

# Chapter One

The Best Defense is a Good Offense:

Using Special Education Advocacy for Delinquency Clients

*Written By*

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By using special education rights and remedies to augment competent delinquency representation, advocates for children can often prevent placements in juvenile incarceration facilities and unnecessary placements in residential treatment facilities.

Advocates seeking to improve outcomes for children in the delinquency system --and, specifically, to reduce detention rates -- should incorporate special education advocacy into their delinquency practice. The premise of this manual is that, by using special education rights and remedies to augment competent delinquency representation, advocates for children can often prevent placements in juvenile incarceration facilities and unnecessary placements in residential treatment facilities. Also, advocates can extricate children from juvenile prisons, detention centers, and restrictive mental health placements. Indeed, in some cases, strategic use of special education advocacy can result in dismissal of delinquency matters altogether.

### **I. The objectives: Getting children educated; getting children out of detention; getting children out of the delinquency system**

The objectives in using special education advocacy for delinquency clients are to obtain appropriate educational services, a lower incarceration rate, and a lower rate of continuing juvenile court jurisdiction. Advocates can use special education law on behalf of delinquency clients to address educational problems underlying delinquent conduct and, in so doing, can either attempt to extricate those clients from the delinquency jurisdiction of the court or influence the delinquency court to be less punitive toward the clients.

Fundamentally, special education advocacy is a means for delinquency clients to gain access to services that can substitute for or negate the perceived need for preventive detention and post-disposition incarceration. Under the federal law, adopted by every state, a child with a disability<sup>1</sup>

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<sup>1</sup> To qualify for special education services, the child must have a disability that substantially affects learning.

is entitled to educational services, as well as to “related services” and “transition services”. Related services can include group and individual counseling, speech and language therapy, transportation to educational services, and any other service that enables the child to benefit from the educational services. Transition services<sup>2</sup> assist a child in making the transition from school to post-secondary education, from school to work, and from dependency to independence. Related services and transition services are broad categories that allow the creative, pro-active advocate to help a client obtain meaningful services to augment individually-designed educational services. Taken together, these services can substitute for incarceration; an advocate often will be able to convince a judge that the services provide a safe and productive alternative to preventive detention or post-disposition incarceration.

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Obtaining special education services for a child with disabilities involves requesting an evaluation of the child from the school or school system.<sup>3</sup> If the child is eligible for services (*i.e.*, if the child has a disability that substantially

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<sup>2</sup> Transition services are required for children with disabilities who are fourteen years old or older.

<sup>3</sup> Following the initial evaluation, the evaluation process must occur at least once every three years; the parent can request evaluations more frequently.

affects the ability to learn at a normal rate), then the school personnel must meet with the parent, the child (if the parent and child want the child to participate), the evaluators, and a teacher (or someone from the school familiar with the child's school work) to develop an Individualized Educational Program (IEP) of appropriate services.<sup>4</sup> School personnel then must provide a notice of educational placement, proposing a school program that can implement the IEP.

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On behalf of the child – through a representative (including an attorney) or *pro se* – the parent is entitled to challenge any aspect of the evaluation, eligibility determination, IEP development, and educational placement on procedural grounds. For example, the parent may contend that the evaluation was improper or that additional or independent evaluations are needed. The parent may challenge the objectives outlined in the IEP or advocate for additional related services. Similarly, the parent may contest the school placement proposed for the child by school system personnel.

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<sup>4</sup> “Appropriateness” is the operative standard. A school system is not required to provide a child with optimal services or to maximize the child's potential; rather, the school system is required to provide appropriate educational and related services that allow the child to make progress from year to year toward graduation.

The Individualized Education Program (IEP) process takes place at least once each year, and the parent can request more frequent reviews and modifications of the IEP (if, for example, the parent perceives that the goals and objectives in the IEP are inappropriate).

Determining what the child needs is an individualized process: addressing the particular needs of the particular child. Remarkably, availability of services or financial considerations are not legitimate excuses for a school system's failure to provide services; the law simply requires the school system to provide appropriate services as outlined in an IEP. If the school system fails to provide appropriate services, the parent can obtain private services and force the school system to pay.

