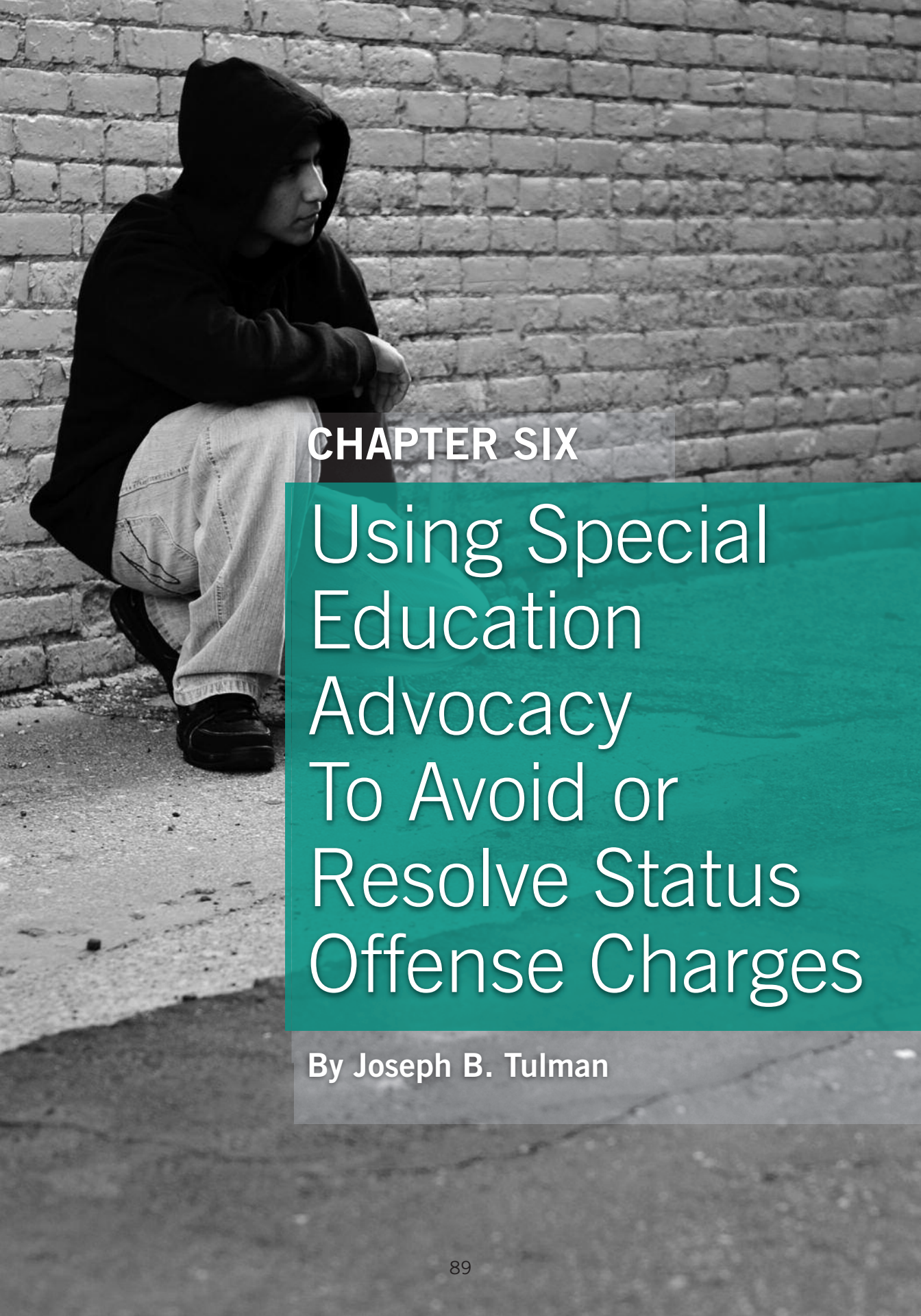

CHAPTER SIX

Using Special Education Advocacy To Avoid or Resolve Status Offense Charges

By Joseph B. Tulman

Using Special Education Advocacy To Avoid or Resolve Status Offense Charges

Identify whether your client has special education needs.

Look for:

- cognitive, physical, and verbal processing issues exhibited during lawyer-client interactions;
- relationship problems with parents, siblings, teachers, and schoolmates;
- chronic behavioral disruptions or emotional withdrawal at school;
- pending suspensions or expulsions from school;
- low achievement in school;
- repeating one or more grades in school;
- significant school attendance problems.

Pursue special education services to circumvent status offense system involvement.

- Work with intake and probation officers early in the court process to ensure they have properly investigated the reasons why the proceeding was brought against the youth.
- Seek to dismiss the status offense charge if a school has failed to comply with federal law requirements regarding special education.
- Start the special education hearing process or identify an attorney who can on the youth's behalf.
- Negotiate continuances of status offense matters to pursue the special education matter. Use that time to line up appropriate services for the youth and family that will supersede the need for the status offense proceeding.

Consider whether your client's rights under the Americans with Disabilities Act or Rehabilitation Act were violated.

- Assess whether your client was referred to the status offense system because of behavior that stems from a disability.

Youth with undiagnosed and unmet special education needs are disproportionately represented in juvenile courts and secure juvenile facilities.[1] A juvenile defense attorney using special education law for clients facing status offense charges can implement useful problem-solving strategies and advance legal arguments to better represent clients' interests. This chapter examines how juvenile defense attorneys can use special education law to keep youth out of the status offense system.[2]

State and federal law favor keeping youth with their families,[3] mainstreaming special education students with nondisabled peers,[4] and deinstitutionalizing status offenders.[5] Prevention and early intervention are better approaches than prosecution and the threat of incarceration. Special education law establishes rights to prevention and early intervention services. Youth receiving special education services can avoid the behaviors—unruliness in school and ungovernability at home—that lead to status offense charges.

Youth facing status offense charges often were not provided appropriate special education services in their schools. Their parents are increasingly frustrated. An attorney representing a youth facing status offense charges should determine whether the charges arise from the failure of school personnel to provide appropriate special education services. If so, the attorney should use that failure as a key component of the defense strategy.

The defense attorney should offer to help the youth and the youth's parents obtain special education services to address the youth's needs, stabilize the family, and remove the youth from the status offense system. Another, more literal, payoff is that a prevailing parent in a special education matter is entitled to attorneys' fees at a reasonable rate.[6] Court-appointed attorneys representing low-income clients in status offense cases might find special education advocacy better serves their clients' interests, as well as their own.

Substantive and Procedural Rights under the Individuals with Disabilities Education Act

What follows is a whirlwind tour of special education rights. This summary is no substitute for reading and digesting the federal statute (20 U.S.C. §§ 1400-1490) and regulations (34 C.F.R. pt. 300), your state and local special education laws, and case law. To represent parents and students effectively, an attorney also must learn how to conduct and win administrative due process hearings against the school system. An attorney who does not provide special education representation should be able, nonetheless, to recognize when special education

Identifying Whether Your Client has Special Education Needs

To identify a child with undiagnosed or unmet special education needs, an attorney should look for:

- cognitive, physical, and verbal processing issues that the child presents within the lawyer-client relationship;
- relationship problems for the child with parents, siblings, teachers, and schoolmates;
- chronic behavioral disruptions or emotional withdrawal by the child at school or at home;
- pending suspensions or expulsions from school, or a history of school exclusion;
- low achievement on standardized tests and other measures;
- repeating one or more grades in school; and
- significant school attendance problems.

issues arise within a status offense case. If the client is interested in pursuing special education rights, the attorney should help locate an attorney to provide that representation.

