

Chapter

Five

Enforcing Special Education Law on Behalf of Children
Incarcerated in Juvenile or Adult Facilities

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Written by

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Delinquency incarceration facilities are particularly uncaring places.¹ In regard to this fundamental feature, the juvenile justice system is a replica of the adult criminal incarceration system. Indeed, commentators correctly characterize the juvenile justice system --and juvenile incarceration facilities, in particular -- as primarily a training ground that “graduates” youngsters into the adult criminal system. The recent trend to put younger people in greater numbers into adult facilities, viewed against this back-drop, is not a fundamental change. Rather, the trend represents an innovative, “early-admissions policy” for post-secondary incarceration.

The young people incarcerated in delinquency placements, as well as in adult penal institutions, are not a representative cross section of those who are deviant. Much like poor and minority children, children with disabilities appear in disproportionate numbers in the delinquency system generally, and in incarceration facilities specifically.² Large percentages of children in

the delinquency system and adults in the criminal system are severely undereducated, and literacy skills in these populations are strikingly low.³

disability status is not as well documented as race status and class status. Estimates of the correlation vary widely. *See generally*, Patricia Puritz & Mary Arm Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report 1998, at 16-17 (studies regarding prevalence of disabilities within delinquency incarceration populations report ranges between 42 percent and 60 percent); *see also*, Leone, et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389 (1995), and *Education as Crime Prevention: Providing Education to Prisoners*, Research Brief, The Center on Crime Communities & Culture (September 1997) at 3, [hereinafter Education as Crime Prevention], citing R.I. Gemignani, *Juvenile Correctional Education: A Time for Change* (NCJ Publication No. 150309, Office of Juvenile Justice and Delinquency Prevention 1994) at 2.

Ironically, while deinstitutionalization of people with disabilities has become common in mental health and mental retardation systems, in the delinquency system, American society continues to incarcerate a large numbers of children with disabilities. Moreover, those children, generally speaking, have disabilities that are relatively less incapacitating than persons institutionalized traditionally in the other systems. Similarly, a large percentage of the people populating penal institutions are emotionally disturbed, mentally retarded, mentally ill, or learning disabled.

A central premise of this chapter is that an astoundingly large percentage of the young people with disabilities who are incarcerated in juvenile or adult facilities would not be incarcerated on the basis of their alleged or proven offenses absent the presence of the disability.

³*Education as Crime Prevention*, *supra* note 2 at 3-5.

¹Parts of this chapter are adapted from, and correspondingly appear in, an upcoming article by Joseph B. Tulman and Mary G. Hynes in the Loyola University School of Law Children's Legal Rights Journal.

²For a clear and insightful account of the history of the Juvenile Court, *see William Ayers, A Kind and Just Parent: The Children of Juvenile Court* (1997), chapter 2 (“Jane Addams: History and Background”). Ayers presents through the entirety of the book a compassionate, yet hard-hitting critique of a juvenile incarceration facility. *See*, Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L.REV. 715 (1991) (“Since their inception, the reality of custodial institutions has contradicted the juvenile court’s rhetorical commitment to rehabilitation.”) *See also*, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* 8 (1991)(The existence of reform schools “ensured that juvenile offenders would receive the worst the system could offer--punishment labeled as treatment.”). As a correlate for delinquency and incarceration,

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Whether rejecting or accepting the premise that education is effective in reducing delinquent or criminal conduct⁴ and that, conversely, incarceration is not effective in reducing delinquent or criminal conduct, one should recognize that special education advocacy can provide effective instrumental strategies for obtaining release of young people from incarceration.

The young client who is incarcerated has several fundamental and self-evident problems. The client is confined; liberty is restrained. Further, the client likely faces intimidating and perhaps brutal circumstances on a daily basis inside the institution.⁵ In addition, the client most likely is not receiving an appropriate or even adequate education. Regarding these post-disposition deprivations, lawyers tend to overlook their fundamental function as professional problem-solvers who are engaged by clients to address those clients' most-pressing problems.⁶

As a result of systemic limitations and perceptual mistakes, lawyers fail to address for

⁴See, *Education as Crime Prevention*, *supra* note 2 at 5-7 (summarizing studies demonstrating that educational programs are more effective in reducing juvenile and adult recidivism rates than other responses).

⁵See, e.g., Miller, Last One Over the Wall, *supra* note 2 at 55-80. See generally, James Gilligan, *Violence* (1997) (Chapter 7).

⁶See generally, Patricia Puritz, Sue Burrell, Robert Schwartz, Mark Soler, & Loren Warboys, A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings, 38-40 and 53-55 (1995).

their clients these most-pressing problems. First, the right to representation afforded under the Sixth Amendment to indigent persons accused of criminal or delinquent offenses does not extend to post-disposition or post-sentence challenges to conditions of incarceration. Second, resources for indigent defense are limited,⁷ and decision-makers reasonably apportion those limited resources primarily and almost exclusively to trial work.⁸ Third, the model of criminal defense and "just desserts" from the adult system permeates the juvenile court.

Lawyers, probation officers, judges, and others in the system tend to rationalize that an accused who is found guilty and is "sentenced" gets a deserved punishment and that the case is then over. Under this approach, advocates for children do little preparation for disposition hearings; they tend not to prepare alternative disposition plans; and they tend not to challenge prosecutorial assertions and judicial declarations that children "need" to be put into, and need to remain in, prison-like settings.⁹

⁷See generally, Robert Burke, Mary Broderick, & Julie Walko, *Indigent Defense Caseloads and Common Sense: An Update* (National Legal Aid & Defender Association 1992) at 3-13.

⁸Absent a commonsensical but, nevertheless, unlikely extension of the right to counsel, advocates for children should seek other means or methods for supporting continued legal representation and advocacy. Fee shifting is available for parties prevailing in cases filed under 18 U.S.C. section 1863. Successful civil contempt challenges also provide attorneys' fees.

⁹*Cf generally*, Puritz, et al., A Call for Justice, *supra* note 6 at 51-53 (summarizing the "shortcomings" of juvenile representation at dispositional hearings).

Acting as a litigator¹⁰ representing an incarcerated child, an attorney can address, through three options,¹¹ the failure of the staff and administration at a youth incarceration facility to provide care and rehabilitation.¹² A first option: the attorney can develop and file a law suit, perhaps a class action, challenging conditions of confinement.¹³ A second option: within the delinquency case itself, after the disposition, the attorney can file a motion for an order to show cause why the government agency (and individual personnel and officials) responsible

for the child's care and rehabilitation should not be held in civil contempt for failure to comply with the court's original disposition order that required the government to provide care and rehabilitation.¹⁴ A third option: the attorney can enforce the child's rights under federal, state, and local law to receive appropriate special education and related services. This third option is the focus of the legal and problem-solving analysis in this chapter.

The third option is particularly attractive because a party (parent or majority-age student) prevailing against the school district in a special education matter is entitled to attorneys' fees, from the government, at a reasonable or market rate.¹⁵ Thus, special education advocacy can provide a basis for funding advocates to challenge any and all of the conditions of

¹⁰Attorneys, of course, also advocate through means other than litigation. An attorney, for example, could draft legislation and lobby for legislative remedies for inhumane conditions at an incarceration facility. Many public defenders are prohibited by statute or by contract from engaging in systemic advocacy of that sort. Most public defenders are not in proximity of a state legislature and, moreover, have large-volume caseloads that seem to make legislative advocacy an incomprehensible indulgence.

¹¹The three options presented are, of course, not suggested as substitutes or replacements for motions to reconsider disposition order or appeals of underlying adjudications. A fourth option is to challenge treatment of children by governmental custodians under child abuse and neglect laws.

¹²*See generally*, Patricia Puritz and Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention Report (1998). The authors detail "six. . . methods of improving oversight, monitoring, and services for detained and committed youth. . .", including (1) The Civil Rights of Institutionalized Persons Act, (2) Ombudsman programs, (3) Individuals with Disabilities Education Act, (4) Protection and Advocacy Systems, (5) Administrative Procedure Act, and (6) Self- Assessment. *Id.* at xi-xii.

¹³For a listing of class action suits that challenge conditions at juvenile incarceration facilities and that include educational claims, see Puritz & Scali, *Beyond the Walls*, *supra* note 2 at 18-19.