The role of the parent in the special education process provides a remarkable contrast with the role of the parent in the delinquency system. Typically, in the delinquency system, the parent has no formal role. Moreover, based upon a feeling that the child's delinquency involvement reflects badly on the parent, the parent may blame the child for the misconduct and inform probation officers, judges, and even prosecutors that the child needs punitive treatment. Often parents who are desperately seeking services for a troubled child rely on the delinquency system without realizing that the delinquency system is rarely constructive and without realizing that the educational system has services. The special education system is based on a model of collaboration between the parent, expert evaluators, and educators. Rather than relying on a judge to order a delinquency placement or probationary conditions, the parent can work with school personnel – including psychologists and teachers – to design an individualized program for the child.

Special education advocacy turns delinquency defendants into special education plaintiffs. Rather than relying exclusively on delinquency defense strategies (e.g., suppression of evidence, affirmative defenses), lawyers can develop alternative solutions and strategies through the special education system. The advocate's challenge is to learn and integrate delinquency law and practice with special education law and practice. Knowing both

areas of law, the advocate can formulate legal theories that would not otherwise be available. For example, an advocate defending a truancy case can challenge the delinquency court's jurisdiction based upon an alleged failure of the school system to exhaust administrative remedies regarding the child's special educational needs. With access to two separate avenues for litigation (the delinquency court and the special education administrative hearing process), the advocate can develop and implement a wide range of problem-solving strategies that would not otherwise be possible. For example, the advocate can obtain evaluations of the child through the special

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education process and, if beneficial, use those evaluations in a challenge to a *Miranda* waiver.

In some jurisdictions, statutory or contract provisions appear to limit public defenders to traditional criminal and delinquency defense work. Even in jurisdictions without such limitations, defense attorneys nonetheless may perceive – given the crush of casework – that it would be difficult, if not impossible, to devote time to learning special education law and to advocating for clients regarding those additional matters. However, because special education advocacy can significantly benefit delinquency clients, defense attorneys who cannot themselves incorporate special education practice should team up with other attorneys who can provide special education representation for delinquency clients.

Special education litigants who prevail are entitled by statute to attorneys' fees at market

rate; hence, defense attorneys seeking to expand resources for representing indigent delinquency clients may find that special education representation actually eases the financial constraints surrounding delinquency representation. Defense attorneys who opt for teaming with special education attorneys likely will be able to locate special education attorneys willing to take the cases based upon the prospects of recovering attorneys' fees. Public defenders seeking to team with outside special education attorneys may think about the following five, somewhat imprecise, categories: (1) attorneys in private practice who already specialize in special education representation, (2) attorneys who specialize in special education representation specifically or disability law generally who work in non-profit, public interest organizations (including protection and advocacy centers), (3) attorneys – sometimes referred to as “panel attorneys” – who accept court appointments in delinquency cases who are willing to learn special education law, (4) pro bono attorneys, typically from larger firms, who want to help indigent children and who are willing to learn special education law, and (5) attorneys and law students from law school disability rights or juvenile law clinics.

In most cities, towns, and rural areas, public defenders and other delinquency attorneys likely will have difficulty initially finding attorneys who know special education law and who are willing to represent delinquency-involved, indigent children and their families. Yet, in light of the availability of attorneys' fees – as noted above – advocates for children enmeshed in the delinquency system should be able to expeditiously train and organize a cadre of attorneys who are willing and able to provide special education representation for this constituency. (This manual is intended to facilitate precisely that process of training and organizing.)

## II. The problem: Incarcerating<sup>5</sup> children unnecessarily, particularly children with disabilities

American unnecessarily incarcerates children in large numbers. The problem is well-documented,<sup>6</sup> and the problem of over-incarceration is particularly acute in regard to minority and poor children, children who are neglected, and children with disabilities.

