

## STRATEGIC USE OF LAW TO EFFECT STUDENT PLACEMENT WITHIN THE JUVENILE JUSTICE SYSTEM

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**ABSTRACT:** There is an educational crises in the juvenile justice system in America with around 80% of all incarcerated juveniles having a documented educational disability. The systematic failures of the American educational and justice systems to provide these children with their legally protected rights. Using a combination of the three main American disability laws The American's with Disabilities Act, The Individuals with Disability Education Act, and section 504 of the Rehabilitation act there are strategies backed by law that provide remedies to protect the right of these students.

### 1. Introduction

Youth in the nation's various juvenile incarceration facilities are guaranteed, by law, educational support for those special education services for which they qualify. Despite the protection guaranteed by the statute, these students are systematically being denied these services. The scope of this problem is enormous, with an estimated 70%-80% of children in the juvenile justice system having been identified as having an educational disability<sup>2</sup>. Given these proportions,

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<sup>2</sup> Stopping the Schoolhouse to Jailhouse Pipeline By Enforcing Federal Special Education

and a current incarcerated population of approximately 57,900 children<sup>3</sup>, there are around 40,500 students at minimum, being denied their constitutionally protected rights<sup>4</sup>. That is more than the entire special education population of New York State<sup>5</sup>. If New York was so systematically failing to educate its children with special needs, there would be a national outcry. However, the failure of our juvenile justice system to educate the youth with disabilities under its care is shockingly absent from public discourse.

The problem of education in the juvenile justice system extends beyond the systemic issues that surround the special education system in general. The overall education within the juvenile justice system is poor, but there are sectors that are better than others, and all are certainly more effective than the complete lack of support or educational opportunity that is suffered by some students. The educational experience in jail mirrors our national system of public education inasmuch as the most enriching experiences are available to the main population of students. The majority of resources are directed towards the population that is easiest to educate or perhaps cheapest to educate, which in the juvenile justice system at least, is a minority population. In the national system this would be the general education classroom. In the juvenile justice system, they are found in the general population.

One of the primary safeguards guaranteed by law is that the special education services required by qualified students must be provided in the least restrictive environment (“LRE”) possible. There is often confusion amongst advocates as to precise definition of LRE, leading to its misidentification as a form of mainstreaming. The difference between LRE and inclusion and mainstreaming, while subt-

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Law,” American Bar Association’s Children’s Rights Litigation Committee (Winter 2007).

<sup>3</sup> Easy Access to juvenile Justice Population, The National Center for Juvenile Justice (Feb. 24, 2015) [http://ojjdp.gov/ojstatbb/ezapop/asp/profile\\_selection.asp](http://ojjdp.gov/ojstatbb/ezapop/asp/profile_selection.asp)

<sup>4</sup> This figure was arrived at using the lower estimated number of 70% of incarcerated children having an educational disability.

<sup>5</sup> Information and Reporting Statistics, New York State Department of Education, (Feb. 26, 2015) <http://www.p12.nysed.gov/irs/statistics/enroll-n-staff/home.html> (reporting that the special education population of New York State is an estimated 39397 students.)

le, is very important for an accurate view of the current situation facing disabled students. The court system has recognized some tension between IDEA's goals of providing an education suited to a student's needs otherwise known as a free appropriate public education ("FAPE") and of educating that student with his non-disabled peers as much as circumstances allow known as LRE. Because there are no clear-cut rules associated with this provision, administrators and IEP teams must rely on the preponderance of educational and behavioral data, and guidance from past court cases. As such, courts have established the necessity of a case-by-case analysis in reviewing whether both of those goals have been accommodated, for they realize that each child's circumstances will be different consequently, a one size fits all approach is not practical<sup>6</sup>. There are two common approaches in education that are often mistaken for LRE: mainstreaming and inclusion. There are proponents of both systems and those who argue that both fail to meet the requirements of the law.

Educating children in the regular education classroom part time based on the child's supposed capabilities is known as mainstreaming. This can mean as little as inclusion in a single hour or part of the day, or up to full time in the regular classroom with the ability for the child to go to an alternate setting if the need arises. IDEA incorporates a strong preference for children with disabilities to be educated to the maximum extent appropriate together with their regular education peers. Opponents of mainstream claim that it allows segregation of students with disability based on nothing more than a teacher's recommendation.

