

Chapter Two

Strategies for Using Special Education Law to Improve
the Outcome of an Individual Delinquency Case

Knowing and applying
both delinquency law
and special education law, a
delinquency defense attorney
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legal theories that would not
otherwise be available.

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Using special education advocacy turns delinquency defendants into special education plaintiffs. Knowing and applying both delinquency law and special education law, a delinquency defense attorney can formulate and prove legal theories that would not otherwise be possible. A defense attorney can utilize the special education process to help a client develop alternatives to incarceration that a judge will accept. Moreover, the special education process (through which the child participates in designing an Individualized Education Program (IEP)) can be empowering for the child.

In this chapter, six broad theories and strategies are developed for advocates who wish to utilize the special education process in conjunction with delinquency or status-offense cases. The six sections that follow are:

- (1) Using Special Education in Support of a Motion to Dismiss for Lack of Jurisdiction;
- (2) Using Special Education in Support of a Motion to Dismiss for Social Reasons;
- (3) Using Special Education During the Intake Process;
- (4) Using Special Education as a Justification for Keeping the Child in the Community;
- (5) Using Special Education Rights to Guide the Residential Placement Process for Delinquent Youth; and,
- (6) Using Special Education Evaluations to Demonstrate that a Child with a Disability Did Not or Could Not Comprehend Miranda Warnings

The practice of law is, by definition, a “practice” that evolves and changes. Hence, these broad theories and strategies are offered as instructive and illustrative, not as necessarily established or exclusive.

I. Using special education in support of a motion to dismiss for lack of jurisdiction

Advocates for children, in many jurisdictions, must contend with prosecutors, school system representatives, or both, who initiate the filing

A Sampling of Theories and Strategies Available to the Delinquency Defense Attorney

Truancy - In a truancy case, an attorney 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 education needs.

Miranda - An attorney can obtain evaluations of the child through the special education process and, if beneficial, use those evaluations to demonstrate that the child was not capable of waiving Miranda (*Miranda v. Arizona*, 384 U.S. 436 (1966)) rights knowingly and intelligently.

Mens Rea - An attorney can demonstrate through expert testimony that, notwithstanding appearances and people’s ordinary interpretations, a child with mental retardation or with a receptive and expressive language disorder was not interacting meaningfully or knowingly (i.e., was not acting with criminal intent) with a purported co-defendant in an alleged crime or delinquent act.

Behavior Management Program - For a child who is incarcerated and who is seriously emotionally disturbed, an attorney can develop, with the assistance of a clinical psychologist, a behavior management program within the IEP that prohibits the use of aversive techniques (e.g., corporal punishment, restraints, harsh language) and requires the use of positive reinforcement and rewards.

Denial of FAPE - In a special education hearing, an attorney can prove that the juvenile incarceration facility is not providing and cannot provide the delinquency client with a free appropriate public education; the attorney could use such a finding to argue that the delinquency court must order the client moved to a more appropriate place or released to the community.

Collaboration - An attorney might find that engaging personnel from an incarceration facility with regular requests and challenges – including record production, evaluations, IEP meetings and hearings – tends to make those personnel more receptive to a good-faith proposal from the attorney to place the child in a special education placement outside of the institution.

of charges alleging chronic or habitual truancy.¹ Another status offense, in some jurisdictions, is “ungovernability”, which is defined as “disobeying the lawful and reasonable commands of the parent or guardian.”²

The factual basis for charging a child with “ungovernability” could support, in some instances, a delinquency charge, as well. For example, a child who physically resists a parent – even a parent who uses corporal punishment – might be vulnerable to a charge of simple assault. A child with a disability, as defined in the Individuals with Disabilities Education Act (IDEA), may appear to be ungovernable when, in fact, the child is incapable – absent appropriate accommodations – of processing and understanding reasonable and lawful commands. Similarly, a child who is emotionally disturbed (as defined in the IDEA) may be “well behaved” or “manageable” if, as part of the child’s IEP, a proper behavior management program is in place. Hence, in such a case, an advocate may use special education law and facts to challenge the jurisdiction of the court, or, in the alternative, to mount a substantive defense to the minor delinquency or status offense charge. These approaches are available typically

¹These matters are regarded as “status offenses” because the offenses, by legal definition, are unique to children; an adult who acts in the proscribed manner would not, due to the status of “adulthood”, be subject to scrutiny or prosecution. Most state statutes designate these status offenses as “Persons In Need of Supervision (PINS)” or “Children In Need of Supervision (CHINS)” cases. Status offenses are generally viewed as non-criminal in nature. *See, e.g., In re B.L.B.*, 432 A.2d 722 (D.C. 1981); *District of Columbia v. B.J.R.*, 332 A.2d 58 (D.C. 1975).

²*E.g.*, D.C. Code Ann. § 16-2301(8). Running away (from home or school, etc.) may be classified as “ungovernable” behavior or may constitute a separate status offense category. Children also can be charged, in some jurisdictions, as status offenders, for possessing alcohol or cigarettes.

whether or not the child has been diagnosed previously as disabled.

A. Status offense cases

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Some courts have dismissed status offenses and related, minor delinquency charges on jurisdictional grounds if, in essence, the school system had failed to fashion and implement an appropriate educational program for the child. In *In re Ruffel P.*, 582 N.Y.S.2d 631 (Fam. Ct. 1992), the principal of the child’s elementary school brought a “Persons In Need of Supervision” (PINS) actions based on an allegation of several acts of violent behavior during the school year. The eight-year-old was represented by a law guardian who sought dismissal of the action in the interest of justice and because the school district had failed to exhaust its administrative remedies in an effort to develop and secure an appropriate educational setting for the respondent.

The court, recognizing that it was without jurisdiction to review the decisions of the school district, nonetheless dismissed the petition in the interest of justice. In dismissing the case, the court concluded that

it is appropriate for the school district to attempt to fashion, from its many resources, a reasonable and appropriate environment for a child before commencing judicial proceedings. The

Court finds that it would be most unjust to adjudicate this young boy as a PINS and subject him to probable destructive placements until after the district has at least attempted, in good faith, to engage the problem.

Id. At 634

The court felt constrained to dismiss the action given the school system's admission that its only response to the problems presented by the child was nothing more than disciplinary measures. While the school district had elected not to classify the child as having an educational disability, the evidence produced at a hearing demonstrated that the child's emotional problems prevented him from controlling his behavior and, as such, interfered with his ability to learn.³

Because the parents were apparently able to handle the child at home, a reasonable response was for school personnel to arrange alternative educational services, including services at home, to benefit both the respondent and his parents. The court, in dismissing the action, recognized that the respondent might eventually be placed in a facility, but that such placement would be appropriate only in extraordinary circumstances and only after the school system made a good faith effort to solve the problem.

³The Court declined to place the respondent on probation, as requested by the school district, because probation would be futile. As long as the school refuses to place [the respondent] in a setting where he can succeed behaviorally as well as academically, probation would place respondent in an untenable situation. It would only be a matter of time until respondent would be before this court on a violation petition which could precipitate placement.

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In some cases, children become "behavior problems" only after school personnel have ignored for years the children's learning disabilities.

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B. Delinquency cases

In delinquency cases, courts have been more hesitant than in status offense cases to recognize relevant mandates of the IDEA in fashioning dispositions or sentences for children who have been identified as disabled under the IDEA. In *In re Christopher V.T.*, 22 IDELR 89 (Oct. 31, 1994), a child with an emotional disturbance pleaded guilty to assault. The child, through counsel, moved to "forego" the disposition hearing because the court was required to determine the least restrictive method of meeting the child's needs and because the federal law so narrowed the dispositional alternatives that any hearing would be "a foregone conclusion." Specifically, counsel for the child asserted that, because the individualized education program (IEP) required home teaching, any dispositional order that required a placement outside of the home would impinge upon the child's right under the federal law to a free, appropriate public education (FAPE) in the least restrictive environment.

In denying the child's motion, the court noted "concerns [that] are broader than merely ensuring that the respondent is receiving a free, appropriate public education." *Id.* at 90. The dispositional statutory scheme authorized the family court judge to determine whether a respondent required supervision, treatment, or confinement; if so, the judge then must determine the least restrictive method by which to meet the child's needs, as well as the needs of the community for protection. The court found that "least restrictive environment" meant "that

placement of students with disabilities in special classes, separate schools, or other removal from regular educational environment occurs only when the nature and severity of the disability is such that, even with the use of supplementary aids and services, education cannot be satisfactorily achieved.” *Id.* The court concluded that the “least restrictive environment” requirement is used in the educational placement context and is an expression of the clear preference in the law to mainstream children with disabilities whenever possible.⁴ *See generally, Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

In a similar case in the United States District Court for the Middle District of Tennessee, the court upheld the order of an administrative law judge (ALJ) from a due process hearing directing the school district to seek termination of the juvenile proceedings. *In Morgan v. Chris L.*,⁵ school officials initiated the filing of vandalism charges against a student diagnosed as having Attention Deficit Hyperactivity Disorder (ADHD). Despite the student’s protracted history of escalating academic and behavioral problems, the school system neither completed a special education evaluation nor provided special education services prior to the decision to file a delinquency petition. In addition, school system personnel failed to advise the student’s parent of any substantive or procedural rights under the IDEA. The parent received inadequate oral notice of a meeting, held after the petition was filed, of the multi-disciplinary team designed to develop methods of dealing with behavior resulting from the disabling condition.

