and made the statement *is* or *is not* disabled. Prosecutors should adjust their responses to motions to suppress statements according to relevance and impact of disabilities on the child's ability to waive rights and the degree to which a child with disabilities may be more amenable to police coercion during interrogation.

Prosecutors could scrupulously record dismissals and diversions they initiate (and agree not to oppose), as well as offers made in plea bargaining. The prosecutors would need to determine whether ordinarily they have been inclined to be more lenient in their dealings regarding children who are not disabled. Conversely, prosecutors should challenge themselves to offer in these dealings reasonable accommodations in order to facilitate, for example, the entry into diversion programs of children who are disabled. Finally, prosecutors could track disposition and post-disposition advocacy in order to effect equal access for children with disabilities to community-based treatment options.

Each category of prosecutorial decision-making (*i.e.*, charging decisions; responses to pre-trial motions; dismissals, diversions, and plea offers; accommodations for entry into programs; advocacy regarding incarceration) supplies myriad opportunities for prosecutors unintentionally to deny benefits to children with disabilities that are provided to children who are not disabled. By keeping track of these decisions while, at the same time, investigating which children are disabled, prosecutors will be taking important steps to monitor and adjust their decision-making so as not to violate the ADA's prohibition against discrimination and mandate to provide equal benefits.

F. Examining the Role of the Juvenile Court Judge in Processing Children with Education-Related Disabilities

Any judge would know to appoint a sign-language interpreter for a criminal defendant or a

delinquency respondent who is deaf and who uses sign language to communicate. Without special training, however, regarding the Americans with Disabilities Act 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. One can speculate that the percentage of children in the delinquency court who are affected by such disorders is high and, correspondingly, that the current awareness of this problem by judges is low. This unmet need to accommodate children with language-processing problems could require, by itself, a wholesale change to the juvenile court. Indeed, the problem -- if it can be demonstrated -- must exist at every stage of a delinquency proceeding, from intake and detention through probation and parole (aftercare) revocation.

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. For example, a child who has difficulty in listening, thinking, and speaking as a result of disabilities might appear to a judge to be aloof, evasive, or hostile. Similarly, a judge who is unaware that a particular child is mentally retarded might perceive that the child is disinterested in the proceedings. In casual, off-the-record conversations, judges occasionally will confide that a decision to lock up a child was necessary because the child "had an attitude" in court or because the child "obviously didn't care about what he had done". Regarding children with disabilities, these characterizations are likely to be erroneous, and the judgments they generate, therefore, are likely to be unjust.

An objective assessment of dangerousness begins with a child's record of prior, demonstrably dangerous acts. A child who has committed two armed assaults is demonstrably more dangerous than a child who has committed two property offenses. For children with equivalent records, though, what factors produce detention for one child and release for another? Most judges and probation officers would say that "social factors", primarily the quality and reliability of parental and school-based control, determine which children the judges detain and which children the judges release. If social science researchers, however, conducted studies in which they controlled for previous records of delinquency and controlled, as well, for the social factors, one could determine whether a statistically-significant disparity in detention rates exists for children with language-based disabilities.

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. Indeed, children with disabilities may be forced out, kicked out, and may drop out in higher percentages than children who are not disabled. On the other hand, children who are not in school may, in fact, be at higher risk for law violations than children who are attending school regularly. These variations provide more impetus for researchers to study whether non-attendance at school as a factor for determining detention of allegedly delinquent children is discriminatory as applied to children with education-related disabilities.

A more troubling case may be, ironically, the case of the child with disabilities whom the judge releases but orders to attend school. That child may be assigned to a school at which the principal will not accept the child back; or the school personnel may fail to accommodate the child's learning needs. If the child consequently does not attend, a subsequent order of detention by the judge (based upon a finding that the child violated the judge's release order) could be discriminatory.

