

2022

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Recommended Citation

Murphy, Savannah L. (2022) "It Starts and Ends with the Schools: Using Strict IDEA Enforcement to Sunder the School-to-Prison-Pipeline for Special Education Students," *Ohio Northern University Law Review*. Vol. 48: Iss. 2, Article 4.

Available at: https://digitalcommons.onu.edu/onu_law_review/vol48/iss2/4

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It Starts and Ends with the Schools: Using Strict IDEA Enforcement to Sunder the School-to-Prison-Pipeline for Special Education Students

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ABSTRACT

Many scholars have advocated for the unification of IDEA, ADA, and Section 504 principles in the juvenile adjudication process. This comment seeks a different approach. We should not have to unify two separate concepts, but rather strive to keep them in their own distinct universes. Special education and juvenile delinquency should not intersect. If a child qualifies for special education under the IDEA, they should not interact with a School Resource Officer, nor should they be adjudicated as delinquents or see the inside of a juvenile detention center. These individuals not only get lost in the system, but public schools are essentially relieved of their IDEA obligations. This comment seeks to spread awareness of the school-to-prison pipeline with regard to special education students. It also implores reformation, which holds the school district responsible for providing every child with special needs a free and appropriate public education.

I. INTRODUCTION

“I don’t know what’s going on. I don’t understand” said ten-year-old boy with autism, John Haygood, as he was placed under arrest at a Florida school.¹ Charges were pressed against John by his own paraprofessional, resulting in his arrest for felony battery.² Due to other behavioral issues, this arrest surprisingly occurred after John had been out of school for six months.³ The paraprofessional pressed charges because she wanted to “get the ball rolling to get [John’s] mother to realize he need[ed] additional help” and yet, such message resulted in a scared young boy spending the night in a juvenile

* Graduate of Ohio Northern University Pettit College of Law Class of 2021. This comment is dedicated to all the special education students who have been or are currently lost in the juvenile justice system. This comment is also dedicated to Angela Uliana-Murphy, Esq, Special Education Attorney for over 25 years.

1. Jacqueline Howard, *10-year-old with autism arrested at Florida school*, CNN (April 24, 2017, 9:17 AM), <https://www.cnn.com/2017/04/21/health/autism-florida-10-year-old-arrested-bn>.

2. *Id.*

3. *Id.*

detention center.⁴ John’s mother, in response, criticized the school’s reaction to her son’s behavior and expressed that children with special needs in schools are “being treated as criminals rather than children with special needs.”⁵

This is the very issue that strikes the heart of this comment. We live in a world where a paraprofessional, whose obligation is to provide individualized services for a special education student, is the first one to press charges in response to a child’s persistent behavioral issues.⁶ The very person (or entity) who is the “additional help” finds it more prudent to send a young boy into the ruthless jaws of the juvenile justice system, rather than to abide by their duties and facilitate a functional and conducive educational program for disabled students.⁷ Such action should be considered a de facto violation of the Individuals with Disabilities Education Act. (IDEA).⁸

The school-to-prison pipeline has been a persistent problem that scholars have been trying to solve for decades.⁹ The issue has been summarized as “juvenile courts, essentially a punitive apparatus, to handle the behavior problems of our schools . . . the juvenile courts make problems worse . . . they make criminals out of children.”¹⁰ However, the school districts’ use of the juvenile justice system as a disciplinary tool is not the root of the problem.¹¹ The IDEA is only effective when free appropriate public education (FAPE) is provided to all qualifying students, even those “who have been suspended or expelled from school.”¹² Notably, the “key step in giving force to that guarantee [of FAPE] is the process that must be followed when evaluating a child to determine whether they require special education and related services to receive a meaningful education.”¹³ Thus, a predominant cause of the overrepresentation of adjudicated delinquents with special education needs is the school district’s failure to identify, assess, and address the student with a disability.¹⁴

4. *Id.*

5. *Id.*

6. Howard, *supra* note 1.

7. *Id.*

8. *See* 20 U.S.C. § 1400 (2012).

9. *See* Ronald Lee Jackson, *Learning Disabilities, Juvenile Delinquency and Legal Advocacy*, 2 CRIM. JUST. J. 287, 295 (1979).

10. *Id.* (quoting WILLIAM M. CRUICKSHANK, *LEARNING DISABILITIES IN HOME, SCHOOL AND COMMUNITY*, 71-73 (2d ed. 1977).