Eligibility

A youth with a disability, between the ages of three and 21, is eligible for special education services if due to the disability the youth requires special education and related services.[7] Eligibility explicitly "include[s] children with disabilities who have been suspended or expelled from school."[8] The "child find" provision of special education law mandates that the school district administrators and personnel identify, locate, and evaluate all children and youth with disabilities, including homeless youth and children who are wards of the state.[9]

Generally, the IDEA covers students until they graduate from high school or until they turn 22, whichever occurs first; obtaining a high school equivalency degree does not terminate eligibility.[10] A child advancing from grade to grade who is not failing can be, nonetheless, a "child with a disability" covered under the IDEA.[11] For a youth with a disability that does not affect academic performance

Finding an Education Attorney

To find a special education attorney to whom you can refer parents, the defense attorney should:

- contact legal services and legal aid attorneys, or other nonprofit legal services offices that may provide special education representation;
- identify local special education lawyers who are willing to represent low-income and indigent parents based upon the possibility of prevailing and receiving attorneys' fees from the school system;
- locate or start a special education unit within the public defender office;
- contact the Protection and Advocacy Center in the state (find the P&A office through www.NDRN.org);
- search the Council of Parent Attorneys and Advocates' listings (www.COPAA.org);
- look for a special education clinic at local law schools; and/or
- help set up special education advocacy training for status offense, delinquency, and child welfare attorneys.

and adjustment in school—a youth, for example, with a physical disability or with a chronic illness—Section 504 of the Rehabilitation Act[12] likely protects the youth from discrimination and affords the youth a right to reasonable accommodations in the school setting.[13]

The IDEA covers any disability that substantially affects a youth's learning and adjustment in school.[14] The disabilities that a defense attorney will likely find within a status offense caseload include learning disabilities (e.g., dyslexia), speech or language impairments, and emotional disturbance. Attention deficit hyperactivity disorder (ADHD) is also common and is covered under the IDEA's definition of "Other Health Impairment."[15]

Evaluation

To determine whether the student has an education-related disability, the law provides for an evaluative process[16] that addresses "all areas of suspected disability."[17] The parent can initiate an evaluation by requesting it, or a state or local education agency, or other state agency, may initiate a request for an initial evaluation.[18] A state court meets the criterion of "other state agency," so a judge may

request an evaluation. An evaluation requires both written notice to and informed consent from the parent to conduct the evaluation.[19] [20]

Generally, the initial evaluation must be completed within 60 days of parental consent.[21] Following an initial evaluation and eligibility determination, the school system must reevaluate the youth—referred to as a "triennial evaluation"—every three years.[22] A reevaluation must occur sooner if school district personnel determine the youth's educational or related service needs require reevaluation, or if the parent or teacher requests reevaluation.[23] A parent has a right to obtain an independent educational evaluation (IEE) of the child,[24] and the parent has a right to an IEE at public expense if the parent disagrees with an evaluation conducted by the school system.[25]

Free Appropriate Public Education (FAPE)

The central entitlement in the IDEA is the right to a free appropriate public education (FAPE).[26] FAPE means "special education and related services" that meet state standards, in an appropriate school setting, and in accordance with the child's individualized education program.[27] The word "free" means that the parent does not pay for the child's services.[28] The word "appropriate" is more difficult to define and is the focus of a key Supreme Court case, *Board of Education v. Rowley*.[29] According to the Court, the instruction must be individualized to meet the youth's unique needs with supportive services necessary to ensure that the youth benefits,[30] but "appropriateness" does not require maximizing the youth's educational opportunities.[31] In assessing educational benefit, the inquiry should include not only academic progress, but also the youth's adjustment and preparation for life after high school.[32]

Individualized Education Program (IEP)

An IEP is a blueprint of the specialized instruction and other services—e.g., related services, transition services, assistive technology, program modifications—that are appropriate for a particular special education student.[33] The IEP must present the youth's current academic levels and functional performance, include annual goals, and specify how the youth's progress toward the goals will be measured.[34] An IEP Team consists of the child's parents, the child's regular education teacher and special education teacher, a school district representative, a person qualified to interpret evaluation results, other individuals invited by the parents or school system representatives, and, whenever appropriate, the child.[35] The IEP Team must review and revise the IEP at least annually.[36]

Notably, the law specifically charges the IEP Team with considering services

to address a child's disruptive behavior: "The IEP Team shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . ."[37] The IEP Team must also consider strengths of the child, evaluations of the child, concerns of the parents, and, of course, "the academic, developmental, and functional needs of the child."[38]

Least Restrictive Environment (LRE)

Special education law emphasizes keeping youth in, or returning youth to, the educational mainstream.[39] The IDEA's emphasis on placement in the least restrictive environment recognizes that education is meant to integrate students and, ultimately, to prepare students to graduate from high school and enter mainstream society through post-secondary education or the work world.[40] Ideally, therefore, IEP Teams should place students in integrated schools and in mainstream, regular education classes, and may only remove a child from regular education settings "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."[41] Placement should be as close as possible to the child's home and ordinarily should be in the school that the child would attend if not disabled.[42] The school district must also have available a "continuum of alternative placements" that includes special classes, special schools, home instruction, and the like.[43] In addition, extended school year services must be available, when necessary, as part of a FAPE.[44]

Related Services

A related service is "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education,"[45] and includes anything that supports the student's ability to learn and to benefit from education. The federal regulations specifically identify, among other things, speech-language pathology[46] and audiology services,[47] and physical[48] and occupational therapy.[49]

Supplemental Aids and Services; Assistive Technology

The IDEA requires the provision of supplemental aids and services,[50] as well as assistive technology devices and services when appropriate to increase, maintain, or improve the child's functional capabilities.[51]

Services Available for Status Offending Youth and Families through Education Laws

Youth and their families facing status offenses may benefit from the following services:

- **Recreation**—assessing leisure function; providing therapeutic recreation services; providing recreation both in schools and arranging recreation through community agencies; and educating the child regarding appropriate leisure activity.[1]
- **Counseling Services**—providing services from "qualified social workers, psychologists, guidance counselors, or other qualified personnel . . . ."[2]
- **Parent Counseling and Training**—helping parents understand their youth's special needs; informing parents about child and youth development; and helping parents acquire skills to support implementing the IEP.[3]
- **Psychological Services**—evaluating the youth; planning and managing a program of counseling for the youth and parents; and helping to develop positive behavioral intervention strategies.[4]
- **Social Work Services in Schools**—studying the youth's social or developmental history; conducting group and individual counseling with the youth and family; addressing, along with the parents and others, all aspects of the youth's life that affect performance in school; engaging school and community resources to enhance the youth's ability to benefit from the educational program; and helping develop positive behavioral intervention strategies.[5]

Under special education law, any services that are appropriate for a particular youth with a disability must be provided, at no charge to the parent, by or through the public school system.

Sources:

1. 34 C.F.R. § 300.34(c)(11).
2. 34 C.F.R. § 300.34(c)(2).
3. 34 C.F.R. § 300.34(c)(8).
4. 34 C.F.R. § 300.34(c)(10).
5. 34 C.F.R. § 300.34(c)(14).