Lawyers and, *a fortiori*, judges are a select and elite group in regard particularly to the ability to use and manipulate language. As trial advocates, lawyers cross-examine and challenge witnesses' credibility. For this reason, primarily, defense attorneys for children accused of committing delinquent acts are extremely reluctant to put their clients on the witness stand and to subject those children to cross-examination by prosecutors and credibility judgments by judges. As suggested in a previous section of this article, defense attorneys also may be mistakenly interpreting manifestations of children's language-based disabilities as a lack of credibility. If a defense attorney investigated and determined that a child client had a language-based disability that affected the child's ability to testify, the attorney would then be in a position to advise the child more effectively. Indeed, the attorney would also be in a position to put on one or more fact witnesses and expert witnesses to testify about the child's disability and, in that way, to provide a context for the child's testimony.

[Insert as a Sidebar](#)

[Case Study: Ben](#)

Ben was present at an armed robbery. The robber was an adult whom Ben knew from the neighborhood. The robber, at knifepoint, stuck up an affluent man and woman as they emerged from their car. Ben was standing nearby. As the robber confronted the couple, Ben said to them, "You do what he say. He means what he's doin'." The police arrested Ben, and the prosecutor charged him as an aider and abettor. Ben tried to tell his court-appointed defense attorney that he was not involved in the robbery. He claimed that he was just trying to warn the couple that they should not doubt the robber's propensity to commit violence if frustrated or thwarted in his aims. (Ben did not use those precise words.)

The defense attorney did not believe Ben's story and was not intending to put Ben on the witness stand. Aware that Ben had been arrested and charged with a serious offense, Ben's special education advocate approached the defense attorney and explained that Ben had been diagnosed through an evaluation at school with a severe expressive and receptive language disorder. In light of this information and buoyed by the advocate's vouching for Ben's character, the defense attorney reassessed the previous determination that Ben was lying about his involvement in the robbery. The special education advocate produced a potential witness, a tutor with special education expertise who was working individually with Ben. The tutor was in a position to testify regarding Ben's difficulties with arranging words and speaking in clear, well-organized sentences.

Assuming that Ben's defense attorney decided to call the tutor as a witness, one could anticipate that the prosecutor might object to the testimony. The trial judge would likely have to determine whether the proffered testimony was relevant and material to the armed robbery charge and to Ben's defense. The defense attorney could claim that the prosecutor's objection was also discriminatory. The judge then would have to rule on that claim of discrimination. The defense attorney could also ask the court, prior to trial, to appoint an expert on language-based disorders to review and to screen the prosecutor's cross-examination questions for Ben. These possibilities raise intriguing questions for judges, in light of the mandates and the broad applicability of the ADA.¹⁰⁶

[End Sidebar](#)

Notwithstanding allegiance to the neutrality of their role, judges continue, at least on occasion, to display their oral communication talents in the courtroom and to judge others based, at least in part, on listening acuity and on oral presentation. Judges might feel particularly free, for example, to question and disarm a youngster at a disposition hearing when the child's legal defenses have been defeated and when the judge must determine what is in the child's best interest.

Exacting promises from the child is a standard part of the dialogue between judges and children at a disposition hearing. The judge may say, "So, Johnny, following this disposition, you are going to start going to school, isn't that right?" Even that seemingly simple and straightforward question may be difficult to understand for a child who is disabled. Furthermore, whether or not a defense attorney prepared Johnny for that question and for other questions, Johnny may understand only that he must agree with the judge. Johnny's comprehension may be at its lowest, moreover, when he is under pressure and stress; he may not have access, at that stressful moment, to the parts of his brain that process language.

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. Typically, that exchange involves the judge's asking the child a series of "yes"-or-"no" questions. In each question, the judge describes a particular right, then asks the child if the child understands the right ("yes" or "no") and if the child intends to give up that right ("yes" or "no"). One might conjecture that the usual reliance on "yes-no" questions often results in *unknowing* waivers of rights by children. Also, one can assume that children with disabilities are more likely than children who are not disabled to follow unwittingly the "yes-no" questioning.