11. *Id.* at 294.

12. § 1412(a)(1)(A).

13. *Rose Tree Media Sch. Dist. v. M.J. by and through M.J.*, No. 18-cv-1063, 2019 WL 1062487 at *1 (E.D. Pa. Mar. 6, 2019).

14. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28 (2003).

The cycle starts: a student struggles in school and repeatedly fails in areas where their nondisabled peers succeed; they either go unidentified or are identified after many years; they fall behind in their academics; if the school district identifies the student, the services provided are inadequate in meeting the individual needs of the student; the student stops going to school or they manifest behaviors that ultimately lead to their detention;¹⁵ the detention center gives inadequate education and transition services; the student cannot integrate back into society upon release; behaviors never improve and they return to detention for probation violations or other crimes.¹⁶

Some may argue that the IDEA explicitly allows a local education agency to report a crime committed by a child with a disability to authorities.¹⁷ However, my focus is not on what the school district does *after* the student's behavior manifests but on what they do leading up to the charge.

If a student with a disability exhibits troubling behaviors, which manifest from their disability, and those behaviors escalate to the execution of what may be deemed a criminal act, it would likely be due to the school district's denial of FAPE to the student.¹⁸ John Haygood is a perfect example: it is never acceptable to hit other students and teachers.¹⁹ However, if he was provided the proper services that assessed and addressed his physical aggression, which was a manifestation of his autism, John would never have engaged in the act that led to his paraprofessional charging him with felony battery.²⁰ School districts must be held accountable,²¹ and the easiest legal avenue in holding school districts accountable for perpetuating the school to prison pipeline is to utilize the IDEA in full force.²²

Section II of this comment provides an overview of the IDEA, outlines its purpose, and explores key features that can be used to protect children with disabilities from juvenile justice.²³ Section III illustrates the problem of disproportionate representation of special education students in juvenile detention centers, and how the system sets the student up for a life recidivism.²⁴ Section IV proposes how the purpose and functions of the

15. *Id.* at 28-29.

16. See *Locked Out: Improving Educational and Vocational Outcomes for Incarcerated Youth*, COUNCIL OF STATE GOV'TS JUSTICE CTR 11-12 (Nov. 2015), <https://csgjusticecenter.org/publications/locked-out-improving-educational-and-vocational-outcomes-for-incarcerated-youth/> [hereinafter *Locked Out*].

17. § 1415(k)(6).

18. Jackson, *supra* note 9, at 293-94, 297.

19. See Howard, *supra* note 1.

20. *Id.*

21. Molly McCluskey, 'What If This Were Your Kid?', ATLANTIC (Dec. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/>.

22. Tulman, *supra* note 14, at 24.

23. See discussion *infra* Section II.

24. See discussion *infra* Section III.

IDEA, if strictly enforced, will sunder the school-to-prison pipeline, and give students with disabilities a chance at success.²⁵ Finally, Section V will briefly conclude.²⁶

II. INSIDE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

This section will provide a brief overview of the IDEA and discuss three main features of the IDEA that, if correctly implemented, will keep children with disabilities out of juvenile delinquency centers. Congress passed the IDEA finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”²⁷ A way to meet this goal is to give children with disabilities access to general education classrooms as much as possible.²⁸ This is also known as the least restrictive environment (LRE).²⁹ The purpose of the IDEA is to “ensure that all children with disabilities have available to them a *free appropriate public education* that emphasizes special education and related services designed to meet their *unique needs and prepare* them for further education, employment, and independent living . . .”³⁰

In securing this purpose, the IDEA implements numerous procedural safeguards that hold a school district accountable.³¹ This section will focus on three particularly important safeguards that requires a school district to (1) to identify and evaluate any student suspected of having a qualifying disability, also known as the “child find” obligation;³² (2) provide FAPE that is uniquely tailored to the needs of the student³³ through an Individualized Education Program (IEP);³⁴ and (3) to hold a manifestation determination hearing before the district can issue a decision to change the placement of a student resulting from a code of conduct violation.³⁵

a. “Child Find” Obligation

A school district’s child find obligation requires the school district to identify, locate, and evaluate a child suspected of qualifying under the IDEA

25. See discussion *infra* Section IV.

26. See discussion *infra* Section V.

27. § 1400(c)(1).

28. § 1400(c)(5)(A).