⁴At least one jurisdiction has held that the best interest of the child standard encompasses the IDEA least restrictive environment standard. *In re White*, 429 N.E.2d 1383 (Ill. App. 1982).

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

In response to these violations of the IDEA, the parent requested a due process hearing. At the hearing, the ALJ found, based on expert testimony, that the child’s disabling condition was responsible for the behavior complained of by the school district and concluded that the commencement of a delinquency proceeding constituted a change in placement which entitled the parent and the child to the procedural and substantive protections afforded under the IDEA.⁶ The ALJ also found, that the filing of a petition in juvenile court constituted the initiation of a change in placement commensurate with expulsion or suspension for more than ten days.⁷

⁶School officials may not, generally speaking, sanction a student for conduct that is related to the student’s disability. Rather, if the behavior is a manifestation of the student’s disability, the school must appropriately modify the child’s IEP and, if necessary, change the child’s placement (through the IEP process) as a means of addressing the student’s behavior. *See, S-I v. Thurlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981). Recent amendments to IDEA make even more explicit schools’ obligation to employ appropriate educational interventions rather than punitive discipline. For a full discussion of these and other discipline issues. *See* Chapter 4 (regarding delinquency, disability, and more school discipline), *infra*.

⁷For a more detailed discussion of the substantive and procedural rights afforded a child with a disability regarding a change in placement, see Chapter 10 and Chapter 11. In *Honig v. Doe*, 484 U.S. 305 (1988), the Supreme Court held that the suspension of a student with disabilities for a period exceeding ten days constitutes a change in placement that triggers the “stay put” provision. (“Stay put” refers to the parent’s right to keep the child in the current placement during the pendency of the special education litigation process.) The Court also refused to infer a “dangerousness” exception to the stay put provision; holding instead that, in emergency cases, the school may seek injunctive relief to authorize suspension of more than ten days. The stay-put rights recognized in *Honig* have been modified somewhat by the 1997 amendments to IDEA. For a

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The district court, reviewing a direct appeal by the school district, upheld the ALJ's ruling. The court found that the ALJ had not required the juvenile court to take any action; rather, the court found that the ALJ had ordered the school district to seek dismissal of the delinquency petition because of "the potential which juvenile court proceedings have on changing a child's educational placement in a significant manner." *Id.* at 785. The district had clearly failed to adhere to the IDEA's procedural and substantive requirements.

In upholding the ALJ and district court decisions, the Sixth Circuit Court of Appeals found that the school system had breached its duty under IDEA to identify, evaluate, and provide this student with a free appropriate public education; had unlawfully attempted to secure a program for him from the juvenile court, instead of providing services itself; and had, by filing the petition, improperly sought to change his educational placement without following the IDEA's change-in-placement procedures. The court, like the lower court and ALJ, expressly held that the filing of the delinquency petition constituted a change in educational placement, entitling the student to IDEA procedural protections, including the convening of an IDEA team meeting prior to such a proposed placement change.⁸

full discussion on this issue, *see* Chapter 4.

⁸The Sixth Circuit's otherwise unpublished per curiam opinion is reported at 25 IDELR [Individuals with Disabilities Education Law Report] 227. As part of the IDEA Amendments of 1997, and

The IDEA does not – and probably could not – preclude school officials' reporting alleged delinquent conduct to police and prosecutor. On the other hand, as demonstrated in the *Chris L.* case, prosecution is a misguided substitute for providing special education services to a child with a disability. Advocates for children should protect clients from such misguided prosecution; advocates can file motions to dismiss in the delinquency court and can also pursue remedies in the special education administrative forum. Similarly, courts should not tolerate attempts by school officials to circumvent their responsibilities to children and parents.

In determining their own jurisdiction, juvenile courts appear to distinguish between PINS matters and delinquency cases in weighing the impact of IDEA requirements. Courts in PINS matters are inclined to require school officials to make a good faith effort at developing appropriate educational interventions before seeking relief from the court. In delinquency allegations, on the other hand, courts are more inclined to balance the best interests of the child and the protections made available under the IDEA against concerns involving the perceived safety of the community. As *Morgan v. Chris L.* suggests, however, when school officials file delinquency charges based upon the very conduct that federal education law requires them to address, advocacy that brings to the court's attention school officials' breach of their substantive obligations can prove effective.

subsequent to the Sixth Circuit decision in *Morgan v. Chris L.*, language was added to IDEA stating that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." 20 U.S.C. §1415(k)(9) as added by Pub. L. 105-17, III STAT. 88 (June 4, 1997). As discussed *infra* in Chapter 4, this new provision in no way overrules or otherwise undermines the holdings in *Morgan v. Chris L.*

II. Using special education in support of a motion to dismiss for social reasons

In almost all cases, whether PINS or delinquency, the jurisdiction of the juvenile court is premised on a need for care and rehabilitation of the child.⁹ If, in representing a child in a delinquency matter, an advocate can demonstrate that the child is not in need of care and rehabilitation or that the child is receiving adequate care and rehabilitation through sources other than the court, the court may relinquish – and perhaps must relinquish – its power over the child.¹⁰ Children diagnosed with an educational disability under the IDEA (e.g., emotional disturbance, learning disabilities, and mental retardation) are eligible to receive, in the least restrictive environment, appropriate services to accommodate for the disability or otherwise respond to the child's individualized educational needs.¹¹

In the District of Columbia, as in many other jurisdictions, the court rules provide for the dismissal of juvenile and PINS cases for social reasons when dismissal is in the interest of justice and welfare of the child.¹² This standard

⁹See D.C. Code §§11-1101(13) and 16-2301(6) for an example of a juvenile court jurisdictional statute.

¹⁰See D.C. Code §§11-1101(13) and 16-2301(6) for an example of a juvenile court jurisdictional statute.

¹¹See, *Hendrick Hudson Dist. Bd. of Educ.* "Rowley, 458 U.S. 176 (1982).

¹²Rule 48(b) of the Juvenile Branch of the Family Division of the Superior Court of the District of Columbia authorizes the dismissal of a juvenile or PINS action for social reasons. Super. Ct. Juv. R. 48(b) provides, in relevant part: Even though the Division may have required jurisdiction, it may at any time during or at the conclusion of any hearing dismiss a petition and terminate the proceedings relating to the child, if such actions is in the interest of justice and the welfare of the child. . . .

commits to the discretion of the trial judge whether dismissal is appropriate or that the child would benefit from further court action.¹³ The court's authority to dismiss a juvenile action for social reasons exists not only before a trial or plea, but also after an adjudication of guilt.¹⁴ The authority to dismiss in such a situation is premised upon the basic philosophy of the juvenile system that "more stress is placed on the welfare and rehabilitation of the individual child than on the technical questions of factual guilt or innocence."¹⁵

Special education advocacy can help a family to obtain specialized services and appropriate opportunities for a child with an educational disability. Specialized services and appropriate opportunities, in turn, can form the basis of a motion to dismiss a pending delinquency or PINS case.¹⁶ Zealous and competent child advocates will recognize in this strategy the possibility of focusing the delinquency court on the child's potential and productivity rather than on the need to punish and constrain the child.

¹³A rebuttable presumption from case law in the District of Columbia supports a conclusion that the commission of a delinquent acts shows the need for care and rehabilitation; if an advocate for a child presents evidence and successfully rebuts the presumption, the court must dismiss the case. See, *In re M.C.F.*, 293 A.2d 874, 877 (D.C. 1972).

¹⁴See, *In re C.S.McP.*, 514 A.2d at 448.

¹⁵*In re M.C.F.*, 293 A.2d at 877.

¹⁶An advocate is more likely to succeed on a motion to dismiss for social reasons in situations in which the disability contributes to the behavior that is the subject of the court action. Similarly (and self-evidently), judges are more likely to dismiss delinquency cases that are relatively less serious. Nonetheless, advocates are well-advised to assert clients' rights to a dismissal for social reasons in delinquency cases that involve alleged behaviors that are not a manifestation of a child's disability and in delinquency cases that reflect alleged behavior of all levels of seriousness.

Moreover, for decades, families with access to private health insurance to pay for therapy and sufficient income to pay for private schools – including boarding schools and military schools – have often spun those services and opportunities into lifesavers for floating children out of the delinquency system. The availability of special education services and opportunities, by rights established in federal law, allow indigent and low-income families to benefit from essentially the same argument to extricate their children from delinquency involvement.

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A proactive child advocate will work actively with the child's family and with school personnel to develop or refine an IEP that meets the individual child's needs and, therefore, forms a solid basis for dismissing a pending delinquency matter. To advocate in this manner, one must understand not only special education services, per se, but also the range of available "related services" and "transition services".¹⁷ Related services are, essentially, developmental, corrective, and other supportive services that help the child benefit from special education.¹⁸ Hence,

¹⁷For a more detailed explanation of related services and transition services, see Chapter 9.