Inclusion, on the other hand requires a system that eliminates categorical special needs programs and removes the current distinction between regular and special education. This system would meet the needs of learners by requiring professionals to personalize instruction the practice of which is currently referred to as differentiation and is called for in IDEA's modification mandate. Opponents of inclusion claim that it removes many of the safeguards put in place by the laws and removes the continuum of services. There are provisions under each of the three main federal laws that pro-

<sup>6</sup> See *P. v. Newington Bd. of Educ.*, 546 F.3d 111, 113 (2d Cir. 2008)

vide procedures for the administration of modifications or accommodations for individuals with disabilities. Each of these laws, The Individual with Disabilities Education Improvement Act (IDEIA), The Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act (Section 504), contain either explicit mandates or have interpretive case law that instruct that the accommodations or modifications required by individuals with disabilities need to be provided in the least restrictive environment (LRE) possible. While it is true that some placements are not feasible for incarcerated students, such as traditional school setting. However, as there are varied settings within the justice system itself, it should be possible within that system to change the placement of children with education needs based on the LRE provisions, in a way consistent with the restrictions placed on the system as a condition of the fact that it is, at its core, a prison.

## 2. Background

To fully understand the reality of the plight of a child with special needs in America's juvenile justice systems, one must understand not only the background of the system itself, but of the human rights fight for educational access and equality with respect to students with disabilities.

### a. Of the Juvenile Justice System

The juvenile justice system has grown and changed substantially in the United States since 1899, when the first juvenile court was established in Cook County, Illinois<sup>7</sup>. Originally, the court process was informal and unregulated, with minors being denied many of the constitutionally protected rights granted to adults. The process was often nothing more than a conversation between the youth and the

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<sup>7</sup> Juvenile Justice History, The center on Juvenile and Criminal Justice ( Mar. 12, 2015) <http://www.cjcj.org/education1/juvenile-justice-history.html> (continuing by the middle 19th century, following the creation of houses of refuge, new innovations such as cottage institutions, out-of-home placement, and probation were introduced. These new approaches were typically the result of enterprising social reformers who sought new and better ways to address the problem of wayward youth.

This collection of institutions and programs were finally brought together with the creation of the juvenile court. First established in 1899 in Cook County, Illinois and then rapidly spread across the country, the juvenile court became the unifying entity that led to a juvenile justice system.)

judge who had almost total discretion over the result of the case<sup>8</sup>. To change the nature of the juvenile incarceration experience, was deemed that it was improper to house most juvenile offenders in jails with adults<sup>9</sup>. The early juvenile courts created a system of probation to monitor the youths and used a separate incarceration system that was designed to provide the juvenile with rehabilitative services, with the court acting in *parens patriae*, or in place of the parent. The new system was designed to give the juvenile supervision, guidance, and education<sup>10</sup>. This model was followed by every state and the District of Columbia<sup>11</sup>.

The process of the juvenile justice system changed once again with the seminal ruling in the case of *In re Gault*. In *Gault*, the Supreme Court determined that the Constitution required that youth in the juvenile system have many of the same due process rights and protections guaranteed to adults in the criminal system, including the right to an attorney<sup>12</sup>.

#### b. The Educational Rights Fight

Prior to the 1960s a large majority of America's children with disabilities were placed in institutions or asylums by the government or parents who felt that there was no other recourse. However, inspired by other social rights movements' disability rights activists mobilized locally and nationally demanding change on a national level to address physical and social barriers, lobbying for institutional change, and fighting negative attitudes and stereotypes that were facing the disability community<sup>13</sup>. Parents were and continue to be one of the driving forces in the disability rights movement, advocating for

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<sup>8</sup> Juvenile Justice: an Overview, The Juvenile Law Center, ( March 13, 2015) <http://www.jlc.org/news-room/media-resources/youth-justice-system-overview>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>13</sup> A Brief History of the Disability Rights Movement, The Anti-Defamation League, ( Feb. 26, 2015) [http://archive.adl.org/education/curriculum\\_connections/fall\\_2005/fall\\_2005\\_lesson5\\_history.html](http://archive.adl.org/education/curriculum_connections/fall_2005/fall_2005_lesson5_history.html)

their children demanding that they be taken out of institutions and into schools where their children would have the opportunity to receive an education just like their non-disabled peers<sup>14</sup>.

In the 1970s, disability rights activists took the fight to Congress and marched on Washington in an effort to secure the political influence necessary to include language protecting the civil rights of people with disabilities into the 1972 Rehabilitation Act. The Rehabilitation Act was passed in 1973, and for the first time in history, civil rights of people with disabilities were protected by law<sup>15</sup>.

The next legislative victory in the educational rights fight was the 1975 Education for All Handicapped Children Act (EAHC). It was passed to guarantee equal access to public education for children with disabilities<sup>16</sup>. This act dictated that every child had a right to education, and mandated the inclusion of children with disabilities in mainstream education classes<sup>17</sup>. The EAHC was renamed in 1990 to the Individuals with Disabilities Education Act (IDEA), which further expanded the scope of the inclusion of children with disabilities and also broadened the responsibilities of schools and provided for more due process rights for parents and students<sup>18</sup>. IDEA required that an Individual Education Plan (IEP) be designed with parental approval to meet the educational needs of a child with a disability<sup>19</sup>.