¹⁴Civil contempt orders are of two types: coercive and compensatory. *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947). The purpose of civil contempt is "[to enforce compliance and] to remedy any harm inflicted on one party by the other party's failure to comply." *Doe v. General Hospital of the District of Columbia*, 434 F.2d 427,431 (D.C. Cir. 1970).

If the government has not implemented the disposition order to provide services or, more generally, to provide care and rehabilitation, an attorney also might ask the court to issue a writ of mandamus to force the youth services agency personnel to provide care and rehabilitation; in the alternative, an attorney might ask the court to reassert its original disposition authority. *See, e.g., In re A.A.I.*, 483 A.2d 1205 (D.C. 1984). In many jurisdictions, the law provides for motions to modify or terminate the disposition order or motions to void the order based upon mistake or newly-discovered evidence. *See, e.g., In re D.W.G.*, 115 D.W.L.R. 2097 (D.C. Super. Ct. 1988). Also, the law must provide a basis to challenge the court's jurisdiction. *See, e.g., D.C. Code Ann. § 16-2324(a)* (1996). On a more mundane note, the law also must provide, in some form, for a motion for release from incarceration.

¹⁵P.L. 105-17 § 615 (i)(3); 34 C.F.R. § 300.513.

confinement that relate to the provision or implementation of special education and related services at juvenile incarceration facilities. Also covered are challenges based upon failures of school system personnel and juvenile incarceration facility personnel to identify children who have educational dis-abilities.

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By enforcing federal, state, and local special education rights on behalf of children, advocates can extricate those children from delinquency placements, jails, and penal institutions. By redefining children as students with potential for being productive, rather than as offenders (or as predators) whom society needs to restrict and repress, adults responsible for children charged with delinquency and criminal offenses can create a system genuinely attuned to goals of care and rehabilitation.

I. The IDEA and children incarcerated in Juvenile facilities.

The fact of incarceration in a juvenile facility does not vitiate a child's right to special education under the IDEA.¹⁶ Courts have long held that children continue to have rights under the IDEA regardless of incarceration.¹⁷ The

¹⁶See, Mary G. Hynes, *Children with Disabilities in Detention: Legal Strategies to Secure Release*, 3 D.C. L. Rev. 299 (1995).

¹⁷See, e.g., *State of Conn. v. State Dept. of Ed.*, 699 A.2d 1077 (Superior Court 1997); *State of Wisconsin v. Trent N.*, 26 IDELR 434 (Wisc. Ct. App. 1997); *Alexander S. v. Boyd*, 876 F.Supp. 773

Office of Juvenile Justice and Delinquency Prevention has recently reported that there are as many as twenty-five pending class action cases on behalf of children incarcerated in juvenile facilities which incorporate an educational claim under the IDEA or the Rehabilitation Act or both.¹⁸

Of particular interest is the court's decision in *Alexander S. v. Boyd*, describing the state's obligations to children incarcerated in both pre-trial detention and post-adjudication incarceration. With regard to children in pre-trial detention, the court adopted the conclusion of the United States Department of Education holding:

In the case of short-term, temporary confinement, the State may meet its obligation under IDEA and Section 504 . . . by implementing the IEP from the previous school district or placement instead of developing a new one. The IEP must be implemented to the extent possible in the temporary setting.. To the extent the implementation of the old IEP is impossible, services that approximate, as close as possible, the old IEP must be provided.¹⁹

With respect to children in long term confinement, however, the court held that the state is obligated to develop a new IEP as soon as the juvenile is transferred to one of the long term institutions.²⁰

(D.S.C. 1995); *Donnell C. v. Illinois*, 829 F.Supp. 1016 (N.D. Ill. 1993); *In re G.C. v. Coler*, 673 F.Supp. 1093 (S.D. Fla. 1987); *Andre H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y 1985); *Green v. Johnson*, 513 F.Supp. 965 (D. Mass. 1981); *In re Marc. A.*, 21 IDELR 341 and 21 IDELR 1079 (N.H. 1994) and *In re JohnK.*, 216 Cal. Ct. App. 1985).

¹⁸Puritz & Scali, *Beyond the Walls*, *supra* note 2 at 18-19.

¹⁹*Alexander S.*, 876 F.Supp. at 153.

²⁰*Id.*

While the 1997 amendments, discussed below, significantly circumscribe the states' obligation to provide special education services to children incarcerated in adult facilities, the amendments have no impact on the rights of juveniles incarcerated in juvenile facilities. In fact, the proposed regulations specifically add "juvenile" correctional facilities as public agencies subject to the IDEA.²¹ The legislative history also emphasizes that the rights of children incarcerated in juvenile facilities are unaffected by the amendments relating to children in adult facilities.²²

II. The IDEA and children²³ incarcerated in adult corrections facilities

The 1997 amendments to the IDEA significantly modify the states obligation to provide special education and related services to children who are incarcerated in adult facilities. Some of these modifications affect only those who are eighteen through twenty-one; others affect all children incarcerated in adult facilities, regardless of age. While the amendments do not completely abrogate the states' responsibility to children with disabilities incarcerated in adult facilities, they do give states considerably more leeway in

²¹Proposed 34 C.F.R. § 300.2. Federal Register, October 22, 1997, p. 55030.

²²"Neither do they [the amendments] affect students who are in juvenile facilities." House Report No. 105-95, p. 95. The same result is evident from the floor debates: "Ms. Boxer. Does this bill make any changes to current law with respect to disabled students incarcerated in juvenile facilities? Mr. Harkin. No." Congressional Record, May 13, 1997, S4376.

²³This section of the chapter contains information regarding young people who are under eighteen years of age and incarcerated in adult facilities, as well as information regarding young people who are between the ages of eighteen and twenty-one (inclusive). To avoid confusion, the authors consistently will use the term "children" rather than "young people" or "young adults".

how they elect to provide services to this population, if at all.

A. Children age eighteen through twenty-one

The 1997 amendments authorize states to exclude from eligibility entirely children aged eighteen through twenty-one who, "in the educational placement prior to their incarceration in an adult correctional facility: (I) were not actually identified as being a child with a disability. . . or (II) did not have an individualized education program."²⁴ In other words, states need not identify any new special education cases among persons who are incarcerated. On the other hand, states continue to be obligated to serve those children who have already been identified as needing special education before their incarceration.

The amendments do not directly speak to the situation of children who have dropped out of school at the time of incarceration. The House Report provides that the law does not exclude students who "had been identified. . . but who had left school prior to their incarceration."²⁵ Comments on the floor of the House tend to support a reading which would require states to provide special education services to students who had once been identified as eligible for special education but who had dropped out of school before being incarcerated.²⁶

²⁴P.L. 105-17, § 612 (a)(1)(B)(ii).

²⁵House Report No. 105-95 at p. 91.

²⁶"Mr. Martinez. . . Members need to understand that disabled children do not often go straight from school to jail. However, the high dropout rate of children with disabilities often lead to these individuals encountering our justice system. . . Fortunately, the provisions in this bill will ensure that those children who drop out and then get into difficulties with our justice system will continue to be served in adult correctional facilities." Congo Recd. May 13, 1997, at H 2536.

However, the House Report also provides that the Act “makes clear that services need not be provided to all children who were at one time determined to be eligible.”²⁷ Thus, presumably, the Act does exclude students who may have been eligible at one point in their educational history but who were no longer eligible at the time of incarceration. Conceivably, for example, a student could receive special education services in elementary school but not need such services in middle school. If such a child were subsequently incarcerated, he or she would not be eligible to receive special education in an adult prison. Thus, continuing eligibility is probably limited only to those students who were eligible or who had an IEP in educational placement immediately preceding their incarceration.