¹⁸"Related services" means "transportation, and such developmental, corrective, and other supportive services...as may be required to assist a child with a disability to benefit from special education ..." 20 U.S.C. § 1401(22); 34 C.F.R. §

related services include, but are not limited to, transportation, individual and group counseling, speech and language therapy, physical and occupational therapy, and recreational therapy. Transition services are, essentially, a coordinated set of activities to help the child move from school to work, from school to post-secondary education (if appropriate), and from living dependently to living independently.¹⁹

300.16 (1997). In October 1997, the U.S. Department of Education published extensive proposed changes to the regulations implementing the IDEA. See 62 Fed. Reg. 55025 (October 22, 1997). These proposed regulations should be finalized before the end of 1988; both the substance and citations for some regulatory provisions (e.g., current 34 C.F.R. § 300.16) likely will change.

¹⁹The term "transition services" has been defined as "a coordinated set of activities for a student, designed with an outcome oriented process, which promotes movement from school to post-school activities, including [but not limited to] post-secondary education, vocational training,... employment... [and] independent living..." 20 U.S.C. § 1401(30). Transition services include, but are not limited to, instruction, related services, community experiences, development of employment and other adult-life objectives and vocational evaluation. *Id.* Transition services focusing on a student's course of

Based upon the broad definitions of related and transition services, the advocate can help the parent and school personnel construct for a child with significant needs a fairly comprehensive package of services, including, for example, individual, group, or family counseling, recreational services, internships and job supports, tutoring, and, if needed, one-on-one transportation to school. The student may also need remedial instruction for designated subjects, along with particularized vocational instruction. Developing this information may put the advocate in a position to demonstrate that the child is receiving services designed to provide care and rehabilitation; accordingly, in such a case, further intervention by the court would not provide any additional service.²⁰

If the child has received specialized treatment while the court case is pending, counsel may seek to demonstrate that not only is the child receiving services designed to meet the child's needs, but also that the child has so benefitted from the services that care and rehabilitation are no longer necessary. In such a case, arguably, court intervention would no longer be appro-

study must be included in the IEP beginning at age fourteen. 20 U.S.C. § 1414(d)(1)(A) (v)(ii). The full array of transition services must be in place by no later than age sixteen, and younger if appropriate. *Id.*

²⁰A prosecutor may contend, or a judge may muse, that the pendency of a delinquency matter "hanging over the child's head" is valuable in keeping the child focused and disciplined. This belief probably is not sustained or supported by studies. The real question is whether fear of incarceration -- the only "service" available through the delinquency system that is not available in other systems -- is, by itself, a sufficient reason to keep a delinquency case open. Counsel might reassure the judge that if the child "messes up", there probably could be a new charge that a well-meaning prosecutor could bring to re-invigorate the fear of incarceration. Within a fair system, however, the fear of incarceration should rarely be a factor. Incarceration should be a consideration only if the child is violent and demonstrably dangerous to others.

priate. If the court-involved child has not previously been identified as eligible to receive special educational services,²¹ the advocate might convince the court to dismiss simply by initiating the special education process and arranging for appropriate services. Advocates must constantly monitor and assess the educational status and progress of a child to determine whether to seek or renew a request for dismissal in the interest of justice.

III. Using special education during the intake process

The decision to petition, paper, or charge a case is much like the decision to dismiss a case for social reasons. The decision-maker must deter-

²¹The court has some authority to refer the child adjudicated as in need of supervision to the school system for special education evaluation. *E.g., Oscar F. v. County of Worcester*, 587 N.E.2d 208 (Mass. 1992). The court also can refer a child facing a delinquency charge for special education evaluation. In some jurisdictions, state law explicitly provides for such evaluations, including school system involvement in the delinquency proceeding for the purpose of seeing that evaluations are conducted. Tennessee law, for example, requires juvenile courts to follow state and federal law regarding evaluations whenever special education is deemed necessary. TENN. CODE ANN. § 37-1-128©(1). New Hampshire law provides for joinder of the school district for the purpose of determining whether the child has a disability or, where the child already receives special education services, reviewing the services being provided. *See* N.H. REV. STAT. ANN. § 169B :22.

The advocate can work with the child's parent -- or, if the child is eighteen or above, with the child alone -- to initiate the special education process; therefore, typically, the advocate does not need to ask the court to order an evaluation or to refer the child for evaluation. In some instances, the advocate may perceive an advantage to involving the court in referring the child for special education evaluation. For example, if school system personnel are slow to evaluate children or resist dealing with children in the delinquency system, a court order may provide the advocate with some useful "clout".

mine whether the child "needs" the court or the juvenile justice system. Police officers, intake probation officers, and prosecutors all have the discretion to keep a child out of the delinquency system. Police officers not infrequently decide to release, rather than to arrest, a child based upon a perception that the child is "a good kid" and that the parents have the situation in hand. Based on reports that a child is doing well in school, an in-take probation officer may decide to "informally adjust" the case. Considering the status of a child's parents and their promises to put the child into private treatment, a prosecutor may decide to informally divert or to "no-paper" a case.

In seeking to use special education on behalf of a child facing a delinquency charge, an advocate should examine carefully standards and procedures governing the intake function.²² The legal standard for "no-papering", diverting, or adjusting a prosecution is often unclear to those applying it, and the process for "no-papering", diverting, or adjusting a prosecution is often hidden and out of view.²³ Indeed, people rarely scrutinize the standard or question how the switch was pulled.

Many people immersed as role-players in the delinquency system – including defense attorneys, prosecutors, probation officers, and judges – are surprised to hear that standards and procedures exist for "no-papering", diverting, or adjusting a delinquency case. They assume that decisions to proceed with a prosecution are wholly within the discretion of the prosecutor and that only instances of selective prosecution or blatant discrimination give rise to grounds to challenge that discretion. A close reading of the

²²See generally, Tulman, *The Role of the Intake Probation Officer in Detention: Stories from Before, During, and After the Initial Hearing*, 3 D.C.L.REV. 235 (1995).

²³Someone pulls the hidden switch to de-rail the prosecution typically when the child is "from the right side of the tracks."

delinquency statute in a given jurisdiction, however, likely will reveal such standards and procedures. In the District of Columbia, for example, the intake probation officer – in most cases – must make a recommendation to petition or not to petition the case. A decision by the intake probation officer not to petition is reviewable by the prosecutor only upon appeal by the complainant. D.C. Code § 16-2305. The intake probation officer should be evaluating, principally, whether the child who is the subject of the prospective petition is "in need of care and rehabilitation." Hence, in such a case, the intake probation should de-rail the prosecution (or – to extend the metaphor – not allow the train to leave the station).

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A child who is receiving, or should be receiving, special education services may be a child for whom that standard arguably requires switching systems, from the delinquency track to the educational track. Often the people responsible for making that decision are simply asleep at the switch or do not realize that the switch is actually functional. Yet, a non-exercise of discretion is, by law, an abuse of discretion. A failure to apply a standard constitutes a procedural violation.

An advocate may be well-advised to provide information about the child's educational status (including the fact that appropriate special education services are, or will be, available to the child) to the intake probation officer and even,

perhaps, to the prosecutor.²⁴ In a surprisingly high percentage of cases, the intake probation officers – and, less surprisingly, the prosecutors – are not aware of the child’s educational status. The information that appropriate services are available for the child through the special education system might be sufficient to persuade the intake probation or the prosecutor to forego charges. In addition, the advocate should, whenever possible, challenge any violation of the intake process and any abuse (or non-exercise) of discretion that results in charges being filed against a child who can receive care and rehabilitation through appropriate special education services.

IV. Using special education as a justification for keeping the child in the community

Over the last several years, rates of preventive detention of juveniles have risen in jurisdictions all over the country. Rates of post-disposition and post-sentencing incarceration in juvenile and adult facilities, respectively, also are high and rising precipitously.²⁵ Advocates can use the special education process to develop for a child an individualized program that will function as an alternative to detention or as an alternative to post-disposition, or post-sentencing, incarceration.

In determining pre-trial placements, courts are generally concerned with issues of dangerous-

ness and risk of flight.²⁶ Generally speaking, detention statutes provide that a court can order detention of a child in a delinquency matter based upon evidence that a child is dangerous to self or to others. A court also can detain a child who presents a risk of non-appearance. To be sufficient to support a detention order, evidence must be clear and convincing.²⁷

Arguably, a child charged with a delinquent act who is also eligible for special education services is entitled to receive those services in the least restrictive environment.²⁸ Delinquency law – and, in particular, delinquency preventive detention standards – requires in some jurisdictions that the court maintain the child in the least restrictive environment or that the court provide for the child the most home-like environment possible.²⁹

²⁶See D.C. CODE § 16-2310 for an example of a preventive detention statute. The District of Columbia's provision permits pretrial detention if the government demonstrates that the child presents a danger to the safety of other persons, a danger to self, or a danger of serious loss or damage to the property of others; in addition, the provision permits detention if the child poses a demonstrable risk of flight.

²⁷See, Julia Colton-Bell & Robert J. Levant, *Clear and Convincing Evidence: The Standard Required to Support Pretrial Detention of Juveniles Pursuant to D.C. Code Section 16-2310*, 3 D.C. L. REV. 213 (1995). Before trial, of course, a child -- like an adult charged with a crime -- enjoys a presumption of innocence.

²⁸See, *In re White*, 429 N.E.2d 1383 (Ill. App. 1982). While in *White* the court determined that residential placement was necessary for three children with mental retardation where the parent had to follow through on community resources made available to the children, the court recognized that the least restrictive environment was a preference.