The court system was integral part securing the right of children with disabilities to an education alongside their non-disabled peers. The early case law such as the *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*<sup>20</sup> (PARC) and *Mills*

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> A Brief History of the Disability Rights Movement, The Anti-Defamation League, ( Feb. 26, 2015) [http://archive.adl.org/education/curriculum\\_connections/fall\\_2005/fall\\_2005\\_lesson5\\_history.html](http://archive.adl.org/education/curriculum_connections/fall_2005/fall_2005_lesson5_history.html)

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

*v. Board of Education of the District of Columbia*<sup>21</sup> (Mills) established some of the basics and laid the groundwork for the least restrictive environment mandate. In *PARC*, the court found:

It is the Commonwealth's obligation to place mentally retarded child in a free public program of education and training appropriate to the child's capacity... among the alternative programs of education and training required by the state to be available placement in the regular public school class is preferable... to placement in any other type of program of education.<sup>22</sup>

The *Mills* case expanded the mandate laid out in the *PARC* case to include all children with a diagnosed handicap not just those with mental disabilities<sup>23</sup>.

Placement in a more restrictive environment cannot be instituted simply because the alternative option does not exist in a specific service district. If an option does not exist but is deemed appropriate for a given child, there exists legal precedent to mandate the establishment of funding for appropriate placement<sup>24</sup>.

### 3. Current Reality of the Situation

The link between a poor education and incarceration is borne out in data. High School dropouts are three and a half times more likely to be arrested than graduates<sup>25</sup>. In America, sixty eight percent of all adult males in prison do not have a high school diploma<sup>26</sup>. Only

<sup>21</sup> *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009)

<sup>22</sup> *Pa. Ass'n for Retarded Children*, 343 F. Supp. 279 at 281.

<sup>23</sup> *See Mills*, 571 F.3d 1304

<sup>24</sup> Danielson, L. C., & Bellamy, G. T. (1989). State variation in placement of children with handicaps in segregated environments. *Exceptional Children*, 55, 448-455.

<sup>25</sup> Economic Impacts of Dropouts, National Dropout prevention center/network <http://www.dropoutprevention.org/statistics/quick-facts/economic-impacts-dropouts> (last visited Apr. 20, 2015).

<sup>26</sup> *Schools v. prisons: Education's the way to cut prison population*, San Jose Mercury News, 5/16/2014, [http://www.mercurynews.com/opinion/ci\\_25771303/schools-v-prisons-](http://www.mercurynews.com/opinion/ci_25771303/schools-v-prisons-)

twenty percent of adult inmates in California demonstrate even a basic level of literacy<sup>27</sup>. When one combines the lack of education in prison in general with the high prevalence of incarcerated juveniles that qualify for educational support, one finds a systematic lack of education provided to students in jails.

All juvenile incarceration facilities have some sort of educational system; however the differences between the different programs are shocking. There are reports of students being provided only GED prep books and no actual support<sup>28</sup>. One student with severe mental disabilities is in segregation due to his inability to control his behavior and he receives 20 minutes a week with a teacher<sup>29</sup>. His release is contingent upon him earning a GED<sup>30</sup>. His reading level is lower than that of a third grader. The likelihood that he will complete this GED while in prison is vanishingly small.<sup>31</sup> However on the other hand, there are programs through the country that offer true educational experiences with many if not most of the students gaining a high school diploma or equivalent<sup>32</sup>. There is an argument that tutoring and GED classes, do not constitute specialized academic instruction because it is not consistent with the students' IEP goals and does not allow youth with disabilities to continue to participate in the general education curriculum.

#### **4. Law cases and their application to placements changes within the Juvenile justice system**

There are three main federal laws that police the policies of schools and other providers of educational services to ensure that they are not engaging in discriminatory behavior or practices towards people

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educations-way-cut-prison-population

<sup>27</sup> *Id.*

<sup>28</sup> *TD. v. Louisiana*, 1624 ILDER 1205, 1206 (2014).

<sup>29</sup> *Id.*

<sup>30</sup> This is a common stipulation that is placed on older students with long sentences

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



with disabilities and more explicitly towards children with disabilities. The laws are often cited together in education discrimination cases. However, they actually cover different groups of people and in different contexts though there is a fair amount of overlap and often more than one of the laws may be applicable to any given situation.

#### a. IDEA

##### i. Who is a Qualifying Individual

To qualify, a child with a disability a child must be between the ages of three and twenty-one and have one of thirteen designated conditions and prove that that condition is having an adverse impact on their education<sup>33</sup>.

##### ii. Application to the Juvenile Justice System

Under IDEA, a state is eligible for financial assistance under the act if it endeavors to meet a number of conditions including making sure that a free appropriate public education (“FAPE”) is made available to “all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled”<sup>34</sup>.