29. § 1411(e)(3)(F)(i).

30. § 1400(d)(1)(A) (emphasis added); see also 34 C.F.R. § 300.1(a) (2016).

31. See 20 U.S.C. § 1415(d).

32. § 1412(a)(3).

33. Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982).

34. § 1414(d).

35. § 1415 (k)(1)(E-F).

for special education services.³⁶ Such a child may be exhibiting developmental delays.³⁷ Developmental delays are measured by diagnostic instruments or procedures in “one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development.”³⁸ Under the IDEA, a child with a disability is defined by including:

Child[ren] with (1) intellectual disabilities, (2) hearing impairments . . . , (3) speech or language impairments, (4) visual impairments . . . , (5) [a] serious emotional disturbance . . . , (6) orthopedic impairments, (5) autism, (6) [a] traumatic brain injury, (7) other health impairments [OHI], or (8) specific learning disabilities . . . [for one who] needs special education and related services.³⁹

It is important to note that a child suspected of a disability can still qualify for services under the IDEA “even though they are [able to] advance[e] from grade to grade.”⁴⁰ In order to identify the student with a disability, a parent, state educational or other agency, or the local education agency (LEA) can request an initial evaluation for special education services.⁴¹ After receiving parental consent, the school district has sixty days to complete an evaluation of the child.⁴² A proper evaluation must “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent.”⁴³ These tools will determine if the child is eligible under the IDEA as a student with a disability, will identify the child with the disability or disabilities, will determine whether the child qualifies for specially designed instruction, and become the basis of the child’s IEP, which can then put forth their individualized education services.⁴⁴

In evaluating the child, the school district must not use one single source of measurement or criterion for determining whether the student is a child with a disability.⁴⁵ Also, the school district must assess cognitive, behavioral, physical, and developmental factors in identifying the child.⁴⁶ Likewise, the evaluation must be administered by “trained and knowledgeable personnel”

36. § 1412(a)(3)(A); 34 C.F.R. §300.8(a)(1).

37. 34 C.F.R. §300.8(b).

38. *Id.*

39. 20 U.S.C. § 1401(3)(A); *see also*, 34 C.F.R. § 300.8(c).

40. 34 C.F.R. § 300.111(c)(1).

41. 20 U.S.C. § 1414(a)(1)(A).

42. § 1414(a)(1)(C)(i)(I).

43. 34 C.F.R. § 300.304(b)(1).

44. § 300.304(b)(1)(ii).

45. § 300.304(b)(2).

46. § 300.304(b)(3).

who are capable of administering the specific assessment.⁴⁷ The assessments must be “tailored to assess specific areas of educational need,” but the child must also be assessed in every area of suspected disability.⁴⁸

The school district’s child find obligation is, arguably, the most critical safeguard provided by the IDEA because if the child goes unidentified, is under identified, or wrongly identified, then he or she will be denied FAPE, and ultimately denied the individualized education purposed to aid in their success.⁴⁹ Therefore, the IDEA allows parents to request a hearing if the school district fails in their child find obligations.⁵⁰ This will result in a due process hearing conducted by an impartial hearing officer appointed by the state educational agency.⁵¹ The hearing officer will evaluate whether the school district was arrant in their child find obligations by looking to the student’s educational records and following the rules established by the IDEA.⁵² Public schools and juvenile justice centers are all responsible for fulfilling their child find obligations.⁵³ It is after the LEA successfully identifies the child with a disability that they can then begin to implement an individualized education program (IEP) in the least restrictive environment (LRE) so that the student can be provided a free and appropriate public education (FAPE),⁵⁴ which is the core of the IDEA.

b. Free Appropriate Public Education and the Individualized Education Plan

FAPE is defined in the IDEA as special education services provided at the public’s expense, which meets the standards of the state educational agency and the standards provided in Section 1414(d) of the IDEA.⁵⁵ Section 1414(d) of the IDEA outlines the procedures and requirements of the IEP.⁵⁶ An IEP is a document, written *annually*, that contains statements of: (1) the child’s “present levels of academic achievement and functional performance[;]” (2) measurable goals designed to meet the child’s specific special education needs; (3) the “child’s progress toward meeting the annual goals[;]” (4) special education services, aids, and a list of specially designed

47. § 300.304(c)(1)(iv-v).

48. §§ 300.304(c)(2)-(c)(4).