²⁹See, e.g., DISTRICT OF COLUMBIA SUPERIOR COURT JUVENILE RULE 2 (court removing child from home must secure for the child "custody, care and discipline as nearly as possible equivalent to that which should have been provided

²⁴An attorney, of course, cannot disclose, without agreement from the client, confidential information obtained from the client or other "secret" information obtained during the course of the representation.

²⁵In light of this "steep inclination" by judges to incarcerate children, advocates should be aware that, by law, children retain benefits of the IDEA even when preventively detained or incarcerated post-disposition or post-sentencing. See Chapter 5, *infra*.

On behalf of a child who is receiving particularized services through the school system, an advocate can argue that these services will address behaviors that, otherwise, could justify a detention order. One can envision readily how related services could target behaviors that are dangerous or problems that, if un-checked, would create a risk of flight. For example, a court may be inclined to permit a child to remain in the community based upon the information that the child will be engaged in individual and group psycho- logical counseling. In addition, the providers of special education services often are, in essence, monitoring the child as well. If the child is eligible for, but is not receiving, services that would address dangerous behaviors or running away (or other avoidance behaviors), the advocate can and should work rapidly to get those services in place in order to avoid or to rescind a detention order. If the child's IEP does not require services that would ameliorate the problematic behaviors, the child's parent (through counsel) can always request that the multi-disciplinary team reconvene to revise the IEP.

A judge may resist ordering detention if the judge knows that special education services will not be available to a child if that child is removed from the home.³⁰ A judge likely will not know that a detention center does not provide special education and related and transition services unless the child's advocate demonstrates those facts. An advocate should not assume that

for [the child] by his parents.")

³⁰A requirement that the court provide the least restrictive environment and provide special education services in the least restrictive environment suggests a corollary: a detention center at which staff cannot provide special education services is, by definition, not the least restrictive environment at which special education services can be provided. Hence, a court should not detain or incarcerate a child with education-related disabilities at a facility at which staff cannot provide a free, appropriate public education.

a judge will respond merely to an argument to that effect or an appeal to the judge's compassion or parental instincts. Courts should not assume facts that attorneys have asserted but not proved.

When a child is removed from the home – whether pretrial, pre-disposition, or disposition³¹ – the child retains the right to receive a free, appropriate public education.³² (For a detailed presentation of rights of incarcerated young people to special education, see Chapter 5, *infra*.) Thus, when confronting a situation in which a judge may impose a period of incarceration, an advocate should be mindful of the child's right to special education services.³³

³¹In fashioning an appropriate disposition under the laws in most jurisdictions, courts must consider the best interest of the child. Any valid consideration of the best interests of a child with education-related disabilities should result in a dismissal or some other dispositional order through which the child is able to obtain a free, appropriate public education.

³²Courts have long recognized that incarcerated youth with disabilities (whether in juvenile or adult facilities) retain their rights under IDEA to a free appropriate public education, including special education and related services. In *Green v. Johnson*, 513 F.Supp. 965, 976 (D. Mass. 1981), for example, students incarcerated in an adult facility brought an action under the IDEA claiming that they had been denied a free, appropriate public education while incarcerated. The district court held that the students' "incarcerated status may require adjustments in the particular special education programs available to them as compared to programs available to children with special educational needs who are not incarcerated, but their incarcerated status does not eviscerate their entitlement under federal and state law." See also *Alexander S. v. Boyd*, 876 F.Supp. 773 (D.S.C. 1995) (juvenile facilities); *Donnel C. v. Illinois State Bd. of Ed.*, 829 F.Supp. 1016 (N.D. Ill. 1993) (pre-trial detention).

³³Advocates should be aware that the 1997 amendments to the IDEA modified the rights of some youth who are incarcerated in adult facilities. The

V. Using special education rights to guide the residential placement for delinquent youth

In an occasional delinquency case, a court will determine that a child will not benefit from care and rehabilitation in the community and that the type of treatment necessary is only available through a residential treatment center. In such a case, the advocate must be aware of the child's right to obtain appropriate educational services while in a residential placement. The advocate also must be aware of the ability to influence the selection of an appropriate residential placement given the educational needs of the child.

In some instances, placement in a residential treatment center may be consistent with the preference expressed in the IDEA for the least restrictive environment.³⁴ The evaluation process conducted by the local school system is an important aspect of obtaining an appropriate residential treatment placement. During the evaluation period, the school system will (or, at least, should) complete a social history, psychological evaluation, intelligence testing, hearing and speech evaluations, and any other tests necessary. These evaluations and assessments will be used in determining the type of disability and the level of placement necessary for the child's treatment. The ultimate placement should be a facility designed to provide the educational services specified in the child's individualized education program (IEP).

1997 changes permit states to enact laws denying special education and related services to youth aged 18 through 21 who are incarcerated in adult facilities and who were not identified as needing special education in their last educational placement prior to incarceration. 20 U.S.C. § 1412(a)(1)(B)(ii), as added by Pub. L. 105-17 (June 4, 1997). The amended law also modifies certain IEP requirements for youth who have been convicted as adults under State law and incarcerated in adult facilities. See 20 U.S.C. § 1414(d)(6). For a detailed discussion of these provisions, see Chapter 5.

³⁴See, e.g., *In re White*, 429 N.E.2d 1383 (Ill. App. 1982).

VI. Using special education evaluations to demonstrate that a child with a disability did not or could not comprehend *Miranda* warnings

Courts traditionally have scrutinized with a great deal of caution statements obtained by the police from juveniles.³⁵ Before any statement that was the product of custodial interrogation³⁶ may be introduced into evidence, the government must prove by a preponderance of the evidence that the accused was provided with a complete set of *Miranda* warnings.³⁷ The government bears the additional burden of demonstrating, by a preponderance of the evidence, that any waiver or intentional relinquishment of *Miranda* rights was knowing, voluntary, and intelligent.³⁸ Waiver is determined by a careful review of all the facts and circumstances surrounding the

³⁵E.g., *In re Gault*, 387 U.S. 1 (1967); *In re C.P.*, 411 A.2d 643 (D.C. 1980); *In re F.D.P.*, 352 A.2d 378 (D.C. 1976).

³⁶The threshold question in determining whether a *Miranda* violation has occurred is whether the accused's statement was the product or result of custodial interrogation by government agents. "Interrogation" has been defined to include "not just express questioning, but also any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 201 (1980). "Custody" has been defined as the deprivation of freedom of action in any significant way. *Miranda*, 384 U.S. at 444. The test – as formulated by the D.C. Court of Appeals – is whether "the investigating officer physically deprives the suspect of his freedom of action in any significant way." *Miley v. United States*, 477 A.2d 720, 722 (D.C. 1984).

³⁷*Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

³⁸See generally, *Brewer v. Williams*, 430 U.S. 387 (1977); *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

relinquishment of the privilege.³⁹ Factors that have traditionally guided courts in determining issues regarding waiver include the individual's prior experience with the legal system, the circumstances of the questioning, any allegations of coercion, and any delay between arrest and confession.⁴⁰ The age and educational level of the accused are factors that should weigh heavily in the consideration of the totality of the circumstances in determining issues relating to the waiver of constitutional protections.⁴¹

The advocate for a child who is eligible for or receiving special education services has an opportunity – based, in part, upon the educational disability – to contest the validity of any purported waiver of constitutional rights. Thus, the advocate may be able to block admission into evidence by the prosecution of any statement made by the child. Courts have demonstrated concern and skepticism regarding the ability of a child who has educational difficulties to waive Miranda rights.

For example, in *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972), petitioners were convicted in state court of armed robbery at the age of fifteen and sixteen. In a subsequent habeas corpus action, petitioners challenged the validity of their Miranda waivers. Witnesses testified about the petitioners' level of functioning at the time that they waived their rights and made the statements. Petitioners' mother and father testified that they were mentally retarded at birth. At least two teachers also testified, indicating that the petitioners were placed in a special education class for mentally retarded children, read at a second grad level, and had IQ scores below sixty-nine. All of the witnesses doubted that either petitioner was capable of intelligently

waiving constitutional protections. The appellate court, in reversing the lower court ruling and finding that the waiver was invalid, emphasized that both petitioners had been diagnosed as being mentally retarded since birth could barely read, had no prior experience with the legal system, and in no way could have understood the “gravity of the charges against them, the consequences of a conviction, any defenses which might be available to them, or any circumstances which might mitigate the charges.” *Id.* at 1145.

An invalid waiver was also found in *United State v. Blocker*, 354 F. Supp. 1195 (D.D.C. 1973). In *Blocker*, a twenty-one year old was arrested and charged with passing an altered one dollar bill. Blocker was questioned extensively for one and one-half hours, strip searched and told that he would face a stiff sentence and high bond if he did not cooperate with the agents. As a result, Blocker finally waived his *Miranda* rights and made a statement. During the course of pretrial motions, evidence was presented through school records and psychological evaluations that Blocker was of low intelligence (IQ of 70), completed the seventh grade but had difficulty reading, and had been enrolled in special education classes. The court found that the government had failed to meet its burden of demonstrating that Blocker had voluntarily waived his *Miranda* rights.

In each of these cases, the successful challenge to the validity of the purported Miranda waiver was greatly supported by the presentation of educational records and individuals who were familiar with the juvenile's educational abilities. *Cf., In re F.D.P.*, 467 (D.C. 1983) (a fifteen-year-old child with an IQ of 74, but with prior experience, was found to have been able to waive Miranda, in part, because no expert testimony was presented regarding appellant's abilities).