The law clearly states that “state and local juvenile and adult correctional facilities” or if are included in the list of political subdivisions of the state that are involved in the education of children with disabilities and must therefore comply with the IDEA<sup>35</sup>.

The law allows for exception when it would be inconsistent with state law or practice, the individual is incarcerated in an *adult* facility and were not prior to their incarceration identified as a qualifying

<sup>33</sup> 20 U.S.C. § 1411 (a)(3)(A). (Stating the thirteen categories are deaf, hard of hearing, vision impairment( including blindness), deaf-blind, intellectual disabilities, speech and language impairments, orthopedic, autism, traumatic brain injury, specific learning disability, emotional disturbance, and other health impairments.)

<sup>34</sup> 20 U.S.C. § 1412 (a)(1)(A).

<sup>35</sup> 34 C.F.R. §300.2(b)(1)(iv)

individual or did not have an IEP<sup>36</sup>. The law doesn't allow for an exemption for juvenile justice facilitates and so they are covered under the law. It even included the administrators of both juvenile and adult facilities on the suggested list of interested parties that should be included on the state advisory panels<sup>37</sup>.

### iii. Relevant Provisions

1. Children with disabilities must be educated in the “least restrictive environment.”

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily<sup>38</sup>.

A child's educational placement must be re-evaluated at least annually and must be based on his/her IEP.<sup>39</sup> He/she also has a right to the LRE<sup>40</sup>.

“In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.”<sup>41</sup>In 1994, the ninth Circuit held that non-non-academic benefits needed to be considered in deciding placement<sup>42</sup>.

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<sup>36</sup> *Id.* At (A)(1)(B) emphasis added

<sup>37</sup> *Id.* At (a)(21)(B)(xi)

<sup>38</sup> 34 C.F.R. § 300.114

<sup>39</sup> *Id.* § 300.116(b).

<sup>40</sup> *Id.*

<sup>41</sup> § 300.116(d).

<sup>42</sup> *Bd. Of Educ. v. Rachel H.*, 14 F.3d 1389 (9th Cir. 1994).

## 2. Stay Put Provision

if...[juvenile correctional facilities] remove a youth with a disability from school and place him or her in restrictive security programs for more than 10 school days without conducting a manifestation determination or without providing the special education and related services he or she is eligible for, they have violated the IDEIA.<sup>43</sup>

If a youth with an IEP is removed from school for more than 10 days in a year, IDEIA considers that removal a “change of placement” which triggers a series of procedural safeguards<sup>44</sup>.

First, the school is required to conduct a Manifestation Determination Review (MDR) to determine if the behavior in question is caused by, or has a direct and substantial relationship to, the youth’s disability or the failure to implement the youth’s IEP<sup>45</sup>.

If the behavior is related to the youth’s disability, the school must conduct a Functional Behavioral Assessment (FBA) and implement a Behavior Intervention Plan (BIP). Then, the youth must be returned to school, unless special circumstances (carrying weapon, drugs, or inflicting serious bodily injury) are present or the new BIP mandates a change in placement<sup>46</sup>.

If the youth is removed for more than 10 school days, the school is required to provide services so the youth can “continue to participate in the general education curriculum and progress toward meeting the goals set out in the child’s IEP”<sup>47</sup>. The Department of Justice’s Sta-

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<sup>43</sup> Statement of Interest of the United States of America re G.F. v. Contra Costa County, Case No. 3:13-cv-03667-MEJ (Feb. 13, 2014).

<sup>44</sup> 20 U.S.C. § 1415(k); *Honing v. Doe*, 484 U.S. 305, 327 (1988) (holding removal of more than 10 days constituted a change in placement that requires parental consent).

<sup>45</sup> *Id.* § 1415(k)(l)(E).

<sup>46</sup> *Id.* § 1415(k)(l)(F).

<sup>47</sup> IEP” *Id.* § 1415(k)(l)(D)(i).

tement of Interest in *G.F. v. Contra Costa County* makes clear that all of these requirements apply to juvenile correctional facilities<sup>48</sup>.

While one administrative decision finds that danger posed by a student excused the denial of FAPE<sup>49</sup>, other decisions have held that problematic behavior is actually evidence behavioral services were not fully implemented, and thus, that a student was denied FAPE<sup>50</sup>.

3. The only formal exception to the IEP and FAPE requirements of IDEIA applies only to youth incarcerated in adult prisons:

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child’s IEP Team may modify the child’s IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated<sup>51</sup>.