[Insert as a Sidebar](#)

[Case Study: Darren](#)

Darren was incarcerated in the juvenile prison for four years following an adjudication for murder. Darren has language-based learning disabilities. Darren's performance IQ far exceeds his verbal IQ, and Darren has great difficulty processing what people say to him. Counselors at the juvenile prison reported that Darren had behaved admirably, well within the rules, for a long time. These counselors and their supervisors in the executive branch youth agency were recommending release for Darren to a halfway house. The judge who conducted the murder trial and who sentenced Darren was also responsible for determining whether to release Darren to the halfway house.

At the hearing to determine whether to release Darren, the judge engaged in the following colloquy with Darren:

Judge: Now, if I let you go, I don't know whether I would feel OK about meeting up with you, let's say, in a dark alley.

Darren: What?

Judge: What I'm saying, young man, is that I would be concerned about what you would do?

Darren: Huh? I got no reason to do nothing to you.

Judge: But if you *did* have a reason, then you would do something. Is that right?

Darren: I guess so.

The judge denied the request to release Darren.

[End Sidebar](#)

VI. Conclusion

This monograph 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 monograph prove that decision makers are ignorant regarding disability laws and regarding the existence and prevalence of disabilities among children in the delinquency system. Indeed, one purpose for this monograph 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 monograph should facilitate such studies. In addition, one hopes that the descriptions of these decision points and of the unintended consequences that flow from these decisions will provide

the immediate impetus for school system and delinquency system personnel to revamp policies and practices. Further, one might anticipate that school system and delinquency system administrators would conclude, based on the descriptions in this monograph, that a substantial need exists to engage in comprehensive training regarding both disability awareness and the dictates of relevant laws.

Federal law prohibits all state and local government entities from discriminating against people with disabilities, including education-related disabilities. In processing children into and through the delinquency system, however, police officers, prosecutors, probation and parole officers, and judges remain generally unaware of the existence and impact of education-related disabilities. Defense attorneys who represent children are largely unaware of their clients' education-related disabilities and the practical and legal consequences of those disabilities in the context of delinquency prosecutions and dispositional placements. Essentially, adults who run the delinquency system have not yet begun to comply with the federal law that prohibits disability discrimination.

This monograph suggests that much of the decision making relating to children in the delinquency system has a discriminatory impact and violates federal laws. One can state as a matter of law that school system personnel must know and follow the dictates of the Individuals with Disabilities Education Act and section 504 of the Rehabilitation Act. By the same token, delinquency system personnel performing educational duties (*e.g.*, running schools for incarcerated children) must follow the IDEA and section 504. In other duties, as well, delinquency system personnel must comply with Title II of the Americans with Disabilities Act. Likewise, school system personnel must comply with the ADA. Yet, due to ignorance of disabilities and of the governing law, neglect of specific duties, and failure to establish policies and practices (including training), many school system and delinquency system personnel and officials routinely violate these laws.

Unmasking the discriminatory impact against children with disabilities in the school system and in the delinquency system holds 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, in turn, to obtaining a broader goal: a society that nurtures and promotes productive young adults.

Ultimately, one hopes that, as a result of heightened awareness of the impact of education-related disabilities and of the mandates of anti-discrimination laws, school-system and delinquency-system officials will uniformly shift the perspectives and alter the assumptions underlying their daily decisions. If so, one would expect a decline in the disproportionate representation in the delinquency system of children with disabilities and a coincident decline in overall rates of incarceration for children.

¹.. *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief, The

Center on Crime Communities & Culture (September 1997) at 3-5, (hereinafter cited as *Education as Crime Prevention*).