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Characteristics common to children with disabilities, such as difficulty in listening, thinking, and speaking, may lead a judge to misinterpret the behavior of a child with learning disabilities; the ultimate result could easily be the unnecessary detention of a child who is not dangerous and who does not pose a risk of flight

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Juvenile court judges detain high percentages of children who appear to be dangerous and who appear to present a risk of flight. Often, however, judges make detention determinations based upon misimpressions. Essentially, judges misinterpret characteristics associated with learning disabilities, emotional disturbance, or mental retardation. Characteristics common to children with disabilities, such as difficulty in listening, thinking, and speaking,<sup>7</sup> may lead a judge to

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<sup>5</sup>The term “incarceration” in this context refers to pre-trial and pre-disposition (i.e., pre-sentencing) confinement, as well as to post-disposition confinement.

<sup>6</sup>See, e.g., *Symposium: The Unnecessary Detention of Children in the District of Columbia*, 3 D.C.L. Rev. ix (1995).

<sup>7</sup>See, Leone et al. at n. 16, citing Thomas M Shea & Anne M. Bauer, *Learners with Disabilities* (1994). A child with a disability might present apparently illogical reasons for actions. See, *id.* At n.

misinterpret the behavior of a child with learning disabilities; the ultimate result could easily be the unnecessary detention of a child who is not dangerous and who does not pose a risk of flight. A mentally-retarded child who is having difficulty understanding the proceedings may appear to a judge to be irrational or offensively disinterested. Similarly, a judge may incorrectly presume dangerousness or flight risk when encountering an emotionally-disturbed child who appears hostile or defiant.<sup>8</sup>

Although the defense attorney may have little information about a client’s educational background at the time of the initial hearing, specific questioning of the child or the parent may indicate a disability. Being sensitive to honor confidentiality, protect privacy, and avoid stigmatization, the attorney can alert the court or the intake officer to the possible educational issues; further, the attorney should argue that the child will not receive appropriate educational services in the detention facility, adding to the child’s frustration.<sup>9</sup> Thus, the attorney often can defeat proposed detention that is based on illegal and inappropriate factors.

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17, citing Pencer J Salend, *Effective Mainstreaming: Creating Inclusive Classrooms* (1994).

<sup>8</sup>Although the focus of this text is the likelihood that judges will make misinformed detention determinations (based upon a misinterpretation of characteristics associated with disabilities), intake probation officers and juvenile prosecutors are prone to make the same errors in interpretation and judgment. Defense attorneys commonly fail to prevent or effectively challenge those misinterpretations and misjudgments and the resulting detention decisions.

<sup>9</sup>Juvenile court rules typically cite the emotional and mental condition of the child as a relevant factor in detaining a child “to protect the child.” All parties involved must differentiate between behavior that results from a disability and poses minimal or no threat, and behavior that more likely indicates dangerousness or risk of flight.

### A. The prevalence of special education needs among children in the delinquency system

Youths with disabling conditions are grossly overrepresented among those confined in juvenile detention and correction systems. Approximately seven percent of all public school students in the United States have been identified as having disabilities such as mental retardation, emotional disturbance, and learning disabilities.<sup>10</sup> Within the juvenile justice system, however, children and adolescents with disabilities are grossly overrepresented and are disproportionately detained and confined. Studies and meta-analysis of disabling conditions among incarcerated juveniles estimate the prevalence rate at twelve percent to seventy percent.<sup>11</sup>

Several theories explain the overrepresentation of youths with disabilities among incarcerated juveniles.<sup>12</sup> Examples include the school failure

theory,<sup>13</sup> the susceptibility theory,<sup>14</sup> the differential treatment theory,<sup>15</sup> and the metacognitive deficits hypothesis.<sup>16</sup> While the school failure, susceptibility, and metacognitive explanations suggest that learning and behavioral characteristics of certain youths directly or indirectly lead to delinquent behavior, the differential treatment thesis suggests that aspects of policing and judicial processing of youths at all stages of the juvenile justice system result in more punitive treatment of suspects and offenders who have disabilities. In attempting to explain this overrepresentation, researchers face a complex set of factors associated with delinquent behavior, variability in the classification and reporting of offenses, imponderables connected to judicial discretion, and problems with measuring disabilities. Hence the disability-delinquency link lacks empirically-established explanations.