Few Courts have examined this exception. One administrative hearing officer found that an adult prison was exempt from IDEIA’s requirements, but also noted, “[T]here is simply no jurisprudence that contemplates how this exception is triggered, or what this exception permits<sup>52</sup>.

ii. Case law interpretation

4. Who bears the ultimate responsibility to oversee the implementation of the law?

Most cases involving incarcerated youth involve agency-punting, with each involved agency claiming other agencies are responsible

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<sup>48</sup> 113 LRP 43079

<sup>49</sup> *State Correctional Institution Pine Grove*, 113 LRP 32792 (SEA PA 02/09/13),

<sup>50</sup> District of Columbia Pub. Schs., 113 LRP 24543 (SEA DC 05/05/13).

<sup>51</sup> 20 U.S.C. § 1414(d)(7).

<sup>52</sup> *State Correctional Institution Pine Grove*, 113 LRP 32792 (2013) (pending appeal in *Buckley v. State Correctional Institution Pine Grove*, 62 IDELR 206 (Pa. Dist. 2014)).

for the failure to implement IDEIA<sup>53</sup>. This decision appears to conflict with IDEIA's mandate that public entities are jointly responsible for educating youth, because the state has the ultimate responsibility for implementing IDEIA<sup>54</sup>.

The Fifth Circuit held that, in Louisiana, the Louisiana Department of Education has the ultimate responsibility for insuring IDEIA requirements are met. The court imposed liability on the Louisiana Department of Education, rather than the St. Tammany Parish School Board, for paying for a student's residential placement:

IDEIA places primary responsibility on the state educational agency, by providing that it shall be responsible for assuring that the requirements of [IDEIA] are carried out... ultimately, it is the [state educational agency's] responsibility to ensure that each child within its jurisdiction is provided a free appropriate education. Therefore, it seems clear that [a state educational agency] may be held responsible if it fails to comply with its duty to assure that IDEIA's substantive requirements are implemented<sup>55</sup>.

This case reflects the current majority view in the country as it has been cited in all of the other Federal appellate circuits save the First Circuit. Though the other circuits have accepted this line of reasoning officially. However, they also each have an individual take on the practical implementation of this rule<sup>56</sup>.

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<sup>53</sup> See, e.g. San Diego County Office of Edu., 39 IDELR 169 (SAE CA 2003). (arguing that provision of services and placement decisions of youth in juvenile facilities were not up to the district, because the youth was under the court's jurisdiction. The hearing officer granted a Motion to Dismiss, because the County Office of Education did not have control over the youth's education.)

<sup>54</sup> 20 U.S.C. § 1413(a)(13).

<sup>55</sup> *Tammany Parish School Board v. State of Louisiana*, 142 F.3d 776 (5th Cir. 1998) (citing *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997)) (citations omitted).

<sup>56</sup> Id. (raising that some incarcerated youth could be placed in facilities that are not of their own state. This case focused on a child sent to a "home for children" in New Hampshire while her parents were residents of another state. The court held that the sending district is liable for the costs of educating the child not the receiving district and so must make payments to the receiving district who is bearing the costs.); (The First circuit has a very similar rule stating that, The New Hampshire legislature has recognized the, "state's

## b. ADA

### i. Who Is a Qualifying Individual

The ADA sets the definition for a qualifying individual is a person with, “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment”<sup>57</sup>.

### ii. Application to the Juvenile Justice System

Title II of the ADA prohibits discrimination against individuals with disabilities by public entities that receive funding from state and local governments.<sup>58</sup>

When drafting the ADA, Congress intended the ADA to address problems of isolation and segregation in education and institutionalization—which is exactly what many children in the juvenile justice system seem to be experiencing. Congress’ findings state:

[H]istorically, society has tended to isolate and segregate indivi-

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responsibility to ensure that children with educational disabilities receive a free appropriate education as mandated by federal law.” The court continued noting that the continuance of federal funding was contingent upon the state’s insurance of that right); (The Second Circuit held that both the State department of education and the local school district share responsibility for ensuring that the IDEA requirements. The court emphasized the shared nature of the responsibilities. In *Handberry v. Thompson*, the court explained the check and balance nature of the relationships of the parties who share these vital roles in the oversight of education. *Handberry v. Thompson*, 446 F.3d 335 (2d Cir. 2006)); (In the third circuit the enforcement of the provisions of IDEA was held by the federal appellate courts to be the responsibility of the individual LEA. In *Lawrence Township Board of Education v. New Jersey*, the court stated that every local educational agency that receives federal funding under the IDEA must provide disabled children with a free appropriate public education (FAPE). 20 U.S.C.S. § 1412(a)(1). The court also stated that Federal funding under the IDEA is contingent on compliance with its numerous substantive and procedural requirements. “In New Jersey, the LEAs are vested with the responsibility for providing and administering a FAPE, in accordance with the requirements of the IDEA.” *Lawrence Twp. Bd. of Educ. v. New Jersey*, 417 F.3d 368 (3d Cir. 2005))

<sup>57</sup> 42 USCS § 12102(1).