².. See, e.g., Patricia Puritz & Mary An Scali, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY (OJJDP Report, January 1998) at 16-17 (*citing, inter alia*, a meta-analysis conducted by Pamela Casey and Ingo Keilitz demonstrating that 35.6 percent juvenile offenders have learning disabilities, 12.6 percent have mental retardation, and adding that the percentage of juvenile offenders with emotional disturbances is not adequately documented); and see, Peter Leone, *et al.*, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L.REV. 389 n.2 (1995)(collecting citations, including Casey & Keilitz, regarding prevalence of disabilities among incarcerated youth); and see also, *Education as Crime Prevention* at 3, *citing* R.J. Gemignani, *Juvenile Correctional Education: A Time for Change* (NCJ Publication No. 150309, Office of Juvenile Justice and Delinquency Prevention 1994) at 2.

³.. JEROME G. MILLER, LAST ONE OVER THE WALL 3-5. For a presentation of over-representation of minorities in the criminal system, see JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTIC SYSTEM, pp.4-9, 149-50 (1996).

⁴ See endnote 3, *supra*. People with disabilities suffer discrimination in incredibly high proportions and in a pervasive range of ways, including exceedingly high rates of institutionalization. See generally, Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. CIV. RTS./CIV. LIB. L.REV. 415-17 (1991) (hereinafter cited as Burgdorf, *The ADA: Analysis and Implications*).

⁵.. Leone *et al.*, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995).

This monograph does not contain a social science defense or dismissal of the theories that purport to explain disproportionate representation of children with disabilities in the delinquency system; rather, the objective is to present an analysis of decision points in the education system and in the delinquency system and to describe the discriminatory impact of decisions that typically ensue.

⁶.. See generally Charles A. Murray, THE LINK BETWEEN LEARNING DISABILITIES AND JUVENILE DELINQUENCY: CURRENT THEORY AND KNOWLEDGE (1976); TRAVIS HIRSCHI, CAUSES OF DELINQUENCY (1969).

⁷.. See MURRAY, *supra* note 6.

⁸.. See generally Ingo Keilitz *et al.*, *Learning Disabilities and Juvenile Delinquency*, in CONTEMPORARY CRIMINOLOGY 95 (L. D. Savitz & M. Johnson eds., 1981); Ingo Keilitz & Noel Dunivant, *The Relationship Between Learning Disability and Juvenile Delinquency: Current State of the Knowledge*, 7 REMEDIAL & SPEC. EDUC. 18 (1986).

⁹.. See generally K.A. Larson, *A Research Review and Alternative Hypothesis Explaining the Link Between Learning Disabilities and Juvenile Delinquency*, 21 J. OF LEARNING DISAB. 357 (1988).

¹⁰.. Leone *et al.*, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L.REV. 390 (1995).

¹¹ . *Id.*

¹² CONG. REC. July 29, 1999 at S9025. Cf. generally, Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers*, Bureau of Justice Statistics Special Report (NCJ 174463

July 1999)(over a quarter million people with mental illness incarcerated in U.S. prisons or jails).

¹³ 20 U.S.C. § 1412 (a)(1)(A); 34 C.F.R. 300.121, 300(a). Note that the amendment now specifically includes children "who have been suspended or expelled from school."

¹⁴ 20 U.S.C § 1401 (3)(A); 34 C.F.R. 300.7(a)(1). The specific disabilities are: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.

¹⁵ 20 U.S.C § 1401 (8)(25).

¹⁶ 20 U.S.C § 1401 (22); 34 C.F.R. 300.22(b).

¹⁷ 20 U.S.C. § 1401 (30). Transition services must be included in IEP's for children beginning at age 14. 20 U.S.C. § 1414 (s)(1)(A)(vii)(I); 34 C.F.R. 300.347.

¹⁸ U.S.C. § 1412 (a)(3); 34 C.F.R. 300.125.

¹⁹ 20 U.S.C. § 1414 (a)(1)(B). Assuming the child is eligible for services, the school must re-evaluate the child at least every three years. 20 U.S.C. § 1414 (a)(2)(A).