Transition Services

For students turning 16 years old and above, the IEP Team must consider and include transition services in the IEP.[52] Special education law requires school personnel to prepare students with disabilities for success after completing high school,[53] and, by definition, "transition services" must be "a coordinated set of activities . . . within a results-oriented process . . . focused on improving the academic and functional achievement . . . to facilitate the child's movement from school to post school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation . . . ."[54] Further, transition services must be individualized according to the child's needs and in consideration of "the child's strengths, preferences, and interests . . . ."[55]

School personnel must facilitate the development of work and other post-school objectives, and must provide specialized instruction, related services, and community experiences that facilitate the transition objectives.[56] Accordingly, although school personnel can engage other agencies to provide transition services, the school personnel must reconvene the IEP Team to develop alternative strategies if other agencies fail to provide transition services.[57]

Parent's—and Youth's—Right to Participation, Notice, and Consent

The IDEA requires parental involvement in decision making regarding the youth's identification, evaluation, placement, and services. The Supreme Court warned that school administrators who exclude the parents are bound to lose on procedural grounds: "[T]he importance Congress attached to these procedural protections cannot be gainsaid. . . . Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard."[58] Parents have the right to receive—from school administrators—notice of the law's procedural safeguards.[59] In addition, parents have the right to examine educational records regarding the youth[60] and, of course, the right to participate in meetings pertaining to identification, evaluation, placement, and the provision of a FAPE.[61]

Parents also have the right to "prior written notice"—that is, notice in writing a reasonable amount of time before school administrators take action or refuse to comply with a parent's request—in connection with the identification, evaluation, educational placement, or the provision of a FAPE.[62] Notice from the school administrators must contain an explanation of the reasons for the

Who is the Client?

Ordinarily, the parent is the client in a special education matter. Special education rights afforded under the IDEA benefit the youth with a disability, but the parent of a youth with a disability has independent, enforceable rights and is empowered under the statute to enforce those rights.[1] Regarding who can make special education decisions and pursue special education rights on behalf of a child, the presumption is that the biological or adoptive parent is the parent for purposes of enforcing special education rights unless that person "does not have legal authority to make educational decisions for the child."[2]

The IDEA regulations also recognize the authority of a state court judge to determine who has the authority to make educational decisions for a youth.[3] A juvenile or family court judge, therefore, can designate a foster parent or other surrogate as the "parent" for educational purposes. The IDEA's definition of "parent" also recognizes that persons other than a biological or adoptive parent (i.e., foster parents, guardians, other relatives, and surrogate parents) may function as the primary parent and should be recognized as the "parent" for the purpose of participating in the special education process.[4] The public agency must ensure that a surrogate parent is appointed for a child with no identified parent; for a child whose parent the agency cannot locate; for a child who is a ward of the state; and for a child who is an unaccompanied homeless youth.[5] A state court judge is also empowered to appoint a surrogate parent for a child who is a ward of the state.[6]

Each state may provide that the right to enforce provisions of the IDEA transfer from parent to child (student) at the age of majority, unless the student is legally incompetent.[7] For students under the age of majority, however, the level of the child's participation—e.g., whether the child attends the IEP meeting—is a decision for the parent to make.[8] Because the IDEA supports students becoming self-sufficient, the parent ordinarily should include the child in IEP meetings and other special education decision making.

Sources:

1. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 526-33 (2007).
2. 34 C.F.R. § 300.30(b)(1).
3. 34 C.F.R. § 300.30(b)(2) (parent by "judicial decree").
4. 20 U.S.C. § 1401(23); 34 C.F.R. § 300.30(a)(1)-(5).
5. 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.519(a)-(h).
6. 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c).
7. 20 U.S.C. § 1415(m)(1)(A)-(D).
8. Education of Children with Disabilities Rule, 71 Fed. Reg. 46671 (Aug. 14, 2006) ("Generally, a child with a disability should attend the IEP Team meeting if the parent decides that it is appropriate for the child to do so."); *see also* 20 U.S.C. § 1414(d)(1)(B)(vii) and 34 C.F.R. § 300.321(b)(1).

proposed action or the refusal to grant the parent's request, as well as a description of the information (e.g., "evaluation, procedure, assessment, record, or report") upon which the school administrators relied.[63]

In a status offense matter, the attorney represents the youth. To initiate a special education defense, the attorney must advise the client (i.e., the youth facing the status offense charges) regarding the advantages, as well as any potential disadvantages, in pursuing the special education matter. Further, the attorney must discuss the need to bring in the parent as a client in the special education matter. If the child agrees to pursue the special education strategy, then the attorney will have to create an alliance with the child's parent and help the parent recognize that appropriate special education and related services can change the child and family's circumstances. The defense attorney can help the youth's parent locate a capable special education attorney who is willing to provide the representation. The defense attorney, though, should strive to coordinate defense of the status offense matter with the special education legal strategy.

Alternatively, the youth's defense attorney could represent both the youth and the parent jointly in the special education matter.[64] However, the facts underlying a status offense charge—whether truancy from school, running away from home, or unruliness at school and at home—provide fertile ground for an ethical conflict of interest for an attorney seeking to represent both the parent and the youth in a special education matter.

For example, a youth facing truancy charges might be missing school at the parent's direction to care for younger siblings. A youth's alleged refusal to obey parental commands may stem from domestic violence between the parents or from direct abuse of the youth. A child and parent also might disagree about the objectives of the special education representation. For example, a parent may believe that the child requires placement in a residential treatment center, and the child may vehemently oppose any out-of-home placement. On the other hand, by providing joint representation in the special education matter, the attorney can assist the youth and parent address and solve the problems that may have led to the status offense charges.

Right to a Due Process Administrative Hearing

A parent who disagrees with any aspect of the identification, evaluation, or educational placement of the child, or believes the child is not receiving a FAPE, can file a complaint and request an administrative due process hearing.[65] The complaint must describe the problem and propose a remedy.[66] The other party—the school system—must respond within 10 days and must address issues raised in

the complaint.[67] Unless the school system personnel interfered with the parent's complaint by misrepresenting or withholding information, the parent is bound by a two-year statute of limitations.[68]

The statute requires that mediation be available, but because mediation is a voluntary process the parent is not required to engage in it.[69] In the 2004 IDEA amendments, Congress provided for a "resolution session" to be held ordinarily within 15 days of filing a complaint.[70] After a 30-day period for resolving the dispute after filing the complaint, a hearing must be scheduled.[71] The hearing must occur and a hearing officer must return a decision within 45 days from the end of the 30-day resolution period after filing.[72] Regarding a due process hearing, parents and other parties are entitled to have an impartial hearing officer.[73] Further, the parties have a right to be represented by counsel and advised and accompanied by persons with special knowledge or training;[74] rights to present evidence and confront, cross-examine, and compel witnesses to attend;[75] rights to an electronic or written record of the hearing, as well as to the findings of fact and decisions of the hearing officer.[76] The IDEA contains a mutual discovery rule, often called the "five-day rule," under which the parties must exchange documents and evidence at least five business days before the hearing.[77]

The IDEA is silent regarding the burden of proof, but the U.S. Supreme Court ruled that the burden of persuasion is on the party seeking relief.[78] Under the so-called "stay put" rule, the parent has a right to maintain the child in the current educational placement while an administrative or judicial proceeding is pending.[79] The IDEA also requires, regarding children who are homeless, compliance with the McKinney-Vento Homeless Assistance Act.[80]

Remedies

The parent can seek relief from an impartial hearing officer on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child . . . ."[81] In an appeal of a hearing officer's decision, a court can provide relief it determines to be appropriate.[82] A hearing officer or court can order the school district to reimburse a parent whose child was not receiving a FAPE in the public school if the parent unilaterally places the child in an appropriate private school.[83]

Low-income parents typically cannot afford to place a child unilaterally in a private school before the due process hearing. Before placing the child, a low-income parent must secure a hearing officer's determination that the public school placement is not appropriate and that, conversely, the parent's proposed private placement is appropriate. Another useful special education remedy is compensatory

Attorneys' Fees and Expert Costs in Special Education Hearings

The IDEA provides for attorneys' fees for a parent who prevails in a special education administrative hearing or court action.[1] To obtain attorneys' fees in a special education matter ordinarily requires prevailing at a due process hearing or in court.[2] Congress in 2004 also added the possibility of the state or school district recovering attorneys' fees for a complaint or cause of action that is "frivolous, unreasonable, or without foundation" or that was brought for an "improper purpose."[3]