<sup>58</sup> 42 USCS § 12132

duals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem...in such critical areas as... education... institutionalization, [and] health services, and access to public services<sup>59</sup>.

Title II of the ADA, and the Regulations enforcing the ADA, require that disabled individuals be treated equally by public entities.<sup>60</sup> An incarcerated child has the right to the same services, programs, and activities as other youth. The incarcerated child with a disability cannot be treated differently based on his diagnosis. A child also cannot be excluded from participation in or denied the benefits of services, programs, or activities of a public entity.

To date, no courts have looked at the ADA as applied to youth in correctional facilities. However, Supreme Court jurisprudence implies that the ADA is applicable in juvenile facilities, since it is applicable in adult facilities.<sup>61</sup> Further, the Department of Justice makes clear the ADA applies to youth incarcerated in correctional facilities.<sup>62</sup>

## c. 504

### i. Who Is a Qualifying Individual

Under §504, there is no list of “approved” disabling conditions. A person with a “disability” is simply one who (1) “has a physical or mental impairment which substantially limits one or more major life activities,” (2) has a record of such an impairment, or (3) is regarded as having such an impairment<sup>63</sup>

### ii. Application to the Juvenile Justice System

<sup>59</sup> 42 U.S.C. § 12101(a)(2-3).

<sup>60</sup> 42 USCS § 12102

<sup>61</sup> See *Pennsylvania DOC v. Yeskey*, 524 U.S. 206 (1998) (applying anti-discrimination principles in ADA to prison inmates).

<sup>62</sup> State of Interest of the United States at 16.

<sup>63</sup> 34 C.F.R. §104.3(j)(1)

[N]o otherwise qualified handicapped individual... shall, solely by the reason of his handicapped, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance<sup>64</sup>.

The 504 regulation applies to all recipients of federal assistance and is intended to ensure the federal programs and activities are not discriminating on the basis of disability<sup>65</sup>.

While the stipulations of Section 504 are required of institutions receiving federal funding<sup>66</sup>, a program that receives federal funding for any program brings the whole program under the auspices of the law<sup>67</sup>. So while most juvenile incarceration facilities are state run they do receive federal funding for various parts of their operations and thus are required to comply with the rules and regulations set forth under section 504.

### iii. Relevant provisions

Subsection D of 504 concerns education and is very closely coordinated with the LRE mandate in IDEA<sup>68</sup>. Appropriate education is to be provided to all children with disabilities in a setting that resembles the general education classroom and is also appropriate<sup>69</sup>. It also ensures that proper evaluation procedures are to be used to ensure the best possible placement and ensures that due process procedures are available to handle dispute over the placement<sup>70</sup>. Subsection D also indicates that if a placement is necessary because of the severity of a person's handicap then that must also be taken into account. It goes on state that nonacademic extra servi-

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<sup>64</sup> 29 USCS § 794(a)

<sup>65</sup> US Department of HEW. 1977 b.p. 2267 6.

<sup>66</sup> 34 CFR 100.2

<sup>67</sup> *Id.*

<sup>68</sup> 34 CFR 104.34(a)

<sup>69</sup> *Id.*

<sup>70</sup> 34 CFR 104.35(a)



ces and activities must be provided and include non-handicapped students<sup>71</sup>. This would perforce provide a lot of the extra-academic activities that are available even to students in prison such as recreation time or the ability to socialize with others of varying academic and social backgrounds, which has been found to be an important component of education<sup>72</sup>.

There is however a provision stating that if behavior is so disruptive that is no longer manageable in the regular classroom then it may warrant a separate placement<sup>73</sup>. However, the facilities must be comfortable and comparable. This leads one to assume that if a child in an incarcerated facility's behavior is such that they cannot be educated with other incarcerated children that not only must the facilities in which they are educated be similar, but so also must the amount and quality of the instruction received.

There are also requirements that are set forth for when a change of placement is warranted. "At the elementary and secondary education level, the amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable about the student, the meaning of the evaluation data, and the placement options"<sup>74</sup>.

#### iv. Socially Maladjusted youth

One of the subgroups that could find protection under 504 are those who are socially maladjusted, as they are specifically exempted under IDEA<sup>75</sup>.

Although the term socially maladjusted does not have a unique definition, it is often interpreted as "a child who has a persistent pattern of violating societal norms with truancy, substance abuse, a perpe-

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<sup>71</sup> 34 CFR 104.37(a)

<sup>72</sup> See *Rachel H.*, 14 F.3d 1389.