³⁹*North Carolina v. Butler*, 441 U.S. 369 (1979).

⁴⁰*E.g., In re F.D.P.*, 352 A.2d at 380.

⁴¹*See, e.g., McBride v. Jacobs*, 101 U.S. App. D.C. 189, 190, 247 F.2d 595, 596 (1957).

Excerpt

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

To further illustrate the difficulties youngsters have in understanding the justice system, two researchers conducted investigations regarding juveniles' comprehension of their Miranda rights. See *Miranda v. Arizona*, 384 U.S. 436 (1996). Thomas Grisso found that many adolescents do not fully understand their *Miranda* rights.¹ While the majority of the more than 400 delinquent youths studied had faulty understandings of Miranda rights, the most noteworthy misconceptions involved the right to an attorney before and during interrogation. Additionally, the results indicated that age and IQ scores significantly predicted the juveniles' understanding of *Miranda* rights. Within Grisso's sample, younger respondents and youths with lower measured levels of intelligence were associated with faulty understanding of legal rights.

In a similar investigation, Barbara Zaremba interviewed 115 male public school students in Virginia aged fourteen to eighteen. Nearly one-third of those studied had been identified as learning disabled by their school systems.² The influences of IQ, age, socio-economic status, and school placement on the understanding of Miranda warnings were considered. When asked what "You have the right to remain silent" means, one respondent stated, "I have to remain silent, while they arrest me, I think." Another stated, "I don't have to say anything until the police ask me questions." In response to the second warning, "Anything you say can be held against you in a court of law," adolescents made statements such as, "What does that mean?"; "I can't figure that one out"; "After they ask me to remain silent, I shouldn't say anything because it will be used

against me"; and "If you say anything unless they tell you to say anything, it will be on your record when you go to court."

Another warning, "You have a right to an attorney before and during interrogation," was interpreted by some as follows: "You can have a lawyer, but I don't know when"; "At the time of your trial one of your privileges is to have an attorney present"; and "I don't know about that."

"The court will appoint an attorney if you cannot afford an attorney" is another Miranda warning. One respondent thought this meant, "They'll give me a lawyer that's not so good from downtown." The most significant finding reported by Zaremba was that the presence of a learning disability severely hampered youths' understanding of the Miranda warnings, regardless of other factors.

While empirical evidence is limited, the Grisso and Zaremba studies indicate that young people with lower IQ levels and those with learning disabilities misunderstand rights intended to guard against self-incrimination extended to juveniles as a result of *In re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U.S. 541 (1966). Ironically, although unable to comprehend their rights, many youths nevertheless waive them. Again, their deficits impede their capability to protect their own interests and maneuver successfully through this process. In short, the behavior, language, and communication skills of young people with disabilities can contribute to their unnecessary detention while awaiting a dispositional hearing.

¹ See Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L.REV. 1134; and Thomas Grisso, *Juvenile's Waive of Rights: Legal and Psychological Competence* (1981).

² Barbara A. Zaremba, *Unpublished data*, 1995 (on file with the District of Columbia Law Review).

Steps to Special Education Advocacy

STEP 1

Identification and Pre-referral Intervention

- ! "Child-Find": Public school agency is required to identify, locate, and evaluate children who are disabled and need special education. *See 34 C.F.R. § 300.220 and Chapter 6 of this manual.*
- ! If it appears a child may be retained, the school system must take intervention steps to ensure promotion of the child.
- ! If a child is retained despite intervention, the school system must make formal referral for special education assessment and obtain parental consent before doing so.
- ! Four to six week intervention period in regular education setting is optional.

STEP 2

Formal Request to Public School to Evaluate Child

- ! A formal request for assessment should be sent to the school that the child attends to formally request assessment of the child.
- ! Once form is filed, child is under IDEA.

STEP 3

Evaluation of Child

- ! After the formal request, a full assessment of the child should occur.
- ! Types of evaluations: Psychoeducational cognitive (IQ) (academic, perceptual); Clinical Psychological (emotional personality); Occupational/Physical Therapy (motor skills); Medical (vision, auditory, psychiatric, neurological, physical); Speech/Language; Vocational.
- ! BLMDT Members: Parent or guardian; Child; and Assessment Team: coordinator, psychologists (school, clinical, neuropsychologist), speech therapist, social worker, principal, teacher(s), counselor, transitional & vocational persons, occupational & physical therapists.
- ! Miscellaneous: Each assessor must draft written report describing results of test and recommendations; Parents must get a copy of evaluations before IEP meeting to review; Parent has a right to an independent evaluation and under certain instances, at public expense; Evaluations must be in the child's native language.

STEP 4

Eligibility of Child for Special Education under IDEA

- ! Child must be between the ages of three and twenty-one *and* have a disability that adversely affects his or her ability to learn or make progress in school.
- ! The child needs specialized instruction, and/or related services in order to learn and make progress in school.
- ! Eligibility -- and final recommendation -- is a team decision that includes parent input.
- ! If ineligible, school system must draft and send letter to parent, explain reasons for ineligibility and include educational prescriptions to be carried out in the regular classroom.
- ! Parent has a right to challenge eligibility, classification of disability, and/or evaluations.
- ! Disability classifications: Learning Disabled (LD); Seriously Emotionally Disturbed (SED); Mental Retardation (MR); Autistic; Visual Impairment (VI); Speech/Language Impairment (SI); Other Health Impairment (OHI); Traumatic Brain Syndrome; Orthopedic Impairment (OI); Hearing Impaired (HI)

Steps to Special Education Advocacy

STEP 5

Individualized Educational Program (IEP)

- ! The IEP is a written document and a conference/meeting.
- ! **Purpose of IEP:** Create a document with objectives, measurable goals, specialized instruction and related services for a child's unique need.
 - S Provide a working guide for school personnel to implement the goals set out in the IEP.
 - S Provide an opportunity for the team to discuss their findings with the parent and answer any questions the parent may have.
- ! **Notice:** School must notify parent – in writing – of time, place and who will attend IEP conference, and notice must be in a language and manner the parent can understand.
 - S If student is sixteen years of age, transitional services must be included in the notice and be stated in IEP.
 - S If transitional services are to be included in IEP, the school system must invite the student.
- ! Other Requirements: Parent must have input and has a right to bring advocate or anyone else to IEP.
 - S Parent should receive all evaluations within a reasonable time prior to the IEP.
 - S The school team may bring a draft IEP, but parent has the right to change, amend, or modify it.
 - S When in disagreement, complete as much as IEP as possible to ensure the student gets some services while dispute gets resolved.

STEP 6

Placement

- ! The school system must consider placement annually in accordance with the child's IEP.
- ! The child should be placed in the Least Restrictive Environment.
- ! The child should be placed as close to home as possible.
- ! The child should get instruction within the regular education setting as much as possible.
- ! A parent has the right to challenge any proposed placement and the "stay put" provision will allow the child to remain at his or her last current placement while the dispute gets resolved over the proposed placement.
- ! If the public school system can not provide a child with the services required by his or her IEP, a parent can seek to have the child placed into a private placement – at public expense – in order to receive a free, appropriate public education.
- ! The continuum of services is the range of levels of special education services available; the range of levels is as follows: regular education classroom, separate special education classroom, separate special education school, residential placement, hospital/institution, detention facility.
- ! The team – which includes parent – determines which level of placement is appropriate.

STEP 7

Annual Reviews

- ! A child's IEP and placement must be reviewed on an annual basis.
- ! A parent may request a review at any time during the year.
- ! **Purpose of Annual Review:** To determine student's progress; to modify or develop new IEP; and to revisit the student's disability classification and placement level.

STEP 8

Triennial Reviews

- ! A triennial review involves a complete assessment of the child, comparable to the initial testing that took place to determine eligibility.
- ! Triennial reviews must occur within three years of last complete assessment.
- ! The purpose of the triennial review is to reconfirm the student's disability, instruction and related service needs.

Steps to Special Education Advocacy for a Delinquency Client

Preliminary Steps and Organizing Actions

- 1** Counsel should read and study this manual. In addition, counsel should obtain copies of relevant state and local laws and regulations, as well as relevant school board and youth authority policies.
- 2** Counsel should identify local attorneys (e.g., private practitioners specializing in special education law, attorneys from the protection and advocacy center, law school clinicians), as well as educators (e.g., university-level professors of special education) who have expertise regarding special education law, practice, services, and evaluations. Counsel should organize training sessions with those experts for delinquency attorneys, social workers, and other interested advocates who work with children in the delinquency system.
- 3** Counsel also should consider organizing training sessions (regarding special education rights and services) for judges; probation and parole officers; detention center counselors, teachers, and administrators; mental health workers; vocational rehabilitation agency workers; private service providers (including organizations that run alternative-to-detention programs); neglect system social workers and administrators; and school system personnel.
- 4** Ideally, counsel would create a fund to support independent or private evaluations and private *Burlington* remedies for clients.
- 5** Counsel should learn how to file for attorney's fees when prevailing in a special education proceeding or matter.
- 6** Counsel should consider raising money from foundations and other sources in order to set up a special education advocacy project in the local public defender office, as part of a law school clinic, or as an independent project. Such a project can become self-funding based upon the attorney-fee-shifting provision of the IDEA.
- 7** Delinquency counsel should consider whether to provide special education representation and advocacy or to advise the delinquency client and the parent to engage outside counsel for the special education representation. If the latter, delinquency counsel should identify special education attorneys who are willing and able to provide special education representation for delinquency-involved children (and their parents).
- 8** Counsel should check ethical rules of the jurisdiction to determine any limitations or concerns regarding representing the child and the parent jointly in the special education matter. Counsel should study and reflect upon conflict-of-interest provisions and solicitation provisions. In addition, counsel should avoid discussing facts of the delinquency case with the parents. This caution to avoid discussing the delinquency facts with the parents is particularly difficult to respect in the context of a delinquency case (or truancy case) that arises from an incident that allegedly occurred at the child's school.
- 9** Counsel should draft a special education retainer agreement for use with delinquency clients and their parents; counsel also should draft a retainer agreement for use with delinquency clients who are eighteen years old or above and who decide to assert their special education rights without parental involvement.