49. 20 U.S.C. §§ 1415(a)-(b)(1).

50. § 1415(f)(1)(A).

51. *Id.*

52. §§ 1415(d)(2)(D)-(f)(1)(E)(i).

53. Lisa M. Geis, *Courtroom, Classroom, Commitment: Using Special Education and Disability Rights to Keep Youth out of Secure Facilities*, 8 J. MARSHALL L. J. 521, 550 (2015) [hereinafter Geis, *Courtroom, Classroom, Commitment*].

54. See 20 U.S.C. §§ 1412(a)(5)(A)-(a)(5)(B)(i).

55. § 1401(9); 34 C.F.R. §300.17.

56. 20 U.S.C. § 1414(d).

instruction (SDIs) and program modifications and supports that will be provided; (5) the child's instruction in the least restrictive environment (LRE) or why the "child will not participate with nondisabled children in regular education class[;]" (6) list of accommodations necessary to achieve annual goals; and (7) projected date of start of services and the frequency, location and duration of the services.⁵⁷

The IEP must consider "(i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial evaluation and most recent evaluation . . . and (iv) the academic, developmental, and functional needs of the child."⁵⁸ In addition, an IEP must consider special considerations of the child.⁵⁹ For example, if the child has behavioral issues, the IEP team must contemplate implementing a positive behavior support plan (PBSP), which contains supports and interventions to assess and address the child's behavior.⁶⁰ The IEP team must *at least* consist of the child's parents, at least one regular education and special education teacher, and the LEA's representative who is knowledgeable of the services provided by the district.⁶¹

FAPE must be provided to any student who qualifies for services between the ages of three and twenty-one.⁶² These services must be provided to a qualifying student even though they are meeting their annual goals and are able to advance from grade to grade.⁶³ The LEA must ensure that an IEP is developed within thirty days of the determination that the child qualifies for special education services under the IDEA and must be implemented as soon as possible.⁶⁴

The IEP must, with the consideration of a few exceptions to be discussed shortly, "to the maximum extent appropriate," educate children with disabilities with children who are not disabled concurrently.⁶⁵ This is known as the LRE requirement.⁶⁶ LRE must even be considered when the IEP team evaluates an alternative placement for the child.⁶⁷ For example, when selecting the LRE, the child cannot be removed from regular education "solely because of needed modifications in the general education

57. § 1414(d)(1)(A)(i).

58. § 1414(d)(3)(A)

59. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2).

60. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2).

61. 20 U.S.C. § 1414(d)(1)(B).

62. 34 C.F.R. § 300.101(a).

63. § 300.101(c).

64. § 300.323(c)(1).

65. § 300.114(a)(2)(i).

66. § 300.114.

67. § 300.116.

curriculum”, and LRE considerations must include potential harmful effects and the quality of individualized services needed.⁶⁸

A major purpose of the IDEA is to ensure that students with disabilities are given the opportunity to succeed in life and independent living, just as their nondisabled peers,⁶⁹ thus a major component to the IEP is the section concerning transition services.⁷⁰ Transition services are designed to assist the child in functional achievement while facilitating “movement from school to post-school activities, including postsecondary education, vocational education, integrated employment . . . independent living, or community participation.”⁷¹ This section of the IEP is meant to provide specially designed instructions (SDI) that will allow the child to meet their post-graduation goals.⁷²

If applicable, a child may also be eligible for extended school year (ESY) services, which may be required for a LEA to adequately provide FAPE.⁷³ ESY is only to be provided on an individual basis if the child exhibits the need for schooling beyond the traditional school year.⁷⁴ This must be a free service provided at no cost to the student.⁷⁵ This is an essential component of FAPE because it recognizes that some students with disabilities will need extra time to achieve their goals as described in the IEP.⁷⁶ In specific circumstances, FAPE is not limited to the traditional school year.⁷⁷

The IEP is purposed to be adjusted frequently, and as needed, but no less than annually to meet the child’s needs.⁷⁸ An IEP will need to be revised prior to the annual review if the child is not making progress toward the annual goals, if reevaluation report results are received, to meet anticipated needs of the child, and any other matter that requires such revision.⁷⁹ In addition, the LEA must ensure that a child with disabilities is reevaluated at least once every three years to ensure that the appropriate services continue to meet the individual needs of the student.⁸⁰ These evaluation procedures must meet the requirements of 34 C.F.R. § 300.304 as discussed in Section II.a in this comment.⁸¹

68. § 300.116(d-e).