B. All children incarcerated in adult facilities

The remaining amendments to the IDEA relating to children incarcerated in adult facilities affect all children, regardless of age. They include: (1) a new formula for withholding funding from states for failure to comply with the IDEA with regard to children incarcerated in adult facilities; (2) the permissible exclusion of incarcerated students from participation in statewide assessments; (3) new limitations on the obligation to provide transition services to incarcerated children and (4) the addition of penological considerations in developing individualized education programs.²⁸

The new withholding formula allows states to entirely discontinue providing special education services to children incarcerated in adult prisons while incurring only a minimal financial penalty.²⁹ The IDEA authorizes the Governor to “assign to any public agency in the State the

responsibility of ensuring that the requirements of this part are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.”³⁰ Thus, the State Educational Agency no longer need be the ultimately responsible agency for educational special education and related services to children incarcerated in adult prisons. Instead, the Governor may designate another agency, presumably the Department of Corrections, to assume this responsibility. If the state then decides to discontinue providing services to these children, the Secretary of the U.S. Dept. of Education may withhold only that agency's funding. The withholding must be: proportionate to the total funds allotted. . . to the State as the number of eligible children with disabilities in adult prisons under their supervision of the other public agency is proportionate to the number of eligible individuals with disabilities in the State under the State educational agency; and. . . shall be limited to the specific agency responsible for the failure to comply with this part.³¹

This provision enables a state to discontinue providing special education services to children incarcerated in adult facilities without suffering a severe financial penalty. The only funding the state could lose would be the funding specifically allotted for special education services for prisoners. The remainder of the state's federal special education allocation, *i.e.* the allocation for the State Educational Agency, is untouched.

The import of this withholding formula is evident from the following colloquy contained in the Senate debate on the amendments: Mrs. Boxer. . . Under current law, if a State fails to provide special education services to eligible prisoners, that State faces the loss of all Federal special education funding. . . This issue is particularly important to the State

²⁷House Report No. 105-95 at 91.

²⁸P.L.105-17 at §§ 612, 614 and 616.

²⁹P.L.105-17 at §§ 612 and 614.

³⁰P.L.105-17 at § 612 (a)(11)(C).

³¹P.L.105-17 at § 616 (c)(1)(2).

of California. My State does not provide special education services in adult prisons, as a result, it faces the loss of over \$300 million in Federal special education assistance. It seems unconscionable to me that the needs of approximately 600,000 California special needs children could be jeopardized because my State does not provide special education services to an estimated 1,500 prisoners.

It is my understanding that this bill makes several significant amendments to these provisions and dramatically changes the scope of sanctions that can be imposed on States for failing to provide special education services to those incarcerated in adult prisons. Would the Senator elaborate on those changes?

Mr. Harkin. . . Under the legislation, States are authorized to transfer the responsibility for educating juveniles with disabilities convicted as adults and incarcerated in adult prisons from State and local education agencies to other agencies. . .

Mrs. Boxer. What are the consequences of the transfer of authority. . . ?

Mr. Harkin. If a State makes such a transfer and if the Secretary finds that the public agency is in noncompliance, the Secretary must limit any withholding action to that agency. Furthermore, any reduction or withholding of payments must be proportionate to the number of disabled children in adult prisons under the supervision of that agency compared to the number served by local school districts. For example if one percent of the disabled students were in adult prisons, the Secretary could only withhold one percent of the funds.

Mrs. Boxer. In the State of California, approximately one-fourth of one percent of all people eligible for special education are convicted of felonies as adults and incarcerated in adult prisons.

It is my understanding that under this bill, if California does not provide special education services in prisons it stands to lose only one-fourth of one percent of its allotted share...is my understanding correct?

Mr. Harkin. The Senator is correct. . . .³²

While comparable statements were made during the House debate,³³ at least one member emphasized the states' continuing obligation to serve children who either had an IEP or who had been identified as eligible for services in their last educational placement. Mr. Martinez remarked:

While the bill before us today provides several exemptions for serving disabled children in adult correctional facilities, States will still be required to serve those who had an individualized education program in their last educational placement. Members need to understand that disabled children do not often go straight from school to jail. However, the high drop out rate of children with disabilities often leads to these individuals encountering our justice system.

Fortunately, the provisions in this bill will ensure that those children who drop out and then get into difficulties with our justice system will continue to be served in adult correctional facilities.³⁴

For those states which elect to continue providing special education services to children incarcerated in adult facilities, the 1997 amendments narrow the states' obligations in developing and implementing individualized education programs for these children. States need not allow children incarcerated in adult facilities to participate in standardized statewide

³²Congressional Record, May 13, 1997, S4375.

³³During the House floor debate on the IDEA amendments, Mr. Riggs, a member of the House commented: "This bill also allows states, at their discretion, to deny services for adult prisoners while forfeiting only the pro rata share of Federal funding for that small segment of the total IDEA eligible population." Congo Record, May 13, 1997, H2535.

³⁴Congo Record, May 13, 1997, H2535-36.

educational testing.³⁵ The amendments also provide that states need not provide "transition services" to incarcerated children who will be over age twenty-two at the time of their release from prison.³⁶ These services are designed to help adolescent special education students move from school towards self-sufficiency.³⁷ They include an array of options, intended to promote productive post-school activities.³⁸ Transition services must be based on the individual student's needs, taking into account the student's preferences, and may include a variety of learning experiences.³⁹ Despite the obvious rehabilitative benefits of such services, children who may still be young adults capable of leading productive lives at the time of their release need not

³⁵“The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. . . the requirements. . . relating to participation of children with disabilities in general assessments.” P.L.105-17 at § 614 (d)(6)(A)(i).

³⁶“The requirements. . . relating to transition planning and transition services. . . do not apply with respect to such children whose eligibility under this part will end, because of their age, before they will be released from prison.” P.L.105-17 at § 614 (d)(6)(A) (ii).

³⁷“The term ‘transition services’ means a coordinated set of activities for a student with a disability that - (A) is designed with an outcome-oriented process, which promotes movement from school to post-school activities. . . .” P.L.105-17 at § 602 (30).

³⁸Transition services may include post-secondary education, vocational training, integrated employment, continuing and adult education, adult services, independent living, or community participation. P.L.105-17 at § 602 (30)

³⁹Such experiences may include instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, if necessary, daily living skills and functional vocational evaluation. P.L.105-17 at § 602 (30).

receive transition services while incarcerated.

This provision reflects Congress’ determination that transition services would serve no rehabilitative purpose for persons who will not be returning to society.⁴⁰ However, by excluding all persons who will be over age twenty-two upon release, the statute deprives individuals who would most likely benefit from transition services as they integrate back into society. The legislative history strongly suggests that transition services continue to be appropriate where they will assist a young adult return safely and productively to society.⁴¹

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An individualized education program that contains meaningful and comprehensive special education, related services, and transition services can provide a safe and productive alternative to preventive detention or post-disposition incarceration.

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Finally, states are now authorized to modify a child’s IEP based on “a bona fide security or compelling penological interest that cannot

⁴⁰“Mr. Harkin. . . This exception applies to those inmates for whom special education will have no rehabilitative function for life after prison. Our aim in assuring that prisoners receive special education is to make them better able to cope after prison, resulting in a safer environment for all of us. This goal does not apply for those who will not return to society. . . .” Congo Record May 13,1996 S4376.

⁴¹“Mr. Harkin: . . . Our aim in assuring that prisoners receive special education is to make them better able to cope after prison, resulting in a safer environment for all of us.” Congo Rcd. May 13, 1996 S4376.

otherwise be accommodated.”⁴² Just what type of situation will constitute a “bona fide security interest” or a “compelling penological interest” is not clear. The language of the exception itself suggests that least restrictive environment considerations, i.e., the requirement that a child with a disability be educated with non-disabled peers “to the maximum extent appropriate,” factor into the exception.⁴³ Thus, for example, a state may rely on this exception to segregate a prisoner receiving special education services from the general prison population for security reasons. The legislative history suggests that, in the case of a child who has been incarcerated in an adult facility and sentenced to death or life without parole, a state would be justified in discontinuing services.⁴⁴ What other situations may be included will be determined as states rely on this exception over time.

III Using the IDEA in representing children in delinquency matters or in criminal cases:

Getting them out and keeping them out of incarceration

A. In general

Special education advocacy is -- as described in

previous chapters -- a means for delinquency clients to gain access to services that can substitute for or negate the perceived need for preventive detention and post-disposition incarceration. An individualized education program that contains meaningful and comprehensive special education, related services, and transition services can provide a safe and productive alternative to preventive detention or post-disposition incarceration. Similarly, in the adult correctional system, if services are available through the special education system, the court may determine that the risk of dangerousness is diminished and that the corresponding benefit of rehabilitation can be accomplished in the community.⁴⁵

Ultimately, success in educating and empowering children in the delinquency system can influence the adult criminal system. The influence will be direct, as advocates enforce special education law on behalf of young people incarcerated in adult facilities. The influence will also be indirect and pervasive, as advocates demonstrate that education and individualized services are more effective than imprisonment.⁴⁶ [need references back to other notes in this note.]