Steps to Special Education Advocacy for a Delinquency Client

Steps to Take in an Individual Case

Counsel should:

- 1** Discuss with the child advantages and disadvantages of employing a special education strategy within the delinquency case. Counsel also should discuss with the child the need to engage a “parent” as a client also for purposes of the special education representation. (If the child is eighteen, counsel should discuss with the child the choice of representing the child alone in the special education matter.)
- 2** Execute a retainer agreement with the client(s) and obtain from the parent and the child a release form to facilitate collection of records, etc.
- 3** Have extensive discussions with the client(s) to determine, at least preliminarily, the goals of the client in terms of education and (for the child) in terms of the delinquency case.
- 4** Obtain all relevant educational, medical, psychological records and evaluations. Counsel should investigate the child’s educational, medical, and social history.
- 5** Chart the child’s educational history, literally creating a chart that organizes the information by year, grade-in-school, school attended, grades on report cards, scores on achievement tests, evidence of special education actions (including referrals for evaluation), etc. In essence, counsel must think of every possible category to include in the chart.
- 6** Based upon relevant special education legal provisions, identify the rights and legal theories that advance the educational and delinquency-case goals of the client(s); Construct a strategy that incorporates all of the steps in a special education case (identification through triennial reviews) and that takes advantage of special education remedies (including private placements via *Burlington* and compensatory education claims). *See also, Summary of Strategies for Obtaining Release from Detention or Other Incarceration for Delinquency Clients on following pages.*

Summary of Strategies for Obtaining Release from Detention or Other Incarceration For Delinquency Clients

Detained Child

Based on special education actions (including provision of services not previously available or supplied to the child), move for reconsideration of detention (or equivalent procedural action to effectuate release).

IEP exists

Begin at Step 5 in the special education process: implement or re-design IEP; based on new-found services, obtain child's release; if child not properly evaluated (or not evaluated within past three years), *begin at Step 3 or Step 8* in order to obtain accurate evaluation; based on new understanding of child's disability and needs, effectuate release.

Eligible for Special Education: no current IEP or placement.

Begin at Step 5 or at Step 6 in special education steps: find interim placement or stay put in last placement or design IEP and then locate placement.

Not previously identified as eligible for special education

Begin at Step 2 in special education steps: request evaluation and/or ask court to refer for evaluation; consider ex parte evaluations through delinquency system in order to expedite special education evaluation process; explore failure by school and other public agencies to "find" the child previously (*see Step 1 in special ed. steps*); look for appropriate

Committed and Incarcerated Child

interim placement services.

Work with "treatment" and educational personnel at the institution to understand the child's general status, behavior, and adjustment, and to determine the child's school status. Based on special education actions (including provision of services not previously available or supplied to the child), either move the court for child's release or persuade executive-branch authorities to release the child).

IEP exists: school personnel at the institution not implementing the IEP.

Locate appropriate school placement in the community, with related services and transition services. Seek agreement from authorities to release the child. If agreement not reached, challenge the educational placement in a special education hearing; compel attendance at hearing (to the extent strategically helpful) of institution personnel; also, challenge the placement, to the extent legally possible, as violating child's right to care and rehabilitation or treatment in delinquency commitment.

IEP exists; child receiving appropriate services at the institution.

This scenario is unrealistic. If it ever occurs, determine whether, based upon provision of educational and other services, the child has been rehabilitated; argue accordingly for release.

No current IEP

Enlist cooperation of education, mental health, and other institutional staff to join with the child, the parent, and other persons invited by the parent to design an appropriate IEP with related services, transition services, and behavioral supports to allow for safe, productive release of the child.

Child slated for placement at a residential treatment facility; child does not want to go

Prepare IEP that provides for all appropriate special education, related services, and transitional services (including, as appropriate, wraparound services with in-home family counseling, drug counseling, externship opportunities, job coaching, etc.); argue that twenty-four hour, residential treatment is unnecessary and, in terms of special education law (and delinquency law, if applicable law allows the argument) not the least restrictive environment.

Child in incarceration facility, not receiving appropriate services:

It is not realistic to assume that counsel can persuade authorities to release the child based upon the strategies described above; child would prefer a residential treatment facility.

Prepare an IEP with participation of above-described personnel and invitees of parent and child to require residential treatment placement.

Summary of Strategies for Obtaining Release from Detention or Other Incarceration For Delinquency Clients

Child Arrested

Facing Pre-trial Detention (Or Child Facing Probation/Parole Revocation)

Based on special education actions (locating services not previously available or currently supplied to the child), argue that the child will return for future court hearings and will not constitute a threat to the community.

IEP exists:
child in current special education placement:
reasonable appropriate services in place

Explain to court intake personnel and to the judge/hearing officer that alternative-to-detention program is in place; get parent and school support (teacher or counselor as witness at detention hearing) to request that court not disturb current services to child; if delinquency charge arises from alleged conduct at school, explore whether charge is an attempt by school personnel to circumvent their obligations to educate the child (including “stay put” right of child); if charge involves allegation of weapon, drugs, or “dangerousness” at school, explore possibility of IDEA 45-day interim placement as affirmative strategy for defeating detention; for truancy case, challenge court’s jurisdiction based upon IDEA exhaustion claim and definition of “truancy”.

IEP exists: child in special education place-

ment, but not receiving appropriate services (including related services like counseling, transition services, and behavioral supports)

Explain to court intake personnel and to judge/hearing officer that framework for alternative-to-detention program is in place; if child is truant, explain that counsel will ensure that related services (including transportation and counseling) can be in place rapidly; meet with school personnel to get appropriate services in place or implemented; to the extent necessary, *begin at Step 5 of special education steps* to enforce implementation or re-design of IEP.

Identified as eligible for special education:
no current IEP or placement

Explain to court intake personnel and to the judge/hearing officer that the child has (and the parent has, on behalf of the child) a right to appropriate services that, in effect, with constitute a comprehensive, alternative-to-detention program; to the extent necessary, demonstrate that school system personnel have violated your client’s rights to services and assure the court of your intention and ability to obtain appropriate services. *Begin at Step 5 or at Step 6 in the special education steps:* find interim placement

or stay put in last placement or design IEP and then locate placement; explore possible collaborations between pre-trial delinquency authority and school system to provide community-based services.

Not previously identified as eligible for special education

Consider explaining to court intake personnel and to court that the client likely has unmet special education needs and likely is eligible for comprehensive services that you will immediately explore; explanation can put truancy and other behaviors in the best light; if proper, assure the court of your intention and ability – with your client’s involvement – to identify appropriate services; *Begin at Step 2 in special education steps:* request evaluation and/or ask court to refer for evaluation; consider ex parte evaluations through delinquency system in order to expedite special education evaluation process; explore failure by school and other public agencies to “find” the child previously (*see Step 1 in special education steps*); look for appropriate interim placement and services.

**Gerald's cases:
A comprehensive joint special education and
delinquency legal strategy**

Gerald¹ progressed well through elementary school and tested as high as the ninety-eighth percentile in some areas of academic achievement before his mom's and dad's drug problems overwhelmed the family. After his mom's incarceration and coincident with his dad's leaving home, Gerald went to stay with an aunt. He repeated the seventh grade three times. At some point during those three years, he went to stay with a twenty-one-year-old cousin. Also, during the third year in seventh grade, Gerald allegedly became involved in a fight in school. School officials suspended Gerald from school and referred the matter to the delinquency court. Prior to the school-fight arrest, Gerald had never been evaluated or identified as eligible for special education services. No one had been attending to his school-related problems prior to that first arrest.

!!!
Prior to the school-fight arrest,
Gerald had never been evaluated or
identified as eligible for special
education services.
!!!

Counsel (a court-certified law student and a clinical supervisor) obtained a court appointment to represent Gerald in the school-fight case. (See case #1 in illustration 1-1.) Gerald was fourteen years old. He presented at various times as withdrawn, sullen, and angry. He needed attention.

Based upon advice from counsel, Gerald decided

to employ a special education strategy. Counsel accordingly initiated a special education case, executing a retainer agreement with Gerald and with his father. (See case #2 in illustration 1-1.) Gerald's father was not available during approximately the first year of the special education case. With Gerald's and the father's permission, counsel dealt with the cousin and then with the aunt in place of the father during that initial period of the special education case.