69. 20 U.S.C. § 1400(d)(1)(A); *see also* 34 C.F.R. § 300.1(a).

70. 34 C.F.R. § 300.43(a)(1).

71. *Id.*

72. § 300.43(b).

73. § 300.106.

74. *Id.*

75. *Id.*

76. *Id.*

77. § 300.43(a)(1).

78. 20 U.S.C. § 1414(d)(4).

79. *Id.*

80. § 1414(a)(2)(B)(ii).

81. *See* 34 C.F.R. § 300.304.

The IEP is the cornerstone to achieving FAPE and ensuring that each student receives specialized education.⁸² However, whereas the IDEA requires a juvenile with a disability residing in adult prison be given FAPE, they are not entitled to access to general assessments and transition planning.⁸³ Otherwise, FAPE is required in traditional public schools and in juvenile delinquency centers, with regard to the exception that juvenile delinquency centers are not required to provide the least restrictive environment for incarcerated youth.⁸⁴

If the parent believes that the LEA has failed to provide FAPE, they can file a due process complaint.⁸⁵ There are two seminal cases by the Supreme Court of the United States that have evaluated the LEA's FAPE requirements to a student with disabilities under the IDEA.⁸⁶ *Bd. of Ed. v. Rowley*, held that FAPE requires an IEP to "consist[] of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services that are necessary to permit the child 'to benefit' from the instruction."⁸⁷ Further, the IEP must be "reasonably calculated to enable the child to receive educational benefits."⁸⁸

More recently, in 2017, the Supreme Court took on this issue again, clarifying the standard of evaluating whether the LEA denied FAPE to a disabled student in *Endrew F. v. Douglas Cnty. Sch. Dist.*⁸⁹ In *Endrew*, the District Court thought that education was not appropriate unless the student was provided "an opportunity to achieve [their] full potential commensurate with the opportunity provided to other children."⁹⁰ The Supreme Court in *Endrew* noted that the educational benefit, reasonably calculated to meet the unique needs of the student, must be more than *de minimis*.⁹¹ The IEP must be reasonable, not ideal.⁹² Most notably, the Court required that the IEP must be "appropriately ambitious in light of [their] circumstances".⁹³ "Appropriately ambitious" may be enough to advance the student from grade

82. *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S.Ct. 988, 994 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)).

83. § 1414(d)(7); see also Blakely Evanthia Simoneau, *Special Education in American Prisons: Risk, Recidivism, and the Revolving Door*, 15 STAN. J.C.R. & C.L. 87, 90-91 (2019).

84. Tulman, *supra* note 14, at 39 ("The requirement in the special education law to provide for a child who is disabled . . . ("FAPE") in the least restrictive environment . . . does not legally control and override . . . standards regarding the imposition of delinquency incarceration").

85. 34 C.F.R. § 300.507.

86. See generally *Endrew*, 137 S.Ct. 988; *Rowley*, 458 U.S. at 176.

87. *Rowley*, 458 U.S. at 188-89.

88. *Id.* at 207.

89. *Endrew*, 137 S.Ct. at 988.

90. *Id.* at 995 (citing *Rowley*, 458 U.S. at 185-86).

91. *Id.* at 997.

92. *Id.* at 999.

93. *Id.* at 1000.

to grade or it may differ due to the child's unique needs.⁹⁴ The Court noted that a "more than *de minimis*" standard was not sufficient and that the IDEA demanded more.⁹⁵ Thus, the "appropriately ambitious" standard was created to require the LEA to provide a program that would be appropriate for the individual child in meeting their unique needs.⁹⁶

c. Manifestation Determination

If the LEA intends to change the placement of a student with a violation, due to a code of conduct violation, a manifestation determination must be conducted within ten days.⁹⁷ The LEA, along with the parents of the child and the IEP team must determine if "the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."⁹⁸ If the conduct is found to be a manifestation of the child's disability, the IDEA imposes specific procedures to be conducted to protect the child from being removed from their current placement.⁹⁹