B. Oliver's case: Using special education advocacy to extricate a child from incarceration facility

⁴²“If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child’s IEP Team may modify the child’s IEP or placement notwithstanding the requirements of [the least restrictive environment] if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodat-ed.” P.L.105-17 at § 614 (d)(6)(B).

⁴³P.L.105-17 at § 614 (d)(6), referencing § 612 (A)(5)(A) (least restrictive environment).

⁴⁴“Mr. Harkin. Public agencies may modify an IEP for bona fide security or compelling penological reasons. For example, the public agency would not be required to develop an IEP for a person convicted as an adult and incarcerated in an adult prison who is serving a life sentence without the possibility of parole or is sentenced to death.” Congo Record May 13,1997 S 4376.

⁴⁵The attorney should search for statutory provisions that allow adult criminal courts to order treatment (rather than standard incarceration sentences) for the youthful offender who demonstrates a capacity to benefit from rehabilitative services. *See, e.g., D.C. CODE § 24-801, et seq.*

⁴⁶*But see, Bishop & Frazier, infra note 53 at 298-99 (positing that successful deinstitutionalization efforts resulting in fewer restrictive juvenile system placements led decision-makers to increase transfer rates to adult system); but see generally, Miller, Last One Over the Wall, supra note 2 at 12-14 (suggesting that deinstitutionalization efforts can be essentially illusory).*

Judges, lawyers, social workers, educators, evaluators, and parents regularly misconstrue children's needs and, as a consequence, continuously pound children with disabilities -- square pegs, so to speak -- into delinquency system, round-hole "remedies"! Oliver's experiences exemplify this phenomenon.

As a young child, Oliver changed schools often. He stuttered. He repeated the first grade; he was in the third grade for three and a half years; and he repeated the seventh grade. School system personnel also, however, "skipped" Oliver from the first grade to the third grade and from the fourth grade to the sixth grade, ostensibly to get him in classes with children closer to his age. Throughout elementary school, Oliver's grades were consistently low. Accompanying comments from teachers on report cards indicated, not surprisingly, that Oliver was having difficulties and needed extra help. Notwithstanding Oliver's tell-tale troubles, school system personnel did not initiate an evaluation to determine whether Oliver had an educational disability.

Early in his elementary school years, Oliver became what teachers often refer to as "a behavior problem." According to Oliver's mother, Oliver was suspended for long periods during his first year in third grade. The mother successfully challenged one of the suspensions. After that successful challenge, however, school personnel began to isolate Oliver in the principal's office. The principal -- again, according to the mother -- literally placed barriers around Oliver in the office and, further, ordered teachers and students not to interact with Oliver. The mother asked school personnel what could be done to help Oliver do better in school. No one informed her of her rights to have Oliver evaluated for special education.

Standard scores on achievement tests revealed uneven performance from year to year, as well as some gaps between Oliver's achievement and his performance in school. Truancy became pronounced when Oliver was in the third grade for

the third time and was an entrenched problem by the time Oliver was in the seventh grade.

When Oliver was twelve years old, his older brother was killed. This death was a trauma for Oliver. A subsequent trauma for Oliver was his witnessing the murder of a friend of his sister. Both of Oliver's parents struggled with drug usage, and Oliver's father left the family not long after the death of Oliver's brother. Apparently, Oliver received no counseling or other services to help him to cope with these traumas and family problems. Oliver's drug use began when he was twelve or thirteen years old.

Oliver engaged in substantial delinquent conduct that resulted in his court-involvement beginning at the age of thirteen. His record includes adjudications for possession with intent to distribute cocaine, possession of marijuana, and unauthorized use of a vehicle. He also missed scheduled court dates and was incarcerated in a maximum-security juvenile facility for the first time when he was fourteen.

Coincident with incarcerating Oliver, the court ordered a referral for special education testing. The testing did not occur for almost another year. That testing resulted in a determination that Oliver was seriously emotionally disturbed and that, therefore, he was eligible for special education services. No special education advocate represented Oliver during the process of that first evaluation and during the formulation of his initial individualized education program (IEP). In addition, the mother apparently did not receive notice and took no part in the creation of the IEP. Persons who prepared that IEP did not identify Oliver as having a learning disability or a speech/language disorder. Consequently, in the initial IEP, they did not adequately address Oliver's educational needs.

Subsequently, when Oliver was sixteen, he and his mother engaged a special education

attorney.⁴⁷ At that time, Oliver was incarcerated in a six-month drug program at a maximum security juvenile facility. During the first interview, the attorney observed that, although Oliver spoke rapidly and intelligently, he almost constantly expressed tangential thoughts. He seemed "hyper" and was unable to express himself clearly. In signing a release form, Oliver omitted a letter from his own name. He also struggled with providing the seven digits of his phone number in the proper order. Towards the end of the conversation, Oliver presented his belief that he may be "more focused" when he is using drugs.

The attorney obtained from Oliver a detailed school history; later, the attorney interviewed Oliver's mother at length to learn about Oliver's school history from her perspective.⁴⁸ In addition, the attorney retrieved school records spanning Oliver's entire school history from the public school system and from the juvenile incarceration facility. Based upon those records, the attorney compiled a chart to summarize the school history.

The attorney requested new evaluations from the public school system for Oliver and arranged for a private, Medicaid-funded, medical evaluation. A speech pathologist tested Oliver and reported that Oliver exhibited a moderate-to-severe receptive language disorder and a mild-to-moderate expressive language disorder; that evaluator identified a possible language-related learning disability and recommended direct intervention in the form of speech/language therapy. In the same period, an educational psychologist tested Oliver and reported

observing "no distractibility". She found Oliver's overall cognitive functioning to be in the borderline range, with a full-scale IQ of 71, a verbal IQ of 66, and a performance IQ of 80.⁴⁹ The psychologist noted that the disparity between performance IQ and verbal IQ was statistically significant and indicated likely effects of emotional and language deficits. Oliver subsequently took a separate test of nonverbal intelligence (TONI-2) and scored 93; that score is within the average range of intelligence.

Academic achievement testing performed in conjunction with the evaluation of Oliver when he was sixteen established grade equivalents in five language-related sub-tests registering in the first- grade range. These results put Oliver in the .1 percentile for his chronological age.⁵⁰ He scored higher in math-related sub-tests, measuring predominantly in the fifth-grade range, with percentile rankings between ten and seventeen. The educational psychologist also noted problems for Oliver with visual motor integration skills and fine-motor skills involving pencil and paper, as well as weakness in auditory perception. The psychologist concluded, not surprisingly, that Oliver needed "positive learning experiences, guidance, support and structure."

⁴⁷The IDEA confers standing on the parents of children with disabilities to pursue the special education rights of their children. *Tschanner v. District of Columbia*, 594 F. Supp. 407 (D.D.C. 1984). Cf. P.L.105-17 at § 615 (m).

⁴⁸Both Oliver and his mother reported that Oliver had stuttered during his pre-school and early school years.

⁴⁹The intelligence testing performed in the evaluation process one year earlier indicated a full-scale IQ of 68, performance IQ of 77, and verbal IQ of 63. The overall score of 68 falls within the range of mild mental retardation. IQ scores alone, however, call not establish whether a person is mentally retarded. One must also measure and consider the individual's adaptive functioning (*i.e.*, how the individual adapts to the environment in terms of self-care skills and other everyday functions). A standard test for adaptive functioning is the Vineland.

⁵⁰This percentile ranking indicates that 99.9% of his peers are functioning at a higher level in language- based skills.

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The IEP case manager, a public schools employee, refused to add to the IEP that Oliver was learning disabled or speech/language impaired. Even when the evaluators endorsed these conclusions regarding Oliver's disabilities, and even after the special education attorney cited the regulation providing that a child can have more than one disability, the case manager refused to change the disability classification on the IEP.