²⁰ 20 U.S.C. § 1412 (a), (b), (c).

²¹ Parent entitled to free evaluations through school in any area of suspected disability — See generally, 20 U.S.C. 1414 and see also, e.g., 1414 (b)(3)(C)

²² See, e.g., 20 U.S.C. 1415 (b)(1)(A) (procedural protections regarding independent evaluations)

²³ 20 U.S.C. 1414 (b)(3)(A)(ii)

²⁴ 20 U.S.C. § 1412 (d)(2)(A); 34 C.F.R. § 300.342.

²⁵ 20 U.S.C. § 1414 (d)(1)(A); 34 C.F.R. § 300.340(a), the IEP must include (1) a statement of the child's present level of educational performance; (2) a statement of annual educational goals and objectives; (3) the special education and related services which will be provided; (4) an explanation of the extent to which the child will not be able to participate with nondisabled students in regular education; (5) any modifications the child requires in order to participate in the administration of statewide assessments; (6) the projected dates for the commencement and the completion of services; (7) transition services (if age appropriate); and (8) a statement of how progress will be measured.

²⁶ *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206-207 (1982). The Act is replete with procedural protections designed to ensure the parent's informed, equal participation in the process, such as notice, consent, the right to an independent evaluation of the child's needs, and the right to challenge the school's proposed placement and program. P.L. 105-17, § 615. In *Rowley*, the Court held that "Congress placed every bit as much emphasis upon compliance with the procedures ... as it did upon the measurement of the resulting IEP against a substantive standard." at 205-206.

²⁷ 20 U.S.C. § 1414 (d)(1)(B); 34 C.F.R. § 300.344.

²⁸ 20 U.S.C. § 1414 (f).

²⁹ 34 C.F.R. § 300.552.

³⁰ 20 U.S.C. § 1412 (a)(5), 20 U.S.C. § 1401 (29); 34 C.F.R. § 300.26.

³¹ 34 C.F.R. § 300.551.

³² 471 U.S. 359 (1985).

³³ 20 U.S.C. § 1415 (i)(3)(B); 34 C.F.R. § 300.513.

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- ³⁴ See, e.g., *Harris v. District of Columbia*, 19 IDELR 105 (D.D.C. 1992).
- ³⁵ E.g., *Eric L. v. Bird*, 848 F.Supp. 303, 313 (D.N.H. 1994); *Martin v. Voinovich*, 840 F.Supp. 1175, 1190 (S.D. Ohio 1993).
- ³⁶ See Burgdorf, *The ADA: Analysis and Implications* at 413-14.
- ³⁷ 42 U.S.C. § 12101(b)(1)&(2).
- ³⁸ 42 U.S.C. § 12132.
- ³⁹ 28 C.F.R. § 35.130(b)(1)(i)&(ii).
- ⁴⁰ *Id.* at 35.130(b)(1)(iii).
- ⁴¹ 28 C.F.R. § 35.130(b)(3).
- ⁴² E.g., 28 C.F.R. §35.130(b)(3)(iii).
- ⁴³ E.g., 28 C.F.R. §35.130(b)(1) and (b)(6).
- ⁴⁴ 28 C.F.R. § 35.130(d).
- ⁴⁵ 28 C.F.R. § 35.130(a).
- ⁴⁶ *Id.*
- ⁴⁷ 28 C.F.R. § 35.160(a).
- ⁴⁸ *Id.* at (b)(1). See also, 28 C.F.R. § 35.104(1)-(4) (definition of "auxiliary aids and services").
- ⁴⁹ "Public entity" is defined in Title II the ADA as, in relevant part, "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government..." 42 U.S.C. § 12131.
- ⁵⁰ See, Burgdorf, *The ADA: Analysis and Implications* at 465.
- ⁵¹ *Id.* at 465 n. 266.
- ⁵² *Id.* at 465-66, n.266.
- ⁵³ See 42 U.S.C. § 12101(b) (one purpose of act to ensure central role of federal government in enforcement of standards against discrimination on the basis of disability).
- ⁵⁴ See 42 U.S.C. § 12202 (eleventh amendment immunity of states not a barrier to actions under the ADA).
- ⁵⁵ See 42 U.S.C. § 12133 (incorporating enforcement mechanisms available in section 505 of the Rehabilitation Act which, in turn, refers back to the mechanisms available for enforcement in title VI of the Civil Rights Act of 1964). Burgdorf, *The ADA: Analysis and Implications* at 468 (citations omitted).
- ⁵⁶ Burgdorf, *The ADA: Analysis and Implications* at 491.
- ⁵⁷ 42 U.S.C. § 12132.
- ⁵⁸ 42 U.S.C. § 12102(2).
- ⁵⁹ 28 C.F.R. § 35.104 (definition of "Disability").
- ⁶⁰ *Id.* (definition of "major life activities" within definition of "Disability", at § 35.104(2)).
- ⁶¹ See, *id.* at § 35.104(4)(ii) (definition of "regarded as having an impairment" within the definition of "Disability").
- ⁶² Burgdorf, *The ADA: Analysis and Implications*, at 444 n.162, citing 42 U.S.C.A. § 12132.
- ⁶³ *Id.* at 466.
- ⁶⁴ *Id.* at 467.
- ⁶⁵ See 34 C.F.R. § 300.7(a)(1).
- ⁶⁶ For a listing of class action cases involving educational claims for students with disabilities in