<sup>73</sup> 34 CFR 104.35(a)

<sup>74</sup> OCR guidance report( 2010)

<sup>75</sup> C.F.R. § 300.7(c)(4)(ii).

tual struggle with authority, is easily frustrated, impulsive, and manipulative<sup>76</sup>. However, this is similar to the definition of emotional disturbance in IDEIA<sup>77</sup>. And there is no bright line rule over where the two are separate. So while there are an estimated 70 to 80% of the population currently in the juvenile justice system that have already been identified as having a disability that affects their education<sup>78</sup>. It is likely that the other 20% would also find safeguards and protections under section 504, the term social maladjustment.

Under sections 504, the onus for finding and identifying a student with a disability is placed on the school<sup>79</sup>, or in the case of the juvenile justice system it would be on the incarceration facility. This process of identification is a yearly requirement<sup>80</sup> and so there should be a constant evaluation of the children that are wards of the various facilities to determine if they qualify for educational support.

#### v. The Effects of *Olmsted* And at the secure care objection

The Supreme Court held that Title II prohibits the unjustified segregation of individuals with disabilities. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when:

(a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity<sup>81</sup>.

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<sup>76</sup> *Doe v. Board of Education of the State of Connecticut*, (D. Conn. Oct. 24, 1990)

<sup>77</sup> 34 C.F.R. § 300.5 (b)(8).

<sup>78</sup> Stopping the Schoolhouse to Jailhouse Pipeline By Enforcing Federal Special Education Law," American Bar Association's Children's Rights Litigation Committee (Winter 2007).

<sup>79</sup> 34 CFR 104.35

<sup>80</sup> *Id.*

<sup>81</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999).

The Olmstead requirement could be used in much the same way as the LRE provision in IDEA, mandating that when possible, services are to be provided in the most community based environment<sup>82</sup>. In the juvenile justice context, providing services the community would not necessitate a release of the prisoner into the general outside environment, it would instead be the provision of services in the general population with supports.

The reach of Olmsted is not limited to just Title II, but can be applied to both section 504 and the ADA, allowing for more this specific requirements to remove some of the ambiguity that the juvenile justice system is employing in an attempt to dodge providing educational services for youth in a less restrictive environment in an attempt to make the provision of such services easier upon the institution. This argument is known as secure care objection.

However, the fact that a child is in secure care does not change the state's obligations under IDEIA<sup>83</sup>. Rather, the incarceration system is required to provide "comparable services" to the child's IEP from school<sup>84</sup>. "Comparable services" is defined as services that are similar or equivalent to those described in the IEP from the previous public agency<sup>85</sup>.

In *Baltimore County Public Schools*, the administrative hearing officer found that on adult prison was required, not only to provide "comparable services" under IDEIA, but also that the youth's IEP could not be based "solely on factors such as category and severity of the student's disability, availability of services, configuration of the service delivery system, availability of space, or administrative

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<sup>82</sup> *See Id.*

<sup>83</sup> *See Sacramento City Unified Sch. Dist.*, 113 LRP 23312 (SEA CA 04/18/12) (requiring school district to implement the IEP of incarcerated juvenile, despite limitations imposed by the probation office.)

<sup>84</sup> 34 C.F.R. § 300.323

<sup>85</sup> Federal Register, Vol. 71, No. 156, p. 46681, August 14, 2006). (analyzing the Comments and Changes to the IDEIA), *See also Baltimore County Public Schools*, 112 LRP 49531 (SEA MD 7/19/2012).

convenience”<sup>86</sup>. In short, the fact that child is incarcerated and the consequential barriers to providing him/her with adequate services do not justify changing his IEP to comport with the facility’s ability to provide services or failing to provide services without changes:

Special education services provided may not be based upon the pre-determination by school system staff of what is possible and not possible in [detention] facilities... [Rather,] the public agency must ensure that the IEP meets the individual student’s needs that arise out of the disability<sup>87</sup>.

This reasoning is just as applicable to both the ADA and Section 504. The fact that a child is incarcerated does not relieve the state of any responsibility as it relates to not only the provision of special education services, but the finding and identify a finding of students who may require them, and the provision of such services in the least restrictive environment possible.

Through a combination of the least restrictive mandate and IDE IA subsection D of section 504 and the Homestead provision, any child who qualifies under any of the laws should be able to challenge of placement that is placed provided in a juvenile incarceration facility that is either failing to meet the needs of the child or when such services are not being provided in the least restrictive environment possible.

## v. Solution

### a. Multipronged Approach

Like most things in education and the justice system this is a complicated issue with no simple options and will likely take a coordinated multi-pronged approach to implement effective change.

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<sup>86</sup> *Id.* at 5.

<sup>87</sup> *Id.* (citing 34 C.F.R. §§ 300.2 & 300.320, and Analysis of Comments and Changes to the IDEIA, Federal Register, Vol. 71, No. 156, p. 46662, August 16, 2006).