Awarding attorneys' fees to a prevailing parent does not include expert witness fees.[4] Parents' attorneys can obtain expert evaluations by using the right under the IDEA to an independent educational evaluation.[5] In addition, parents can obtain evaluations (and a source of expert witnesses) through private medical insurance or Medicaid. Defense attorneys also have access through the juvenile court to court-ordered evaluations and the experts who conduct them, as well as rights (at no charge for indigent clients) to *ex parte* evaluations that are, as a matter of due process, germane to the defense.[6]

Sources:

1. 20 U.S.C. § 1415(i)(3)(B)-(C); 34 C.F.R. §§ 300.517(a)(1)(i), 300.517(c); Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Resources, 532 U.S. 598, 605 (2001) (to prevail requires alteration of legal relationship of parties, not just voluntary change of behavior).
2. Bingham v. New Berlin School Dist., 550 F.3d 601, 603 (7th Cir. 2008) (Buckhannon applies to special education cases).
3. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III); 34 C.F.R. § 300.517(a)(1)(ii)-(iii).
4. Arlington Cent. Sch. Dist. v. Murphy, 548 U.S. 291, 293-94, 300-304 (2006).
5. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.
6. Ake v. Oklahoma, 470 U.S. 68, 74 (1985).

education. This is an equitable remedy, created in the case law, through which the child receives services to make up for the previous denial of FAPE.[84]

Discipline Protections

Even a short suspension from school of 10 days or less requires some due process protection.[85] Removal of a child from school for more than 10 days constitutes a "change in placement" under special education law[86] that triggers procedural protections[87] to ensure the authorities are not removing a child with a disability in a discriminatory manner[88] or for behavior that is a manifestation of the disability.[89] If the behavior is not a manifestation of a disability, school authorities

may discipline a child with a disability as they would a nondisabled child,[90] except that the child nevertheless maintains the right to participate in the general education curriculum and progress toward meeting the IEP goals, although perhaps in a different setting.[91] In other words, a child with a disability does not lose the entitlement for special education and related services, even if excluded from school.[92]

If the behavior is a manifestation of the child's disability but the behavior was having a weapon or illegal drugs in school or if the behavior caused serious bodily injury to another person in school, school authorities may remove the child to an interim alternative educational setting for no more than 45 days.[93] A child with a disability sent to an interim alternative education setting or a child with a disability suspended or expelled for conduct that was not a manifestation of the disability has a right, as appropriate, to a functional behavioral assessment and behavior intervention plan, as well as a right to modifications in the IEP to address the behavior that led to the disciplinary exclusion from the current educational placement.[94]

Of course, the IEP Team can decide to include appropriate behavioral interventions in the IEP at any time to prevent or address behavioral problems. For a child with serious behavioral concerns, the parent and the attorney should work with the IEP Team to develop and adopt a protocol of individualized, positive behavioral interventions and supports. The protocol should contain an explicit agreement to avoid, except in extreme circumstances, calling the police and referring the child to the juvenile court.

School officials have authority under the IDEA to consider the circumstances of a special education student on a case-by-case basis when addressing a violation of school discipline.[95] Defense attorneys should remember this case-by-case authority, as well as other IDEA procedural protections in the federal law in circumstances when school officials attempt to apply a state or local zero tolerance discipline policy.

For a child not previously identified as eligible for special education and facing suspension or expulsion, a parent can successfully assert rights to procedural protection under the IDEA if school personnel "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."[96] The school personnel are deemed to have had knowledge if the parent previously raised concerns about the child's need for special education; if the parent previously requested an evaluation; or if the child's teacher or other school personnel expressed concerns about the child's pattern of behavior to supervisors.[97]

Regarding a child not previously identified and for whom school personnel did not have knowledge that the child has a disability, a parent requesting a special education evaluation has a right to an expedited evaluation if the child is being disciplined.[98] If the team determines, based on the expedited evaluation and other input, that the child has an education-related disability, then the child is protected under the IDEA (including its discipline protections) and school system personnel must provide special education and related services.[99] For challenges to special education decisions that involve a disciplinary change in placement, including a challenge to a manifestation determination, the law provides for an expedited hearing.[100]

Rights to Special Education Services for Incarcerated Youth

Nothing in the IDEA excludes from coverage, or diminishes the rights of, youth with education-related disabilities who are detained or incarcerated in delinquency facilities. A person under age 22, identified as eligible under the IDEA, retains eligibility and a right to services during a period of incarceration in an adult prison, as well.[101] A state is not required, on the other hand, to provide FAPE to a student between the ages of 18 and 21 if the student was not identified before sentencing or did not have an IEP prior to adult incarceration.[102] In addition, the IEP Team of an eligible student incarcerated in an adult prison may modify the IEP based upon a "bona fide security or compelling penalogical interest that cannot be otherwise accommodated."[103] An eligible student incarcerated in an adult facility for a period of time that will extend beyond the end of IDEA eligibility loses the right to transition services.[104]

Using Special Education Advocacy on Behalf of Alleged Status Offenders

Advantages of the Special Education Approach

The IDEA applies in every school district and every public school in the United States. As detailed above, children with education-related disabilities are entitled to an array of individualized services. In most cases concerning children with education-related disabilities, appropriate IDEA services should be available to address the conditions that lead to a status offense referral for truancy or for unruliness or disruptiveness at school.[105] A youth receiving appropriate individualized instruction and related services—including individual or group counseling,

speech language therapy, recreation or therapeutic recreation services—is getting as much or more than what a juvenile court typically would be able to provide for status offender treatment.

Decision making in the status offense system tends to be hierarchical; in contrast, special education decision making is collaborative.[106] Status offense services tend to be undifferentiated; special education services are individualized. In status offense matters, the parent is either a complainant or has no formal role. In a special education matter, the parent and child (at the parent's discretion) are members of the IEP Team. Status offense decision making features a one-time disposition hearing, with the subsequent possibility of probation revocation. In special education matters, the team develops a new IEP at least once a year. At any time, the parent or school system representatives can request that the team reconvene to review and modify the child's program. The IEP Team can act, therefore, whenever the student requires different or additional services.

Obtaining Appropriate Special Education and Related Services for a Child Who is Emotionally Disturbed

The disability emotional disturbance (ED) illustrates the problems and opportunities for attorneys representing children in status offense cases.[107] The definition of ED is a functional definition that requires chronic and intense emotional problems manifesting in one or more of five characteristics that affect educational performance.[108] Excluded from the definition of ED, however, is a child who is "socially maladjusted" but who does not manifest one or more of the five characteristics. School administrators tend to over-identify minority and poor children as requiring special education, unfairly and inaccurately labeling them as emotionally disturbed or mentally retarded.[109]

On the other hand, children with unmet special education needs are dramatically overrepresented in the juvenile system.[110] The strategic choices include using the ED label as a way of avoiding the status offender label and getting special education services. However, the ED label often covers another trap. A child who has an unaddressed learning disability, hearing impairment, or other education-related disability might develop over time a tendency to act out in school, as well as at home. If teachers and school administrators convince parents to label the child as emotionally disturbed without identifying and addressing the underlying learning problems, they might be condemning the child to a downward spiral.

If the child's disabilities and behavioral issues affect relationships and performance at home and at school, the IEP should include such services as family counseling and parent training and the myriad other services contemplated under

What is an Emotional Disturbance?