First, the LEA must "conduct a functional behavioral assessment" (FBA) and "implement a behavioral intervention plan" that assesses and addresses the concerns posed by the FBA.¹⁰⁰ If a behavioral intervention plan had already been in place, the LEA must review and modify the plan to address the behavior.¹⁰¹ Lastly, unless there are special circumstances, the child must be returned to their original placement unless otherwise agreed by the child's parents and the IEP team.¹⁰² The special circumstances that will result in the removal of a child, for not more than forty-five days, regardless as to whether the behavior was a manifestation of the child's disability or if the child (1) possesses a weapon at school; (2) knowingly possesses illegal drugs or solicits the sale of them while at school or on school premises; or (3) "has inflicted serious bodily injury upon another person while at school".¹⁰³

If the parents disagree with a manifestation determination decision, they may appeal the decision.¹⁰⁴ An impartial hearing officer will have the authority to either return the child to his or her original placement, or order a

94. *Endrew*, 137 S.Ct. at 1000.

95. *Id.* at 1001.

96. *Id.*

97. 20 U.S.C. § 1415(k)(1)(E)(i).

98. *Id.*

99. § 1415(k)(1)(F).

100. § 1415(k)(1)(F)(i).

101. § 1415(k)(1)(F)(ii).

102. § 1415(k)(1)(F)(iii).

103. § 1415(k)(1)(G).

104. § 1415(k)(3)(A).

change in placement for no more than forty-five school days if the current placement of the student is “substantially likely to result in injury to the child or to others.”¹⁰⁵ While the appeal is pending, the child must remain at their new placement unless otherwise agreed by the parents and the LEA, but the LEA must arrange for an expedited hearing to occur within twenty school days.¹⁰⁶

Likewise, the IDEA does not prohibit an LEA from “reporting a crime committed by a child with a disability to appropriate authorities,” which would result in the child being adjudicated by a juvenile court.¹⁰⁷ However, when the LEA reports the crime, they must also ensure that copies of the child’s special education and disciplinary records are given to the court for consideration.¹⁰⁸ Whereas the IDEA implements safeguards that are meant to protect a child with a disability when they are subject to punishment, either internally through the school administration or through the juvenile justice system,¹⁰⁹ the next section of this comment will show that these safeguards have little teeth.¹¹⁰ Regardless as to whether a student’s behavior manifests from their disability, far too many students find themselves in the criminal morass of the juvenile justice system, a system that is not equipped to educate or transition children back into society.¹¹¹ They, therefore, become lost in the school-to-prison-pipeline, which is no place for any child, let alone one with a disability.

III. THE PROBLEM: DISPROPORTIONATE REPRESENTATION OF SPECIAL EDUCATION STUDENTS IN JUVENILE DETENTION CENTERS

The school-to-prison pipeline can be defined as “a collection of punitive laws, policies, and practices that push young people – particularly African-American students, male students, students with disabilities, and students from low-wealth communities – out of school and into the juvenile and criminal systems.”¹¹² At alarming rates, students’ education in public schools are being disrupted as they are shuffled through juvenile and criminal

105. § 1415(k)(3)(B)(ii).

106. § 1415(k)(4).

107. § 1415(k)(6).

108. *Id.*

109. § 1415(k)(1)(E-F), (k)(6).

110. See *supra* Part III.

111. See *supra* Part III.

112. See generally Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients’ Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 653 (2013).

systems.¹¹³ Lisa M. Geis argues that the school-to-prison pipeline is a result of suspensions, expulsions and zero tolerance policies.¹¹⁴

One study shows that around six-thousand (6,000) juveniles are incarcerated in adult prisons.¹¹⁵ Another study showed that from 1993-2014, 70-91% of youths were still incarcerated as adults.¹¹⁶ Although juvenile detention facilities and adult prisons provide some education services for inmates, both provide limited education and transition services for youth.¹¹⁷ Alarming, the IDEA carves out exceptions that allow adult prisons to deny FAPE to offenders age eighteen through twenty-one,¹¹⁸ even though the IDEA requires that a district provide FAPE to qualifying students ages three to twenty-one.¹¹⁹ These exceptions are problematic for juveniles adjudicated as adults and should be reconsidered.¹²⁰ Educational rights of juveniles who are tried as adults is an issue worth noting, but this comment will focus on the juvenile justice system.