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<sup>10</sup>See U. S. Department of Education, Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (1994).

<sup>11</sup>See generally Pamela Casey & Ingo Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-analysis*, in *Understanding Troubled and Troubling Youth* 82- 101 (Peter E. Leone ed., 1990); National Council for the Mentally III in the Criminal Justice System, *Responding to the Mental Health Needs of Youth in the Juvenile Justice System* (J.J. Cocozza ed., 1992); Donna M. Murphy, *The Prevalence of Handicapping Conditions Among Juvenile Delinquents*, 7 REMEDIAL & SPEC. EDUC. 7 (1986); and D.J. Morgan, *Prevalence and Types of Handicapping Conditions Found in Juvenile Correctional Institutions: A National Survey*, 13 J. OF SPEC. EDUC. 283 (1979).

<sup>12</sup>Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C.L. REv. 389, 390 and n.3-6 (1995).

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<sup>13</sup>See generally Charles A. Murray, *The Link Between Learning Disabilities and Juvenile Delinquency: Current Theory and Knowledge* (1976); Travis Hirschi, *Causes of Delinquency* (1969).

<sup>14</sup>See Murray, *supra* note 3.

<sup>15</sup>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).

<sup>16</sup>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).

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Particularly under-examined is the disproportionate use, against children with disabilities, of preventive detention. Preventive detention is, by definition, secure confinement prior to trial and disposition or prior to a probation or parole (after-care) revocation hearing. Similarly under-scrutinized is judges' securely confining children with disabilities at disposition in disproportionate numbers; defenders of the status quo justify this incarceration as treatment.

### **B. Failure to address educational needs of pre-delinquent & court-involved youth**

The overwhelming majority of children enmeshed in the delinquency system do not receive meaningful rehabilitation.<sup>17</sup> In the District of Columbia, for example, the government has failed consistently to generate educational programs, foster care placements, counseling and other services which would help to stem recidivism and alienation among court-involved youth. The District of Columbia does not provide local residential treatment options for emotionally disturbed children. Conditions at the juvenile incarceration facility are inhumane. Officials operating the facility do not adequately protect

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<sup>17</sup>Many children with cases in the delinquency system are not in need of care and rehabilitation and should be screened out of the system. *See generally*, Tulman, *The Role of the Probation Officer in Intake: Stories from Before, During, and After the Delinquency Initial Hearing*, 3 D.C. L. REV. 235 (1995). Other children could receive care and re-habilitation from agencies other than the court system and should be screened out of the delinquency system. *See*, note 2, *supra*

the children from physical and emotional harm. Failing to distinguish children who are neglected or home-less from children who are dangerous, judges incarcerate many young District of Columbia residents unnecessarily.<sup>18</sup>

Educational deficiencies are a cause of delinquency, but few preventative, educational programs exist that serve children in the delinquency system. The majority of children entering the delinquency court have undiagnosed and unattended special education needs, but typically no agency attached to the delinquency system routinely evaluates or even screens children for special education needs. Schooling comprises by far the largest part of a child's day, but the delinquency system usually fails to provide adequate schooling for incarcerated children. These systemic breaches are resistant to remediation.<sup>19</sup>

Federal, state, and local laws obligate government employees who work with children in the delinquency system to identify or "find" children who have disabilities that significantly affect ability to perform in school. This "child find" obligation applies, generally speaking, to

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<sup>18</sup>*See generally*, *Symposium: The Unnecessary Detention of Children in the District of Columbia*, 3 D.C.L.REV. ix (1995). Children in the delinquency system are disproportionately neglected children. *See*, Beyer, *Juvenile Detention to "Protect" Children for Neglect*, 3 D.C.L.REV. 373 (1995). Like educational disabilities, child neglect is a fundamental cause of delinquency. The development and dissemination of strategies for representing neglected children in the delinquency system is analogous to the special education advocacy process outlined in this manual. Advocates must develop strategies that will force judges, probation officers (and other social workers) and prosecutors in the delinquency system to recognize and to address child neglect.