34 C.F.R. § 300.8(c)(4)(i) provides:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- inappropriate types of behavior or feelings under normal circumstances;
- a general pervasive mood of unhappiness or depression; and
- a tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

"counseling services," "parent counseling and training," "psychological services," "social work services." and "therapeutic recreation."[111] The IEP Team can order a functional behavioral assessment (FBA), then design and implement a behavioral intervention plan (BIP).[112]

If done correctly, the BIP should cover the child's behavior at home and at school, and teachers, school counselors, and parents should coordinate how they implement their behavioral interventions. If appropriate, the IEP can include training the parent to implement the BIP during nonschool hours. The team can prescribe one-on-one services for the youth. Transition services, as outlined above, address the student's needs to prepare for the work world, postsecondary education, and living independently.

In addition, each local education agency must have available a continuum of placements, keeping a special education student in the least restrictive environment that facilitates the student's learning. Although, if the child is not progressing academically and socially, the parents, school teachers and administrators, and other members of the IEP Team can place the child in a more intensive and more segregated setting, including, in extreme cases, placement in residential

treatment facilities or mental hospitals. Under the principle of placing the child in the least restrictive environment, the IEP Team can prescribe wraparound services—like Multisystemic Therapy and Functional Family Therapy—to avoid placing the child in a residential treatment facility or mental hospital. Moreover, the IEP Team can bring in service providers from other agencies (e.g., mental health, vocational rehabilitation).

Based on a past denial of a FAPE, a parent can secure additional services for the youth through a compensatory education agreement or hearing officer's order. If the youth is not receiving appropriate services in the public school, the parent is entitled to services in an appropriate private school at public expense. If, in such circumstances, the IEP Team members refuse the parent's request for private services or for placement in a private school, the parent can seek an administrative hearing to determine if a private placement at public expense is required.

Alternatively, the parent can notify school administrators and then unilaterally place the child in a private school (or in private services) and then seek reimbursement through a due process hearing. Considering this array of special education rights, one might conclude the only placement not available through special education is incarceration and that the only "service" not available through special education is the threat of incarceration.

Disability and the Defense of Status Offense Charges

In passing the IDEA, Congress intended to ensure schools provide educational services to children with disabilities, and Congress intended, as well, to stop schools from using allegations of disruptive or even dangerous conduct to exclude children with disabilities. Accordingly, the court noted, "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."[113] Against this backdrop, one can interpret cases where school administrators have referred children to juvenile courts.

Dismissing the Status Offense Charge and Using the Special Education Process in Its Place

In some states, a juvenile court judge can grant a motion to dismiss in the interest of justice and in the best interest of the child, assuming that the judge finds that the dismissal does not jeopardize the safety of the community.[114] In

Primary Problem-Solving Strategies and Legal Theories for Status Offense Cases

- Obtain agreement from the child and parent to investigate and to enforce their special education rights. Substitute special education and related services for "treatment" through the juvenile court. Explore the broad definition of related services (for the child and parents) and transition services, as well as the availability of discipline protections and positive behavioral interventions. Consider obtaining private services for the child, at public expense, if public school officials refuse to provide appropriate services. Seek compensatory education services for past violations of the IDEA. Stick with the special education advocacy until the youth and family have stabilized and the youth is making appropriate academic and emotional progress.
- Move to dismiss the status offense case "in the interest of justice" or "for social reasons."
- Move to dismiss the status offense case based on a violation of the intake process and a failure to exercise discretion by the intake officer.
- In some jurisdictions, the government must establish in a truancy case that school personnel made adequate efforts to serve the child's needs before referring the matter to the juvenile court.[1] Based on this kind of statutory language, the defense can show that the government has not met its burden.
- In a special education case, argue that the status offense petition was an "end run" around special education responsibilities and was intended to "change the educational placement" without due process, and move for an order that school officials withdraw the status offense petition.

Source:

1. Tenn. Code Ann. § 49-10-1304(b)(3)(B) (2009); *Defending Youth in Truancy Proceedings: A Practice Manual for Attorneys*. Seattle, WA: ACLU of Washington & TeamChild, September 2008, 72, available at www.teamchild.org/pdf/Truancy%20Manual%202008.pdf (pointing out Washington statute that requires school personnel to address reasons for truancy prior to filing truancy petition in court).

addition, the defense attorney has a better chance of blocking a prosecution if the child is young[115] and if the child has no prior record with the juvenile court. One might also find a judge sympathetic to dismissal if the school should have identified the child (under the IDEA's "child find" requirement), and especially

if the parents were requesting an evaluation that school personnel ignored over a long time.

In a small number of status offense and delinquency cases, attorneys have argued school personnel used charges against the youth to circumvent or "end run" their obligations to serve the child under special education law.[116] Because the IDEA requires exhausting administrative remedies before appealing to a state or federal court,[117] the juvenile court should not be the correct forum in which to litigate IDEA eligibility and denial of a FAPE, as well as the propriety of suspending and expelling students with disabilities. Accordingly, an attorney should use a special education hearing to challenge a school administrator who fails to comply with the IDEA and then files a status offense petition against a child. *Morgan v. Chris L.* is such a case.[118]

In the 1997 IDEA amendments, Congress clarified that the IDEA does not constrain schools from referring alleged criminal activity by a child with a disability to proper authorities, nor does the law keep police and courts from handling such matters:

> Nothing in this subchapter 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.[119]

A small number of courts and commentators have interpreted the above quote as overturning *Morgan v. Chris L.* and similar cases,[120] but "[t]he Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student [and] school districts should take care not to exercise their responsibilities in a discriminatory manner."[121] The section "does not authorize school districts to circumvent any of their responsibilities under the Act."[122] Fair interpretation of section 1415(k)(6) is that a special education hearing officer can not prohibit a school from referring a child to the juvenile court, but the hearing officer may be authorized to order school officials not to press charges.[123]

In passing the IDEA, Congress also did not intend to supplant the states' "general welfare and supportive services for children."[124] Recognizing that Congress sought to protect children with disabilities from school removal, the court in *In re Beau II*, using a four-part test, found no evidence that school authorities sought to change the child's placement by pursuing the status offense matter; rather, they sought to reinforce his participation in the school program.[125] The

court found that, regarding the child's special education needs, the status offense action was "compatible and supportive."[126] The prohibition in New York against incarcerating children in status offense matters provides a significant backdrop to the rulings in *Beau II* and *Charles U.* (discussed in endnote 126). Because children in New York status offense cases are not facing incarceration, the interests of justice do not weigh as strongly in favor of dismissal.

Working with Intake and Probation Officers Early in the Court Process

Attorneys should consider whether school administrators are attempting an end run of special education responsibilities at the "investigative and referral levels" of the juvenile court process. This is when decisions are made regarding "whether the case belongs in the juvenile system in the first instance...."[127] The *Trent M.* court found that one should not assume intake probation officers and prosecutors will rubber stamp a referral by school authorities.[128] If intake probation officers and prosecutors misuse their discretion, the court can use its supervisory authority to correct the error.[129]

An intake probation officer typically is empowered by statute to investigate and examine complaints to consider whether to proceed against a child.[130] Recognizing this authority, Congress provided that agencies referring children to the juvenile court should transmit special education and disciplinary records.[131] At intake, state law—requiring probation officers to screen out inappropriate cases[132]—meshes with the congressional mandate that school authorities provide relevant school records to the court.

If an intake officer fails to investigate properly and fails to recognize the significance of special education violations by school personnel, the attorney can provide school records and explain to the intake officer—and subsequently, if necessary, to the prosecutor—that the case is really an unfair attempt by school officials to transform a failure to evaluate and to provide special education services into a dispute in the juvenile court. Furthermore, an intake probation officer who is fully informed of special education entitlements should rarely recommend petitioning a status offense case against a child who is eligible for special education. Nevertheless, the defense attorney must be prepared to challenge the decision making of, or failure to exercise discretion by, the intake officer.[133] The attorney can file a motion to dismiss the petition based on violations of the statutory intake process.