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A clinical psychologist who tested and interviewed Oliver when he was sixteen as part of the special education evaluation found evidence of chronic depression, evidence of a reading disorder and a disorder of written expression, and no evidence of psychosis. The clinical diagnosis included "Adjustment Disorder with Depressed Mood", "Dysthymic Disorder, Early Onset", and "Cannabis Abuse". Both the psychologist and a psychiatrist, who also interviewed Oliver, recommended that Oliver be placed into a therapeutic, residential facility.

Upon request of the mother and Oliver through the special education attorney, the public school evaluators and other personnel met with Oliver and with the attorney at the juvenile incarceration facility to devise a new IEP. Oliver's mother did not attend the IEP meeting. The aftercare worker (parole officer), however, did attend. With his special education attorney, Oliver prepared for the IEP meeting. At the meeting, Oliver sat beside his aftercare worker. He communicated with her and with the attorney in appropriate ways during the meeting.

The IEP case manager, a public schools em-

ployee, refused to add to the IEP that Oliver was learning disabled or speech/language impaired. Even when the evaluators endorsed these conclusions regarding Oliver's disabilities, and even after the special education attorney cited the regulation providing that a child can have more than one disability, the case manager refused to change the disability classification on the IEP. Everyone "agreed to disagree" and to include in the IEP, nevertheless, services to address Oliver's speech/language disorders and learning disabilities. The IEP also contained individual and group counseling for Oliver, as well as vocational training and other transitional services.

Also at the IEP meeting, the counselor principally responsible for Oliver at the incarceration facility, speaking in loud and angry tones, attacked Oliver for his lack of effort and for his negative attitude. Oliver maintained his composure. The evaluators discussed how Oliver had cooperated with them during the testing process, and a teacher at the facility praised Oliver for working hard and behaving well in school. Oliver presented some of his ideas about his educational needs and responded to his counselor's attacks in a calm and reflective manner. These exchanges at the IEP meeting seemed to impress the aftercare worker.

Based on the new IEP, the special education attorney located a private, special education day school for Oliver. The school is a 100 percent special education program for children with learning disabilities and serious emotional disturbance. The school also provides a strong vocational component; students in the school's building trades program, for example, participate over the course of an academic year in building a home from the foundation up. Based upon a re-request from the special education attorney, public school personnel agreed to place Oliver at the school and to pay the tuition and other costs, and to provide transportation.

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The evaluation results and recommendations developed through the special education evaluation when Oliver was sixteen contrasted radically with the information generated through the delinquency system that was presented to judges in anticipation of disposition hearings when Oliver was thirteen and fourteen years old.

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At the subsequent court hearing, the aftercare worker disclaimed a negative report about Oliver that she had written and submitted to the court prior to the IEP meeting. The aftercare worker explained to the judge (who had retained power to determine Oliver's release date) that Oliver had never before been diagnosed properly. The aftercare worker endorsed removing Oliver from the incarceration facility, placing him in a group home, and allowing him to attend the private special education day school. The judge responded by proclaiming that the decision did not revolve around Oliver's educational disabilities and his special education needs. The special education attorney explained, in some detail, Oliver's educational history and needs, concluding that Oliver's special education needs were indeed pivotal to the decision in the delinquency matter. The aftercare worker strongly endorsed the attorney's conclusions. The delinquency attorney, of course, agreed, as well. The judge ordered release.

The evaluation results and recommendations developed through the special education evaluation when Oliver was sixteen contrasted radically with the information generated through the delinquency system that was presented to judges in anticipation of disposition hearings when Oliver

was thirteen and fourteen years old. The probation officer who prepared the pre-disposition reports for the judges wrote only that Oliver had behaved poorly and scored poorly in school, that he was constantly truant, and that he had repeated several grades. One must assume that Oliver's defense attorneys had added nothing, being themselves unaware of Oliver's educational disabilities and unaware also of the failure of school system personnel during Oliver's entire school career to identify or address those disabilities. Thus, the delinquency judges who passed judgment on Oliver and ordered his incarceration knew little about his school history and absolutely nothing about his educational disabilities.

Oliver's circumstances and reactions typify in several respects the circumstances and reactions of many children who are in serious trouble in the delinquency system and who are incarcerated. First, Oliver's parents did not provide a stable home for him. Second, Oliver has, and has always had, learning disabilities. No one diagnosed or addressed those disabilities throughout his elementary school years. Third, he experienced multiple traumas and received no noteworthy services to address his serious emotional problems. Fourth, Oliver's school failure began early, and he continued to fail in school without any meaningful intervention. Fifth, after years of failure in school, Oliver began to skip school and run away from home. Once in the delinquency system, he also ran away from halfway houses and other non-secure placements. Sixth, Oliver used drugs and sold drugs. Seventh, although Oliver has no history of violent conduct, he was incarcerated at a young age (fourteen) and there-after spent much time incarcerated.⁵¹

⁵¹The Court ordered that Oliver reside in a delinquency group home, a facility that housed a total of ten adjudicated delinquent children. Soon after his placement in the group home, Oliver became embroiled in a conflict regarding the Ownership and possession of a coat. Fearing for *his* safety, Oliver left the group home without permission. While he

C. Using special education advocacy on behalf of young people facing incarceration in adult correctional facilities

1. Transfer from juvenile court to criminal court

An attorney can use special education advocacy effectively in representing a child with a disability who is facing judicial transfer to adult criminal court. For example, in *State v. Michael S*, the court held that the government's failure to adequately explore Michael's potential for rehabilitation in the juvenile system, with special education assistance, precluded the government's request that Michael be transferred to the adult criminal system.⁵² A necessary step for the attorney is to excavate the child's school records and to conduct a thorough investigation of the child's school history. As in Oliver's case, above, the attorney can then demonstrate that the child has an educational disability, that school personnel (as well as juvenile system personnel) never diagnosed or addressed the child's learning needs, and that the child has rights to both a comprehensive evaluation and to appropriate services.

If the standard for transfer requires a judicial finding that the child is not amenable to

was "on the run" from the group home, Oliver stopped attending school. In short order, the police arrested Oliver on a new drug charge, and the Court ordered detention, again.

Oliver prevailed at trial in the new drug case. Working with the defense attorney who represented Oliver in the old case and in the new case, the special education attorney arranged for Oliver's release to a program that provides supervised living for Oliver in his own apartment. In addition, Oliver switched schools again -- to another 100 percent special education school -- and is receiving counseling and other related services.

⁵²*In Re Michael S.*, 423 S.E.2d 632 (W. Va. 1992).

services,⁵³ the attorney can attempt to defeat the transfer by proving that the child never received services to which the child is entitled under federal, state, and local law.

2. Convincing a criminal court judge to order probation rather than incarceration

In cases in which a convicted young person is not facing a mandatory minimum sentence, attorneys should be able to obtain at sentencing, with remarkable frequency, orders for probation rather than orders for incarceration. Attorneys should remember, in particular, the requirement under special education law for the school system to provide related services (including individual and group counseling) and transition services (including job training). The availability of these services adequately provide legitimate alternatives to incarceration. Indeed, the recent limitations on the states' obligations to provide special education services to juveniles in adult correctional facilities may make the argument for probation, as opposed to incarceration, more compelling. A young person with a disability in the community may be entitled to special education and related services which no longer need be provided in adult correctional facilities. Thus, counsel may be able to argue that the only means of ensuring that the young person receive certain special education services is to allow that person to remain in the community.

⁵³*But cf: generally*, Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 295 (1991) (study of prosecutorial waiver in Florida finding, inter alia, that -- notwithstanding transfer standard of non amenability to treatment -- only 29 percent of transfers in two counties studied involved the alleged commission of a felony against persons). Thus, based on the relatively non-serious level of offenses in most transfer cases, one cannot conclude that decisionmakers, in making decisions to transfer, are genuinely finding youth nonamenable to treatment.