juvenile correctional facilities, *see*, Patricia Puritz & Mary Ann Scali, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY (OJJDP Report, January 1998) at 18-19.

⁶⁷ 28 C.F.R. § 35.104.

⁶⁸ 119 S.Ct. 2176 (1999).

⁶⁹ *Id.* at 2180-81.

⁷⁰ The opinion references, as well, the "integration regulation" at 28 C.F.R. § 35.130(d), but the holding does not rest on that regulation.

⁷¹ 118 S.Ct. 1952 (1998).

⁷² *Id.* at 1953-54.

⁷³ *Id.* at 1955.

⁷⁴ *Eric L. v. Bird*, 848 F. Supp. 303, 313-14 (D.N.H. 1994)(denying state's motion to dismiss as to § 504 and ADA claims).

⁷⁵ *Id.* at 313.

⁷⁶ *Cf.*, *Easley v. Snider*, 36 F.3d 297 (3rd Cir. 1994) (requirement that persons with disabilities be "mentally alert" in order to participate in attendant care program not discriminatory -- persons who were not mentally alert were not otherwise qualified for the program; admitting those persons who were not mentally alert would fundamentally alter the nature of the program).

⁷⁷ State and local law typically provides that, even if detention appears justified based on dangerousness or risk of flight, the court should determine whether the child can receive sufficient supervision at home and in the community to justify release. *See, e.g.*, District of Columbia Superior Court Juvenile Rule 106(a)(5) (when detention justified, court "may nevertheless consider whether the child's living arrangements and degree of supervision might justify release pending adjudication").

⁷⁸ *Alexander v. Choate*, 469 U.S. 287 (1985); *Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir. 1994), *Sarsycki v. United Parcel Service*, 862 F. Supp. 336 (W.D. Okl. 1994), *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992); *Nathanson v. Medical College*, 926 F.2d 1368 (3rd Cir. 1991); *Begay v. Hodel*, 730 F. Supp. 1001 (D.Ariz. 1990)(discriminatory intent not required).

⁷⁹ *E.g.*, *Alexander v. Choate*, 469 U.S. 287 (1985).