Advancing Arguments under Section 504 of the Rehabilitation Act

If evidence shows school officials are referring children with disabilities to the juvenile court for behavior for which nondisabled children are not being referred, the defense attorney should consider advancing an argument, under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, that the status offense prosecution is discriminatory: "Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (e.g., if they were only reporting crimes committed by children with disabilities and not [those] committed by nondisabled students)."[134]

Negotiating Continuances of Status Offense Matters

The defense attorney typically is appointed to represent the child *after* filing a status offense petition (which also may be after the child has failed a status offense diversion program). To negotiate a dismissal of the petition or to effectively challenge the intake process, the attorney must rapidly uncover the facts and legal claims that are germane to both the status offense matter and the parallel special education case. The special education advocacy process, however, often will require several months, particularly if the child was not previously evaluated and identified as eligible for special education. For this reason, the defense attorney is not usually in a position early in the defense of a status offense case to present to the juvenile court a hearing officer's determination establishing a denial of a FAPE.

Given these time constraints, a more manageable strategy is to negotiate a continuance of the status offense matter to help the parent use special education processes—e.g., an IEP meeting or a due process hearing—to line up appropriate services for the child and for the family that will supersede the need for the status offense proceeding.[135]

Advocating for Clients' Special Education Rights

Like probation officers and prosecutors, judges must determine whether a child—even if unruly or truant—is "in need of treatment or rehabilitation."[136] Representing a child who has access to appropriate and comprehensive services within the special education system, a defense attorney may be in a strong position to rebut the presumption that the child is in need of treatment from the juvenile court. On this basis, the attorney can move at any point during the proceedings to dismiss the petition or move at trial for a judgment of acquittal.

Additional Arguments Defense Attorneys Can Make in Status Offense Cases

The defense attorney might argue that school officials failed to inform the parent of the child's possible special education needs and also failed to get the parent's consent to an evaluation. In this light, school officials may have failed to exhaust their administrative remedies through the special education system before referring the alleged truancy to the juvenile court.

The evidence may support a claim that school officials and prosecutors pursue status offense charges against children with disabilities (and the child in the individual case, particularly) that they would not and do not pursue against nondisabled children. If so, move to dismiss the status offense case as a violation of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act's prohibition against discriminating against people with disabilities.

Some children develop school-avoidance behavior or school phobia over time as a result of not being appropriately identified and not receiving appropriate special education and related services. The situation for them is embarrassing, painful, and increasingly untenable. Teachers and expert evaluators can be witnesses to help establish that a child was "constructively evicted" from school and did not have the necessary *mens rea* to be guilty of truancy.

For children who allegedly violate pretrial or probationary orders to attend school regularly, an attorney can argue that, by failing to comply with "child find" and failing to provide appropriate services, school officials have interfered with the child's ability to comply with the court's order. In theory, a court can assert jurisdiction over a nonparty that interferes with a party's ability to comply with a court order.

A defense attorney can request that a court's order contain appropriate accommodations for a child with a disability. If the child, for example, has a disability that affects receptive and expressive communications, an appropriate accommodation may be appointing a probation officer who is trained and qualified to communicate with a child with this disability.

As a protective measure, an attorney for parents of a child with a disability should suggest that IEP Team members write into the IEP that school officials will not refer the child to the juvenile or criminal court for minor behavior that is a manifestation of the child's disability.

If the status offense case is in court, the defense attorney is almost certainly confronting parents who claim to be properly rearing the child or school administrators who claim to be providing appropriate opportunities for the child. These adults will say that the child's alleged out-of-control behavior is attributable primarily, if not exclusively, to the child. To convince a probation officer or, subsequently, a prosecutor or a judge, that the status offense referral reflects special education violations, a defense attorney typically must file for, and then prevail in, a special education due process hearing.

A defense attorney can accomplish two central objectives by winning a due process hearing. First, the attorney can obtain appropriate services for the child and perhaps for the parents, as well. Second, the attorney can use the findings of fact and conclusions of law from the special education matter to obtain a dismissal of the status offense charges (or a termination of a diversion or probation period). One might think of this strategy as turning a defendant into a plaintiff.[137] To address the underlying problems effectively and to serve these children properly, attorneys must maintain the special education representation until the child is receiving appropriate services and has stabilized in school and at home.

Based upon success in the special education case, one can anticipate the prosecutor or judge will agree to dismiss the status offense matter. If not, the defense attorney can introduce into the status offense proceeding the findings of fact and conclusions of law by the special education hearing officer, demonstrating that school personnel have violated the IDEA, that the child's behavior underlying the status offense charge arises from the child's disability, and that the hearing officer has ordered appropriate services for the child. If the juvenile court judge maintains, in the face of the special education findings, that the child is guilty of the status offense charges and needs treatment and rehabilitation from the juvenile system, the defense attorney—having introduced the special education findings and order—will be in a strong position to appeal.

Conclusion

A status offense charge suggests the child is in a crisis situation at school, at home, or both. For children with disabilities that affect education, IDEA services should be sufficient to address the conditions that lead to a status offense referral for truancy or disruptiveness at school. Further, for a child whose education-related disabilities also affect relationships at home, special education services should be in place to address behaviors underlying a status offense referral for ungovernability. A juvenile defense attorney who provides special education representation

can obtain appropriate services for clients and often extract those clients from the juvenile system. Problems developed over years will not dissipate immediately. The attorney should maintain the special education representation until the youth is making satisfactory progress academically and emotionally.

Endnotes

1. Rutherford Jr., Robert B. et al. *Youth with Disabilities in the Corrections System: Prevalence Rates and Identification Issues*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, July 2002, 7-19, available at http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf (describing the prevalence of disabilities in detained youth); *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research*. Washington DC: National Council on Disability, May 1, 2003, 49-71, available at www.ncd.gov/newsroom/publications/pdf/juvenile.pdf (discussing the link between disability and delinquency); Tulman, Joseph B. "Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System." *Whittier Journal Children & Family Advocacy* 3(2), 2003, 4 (describing how to use special education law to address disproportionate representation).

2. For a detailed description of how the failure to follow special education law leads to the disproportionate representation of children with disabilities in the delinquency system, *see* Tulman, 2003, note 12; Rivkin, Dean H. "Legal Advocacy and Education Reform: Litigating School Exclusion." *Tennesee Law Review* 75, 2008, 265, 266-69.

3. The Uniform Law Commissioners' Model Juvenile Court Act of 1968, the blueprint for state laws on child welfare, delinquency, and status offense matters, requires "achiev[ing] the . . . purposes [of the Act] in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety." § 1(3).

4. 20 U.S.C. § 1412(a)(5).

5. 42 U.S.C. § 5633.

6. 20 U.S.C. § 1415(i)(3)(B)-(C); 34 C.F.R. §§ 300.517(a)(1)(i), 300.517(c).

7. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); *see also* 20 U.S.C. § 1412(a)(1)(B) and 34 C.F.R. § 300.102.

8. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a).

9. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1).

10. 34 C.F.R. § 300.102(a)(3)(i)-(iv) (describing specific exception).

11. 34 C.F.R. § 300.101(c).

12. 29 U.S.C. § 794.

13. 34 C.F.R. §§ 104.31-39.

14. A "child with a disability" is a child with "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A)(i)-(ii).

15. 34 C.F.R. § 300.8(c)(9)(i)-(ii).

16. 20 U.S.C. § 1414(a)-(c); 34 C.F.R. §§ 300.300-.311.

17. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4), § 300.304(c)(6) (evaluation must be comprehensive), § 300.304(c)(1)(i) (nondiscriminatory), § 300.304(c)(1)(iii)-(v) (properly administered), § 300.304(c)(1)(ii) (in the child's native language or mode of communication), §§ 300.307(a)(2), 300.309(a)(2)(i), 300.311(a)(7) (response-to-intervention approach for determining learning disability).