An attorney should seek agreement from the client, in some cases, to suggest that the judge require that the client Participate in special education services as a condition of probation. Making this "offer" to the judge sometimes helps to convince the judge and the prosecutor that they are taking a risk that is manageable and that is not unreasonable.⁵⁴

A probation officer (or other government or court functionary responsible for preparing a pre-sentence report for the Court) may have a large caseload and, thus, may have difficulty arranging programs and services for young people facing sentencing in criminal matters. In such a case, an attorney may optimize the likelihood of obtaining an order of probation rather than incarceration by arranging special education services, formalized in an IEP. Further, by providing the plan for services and the IEP to the probation officer in advance of sentencing, the attorney will likely increase the chances that the probation officer will adopt the plan and incorporate the plan into the pre-sentence report. Obviously, to whatever extent is necessary, the attorney should work with the probation officer -- and negotiate with the probation officer -- in order to convince the

⁵⁴If the young person with adult criminal matters pending still has open cases in the delinquency system, the attorney can arrange services through the special education system, as well as through the delinquency system. The attorney then can offer those services as an alternative to incarceration in the adult system. Again, the attorney may find that proposing to make those services a condition of probation in the criminal case helps to convince a judge and prosecutor to agree to the arrangement.

If the child is not eligible for special education services, the defense attorney may attempt to arrange for services through the delinquency system. If the child's cases in the delinquency system are in a post-disposition posture, the attorney might be able, nevertheless, to negotiate for services through a mutually-requested revocation of aftercare (parole). Services through the delinquency system could then become conditions of probation in the criminal case.

probation officer to adopt and incorporate the special education sentencing plan.

3. Martin's case: Using special education advocacy to extricate a young person from incarceration in an adult facility

Martin has an extensive juvenile delinquency record. He is also learning disabled and emotion-ally disturbed. He has been in a number of special education placements including a residential treatment facility. After turning eighteen, Martin continued to get arrested. Primarily, he was arrested on relatively minor charges.

By the time he was nineteen, Martin had a couple of adult criminal convictions. He also allegedly had violated conditions of probation and was facing additional charges for leaving a halfway house and for failing to appear in court. These latter charges resulted in preventive detention in the adult jail pending a probation revocation hearing and a trial on the failure to appear charge.

The criminal court judges encountered Martin as a young person "with an attitude" who regularly seemed to disobey court orders. One of those judges assured Martin that he had received "his last break". The special education advocate compiled evidence of Martin's education-related disabilities, including information from previous psychological and educational evaluations. The advocate provided to the judge that compilation with a detailed cover letter that explained Martin's disabilities and his educational history. Then, coordinating with the criminal defense attorney, the special education advocate appeared at the probation revocation hearing.

The judge who previously had issued the "last break" to Martin listened attentively to the advocate's presentation. In a remarkable and surprisingly-intense moment, the judge stopped the proceeding to address the law student advocate. The judge thanked the student for providing the cover letter and other materials

and for making the oral presentation. The judge explained that he ordinarily spends only a few minutes with each defendant and observes each defendant's demeanor in court without having any other context through which to know that person. The judge acknowledged that he had "judged" Martin to be a person with an attitude problem and had made a note to revoke Martin's probation and order incarceration if Martin violated any conditions of the probation. The judge, in addition, reiterated that he had promised Martin and everyone else that he would incarcerate Martin if and when Martin messed up again. But the judge then thanked the law student for helping the judge to understand some things about Martin, and the judge gave Martin another chance at probation.

4. Jack's case: Building a case for moving a serious, violent offender from an adult facility to a residential treatment center

Jack's family background and educational background are an amalgam of neglect. As a young child, Jack was the target of emotional and physical abuse, and he did not receive sufficient support to meet his daily needs. Upon entering elementary school, consequently, Jack demonstrated serious emotional problems.

Unfortunately, educational neglect compounded the earlier neglect. Jack failed the first grade, and school system personnel failed to suggest an evaluation or to diagnose Jack's emotional disturbance and learning disabilities for several years. Even after school personnel identified Jack as disabled, they failed to provide appropriate services.

In contrast, Jack was identified early – before he was a teenager – as a delinquent child. From the age of twelve through seventeen he stayed in a series of delinquency group homes, juvenile incarceration facilities, and residential treatment facilities. Increasingly, Jack resisted attempts at

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 Jack failed the first grade, and school system personnel failed to suggest an evaluation or to diagnose Jack's emotional disturbance and learning disabilities for several years. Even after school personnel identified Jack as disabled, they failed to provide appropriate services.
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intervention and withdrew from people; he was hostile to adults and, particularly in incarceration settings, to other children. In addition, Jack's propensity to violence focused on women, perhaps as a consequence of having witnessed domestic violence in the home and having been himself a victim of emotional cruelty and physical abuse.

At the age of seventeen, as a result of placement order in a delinquency case, Jack was residing at a private residential treatment facility in a neighboring state. Left alone with one other resident and with a female nurse, Jack physically attacked the nurse, took her keys, and attempted unsuccessfully to escape from the facility. Administrators of the private residential facility terminated Jack from their care, and state officials transferred Jack back to the juvenile incarceration facility.

During the time that Jack was at the juvenile incarceration facility (following his expulsion from the residential treatment center), special education counsel met and discussed with Jack his continuing interests in obtaining special education, related and transition services. Jack expressed tremendous anger regarding the "treatment" he had previously received in juvenile jails and residential treatment centers.

Notwithstanding his anger regarding previous treatment and educational experiences, Jack identified several objectives that he and counsel

recognized as relevant to the process of formulating an IEP. For example, although Jack's mother was dead and his father's whereabouts were unknown, Jack was quite focused on maintaining and strengthening a relationship with an adult relative who could serve as a surrogate parent both for educational and familial purposes. Thus, he agreed to participate in family counseling with his maternal aunt, and he affirmatively agreed with putting parent counseling (with the aunt) or family counseling in the IEP.

Jack readily verbalized vocational goals and, with hesitation, articulated some academic goals. The vocational goals translated directly into proposals for transition services in the IEP. Jack's hesitation in articulating academic goals arguably stemmed from many years of school failure and his related feelings of humiliation and rejection. Still, he recognized that he would be interested in studying in a one-on-one setting with a "good" teacher.

Jack and his counsel participated in an IEP meeting and convinced the rest of the team members that the various services (outlined in general terms above) that Jack had agreed to pursue were indeed appropriate for him. The IEP required placement in a twenty-four hour residential treatment setting with one-on-one teaching, appropriate vocational training and transition services, recreation, and family/parent counseling. In recognition of Jack's academic potential, extremely low function, and language-based disabilities, the participants also incorporated computer-based instruction into the IEP.

Subsequently, Jack was charged as an adult in criminal court based upon the assault of the nurse. The court transferred Jack to a jail in the neighboring state and preventatively detained him pending trial. While incarcerated in the adult facility, Jack did not receive educational services of any sort. Jack was convicted of an aggravated assault and attempted grand larceny. At sentencing in that case, Jack's defense attorney proposed that the court suspend imposition of the adult sentence and return Jack

for placement in the juvenile incarceration facility in Jack's home jurisdiction pending placement of Jack by the school system in an appropriate, secure, residential treatment facility. At the sentencing, the defense counsel called Jack's special education attorney as a witness. Both the defense attorney and special education counsel proposed that the sentencing judge maintain control, a veto power, over Jack's subsequent placements and the power to return Jack to adult prison, if appropriate and necessary, following Jack's twenty-first or twenty-second birthday.

Jack's aftercare worker (parole officer) in his juvenile case supported the plan to return Jack for placement in an appropriate residential treatment facility. She recognized that the youth services (juvenile delinquency) agency and the public school system would be responsible for splitting the cost of Jack's residential care and education. Thus, the availability of treatment potentially provided officials and administrators from the neighboring state an opportunity to avoid the financial burden of incarcerating Jack. Moreover, adult correction system personnel in the neighboring state are apparently ill-prepared to provide special educational services to Jack and other young people incarcerated in adult facilities. Hence, by returning Jack to his home jurisdiction for an educational placement, the judge could have ensured that Jack received his federally- and locally-mandated rights to special education services. In addition, the judge could have helped adult corrections personnel avoid a potential challenge (through the special education adjudication system) based upon their inability to provide Jack with a free, appropriate public education.

The judge, nonetheless, sentenced Jack to twenty years in prison, refusing to suspend the sentence and return Jack to his home jurisdiction for special education placement in a residential treatment facility. The sentencing strategy failed, in part, because special education counsel failed, prior to the sentencing, to find a residential treatment facility that was appropriate for Jack.

In addition, the overall preparation for the sentencing hearing was arguably inadequate and, self-evidently, was insufficiently persuasive. Notwithstanding those shortcomings and setbacks, counsel began the day after the hearing to devise and implement plans to challenge the sentence and counsel will continue to seek an appropriate placement and appropriate services for Jack.