⁸⁰ In *Choate*, the Supreme Court "[assumed] without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped" but concluded that the cap on medicaid services was not such a case. The Court reasoned that the limitation on services, neutral on its face, "does not invoke criteria that have a particular exclusionary effect on the handicapped." *Id.* at 720. Nor, the Court held, did the limitation on services deny individuals with disabilities meaningful access to the program's benefits in that the Medicaid program itself is designed only to achieve "the amorphous objective of 'adequate health care,'" rather than health care "precisely tailored" to meet the needs of the recipients. *Id.* at 721. Moreover, the Court found that there was no evidence that any of the illnesses generally associated with disabilities could not be treated within the new limitations on services. *Id.* Thus, while it was undisputed that persons with disabilities disproportionately require longer hospital stays than nondisabled persons, the Court found that the cap on services was not discriminatory.

⁸¹ Fundamentally, regarding preventive detention based on a claim that a child is dangerous,

prosecutors should seek detention and judges should order detention based solely upon demonstrable evidence of previous dangerous conduct by the accused child. The principal factor governing detention, therefore, should be the accused child's history of proven dangerous conduct combined with the record of pending charges involving allegedly dangerous conduct. If researchers were to document -- in a study in which the researchers controlled for accused children's prior adjudications and pending charges involving dangerous conduct -- that judges in a particular jurisdiction detained children with disabilities at a higher rate than non-disabled children, that result would support a challenge under the ADA. One could argue that, if children with disabilities are routinely and disproportionately denied access to educational and community-based delinquency prevention programs, the very denial of services, as well as resulting elevated detention rates for children with disabilities (due to the denial of prevention services), both violate the ADA.

⁸² See, e.g., *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993); *DeLong v. Brumbaugh*, 703 F.Supp. 399 (W.D. Pa. 1989); *People v. Caldwell*, 603 N.Y.S.2d 713 (Crim. Ct. 1993); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288 (9th Cir. 1982).

⁸³ See, *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity not a bar to prospective injunctive relief against judicial officer acting in judicial capacity). In *DeLong*, the court held that a deaf woman's declaratory and equitable claims under the Rehabilitation Act against a local trial judge for unlawfully excluding her from the jury array on the basis of her disability were neither barred by the Eleventh Amendment nor by the doctrine of judicial immunity. *DeLong v. Brumbaugh*, 703 F.Supp. at 407. Moreover, the Department of Justice's implementing regulations for Title II of the ADA expressly apply "to anything a public entity does" including "activities of the legislative and judicial branches of State and local governments." 56 Fed. Reg. 35696 (July 26, 1991).

⁸⁴ Burgdorf, *The ADA: Analysis and Implications* at 465-66 n.266.

⁸⁵ No doubt, the failure to find, evaluate, and serve children appropriately within the school system is also a function of the parent's relative inability to advocate on behalf of the child. This lack of parental capacity also correlates independently with delinquency rates and, one must assume, with the rate of disabilities among parents, as well.

⁸⁶ These statements regarding typical developments derive from the author's experience in cases observed over the years in the law school clinic.

⁸⁷ For a number of years, law students and law professors in the Special Education Advocacy Project at the University of the District of Columbia School of Law have investigated the individual school histories of children with education-related disabilities whom they represent in delinquency and special education cases. At particular points in this essay, the author provides examples from some of these cases to illustrate how children with education-related disabilities fair in the school system and in the delinquency system.

In order to preserve anonymity of individual clients of the U.D.C. David A. Clarke School of Law Juvenile Law Clinic, case descriptions in this essay contain fictitious names.

⁸⁸ Dale's failures in school and in life are not simply the result, of course, of school system personnel's failure to identify and meet his special education needs. Dale's mother did not control Dale and train him well. His lawyers arguably should have counseled him more

effectively on the benefits of accepting special education services, once he had been identified. Even the prosecutor may be faulted in that the initial delinquency charge may have merited more work and might have resulted in an adjudication. Given those shortcomings, one can nonetheless speculate that early, appropriate intervention through the school system to provide educational, speech/language, and emotional services would have provided significant preventive effects.