18. 20 U.S.C. § 1414(a)(1)(B).

19. 20 U.S.C. § 1414(b)(1).

20. 20 U.S.C. § 1414(a)(1)(D)(i)(I).

21. 20 U.S.C. § 1414(a)(1)(C)(i)(I)-(II).

22. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

23. 20 U.S.C. § 1414(a)(2)(A)(i)-(ii); 34 C.F.R. § 300.303(a)(1)-(2); 20 U.S.C. § 1414(b)(1) (prior written notice); § 1414(c)(3) (informed consent).

24. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.

25. 34 C.F.R. § 300.502(b), § 300.502(b)(2).

26. 20 U.S.C. § 1401(9) (defining free appropriate education).

27. 20 U.S.C. §1401(9)(B)-(D).

28. 20 U.S.C. § 1401(9)(A).

29. 458 U.S. 176 (1982).

30. 485 U.S. at 188-89.

31. 485 U.S. at 198-201.

32. 20 U.S.C. § 1400(d)(1)(A).

33. 20 U.S.C. §§ 1401(14), 1414(d).

34. 20 U.S.C. § 1414(d)(1)(A)(i).

35. 20 U.S.C. § 1414(d)(1)(B).

36. 20 U.S.C. § 1414(d)(4); § 1414(d)(2)(A)(requiring that an IEP be in place at the start of the school year).

37. 20 U.S.C. § 1414(d)(3)(B)(i).

38. 20 U.S.C. § 1414(d)(3)(A)(i)-(iv).

39. 20 U.S.C. § 1412(a)(5).

40. 20 U.S.C. § 1400(d)(1)(A) (requiring that special education students be prepared for "further education, employment, and independent living").

41. 20 U.S.C. § 1412(a)(5)(A).

42. 34 C.F.R. § 300.116(b)-(c).

43. 34 C.F.R. § 300.115.

44. 34 C.F.R. § 300.106.

45. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (specifying further "related services"). The requirement to provide related services includes medical services by a licensed physician only for purposes of diagnosis or evaluation; Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891-92 (1984).

46. 34 C.F.R. § 300.34(c)(15).

47. 34 C.F.R. § 300.34(c)(1).

48. 34 C.F.R. § 300.34(c)(9).

49. 34 C.F.R. § 300.34(c)(6).

50. 20 U.S.C. § 1401(33); 34 C.F.R. §§ 300.42, 300.107, and 300.117.

51. 34 C.F.R. § 300.324(a)(2)(v); 20 U.S.C. § 1401(1)-(2).

52. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b) (mandating IEP Team to include transition services for children younger than 16, if appropriate).

53. 20 U.S.C. § 1400(d)(1)(A).

54. 34 C.F.R. § 300.43(a)(1).

55. 34 C.F.R. § 300.43(a)(2).

56. Ibid.

57. 34 C.F.R. § 300.324(c)(1).

58. Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). In the 2004 amendments, Congress reinforced the substantive focus on FAPE and prohibited hearing officers from granting victory to parents based solely on *de minimis* procedural violations. 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III) (indicating when procedural violations violate the right to a FAPE). Subsection (f)(3)(E)(ii) contains a three-part, disjunctive test for whether a procedural inadequacy is sufficient to constitute a basis for a hearing officer to rule in favor of the parent. The procedural violation must impede the child's right to FAPE; significantly impede the parent's opportunity to participate in decision making; or cause a deprivation of educational benefits. The parallel regulation is 34 C.F.R. §300.513(a)(2).

59. The law specifies that the parent must receive notice of rights once per year, as well as when triggered by other specified events. 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. §§ 300.504(a)(1)-(4).

60. 34 C.F.R. §§ 300.501(a), 300.613-300.621.

61. 34 C.F.R. § 300.501(b)-(c). Parents have a right to participate, with a team of qualified professionals, in the determination of whether their child is eligible for special education, 20 U.S.C. § 1414(b)(4)(A), as well as in the placement decision, § 1414(e).

62. 20 U.S.C. § 1415(b)(3)(A)-(B); 34 C.F.R. § 300.503(a)(1)-(2).

63. 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).

64. The retainer agreement probably should contain an explanation regarding the potential conflict of interest between the parent and the child, including the possibility that they might disagree on the objectives of the special education representation. An irresolvable and unwaivable conflict likely would lead to the withdrawal by the attorney from the representation.

65. 20 U.S.C. § 1415(b)(6)(A). The regulations also require each state education agency to adopt procedures for receiving, investigating, and addressing complaints regarding the failure to provide appropriate services under the IDEA. 34 C.F.R. §§ 300.151-300.153.

66. 20 U.S.C. §§ 1415(c)(2)(A), 1415(b)(7)(A).

67. 20 U.S.C. § 1415(c)(2)(B)(ii); § 1415(c)(2)(B)(i).

68. 20 U.S.C. § 1415(f)(3)(C)-(D).

69. 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

70. 20 U.S.C. § 1415(f)(1)(B); § 1415(f)(1)(B)(i)(IV) (parties may waive resolution session).

71. 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.515(a); § 300.510(b)-(c) (exceptions and adjustments to 30-day period).

72. 34 C.F.R. § 300.515(a).

73. 20 U.S.C. § 1415(f)(3)(A).

74. 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1).

75. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2).

76. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(4)-(5), § 300.512(c)(3).

77. 20 U.S.C. § 1415(f)(2); 34 C.F.R. §§ 300.512(a)(3), 300.512(b).

78. Schaffer v. Weast, 546 U.S. 49, 57-58 (2005).

79. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

80. 20 U.S.C. §§ 1412(a)(11)(A)(iii),1401(11); 34 C.F.R. §§ 300.149(c), 300.19.

81. 20 U.S.C. § 1415(b)(6)(A).

82. 20 U.S.C. § 1415(i)(2)(C)(iii).

83. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); Burlington v. Dept. of Educ., 471 U.S. 359, 369-70 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 9-10 (1993); Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2488 (2009).

84. Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 (6th Cir. 2007) ("An award of compensatory education is an equitable remedy that a court can grant as it finds appropriate.").

85. Goss v. Lopez, 419 U.S. 565, 577 (1975). Some kind of notice and hearing also is required, as well as an explanation of the evidence and an opportunity to be heard. Ibid., 579, 581.

86. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.536(a)(1) (removal for more than 10 consecutive days), § 300.536(a)(2) (removal for more than 10 days that are not consecutive but that constitute a pattern creating a change in placement).

87. *E.g.,* 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).

88. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

89. 20 U.S.C. § 1415(k)(1)(E)-(F); 34 C.F.R. § 300.530(e)-(f); *see also* 20 U.S.C. § 1415(K)(1)(E)(i)(I)-(II); 34 C.F.R. § 300.530(e)(1)(i)-(ii) (noting that conduct is a manifestation if the disability caused, or substantially and directly related to, the conduct; or the conduct is a manifestation if it directly resulted from failure to implement child's IEP).

90. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).

91. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).

92. Ibid.

93. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

94. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).

95. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a).

96. 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534.

97. 20 U.S.C. § 1415(k)(5)(B)(i)-(iii); 34 C.F.R. § 300.534(b)(1)-(3).

98. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(i).

99. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(iii).

100. 20 U.S.C. §§ 1415(k)(3), 1415(k)(4)(B); 34 C.F.R. §§ 300.532(a), 300.532(c)(2). School officials can seek an expedited hearing to seek to exclude from the current educational placement a child with a disability whom they allege to be a danger to self or others. 34 C.F.R. § 300.532(c)(2).

101. 20 U.S.C. § 1412(a)(1)(B)(ii).

102. Ibid.

103. 20 U.S.C. § 1414(d)(7)(B); 34 C.F.R. § 300.324(d)(2)(i).