With Gerald's permission, counsel described in general terms to the juvenile prosecutor Gerald's family and school situations and Gerald's plan to obtain special education and related services. Counsel negotiated with the juvenile prosecutor an informal diversion of the school fight (simple assault) case. The parties accordingly asked the court to continue the simple assault case for three months; the court scheduled a status hearing for three months, with the parties anticipating a mutual request for a dismissal. During the ensuing months, counsel shepherded Gerald through the special education evaluation process and, following a determination that Gerald was seriously emotionally disturbed, prepared to develop an IEP and to seek an appropriate placement.

Gerald was arrested – during this same period – and was charged with distributing cocaine. (See case #3 in illustration 1-1.) The cocaine sale, allegedly by Gerald, was from inside a "crack house", at the front door, and the buyer was an undercover police officer. The sale preceded a larger-scale police action to raid the house. Both the sale and the raid occurred on a snowy night. During the raid of the house, several young men fled through the back of the house and through an alley. The police apprehended Gerald in that alley; they apprehended an eighteen-year-old male, A.B., as he attempted to flee from the back of the house. A.B. and Gerald were approximately the same height and weight, and they were wearing similar clothing at the time of their arrests. The police found no drugs on Gerald, but they did find on him a pre-recorded \$20 bill

¹Name is changed to protect anonymity of client.

allegedly used by the undercover officer to purchase the drugs. The court released Gerald to his aunt pre-trial, and set a date for trial.

Public school system personnel – in response to counsel’s special education advocacy – placed Gerald into an “appropriate” special educational program with necessary psychological and

speech services. The placement also provided fifteen hours per week of special education instruction.

At the status date for the simple assault case, the court set a new trial date. Counsel’s investigation of the simple assault produced evidence that the complainant and Gerald had engaged in other scuffles – some of which the complainant in this case had initiated. Counsel for Gerald persuaded the prosecutor to allow counsel to

Case	Case/Charge	Duration	Other Information	Outcome
#1	Simple Assault	Long-approx. one year	Informal agreement with prosecutor to delay three months for status hearing and possible dismissal; long delay before final resolution	Mediation
#2	Special Education Case - Failure to identify (child find violation); denial of FAPE	Longest - approx. seven years		Obtained initial placement that included approx. fifteen hours per week in special education; then vocational placement and G.E.D.; school system failed to serve; developed residential option; Gerald stayed with G.E.D. program for a while
#3	Possession with intent to distribute crack cocaine	Long-approx. 15 months	Much investigation; subpoena to A.B., adult co-defendant; developed argument that co-defendant was guilty and that Gerald had a right to present such evidence; files motions to suppress evidence	Court granted motion to dismiss based upon social factors, including availability of special education program
#4	PWID-Crack	Short-approx. two months		Court granted pre-trial motion to dismiss based upon insufficient evidence to establish guilt
#5	Driving without a license	Short-approx. three months	Driving uncle’s car during period of time when court was considering dismissing case #2 for social reasons	Dismissal for social reasons after a few months’ delay, dismissal based on school programming primarily

#6	Drug charge	Medium - approx. six months	Pre-trial Motions to Suppress	Dismissal in pleas with case #7
#7	Drug charge	Long-approx. ten months	Ex parte motion for psychiatric eval. with explanation of social history); preparation of interlocutory appeal in case motion denied; filed pre-trial motions to suppress	Probation

Illustration 1-1: Gerald's cases

arrange for a mediation of the ongoing dispute between the two children. The mediation led to an agreement between the two children and their adult family members. Ultimately, the prosecutor agreed to dismiss the simple assault in light of the successful mediation of the dispute.

Recognizing that the defense has difficult winning undercover drug sales in which the police officer has positively identified the alleged seller, counsel developed a number of strategies to challenge the government's evidence and to delay the day of reckoning in case #3. Counsel filed a motion to suppress the identification and to suppress the tangible evidence (the \$20 bill).

Counsel's investigation revealed that the police, in arresting A.B., had recovered cocaine from his pocket. The cocaine recovered from A.B. matched the percentage of purity of the cocaine allegedly sold to the undercover police officer. Counsel developed a theory of misidentification that included the possibility that A.B., rather than Gerald, had been the seller in the undercover officer's purchase of cocaine. Counsel researched case law that arguably allowed the introduction of evidence in Gerald's case tending to inculpate A.B. Counsel also researched the conflict between A.B.'s fifth amendment rights and Gerald's sixth amendment rights to call and to confront witnesses. Gerald's counsel served A.B. with a subpoena. A.B. did not show up on one or two trial dates; counsel argued that A.B. was a necessary witness. Eventually A.B. pled guilty to possession of the cocaine that he had when

stopped by the police. Counsel obtained a written statement from A.B. in which, based upon personal information, A.B. stated that Gerald did not sell cocaine to the undercover officer. Counsel prepared an argument – albeit a weak argument – to demonstrate that A.B.'s possession conviction and the undercover sale were part of the same transaction (thus extinguishing A.B.'s fifth amendment rights). Counsel also researched issues that might allow for an interlocutory appeal in Gerald's case #3.

Gerald was arrested again and charged with possession of cocaine with intent to distribute. (See case #4 in illustration 1-1.) The court detained Gerald for a week in a medium security facility and then, in response to a motion for reconsideration of detention, released Gerald to a youth shelter house (a detention halfway house). The motion to reconsider relied in part on Gerald's having recently started to participate in a therapeutic school program. Gerald was at the youth shelter house for an extended time while counsel helped him to reconnect with his father; the aunt and the cousin were no longer willing to accept custody of Gerald. Gerald's mother, at that point diagnosed with AIDS, remained incarcerated in Kentucky.² Counsel arranged for Gerald to visit his mother; the visit was the first in several years.

²The District of Columbia sends its female prisoners to facilities in other states.

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Gerald seemed to appreciate the vigorous advocacy provided in the delinquency and special education matters. Within a period of two years, Gerald significantly improved his living situation and his school situation. He was not as depressed and did not seem to be sad, sullen, or angry nearly as often as he had been two years earlier; his relationship with his father was much more stable.

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The facts of case #4 allowed counsel an opportunity for a quick victory on Gerald's behalf. Gerald was a passenger in an automobile. After stopping the car, the police found drugs underneath Gerald's seat. Those drugs, however, were not in plain view, and no other evidence connected Gerald to the drugs. Based upon a recently published opinion refining the definition of constructive possession, Gerald's counsel filed a dispositive motion arguing that – as a matter of law – Gerald could not be found guilty of constructive possession of the drugs. The trial court granted Gerald's motion and accordingly dismissed the case.

Counsel's delay antics regarding A.B.'s non-availability as a witness and other matters in case #3 continued. That case was already close to a year old. Based upon Gerald's demonstrated progress in his special education placement³ and Gerald's positive reunification with his father, counsel filed a motion to dismiss case #3 for social reasons. (The motion is based upon the legal argument that a child is, by

³A District of Columbia School of Law student was also tutoring J.M., and J.M. was responding positively to the tutoring and to the regular attention.

definition in the District of Columbia, not delinquent – even if guilty of an offense – if the child is not “in need of care and rehabilitation.”)

Before the motion to dismiss for social reasons in case #3 was heard, Gerald was arrested a fourth time. (See case #5 in illustration 1-1.) The charge was driving without a license. The judge responsible for hearing case #3 and for ruling upon the motion to dismiss for social reasons agreed to continue the hearing on that motion. The judge recognized that Gerald was making significant progress overall and thus kept the motion pending. After waiting a respectable amount of time, counsel also filed a motion to dismiss for social reasons in case #5. Eventually, as Gerald continued to progress at home and in school without any re-arrests, the judge dismissed both case #3 and case #5.

Gerald interacted actively with counsel. Gerald seemed to appreciate the vigorous advocacy provided in the delinquency and special education matters. Within a period of two years, Gerald significantly improved his living situation and his school situation. He was not as depressed and did not seem to be sad, sullen, or angry nearly as often as he had been two years earlier; his relationship with his father was much more stable. Remarkably, his father became somewhat active in the special education matter, speaking with counsel regularly and attending IEP meetings.

Unfortunately, the school system did not provide Gerald with the services required by the first two IEP's developed over the two years following Gerald's being identified as eligible for special education. Gerald eventually decided to discontinue attending school in the primarily special education program counsel had helped to arrange. Gerald opted instead for a vocational program with a general equivalency degree (G.E.D.), as an alternative. That vocational program was not adequate. Rather than fight for his education, Gerald stopped attending that program as well.

Counsel represented Gerald and his father in a

special education hearing claiming, among other things, that the school system owed Gerald compensatory education for the time – the three years that Gerald spent in the seventh grade – that school personnel failed to identify Gerald as needing special education services; counsel also claimed a right to compensatory education for the time that the school system failed to implement Gerald's IEP's. Although counsel prevailed, obtaining a significant amount of compensatory education time as a remedy for the school system's failures, Gerald – whose girlfriend was expecting a baby – was losing interest in school. Gerald continued to participate in G.E.D. tutoring, but he failed to pass the G.E.D.