First, this section will talk about the juvenile justice system, its purpose, its failures, and discuss how the justice system has been disproportionately represented by special education students. Then, this section will discuss zero tolerance and the turmoil these policies present to students with disabilities. Lastly, this section will reach the root of the juvenile injustice problem: the lack of individualized education and transition services in detention centers and how it contributes to recidivism among juvenile delinquents with disabilities.

a. The Juvenile Justice System

The juvenile adjudicatory process can begin by a school district filing two types of petitions.¹²¹ First is a juvenile delinquency petition, which is filed against a juvenile who is accused of having committed a criminal act.¹²² The second is a status offense petition, which is filed against a juvenile who

113. Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 879 (2014) [hereinafter Geis, *An IEP*].

114. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 532.

115. *Locked Out*, *supra* note 16, at 1.

116. Karen Sullivan, *Education Systems in Juvenile Detention Centers*, 2018 B.Y.U EDUC. & L.J. 159, 164 (2018).

117. *Locked Out*, *supra* note 16, at 1.

118. Simoneau, *supra* note 83, at 90-91 (listing problematic exceptions to the IDEA: (1) the state can refuse FAPE to incarcerated individuals 18-21, who are eligible, if they have not been previously identified; (2) the state can deny transition services to those who are imprisoned until age twenty-two; (3) juveniles adjudicated as an adult are “excluded from normal assessment testing”; and (4) relaxes the LRE requirement for incarcerated juveniles).

119. 20 U.S.C. § 1412(a)(1)(A).

120. Simoneau, *supra* note 83, at 136.

121. Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL’Y 125, 128 (2000).

122. *Id.* at 128.

is accused of having committed a non-criminal act such as truancy.¹²³ It must be noted that a status offense is only criminal if committed by a juvenile.¹²⁴ Adults can freely skip work or school, and they cannot be considered truant.¹²⁵ After the petition is filed, the charges will either be diverted or court proceedings will commence.¹²⁶ A diversion is a non-judicial approach that aims to rehabilitate the juvenile through “parent and family services [or] informal supervision by probation officers or social workers.”¹²⁷

At trial, the state must meet the standard of proof beyond a reasonable doubt.¹²⁸ The juvenile is adjudicated when he or she is found to be delinquent.¹²⁹ A disposition hearing will then be held to determine the “sentence.”¹³⁰ The purpose of the juvenile justice system is said to further rehabilitation, not to punish.¹³¹ This was supported by the doctrine of *parens patrie*¹³², which reinforces the rehabilitative role of the juvenile court and the idea that it is the court’s duty to determine the best interest of the juvenile.¹³³ However, as Lauren A. Koster notes, even though the juvenile justice system is supposed to rehabilitate, “the implementation of the system was rife with abuse, as evidenced by the harsh conditions within juvenile justice facilities.”¹³⁴

In response to corruption in juvenile detention centers, Congress passed the Juvenile Justice Delinquency Prevention Act of 1974 (JJDPA).¹³⁵ The purpose of the JJDPA was to prevent juvenile delinquency and “improve the juvenile justice system.”¹³⁶ JJDPA implemented four main requirements which contributed to (1) the “deinstitutionalization of status offenders”; (2) the separation of juvenile and adult inmates; (3) prohibiting states from detaining “juvenile offenders in ‘adult jail[s] or lockup[s]’” and (4) enforced efforts of states to reduce proportion of detained juveniles belonging to

123. *Id.* at 129.

124. Sullivan, *supra* note 116, at 172.

125. *Id.*

126. Mayes & Zirkel, *supra* note 121, at 130-131.

127. *Id.* at 130.

128. *Id.* at 131; Tulman, *supra* note 14, at 45 (noting that “‘delinquency’ . . . requires proof by the government beyond a reasonable doubt that a child committed an offense and that the child be in ‘need of care and rehabilitation.’”).

129. Mayes & Zirkel, *supra* note 121, at 131.

130. *Id.*

131. Sullivan, *supra* note 116, at 170.

132. The term “*parens patriae*” is Latin, meaning “parents of the people.” *Legal Information Institute*, CORNELL LAW SCHOOL (last visited, May 9, 2022), https://www.law.cornell.edu/wex/parens_patriae.

133. *Id.*; Tulman, *supra* note 14, at 58.

134. Lauren A. Koster, *Who will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 687-88 (2019).

135. *Id.* at 688.