## 5. Legislative

The LRE provision in IDEIA should be amended, reinforcing its mandate with more definite language to clear up many of the ambiguities that seem to surround the provisions and clarifying that it must be used in all contexts, specifically highlighting that the provision should be used in the juvenile justice context whenever possible. This will hopefully lead to system reform perpetuated by the system itself. However, if it fails to produce timely reform then it will provide a legal platform that attorneys may use in behalf of clients to ensure compliance.

Language should also be added to address the “penological exception” to reinforce the idea that services are not optional for administrative convenience and it is only extreme emergency circumstances that these services may be removed without the proper due process procedures. They should also not be able to claim a lack of staff as a defense, as it is not available to any other affected agency.

Language also be added to be ADA mandating the provision of modifications to programs within the juvenile justice system be provided in the least restrictive environment possible. In order to further the full inclusion of children with disabilities in their current situation.

Language specific to the juvenile justice context should be added to 504 to reinforce the notion that it is applicable to youth in the juvenile justice and adult correctional facilities.

## 6. Advocacy

Concurrently advocates should respond to individual institutions encouraging the use of education in the least restrictive environment as a tool and not only better the lives of the participants but as a way of improving the juvenile justice system as well as recidivism rates.

## 7. Court System

The legal community should also work together to bring a series of court cases to emphasize in state jurisdictions the use of the LRE

provision as a tool for placing additional pressure leading to system changes. Due to the nature of the way the laws are written and as well as where the circuit courts have interpreted the law, suits not only can be brought against the juvenile facility as an LEA itself, but also against the state education system.

Test cases should also be brought test the use of the social maladjusted label to provide students who qualify for additional educational supports while incarcerated.

a. Sample system: The Missouri System.

The Missouri approach is more than a program model. While structural changes such as small programs close to home, family-like groups, and least restrictive environments have been vehicles for change, the organizational culture has clearly fueled the change. The culture is like a healthy tree that has roots that run deep and wide. You can see it in the faces of young people<sup>88</sup>.

For example the Rosa Parks Center and Waverly youth center both are last chance centers one for boys and girls<sup>89</sup>. Here, even the most violent of youth live together in a community style dorm environment, with no guards or locks, but escapes are few and far between<sup>90</sup>. The students attend school with their peers in the house five days a week and as a result the students are experiencing both traditional graduations and GED success rates far above those in prison<sup>91</sup>. The 2014 results of all students in the custody of DYS: 461 students completing their secondary education, including 49.19% percent of all 17 year-olds at the time of discharge which is over 3 times the national average<sup>92</sup>.

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<sup>88</sup> The Missouri Approach: A meaningful approach to Juvenile Justice Reform (Mar, 11,2015),<http://missouriapproach.org/>

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

Even though approximately 33% of the youth served by the Division have diagnosed educational disabilities, 74% of the students begin closing the achievement gap by improving academically during their commitment to DYS<sup>93</sup>.

The students speak about how the staff care about them and take a true interest in them, they said they feel wanted, some for the first time in their lives<sup>94</sup>. The councilors say that the most important thing they do is something that one never sees in a traditional prison hug; they say that some of the kids don't feel that they are worthy of hugs<sup>95</sup>.

This system focuses on the rehabilitative nature of the juvenile justice system, every student gets the same sentence 'indeterminate' they don't are not released until staff thinks that they have been rehabilitated. This allows them to focus on the problems that are the root of the destructive behavior<sup>96</sup>. The youths say that it is harder in this system where they are forced to face their problems rather than just sitting in a cell<sup>97</sup>.

The cost per child in Missouri is half of the national average per child. This program has been working for over two decades. And only 10% of the juveniles reoffend as adults<sup>98</sup>.

## 5. Conclusion

The above solutions would be effective but would require substantial time to gain the momentum necessary to get a congressional and judicial action requiring the implementation of the proposed changes. Using other large-scale educational initiatives as models

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<sup>93</sup> *Id.*

<sup>94</sup> The Missouri Approach: A meaningful approach to Juvenile Justice Reform (Mar, 11,2015),<http://missouriapproach.org/>

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

which took seven years from conception to adoption in all 50 states, I predict that it would be at least ten years before this process would face a comparable level of acceptance. The reason for the increased time span is based in the public perception of children that are system involved. Other large-scale educational initiatives had large political backers from the beginning but with a less universally accepted population the political and popular acceptance will likely to take longer to take effect.

It would be necessary for the advocacy part of the process to start as soon as possible to not only raise awareness of the reality of these students but also to start showing the failures of the prison system and the disparate effect it is having on students with disabilities. The process would also need to start in the court system as the time for these case to reach conclusion would be even more drawn out than regular court cases which deal with special education students as there is the additional burden of having to exhaust not only the educational administrative process but also the administrative process that are present in the justice system.

Autora convidada.

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