Gerald was arrested and charged two more times in the District of Columbia, both drug possession charges. (See case #6 and Case #7 in illustration 1-1.) Counsel in a certain sense replicated the overall strategy in cases #3 and #4, developing additional special education services and heavily litigating pre-trial matters in case #7. Counsel commissioned, on an ex parte basis, a psychiatric evaluation of Gerald in preparation for arranging additional services (including possibly residential treatment). Counsel prepared an argument for an interlocutory appeal based upon the possibility that the court might deny the request for a psychiatric evaluation or deny a subsequent motion to dismiss. At the same time, counsel wrote and filed motions to suppress evidence. The delay occasioned by the litigation and arranging evaluations provided Gerald with time again to attempt to stabilize at home and in school.

Consulting with Gerald's father and with Gerald, counsel prepared to seek a residential therapeutic placement for Gerald, either through the school system or through the delinquency court. Gerald pled guilty to the charges in case #7, in exchange for a dismissal of the charges in case #6. Eventually, notwithstanding continuing marginal behavior, Gerald was ordered onto probation by the Court. He continued to function, albeit marginally, in the community.

Counsel continued to work with Gerald on educational and other issues. Law students tutored Gerald for periods of time.⁴ Gerald remained in the community without re-arrest, living with his father, for the remainder of his "juvenile" years (i.e., past his eighteenth birthday). Gerald's mother was released from prison, but she was in failing health. Gerald's goal was to obtain a G.E.D. and to get a job. He did not succeed with either goal. As a young adult, feeling the pressure to provide for his child, Gerald went back to drug selling and has been incarcerated for relatively short periods in the adult system.

In retrospect, counsel understood that – even at thirteen and fourteen – Gerald was "living on the street". The "crack house" and his peers became Gerald's support system during his early teenage years following the disintegration of his family. For a period of three or four years, his mid-to-late teenage years, however, Gerald reunited with his father, returned to school, and by-in-large stayed out of serious trouble. A juvenile prosecutor who reviewed Gerald's history – after the facts – expressed surprise that Gerald spent virtually no time in secure detention; the prosecutor opined that, absent the special education advocacy and the vigorous defense work, Gerald would have been in detention for significant stretches of time. The failure of advocacy by counsel in Gerald's case was in not forcing the school system to implement meaningful, comprehensive special education, related services, and transition services.

Ray's cases: Designing a meaningful and comprehensive IEP

Ray, as a thirteen-year-old involved in his first

⁴One law student described her time tutoring Gerald as the most meaningful experience in her law school career.

delinquency case -- much like Gerald -- presented as sad, sullen, and occasionally angry. Like Gerald, Ray was in many respects living life independently, getting insufficient support or structure. In addition to Ray, his mother has a son, S.L., who is one year older than Ray and five younger children ranging in age from one to seven years old. Ray receives no guidance, nurture, or support from his father. The house is chaotic; three of the little children sleep in a sofa bed with the mother in the living room. They do not seem to have toys. The mother has several belts placed around the house; she apparently keeps them handy in order to "discipline" the children. The family seems chronically to have insufficient supplies of food, and they run out of food toward the end of the month. The children do not have enough clothing.

Ray was arrested and charged with the unauthorized use of a vehicle. The court released Ray pending trial, and before trial Ray entered a diversion program. Within a couple of months, Ray was charged with another unauthorized use of a vehicle. Based on that second charge, the diversion program dropped Ray. As the pressure in the delinquency system mounted, Ray decided, based upon advice of counsel, to pursue a special education strategy.

At thirteen, having failed a couple of grades in school, Ray was in the fifth grade, but he was achieving academically at the second- and third-grade level. Although he was (and is) slender, he towered over the other kids in his class. Because he was chronically underachieving and he was so much taller and older than the other kids, he desperately wanted to be out of elementary school. Not surprisingly, his school attendance started to slip.

On behalf of Ray and his mother, counsel requested a special education evaluation of Ray. School personnel did not conduct the evaluations and did not produce the reports in a timely fashion. The evaluations produced seemed inaccurate. For example, the evaluator who wrote the psycho-educational report found

Ray to be mildly mentally retarded, but no one conducted sufficient adaptive testing to confirm that conclusion. (Ray described to special education counsel during their first meeting how he managed to participate in stealing and stripping cars in order to sell parts. This description alone convinced counsel that this child is operating above the mild mental retardation range.)

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Following several failed attempts over a period of months to get school personnel to convene an IEP meeting, counsel managed to negotiate an "IEP deal" with those officials. The deal was to place Ray in a junior high school program with approximately fifteen hours of special education classes per week with various related services, including counseling.

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Following several failed attempts over a period of months to get school personnel to convene an IEP meeting, counsel managed to negotiate an "IEP deal" with those officials. The deal was to place Ray in a junior high school program with approximately fifteen hours of special education classes per week with various related services, including counseling. As part of the deal, the members of the IEP multi-disciplinary team agreed to re-convene and change the IEP to require a segregated, 100% special education setting for Ray if the less-restrictive, fifteen-hour-per-week program proved to be ineffectual. School personnel did not implement the IEP, but they did allow counsel to place Ray into two different school programs. Neither was

effective.

Counsel filed a request for a special education, due process hearing claiming that the school system personnel had failed for several years to identify Ray as a child with a disability; counsel also alleged that school personnel delayed illegally to conduct the evaluations and then failed to implement the first IEP. The hearing officer granted Ray and his mother a couple of years of compensatory education and ordered the school system to work with the parent to produce another IEP.

Meanwhile, Ray was not going to school. He failed to appear for a court hearing. The police picked him up on a custody order, and, as a result, a judge ordered that Ray stay in a youth shelter house. Ray arrived at the shelter house and announced that he did not intend to stay. The counselor on duty asked Ray to wait until after her shift to leave. Ray accommodated that request, leaving five minutes after the counselor. Soon thereafter the court issued another custody order.

On behalf of Ray, counsel worked with school officials to design a new IEP.⁵ This IEP contained the following elements: 100% special education placement (thus, given the shortage of appropriate, 100% special education, public placements, ensuring that Ray could select a private school placement); computer-assisted instruction in academic course work; daily tutoring; family counseling with a psychologist or a licensed clinical social worker in order to design and implement a non-aversive behavior management program; and -- as a transition service -- assistance, presumably by the tutor, learning to cook and put out breakfast each day for the family.

⁵Counsel and Ray's mother also worked together with school officials to design an IEP for Ray's older brother, ultimately, the two IEP's -- Ray's and his brother's -- were similar.

The school system did not locate a placement and did not issue a notice of placement. Counsel attempted, with limited success, to interest Ray in going to interviews at private or public school programs. Ray may have been wary of going to interviews based upon a concern that someone would become aware of the extant custody order. For more than a year, Ray remained in the community without being re-arrested.

Counsel located John Malloy,⁶ a graduate student in the Department of Special Education at a nearby, major university. This graduate student agreed enthusiastically to become a tutor for Ray and for his brother. Based upon the failure of public school officials to provide the services in Ray's IEP, counsel obtained a hearing officer's determination that Ray was entitled to private tutoring from John Malloy at public expense. Moreover, the school system's attorney agreed to designate the private tutoring, for four hours per day, as an interim placement until the parties located an appropriate school program for Ray.

Counsel has attempted to arrange for in-home family counseling and individual counseling, as well, for Ray. The therapist, according to the IEP, must be capable of helping the family to create a behavior management program. The intent behind this requirement is to train the mother to reinforce Ray for positive behavior and, as a consequence, to lighten the mother's load. For example, Ray and his mother could agree that he will receive positive, alone time with his mother in exchange for Ray's baby sitting with the younger siblings for a short period of time. (The same arrangement with Ray's older brother would make it possible for both Ray and his older brother to have alone time with the mother.) Or Ray's mom might agree to help Ray obtain clothing items in exchange for his keeping a curfew. A therapist did agree to begin therapy with the family in

⁶The name is fictitious.

their home; he had two or three sessions with the family. He then discontinued after the mother's landlord locked her out of her house (presumably based upon a claim of non-payment of rent).

Ray met with the tutor on a regular basis. Among other goals, the tutor attempted to assess Ray's current educational achievement and to prepare Ray academically and emotionally to reintegrate into school. This relationship was productive and helped Ray to stabilize and avoid law violations. After a year, however, Ray was re-arrested and, based upon his previous non-appearances and abscondences, Ray was detained. In detention for two days, Ray continued to meet with his tutor and, perhaps more significantly, expressed a keen interest in helping counsel to identify an acceptable special education school.

While the story of Ray does not appear to be an unqualified success, one must consider whether Ray has done better or worse than he would have done without the special education intervention and, indeed, whether he is involved in more or less delinquent conduct, and whether he is spending more or less time in secure detention than he would have without the intervention. By these measures, Ray is improving. In addition, his mother-- even with her own nearly overwhelming circumstances (many of which have not been detailed in this account) -- is still at least marginally involved with Ray.

Ray has a private tutor with whom he has established a meaningful and socializing relationship. Ray now calls counsel regularly to ask for advice and to discuss his many needs, problems, and aspirations. Moreover, Ray has a good IEP that calls for many significant services, plus Ray has a couple of years of compensatory education "in the bank". He will be able to use those years of compensatory education to obtain individual lessons,

recreational and transitional services above and beyond those required by the standard of appropriateness. The primary challenges outstanding in Ray's case are helping the mother to stabilize her situation, getting the public school system to implement Ray's comprehensive IEP, and getting Ray to stick with that comprehensive program as it materializes for him.