<sup>19</sup>*See generally*, M. Beyer, N. Opalack, and P. Puritz, "Treating the Educational Problems of Delinquent & Neglected Children," (1988) (paper available from the ADA Juvenile Justice Center, Washington, D.C.)

all executive branch workers who are responsible for the care of children, not just to school personnel. Furthermore, executive branch personnel who work with children in juvenile institutions and in the community are obligated to obtain appropriate educational services for children with disabilities.

### III. Client service considerations: Whether and how to use special education advocacy for delinquency clients

Various considerations influence whether and how an attorney implements the strategy of advocating for a delinquency client's rights. A threshold consideration is the delinquency client's decision whether to pursue special education rights. An attorney representing a child in a delinquency matter cannot, consistent with professional ethics, pursue special education rights if the child does not want to pursue those rights. An attorney in a delinquency matter cannot – and should not – substitute the attorney's judgment for the child's. Often, the client in a delinquency matter has dropped out of school and resists re-entering school. Such resistance typically reflects an understandable desire to avoid renewed failure and frustration. The attorney should listen empathetically and, in light of the client's own perceptions of self-interest, counsel and advise the client. If such discussions do not convince the client to seek a psycho-educational evaluation and to pursue special education rights, the matter ends.

If the child decides to pursue educational rights, a secondary consideration arises; whether the delinquency attorney or another attorney assumes responsibility for the special education representation.<sup>20</sup> Either way, the attorney handling the

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<sup>20</sup>If another attorney represents the child's parent regarding special education rights, then the delinquency attorney will not be in a position to execute a special education strategy to influence the delinquency case independent of that other attorney. When a child whom University of the District of Columbia School of Law (UDCSL) clinical law

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special education matter must involve the child's parent in that advocacy.<sup>21</sup> Many of the special education rights, particularly the procedural rights, inure to the parent rather than to the child.<sup>22</sup>

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students and their supervisors represent in a delinquency case agrees to pursue special education rights, UDCSL clinicians typically represent both the child and the parent in the special education representation. University of the District of Columbia School of Law clinicians also often represent children and parents in pursuing special education in situations in which the child is already represented by another attorney in one or more delinquency cases.

<sup>21</sup>One might substitute the plural "parents" or the term "guardian"; for simplicity, the reference in this text will be to the "parent".

<sup>22</sup>*See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. §1415(b)(I)(A) (parent's right to examine records), §1415 (b) (I) (C) (right to prior written notice of educational changes), and § 1415(b)(2) (right to hearing); *but cf generally, id.* § 1417 (c) (protection of rights and privacy of parents and students).

The regulations, similarly, focus primarily on rights of the parent. *See, e.g.*, 34 C.F.R. §300.500 (terms "consent", "evaluation", "personally identifiable" all defined with reference to the parent), §300.502 (parent's right to examine records), §§300.504 & 300.505 (right to notice and consent), §300.506 (right to hearing); *but see, id.* §300.344 (child's right, where appropriate, to participate in meetings) and §300.550 (least restrictive environment and needs of the child).

The IDEA provides for the appointment of a surrogate for a child whose legal custody has been transferred to the state. *Id.* §1415(b)(I)(B).

The child's attorney in a delinquency matter does not face an inherent conflict of interest in concurrently assuming representation of the parent in the special education system.<sup>23</sup> However, the attorney must advise the child and the parent of the potential conflicts that can arise between parent and child. The attorney must advise the parent and child of the limits of legal representation in the event that a conflict arises.<sup>24</sup> It is advisable for the attorney to ask the parent and the child to consider, and then execute, a retainer agreement detailing the limits of the representation and noting the attorney's intentions in the event that a conflict between the parent and the child were to arise.<sup>25</sup>

Having received permission in advance from the

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<sup>23</sup>Clinicians at UDCSL maintain confidentiality with the child regarding all aspects of the delinquency matter; they do not communicate with the child's parent regarding the facts and strategies of the delinquency matter. Theoretically, maintaining confidentiality with the child occurrences or transactions in the school setting (*e.g.*, a charge for allegedly assaulting someone in school); and excluding the parent would be even more difficult if the school-based delinquency allegation were to implicate the disability (*e.g.*, if the child charged with the school-based assault was seriously emotionally disturbed and assaultive behavior was for that child a manifestation of the disability).