⁸⁹ A more-detailed version of Oliver's history is included in Tulman, Joseph B. & Hynes, Mary G., *Enforcing Special Education Law on Behalf of Incarcerated Children: A Blueprint for Deconstruction*, 18 CHILDREN'S LEGAL RIGHTS JOURNAL 48, at 55-57 (1998).

⁹⁰ 927 F.Supp. 267 (E.D. Tenn. 1994), *aff'd* 106 F.3d 401 (6th Cir.), *cert. denied*, 117 S.Ct. 2448 (1997).

⁹¹ CONG. REC. May 14, 1997 at S4403.

⁹² *See, e.g., State v. Trent N.*, 569 N.W.2d 719, 724 (Wis. App. 1997).

⁹³ *Cf., id.* at 725 n.10 (referral by court back to the intake worker for disposition).

⁹⁴.. Proponents of the system view the network not as an entangling web but rather as a nurturing nest for children who are in need of care and rehabilitation. Little evidence supports such a viewpoint. Confronted by those who draw a benevolent picture of the delinquency system, one is reminded that, when "[a]sked what he thought of Western civilization, Mahatma Gandhi said it sounded like a good idea and should be tried sometime." (Jim Hoagland, "Russia on the Brink", "The Washington Post", Sept. 3, 1998, p. A21.) Indeed, few people who have other options would choose to place their own children in the delinquency system in order to obtain services.

⁹⁵.. *See, e.g., MILLER, LAST ONE OVER THE WALL* 5. *But cf. generally*, Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L.REV. 699-700 (1991)(describing inappropriate and unfair "transinstitutionalization" of children, primarily through private means, but, nevertheless, without procedural and substantive protections).

⁹⁶..*See, e.g.,* D.C. Code section 16-2301 (8).

⁹⁷.. Furthermore, as a substantive matter, education can be an effective antidote to, substitute for, or inoculant against delinquency. *See generally, Education as Crime Prevention*. "[R]esearch shows that quality education is one of the most effective forms of crime prevention." *Id.* at 1 (footnote omitted). "[C]rime prevention is more cost-effective than building prisons. Of all crime prevention methods, education is the most cost-effective." *Id.* at 11, *citing* the 1996 Rand Corporation study, *Diverting Children from a Life of Crime: Measuring Costs and Benefits*. *See also*, Sarah Ingersoll & Donni LeBoeuf, *Reaching Out to Youth Out of the Education Mainstream*, OJJDP Juvenile Justice Bulletin, NCJ No. 163920 (1997) at 2-3, 6-7.

⁹⁸ The Constitutional right, in felony cases, to an indictment by grand jury does not apply in juvenile court.

⁹⁹ *Cf., e.g.,* D.C. Code § 16-2305.

¹⁰⁰ *See*, Tulman, *The Role of the Probation Officer in Intake: Stories from Before, During, and After the Delinquency Initial Hearing*, 3 D.C. L. REV. 242-50 (1995).

¹⁰¹ An intake probation officer should not recommend pre-trial detention based upon a child's danger to self unless the child meets the standard for civil commitment to an inpatient facility in

the mental health system. A recommendation for preventive detention to protect the child, if the child does not meet the mental health standard, is a *per se* violation of the least restrictive environment precept of both the special education law and of the delinquency law.

¹⁰² See, 28 C.F.R. § 35.130(b)(7).

¹⁰³ See, 28 C.F.R. 35.130(b)(3)(iii).

¹⁰⁴ *Moran v. Burbine*, 475 U.S. 412 (1986).

¹⁰⁵ See, *Colorado v. Connelly*, 479 U.S. 157 (1986).

¹⁰⁶ In fact, the prosecutor did not object to the tutor's testimony. The defense attorney did not request a pre-screening of the prosecutor's questions by an expert. The judge acquitted Johnny. The defense attorney was convinced that the tutor's testimony was a pivotal factor in gaining the acquittal.