5. Daniel's case: Mitigating sentence, improving the quality of time served

Like Jack, Oliver, and others described in this chapter, Daniel experienced little more than failure in school from the earliest grades through, ultimately, the point of his incarceration as a teenager. Daniel's public kindergarten teacher wrote on his report card, literally, that he was "failing" kindergarten. A succession of teachers wrote essentially the same comment. Daniel failed year after year in elementary school. Some years, school administrators would allow Daniel to move into the next grade; other years, they would "hold him back".

No one referred Daniel for a special education evaluation. At the age of fifteen, Daniel was arrested and charged in delinquency court for an alleged assault with a dangerous weapon. His mother did not attend the initial hearing, and the judge ordered preventive detention, finding that Daniel -- who had no previous record -- would present, if released pre-trial, a danger to others.

At that point, Daniel and his mother engaged counsel from the UDC School of Law Juvenile Law Clinic to represent them regarding special education matters. Special education counsel (a law student working under the supervision of a clinical professor) requested from the school system a special education evaluation for Daniel. In the meantime, working collaboratively with the delinquency defense attorney, special education counsel also prepared a motion to reduce Daniel's level of detention. The defense

attorney had not yet filed that motion, however, when the government moved to dismiss their case against Daniel. The case was dismissed, and Daniel was released.

Daniel resisted the special education evaluations, but when the law student (special education counsel) accompanied him, Daniel cooperated somewhat with the evaluators. The evaluators concluded that Daniel was both mildly mentally retarded and emotionally disturbed. A psychologist reported that, based upon a consistent failure to negotiate the environment, Daniel was extremely frustrated and was a time bomb waiting to explode.

A first special education placement for Daniel provided approximately fifteen hours per week of specialized instruction in a public school environment. He was also supposed to receive counseling as a related service. Daniel and the special education providers were a dysfunctional team. Daniel resisted the education and related services; the providers routinely failed to show up and failed also, when they did show up, to engage Daniel.

Daniel let counsel know that he was dissatisfied with the special education services and placement. He had experienced nothing but failure, and he did not want to continue with school. Daniel's mother was not prepared to assert a view or position that contradicted Daniel's; on the other hand, perhaps she knew that, given Daniel's consistent failures in school, she would not be able to convince him to trust in the process. She instructed special education counsel to represent Daniel based upon his desires.

The public school special education case manager and the evaluators asserted a position that the current placement was not appropriate for Daniel, and, remarkably, they argued that Daniel needed a twenty-four hour per day, residential treatment placement in order to benefit educationally. Daniel stopped attending school. According to instructions from the

clients, Daniel's special education counsel took no position and took no action. School system personnel also took no action: they did not issue a notice of placement for Daniel, and they did not seek to enforce, through the administrative hearing process, their position that Daniel required a more restrictive educational setting. Daniel and his mother did not respond to contact from the special education counsel, and eventually allowed the representation to terminate.

Approximately a year later, Daniel, then seventeen, and another young man became entangled in a verbal altercation with an off-duty police officer; the two young men returned to the scene of the altercation and shot and killed the officer. Daniel was convicted as an adult of second-degree murder. At the sentencing, with Daniel's permission, special education counsel provided information regarding Daniel's lamentable school history as mitigation evidence. Daniel, at eighteen years of age, re-engaged special education counsel to ascertain whether Daniel can obtain special education services. Daniel has been sentenced to forty-six years to life.

6. Defeating a petition to revoke probation (or parole)

People who have a receptive or expressive language disorder, by definition, are likely to misunderstand or inaccurately process what other people say to them. They, therefore, relatively frequently do not comprehend instructions. A young person with such a disorder may constantly "mess up" by failing to meet at appointed times with a probation officer, by failing to attend scheduled drug tests and court dates, etc. In many cases, these failures translate into petitions to revoke probation.

Probation officers, prosecutors, defense attorneys, and judges rarely recognize that the young person with a language processing disability is simply not able to comply with the myriad instructions. Rather, people predictably ascribe a "negative attitude" to the young

person. People fail further to recognize the need to accommodate the young person by simplifying directions, drawing maps, writing out instructions, accompanying or "travel training" the young person, making more reminder calls, etc.⁵⁵

In defending a young person with a receptive or expressive language disorder in a probation revocation hearing based upon charges that the child violated conditions of probation, an attorney can call a special education teacher who works with the child or a psychologist who has evaluated the child to prove that the child's non-compliance with conditions is not volitional and that, on the contrary, the adults surrounding the child have misunderstood fundamentally the child's needs. The same analysis, obviously, applies to revocation of parole (or aftercare).

IV. Running into walls on the way to prison deconstruction

To deconstruct delinquency incarceration facilities and adult corrections facilities, one must confront and surmount conceptual and concrete barriers.⁵⁶ [Change note to reflect earlier citation of Miller's book.] One barrier is the dearth of programs that effectively address young people's problems and build upon their strengths.

In releasing Oliver, the judge ordered that he go to a group home. Oliver had eloped, absconded, or -- in the vernacular -- run away from group homes before. Even when buttressed by services at a private special education school, a group home placement constituted a high-risk option

⁵⁵One might research, as well, whether the failure to accommodate constitutes a violation of other federal, state, or local anti-discrimination laws. Such an inquiry is beyond the scope of this article.

⁵⁶For an enlightened and pathbreaking tour of a statewide demolition operation, see Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools* (1991).

for Oliver. He ran away, ostensibly in response to a confrontation with another child regarding the ownership of a coat. The special education attorney again retrieved Oliver, with a successful legal argument, from the incarceration facility; the Court re-ordered a group home place. Oliver ran away again; the cycles of failure continue to spin.⁵⁷

Some interventions are remarkably effective in reducing recidivism for serious offenders.⁵⁸ [Change this note also to reflect earlier citation to Miller's book.] Chart __ presents program characteristics, in a listing developed by Richard W. Sammons, a juvenile justice consultant. Characteristics listed in the left column of the chart are associated with traditional programs; in the right column are characteristics associated with more effective programs.

Rather than accepting boilerplate IEP language, the child and the parent should carefully consider and help craft the IEP educational goals and objectives. Further, they should strive to include in the IEP appropriate related services and transition services. Music therapy, art therapy, family counseling, individualized recreational programming, tutoring, and internships are examples of the kinds of services that one might consider.

⁵⁷The clinical psychologist and psychiatrist who evaluated Oliver both recommended that Oliver go to a residential therapeutic center. Indeed, Oliver may yet go to such a placement. Arguably, these centers are necessary for some children. The cost per child is extraordinarily high, and, in many cases, the child returns from a year or two in treatment to the same problems that existed before the child left. Often, the child has not meaningfully confronted family crises, nor have the residential treatment center staff helped the child to address substantially the child's educational and vocational needs.

⁵⁸See generally, Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools*, 151-226 (1991).

Based on their discussions and agreements, Davitt and his attorney pushed at the IEP meeting for a daily schedule for Davitt that included half the day in a computer-based educational program to accommodate Davitt's language-processing problems, with a one-on-one teacher, using age-appropriate and academically-appropriate software. They also proposed that, after one semester in school, Davitt participate in a computer-repair training course. Davitt and his attorney proposed also that Davitt work at a barber shop in the afternoons and that he have a job coach. Davitt and his attorney also advocated to include tutoring and instruction so that Davitt could get his barber's license as well as his driver's license. They also proposed music therapy based on Rap Music as a means for Davitt to explore language arts and to explore math concepts (based on the complex rhythms in the music). They also proposed that Davitt participate in a course for learning-disabled teenagers on anger management, conflict resolution, and decision-making offered at night, once a week, in a local church.

School system personnel participating in the IEP meeting for Davitt resisted several of the more creative or unusual proposals that Davitt and his attorney made. The Rap Music emphasis in particular, and music therapy in general, troubled several of the participants. Nevertheless, the IEP and overall release plan were sufficient to convince the judge to release Davitt from the juvenile incarceration facility. For example, Davitt has a mentor and is enrolled in the fourteen-week course. The one-on-one, computer-based educational component has been arranged. Personnel from the youth services agency are providing (or have agreed to provide) some of the services; school system personnel are providing (or have agreed to provide) other services. (Davitt was released a matter of weeks prior to this writing.) Davitt and his attorney continue to advocate informally and search for the remaining services – including Rap-based music therapy – that the team members refused to include in the IEP. Using the administrative litigation process, Davitt and his attorney are prepared to pursue those remaining services.