104. 20 U.S.C. § 1414 (d)(7)(A); 34 C.F.R. § 300.324(d)(1)(ii).

105. The same is true with regard to minor delinquency matters that arise at school (e.g., fighting, disorderly conduct, making threats, destruction of property, and drug possession).

106. Schaffer v. Weast, 546 U.S. at 53 ("The core of the [IDEA] is the cooperative process that it establishes between parents and schools.").

107. Because the IDEA requires developing an individualized program, a child's disability category does not limit what particular services are appropriate. So, for example, a child may need positive behavioral interventions and supports or psychological counseling even though the child is not identified as "emotionally disturbed."

108. 34 C.F.R. § 300.8(c)(4)(i).

109. Tulman, 2003, 31 note 140 (citing authorities).

110. Ibid.

111. 34 C.F.R. § 300.34(c).

112. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (IEP Team shall consider positive behavioral interventions and supports); 20 U.S.C. § 1415(k)(1)(D)(ii) (FBA and behavioral intervention services for child removed to interim alternative educational setting); § 1400(c)(5)(F) (whole-school approaches, including positive behavioral interventions and supports, improves effectiveness of education for children with disabilities).

113. Honig v. Doe, 484 U.S. 305, 323 (1988).

114. In re Robert T. Doe, 753 N.Y.S.2d 656, 660 (Fam. Ct. 2002) (relying upon juvenile court's inherent authority to dismiss status offense matter in the interest of justice). In re Trent M., 569 N.W.2d 719, 725-26 (Wis. Ct. App. 1997) (recognizing in dictum that trial court could have dismissed the petition in the best interest of the child but holding that trial court ruled on legal grounds instead).

115. In re Ruffel P., 582 N.Y.S.2d 631, 632 (Fam. Ct. 1992) (dismissing status offense matter in the interest of justice, emphasizing that the child was eight and a half at the time of petitioning).

116. In re Trent M., 569 N.W.2d at 724.

117. 20 U.S.C. §§ 1415(i)(2), 1415(l); 34 C.F.R. §§ 300.516(a), 300.516(e).

118. Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994) (upholding rulings by an administrative law judge and a district court that school administrators who failed to identify and serve Chris L. under the IDEA had attempted improperly to change his educational placement by petitioning a delinquency matter for behavior that was a manifestation of the student's disability), aff'd, 106 F.3d 401 (6th Cir. 1997) (unpublished opinion), cert. denied, 520 U.S. 1271 (1997). A distinguishing feature of Morgan v. Chris L. is that Tennessee's statutes authorize school-initiated petitions in the juvenile court; In re Trent M., 569 N.W.2d at 725; Commonwealth v. Nathaniel N., 764 N.E.2d 883, 886-87 (Mass. App. Ct. 2002); In most states, school officials must rely upon juvenile

court personnel to file a petition. Beginning in January 2009, Tennessee prohibits school officials from filing a petition against a special education student unless they first find that the alleged behavior was not a manifestation of the child's disability. Tenn. Code Ann. § 49-10-1304(b)(3)(B) (2009).

119. 20 U.S.C. § 1415(k)(6)(A)(2005) (originally codified, following the 1997 amendments, at 1415(k)(9)(A)). One might presume that Congress meant for subsection 1415(k)(6)(A) to cover "delinquent acts" and "status offenses," as well as "crimes." Whether to argue that the omission of these terms is significant, on the other hand, is a matter left to the judgment of the individual attorney.

120. Commonwealth v. Nathaniel N., 764 N.E.2d at 887 (*citing* Seligmann, Terry Jean. "Not as Simple as ABC: Disciplining Children with Disabilities under the 1997 IDEA Amendments." *Arizona Law Review* 42, 2000, 77, 115 note 211.

121. 64 Fed. Reg. 12631 (March 12, 1999).

122. Ibid.

123. Congress has not retreated fundamentally from its intention to prohibit school administrators from unilaterally excluding children with disabilities. The Gun-Free Schools Act, 20 U.S.C. § 7151(b)(1) requires states that receive federal education money to have a state law requiring LEAs to expel any student bringing a firearm to school or possessing a firearm in school. The state law, however, can allow the chief of each LEA to modify expulsion on a case-by-case basis. Subsection 7151 (b)(1); Subsection 7151(c), furthermore, is a "special rule" providing that "[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act . . . ."

124. In re Beau II, 738 N.E.2d 1167, 1170 (N.Y. 2000) (habitual school tardiness).

125. Ibid.

126. Ibid.; In re Charles U., 837 N.Y.S.2d 356, 359 (App. Div. 2007) (determining that status offense case not an improper effort to change suicidal child's educational placement where there was an IEP meeting to evaluate placement needs).

127. In re Trent M., 569 N.W.2d at 724.

128. Ibid.

129. Ibid.

130. Model Juv. Ct. Act § 6 (1968) (specifying that the "[p]owers of the probation officer" include "mak[ing] investigations, reports, and recommendations to the juvenile court; receiv[ing] and examin[ing] complaints and charges of delinquency, unruly conduct or deprivation of a child for the purpose of considering the commencement of proceedings . . . [and] mak[ing] appropriate referrals to other private or public agencies of the community if their assistance appears to be needed or desirable…" D.C. Code § 16-2305 (requiring that intake probation officer recommends whether to file petition; notifies complainant of recommendation not to file, and that complainant may appeal to the prosecutor). Thus, the intake probation officer can delay, block, or divert a complaint and, essentially, refer the matter to the public agency—the school system—that sent it to the court.

131. Under 20 U.S.C. § 1415(k)(6) ("Referral to and action by law enforcement and judicial authorities"), subsection (B)—concerning "[t]ransmittal of records"—provides: "An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime." The transfer of records is subject to protections of the Family Educational Rights and Privacy

Act (FERPA). Commonwealth v. Nathaniel N., 764 N.E.2d at 888 (holding also that transfer is permitted by FERPA).

132. Schall v. Martin, 467 U.S. 253, 284 (1984) (illustrating the intake process).

133. Tulman, Joseph B. "The Role of the Probation Officer in Intake: Stories from Before During and After the Delinquency Initial Hearing." *D.C. Law Review* 3, 1995, 235, 235-50. (discussing responsibilities of an intake officer).

134. 64 Fed. Reg. 12631 (March 12, 1999).

135. *Defending Youth in Truancy Proceedings: A Practice Manual for Attorneys*. Seattle, WA: ACLU of Washington & TeamChild, September 2008, 75, available at www.teamchild.org/pdf/Truancy%20Manual%202008.pdf (recommending that defense counsel file motion for stay or seek a joint request for continuance of status offense matter to address reasons for truancy). In re Ruffel P., 582 N.Y.S.2d at 632 (continuing twice a hearing on defense counsel's motion to dismiss to await special education decision making by the IEP Team). *But cf.* In re C.S., 804 A.2d 307 (D.C. 2002) (noting that trial court that first ordered and awaited submission of IEP did not abuse its discretion by conducting disposition hearing without receiving or considering the IEP).

136. Model Juv. Ct. Act § 2(4)(iv) (1968). The definition of "unruly child" (like the definition of "delinquent child") requires both the deviant conduct and a separate finding of a "need for treatment and rehabilitation." Ibid. The definition is conjunctive, and the prosecutor must prove both elements. In re M.C.F., 293 A.2d 874, 877 (D.C. 1972) (finding rebuttable presumption that delinquency adjudication establishes need for care and rehabilitation).

137. Tulman, Joseph B. "The Best Defense is a Good Offense: Incorporating Special Education Law into Delinquency Representation in the Juvenile Law Clinic." *Washington University Journal of Urban & Contemporary Law* 42, 1992, 223 (discussing the change in relationship needed to advocate through special education law).