<sup>24</sup>Conflicts will arise. For example, a parent may believe that the child's special educational needs dictate placement in a residential school, and the child may balk at the idea of living away from home.

<sup>25</sup>The attorney could execute a retainer agreement regarding special education representation with the parent alone (assuming, as discussed above, that the child had agreed initially). If the "child", however, is over eighteen, the child has a right to be a party to the special education matter and to contract for representation without the parent. Clinicians at UDCSL typically execute a special education retainer agreement with both the parent and the child. When the "child" is eighteen or over, UDCSL clinicians leave to that child the decision regarding whether the advocates should invite the parent to become involved in the special education matter.

parent and child, the attorney can help them resolve any disagreements that arise. In practice, the need often arises to mediate disagreements between parent and child clients in special education matters. If the attorney cannot successfully mediate a disagreement between the parent and the child regarding a significant matter, then the attorney might be required to withdraw as counsel in the special education matter.<sup>26</sup> The attorney ordinarily will succeed in helping the clients resolve disputes that may arise, and, accordingly, the attorney will rarely, if ever, encounter situations that require withdrawal.

Often, parent-child disputes are central to the problems that lead to the child's involvement in the delinquency system. Indeed, failure at school and conflict at home are characteristic elements of a serious delinquency case. Representing the child and the parent together, the attorney is well-positioned to work with them on school and family problems.<sup>27</sup> By helping to reveal and to resolve some parent-child disputes, the attorney is helping the clients learn to cooperate, to collaborate, and to address their own problems. Thus, resolving disagreements between the parent and child can be a critical step for the child educationally, as well as emotionally.

The attorney must remain sensitive to the clients' prerogatives, providing forthright and respectful counsel. For example, some clients would be inclined to choose a private, residential treatment center for emotionally disturbed

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<sup>26</sup>In such a conflict situation, an attorney who also represents the child in a delinquency case would have to review the ethics of remaining on the delinquency case.

<sup>27</sup>Family counseling, as well as individual counseling for the child, may be appropriate "related services" that the attorney helps to secure in the child's special education individualized education program (IEP).

children over incarceration.<sup>28</sup> Counsel should fully inform the client, however, of the likely outcomes of those respective placements. If the child's post-disposition placement in the juvenile prison is likely to be shorter in duration than placement in a residential treatment center, the attorney should advise the client of that likelihood. If the juvenile prison is closer to the child's home and more accessible for family visitation than the residential treatment center, then the attorney necessarily would want to point out that difference, as well. On the other hand, an attorney who has evidence that a residential treatment facility might indeed provide better therapeutic and educational services than a juvenile prison would share that evidence with the client and provide appropriate counsel and advice to the client. After informing a parent and a child regarding disparities in such things as "time served", distance from home, and available services, an attorney must respect the clients' informed decision.

Both the attorney and the clients should investigate and visit any special education schools (day program or residential) under consideration before making a placement decision. A school that "looks good on paper" may, in reality, be disorganized, punitive, or non-rigorous. School personnel may be insensitive to the client's needs and background. The staff and student body at many private schools, for example, may be majority white. An African-American or Latino client must consider whether such an environment is acceptable; indeed, attorneys and clients are likely to encounter school officials, teachers, and students who are racist and who stereotype delinquency clients.

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The special education placement process can be quite positive for a delinquency client and the parent. The attorney is inviting them to participate in designing an IEP and to "go shopping" for a school that fits the child's needs. People enmeshed in the delinquency system rarely have a sense of control. Exercising special education rights provides them with real choices of services and approaches.

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<sup>28</sup>Incarceration and placement in a "residential therapeutic center" both represent restrictive alternatives. The present discussion is not necessary an endorsement of placing children in such settings.