Martin's case re-visited: One example of bouncing between public and private school placements

Part of the difficulties in the school history of Martin, the young man described above (in section III(C)(3)), was his having bounced between private and public school placements. Fairly early in his special education schooling, Martin attended a private, 100% special education day program. That private school program was expensive. Public school administrators re-assigned Martin to a purportedly comparable public school program. Martin's parent – who was not, at that time, represented by special education counsel – did not effectively challenge the placement. That program was overcrowded, and Martin did not receive the special education and related services to which he was entitled.

Following additional delinquency involvement, Martin went off to a residential treatment center in another state. (Martin's jurisdiction, the District of Columbia, essentially has no residential placement facilities that accept children from the delinquency system.) Unhappy being far wary from home, Martin contemplated the rules at the treatment center and recognized that he could effectuate his release by starting a fire. He did that and was sent home.

Martin subsequently returned to the private school placement. That second stint at the private school was disrupted when Martin was arrested, charged with a delinquent act, and incarcerated for a period of months in a juvenile detention facility. Public school personnel claimed that the private school administrators were unjustly requesting payment for Martin for the period of time during which Martin was detained. The private school administrators, for their part, claimed that their contract required payment until school system personnel notified them that a student – Martin, in this case – was terminated. Further, the private school administrators felt that they were not able to “fill” Martin's seat until they clarified his status. Finally, the dispute resulted in the private school administrators' refusal to re-admit Martin unless they received the back payment.

At the subsequent IEP meeting, Martin strongly argued for placement at a public school close to his home. Martin objected to, among other things, the long bus ride on the “cheese bus” (i.e., the yellow

special education students who attend schools outside their neighborhood ride the yellow school buses. Thus, traveling on the bus is stigmatizing.

Recognizing the relative lack of services and structure at the public school and striving to provide Martin with the “least restrictive environment”, the IEP team members agreed to include daily after-school tutoring, a one-on-one teacher's aide (assigned to Martin), as well as extensive other services. These services, however, did not materialize. Martin soon thereafter was the victim of a serious assault (in an incident unrelated to school), and, fearing for his safety, entered a witness protection program. Upon his return, some months later, from the witness protection program, Martin was allowed to re-enroll in his previous private school placement.

Another wall that an advocate might face with the child and parent is the dilemma between, on the one hand, choosing public school placements that may be substandard or at which officials reject (and suspend and expel) and, on the other hand, choosing private placements that are simply “exclusive” and, in that sense, not embracing “delinquents”.⁵⁹ In response to this dilemma, advocates can negotiate with both private and public school personnel to devise a program in one setting or the other that meets the needs of a particular child and family.

For a child who has failed consistently in school and who has been out of school for an extended period, counsel may need to work with the child to fashion and propose an individualized program that will reintegrate the child into educational services. Such a program may not resemble a traditional educational program or exist within a standard school setting. Of course, an

⁵⁹ One might say that the public schools often are not academically competent and that private schools are not culturally competent.

unusual or creative program that one must piece together will necessarily be more difficult to implement than a pre-existing program.

Finally, one may run headlong into an additional wall, the wall that represents barriers to economic opportunities. Children with disabilities in the juvenile and criminal justice systems characteristically have relatively poor chances of finding a path that leads, around the barriers, to good training and to good jobs. Many clients who face an apparent inability to become productive and to earn a living within the regular, legitimate economy repeatedly resort to crime, particularly to selling illegal drugs. Recognizing the barriers surrounding economic opportunities for people with disabilities, particularly those who are poor, poorly educated, and members of minority groups, advocates must vigorously enforce clients' rights to special education services and must particularly enforce rights to transition services.

Individualized transition and related services can and should be based in neighborhoods and communities where children who are the subjects of IEP's live. If public school personnel are responsive to children's individualized needs, such transition services increasingly will flourish within, and attached to, neighborhood schools. If, on the other hand, school personnel resist and refuse to provide or pay for appropriate services, children and their advocates can find or create those services and opportunities within the children's neighborhoods and communities and then ask a hearing officer to order the school system to pay for those private services, as well as for attorneys' fees.

Listing or describing other approaches for economic development, community organizing, and individual empowerment would be beyond the scope of this chapter and of this manual.

Sam's case: Attempting to re-integrate a child into school

Sam is mildly mentally retarded, and he has never succeeded markedly in school. When he first entered the delinquency system at the age of fourteen, he had been truant constantly over a couple of years; he also was using marijuana regularly. Sam also stayed out late at night and appeared to be malnourished.

Sam expressed little interest in re-entering school. Facing incarceration, however, he agreed to participate in several hours of tutoring each day as an "interim" special education placement until he and his special education counsel could locate an appropriate special education placement. Counsel located a student in a masters program in a department of special education at a local university. That graduate student tutored Sam (and Sam's younger brother) on a daily basis.

Sam also agreed to related services, including recreational services of boxing and basketball, and to parent counseling in which a therapist was to train Sam's grandmother (his custodian) to use non-aversive behavior management approaches with Sam. Furthermore, the therapy was to occur in the home, and Sam was to participate by, among other things, helping to identify rewards that he would enjoy receiving as reinforcement for positive behavior.

Sam did participate with the tutor for some weeks, but counsel and others were essentially unsuccessful in finding a therapist who was able and willing to conduct the behavior management training in-home with Sam and with Sam's grandmother. In addition, although counsel located a person to train Sam in boxing, school system personnel were not prepared to pay for that service (absent an administrative hearing battle). Sam had been re-incarcerated before counsel could coordinate the services and obtain agreement from school system administrators to support the services.

Sam spent a few months in the juvenile detention facility. Having participated in tutoring, Sam was able to apply himself to the modest school program offered in the detention center. Sam is now back in the community and planning to enter a special education school. The effort to patch together tutoring and an array of other services was, at best,

**Time dollars guilds (“Time crews”):
A proposal for creating and developing
economic opportunities for young people
with disabilities**

One idea for scaling the wall representing economic barriers is to design and develop a system of “guilds” for young people. The guilds would be, in essence, collectives of teenagers working together to support each other. The guilds would focus on, among other things, home or apartment renovation, food services, transportation (automobile repair and rental), furniture building, child and elder care, computer and information services, and arts.

The guilds would be based on Time Dollars, a system created by Edgar Cahn in which value attaches – without the medium of money – to each person’s labors and to each person’s time. Each person’s hour of work constitutes a Time Dollar that goes into a software “bank”, redeemable for the services generated from another person’s hour of work.¹ One might refer to the separate guilds as “Time Crews”.

Teenagers in the various guilds, through the Time Dollars system, would be able to serve each other without exchanging cash. Moreover, by developing skills through participation in guilds, young people would be able to move into the market economy as apprentices or as regular, paid workers and entrepreneurs.

¹See generally, Edgar Cahn & Jonathan Rowe, Time Dollars

V. Conclusion

By using special education advocacy in the manner summarized in this chapter, an attorney can extricate or insulate children and young adults from confinement in juvenile facilities or in adult corrections facilities. On a more substantive basis, one can help a young person who has a disability to become productive and relatively well-adjusted by helping that young person to understand the disability and by helping that young person to obtain appropriate special education, related services, and transition services. The IDEA requires that school system, delinquency system, and -- still, to an extent -- corrections system personnel provide these services to children and young adults who are disabled. Thus, if a sufficient number of trained attorneys⁶⁰ enforce rights codified in the IDEA, many cell doors and prison gates could open.⁶¹ One can envision ambitious initiatives in states all over the country for establishing constructive educational programs and for "deconstructing" prisons.

⁶⁰ See, *Burlington v. Mass. Dept. of Ed.*, 471 U.S. 359 (1985). Special education litigants who prevail against the public school system are entitled, by federal statute, to reimbursement for their attorneys' fees.

⁶¹ In this regard, as noted previously, the fee-shifting provision of the IDEA provides a largely untapped basis for funding advocacy for children who are incarcerated or who face incarceration.