136. Sullivan *supra* note 116, at 171.

minority groups.¹³⁷ The JJDP Act forced the states to reform their juvenile justice systems so that they focused on rehabilitation instead of punishment.¹³⁸ However, the Prison Litigation Reform Act of 1995 (PLRA) makes it difficult for inmates, both juvenile and adult, “to challenge prison conditions in the court.”¹³⁹ The petitioner must exhaust all administrative procedures before challenging facility conditions in court, and a juvenile with a disability may not understand how to navigate this complicated process.¹⁴⁰ Thus, poor conditions go unnoticed.¹⁴¹

Around forty-eight thousand (48,000) juveniles are confined in facilities in the United States.¹⁴² A disturbing number of juveniles are imprisoned in adult prisons.¹⁴³ Even more disturbing, more than five-hundred (500) juveniles incarcerated in juvenile delinquency centers are twelve years of age or under.¹⁴⁴ Typically, there are three types of facilities an adjudicated or convicted juvenile can be sent to: (1) correctional facilities, which physically restrain the juvenile; (2) residential-style facilities, which feature a treatment program akin to a boot camp and are very similar to incarceration; and (3) jails or prisons, which are operated by local authorities and are likely adult prisons.¹⁴⁵

A shocking 92% of juveniles are held in a locked facility, and roughly 66% of juveniles are held in the most restrictive facilities.¹⁴⁶ Even though these high security facilities are meant for more violent offenders, around four-thousand (4,000) low-level juvenile offenders find themselves confined in these facilities.¹⁴⁷ For example, nearly 26% of juveniles are serving time in these centers before being adjudicated, and nearly 20% of juveniles are incarcerated for technical violations of probation or for status offenses, which again, are crimes that are not applicable to adults.¹⁴⁸

These facilities present a particular danger to many juveniles because of “unsafe conditions, including isolation, sexual victimization, and abusive

137. *Id.* at 172 (quoting Shay Bilchik, OJJDP Fact Sheet, U.S. DEPT. OF JUST., (Nov. 1999), <https://www.ncjrs.gov/pdffiles1/ojjdp/fs99122.pdf>).

138. Koster, *supra* note 134, at 688.

139. *Id.* at 693.

140. *Id.* at 694.

141. *Id.*

142. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html>.

143. *Locked Out*, *supra* note 16 (nearly 6,000 juveniles are incarcerated in adult prisons).

144. Sawyer, *supra* note 142.

145. *Id.*

146. *Id.* (Disturbingly, 43% of juveniles are subjected to mechanical restraints, and 40% of them are isolated for four hours or more.).

147. *Id.* (These centers are encased in razor wire fences, officers use pepper spray, mechanical restraints, and solitary confinement to enforce compliance.).

148. *Id.*

confinement.”¹⁴⁹ Unsafe conditions may also include strip searches, use of force, and abusive relationships with the staff.¹⁵⁰ Out of the many horrors present in these facilities, one of the most troubling, particularly for juveniles with a disability, is solitary confinement.¹⁵¹ Solitary confinement can result in “risk of suicide, depression, agitation, and an exacerbation of pre-existing mental health conditions.”¹⁵² In addition, solitary confinement poses a threat to the juvenile’s education.¹⁵³

Juveniles in solitary confinement may be secluded for twenty-three hours a day, seven days a week in a disgustingly small cell with poor lighting.¹⁵⁴ The juvenile may get a book to read if they are lucky, and they receive photocopied pages of a school workbook which constitutes their education.¹⁵⁵ As one can imagine, a juvenile delinquency center is no place for a child, let alone one with neurodevelopmental disorders, emotional disturbance, autism, learning disabilities, or any disability, for that matter. Yet, special education students disproportionately represent these very juvenile detention centers, and they have few coping skills and may lack the capacity to understand why they are even there.¹⁵⁶

b. Disproportionate Representation of Special Education Students Adjudicated as Delinquents

In 2011, statistics show that 43% of delinquency complaints in North Carolina originated in the school.¹⁵⁷ In 2012, the U.S. Department of Justice found that students had been routinely incarcerated for minor school disciplinary infractions, and juveniles on probation were incarcerated for violating probation by “committing minor school infractions.”¹⁵⁸ Minor school infractions can be as minor as a dress code violation.¹⁵⁹ Notably, 80% of juveniles who end up committed to a juvenile delinquency facility have “had serious problems in school, with an average of thirty-six days of

149. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 541 (arguing that post-disposition representation is essential to protect juveniles from these unsafe conditions).

150. Sawyer, *supra* note 142.

151. See McCluskey, *supra* note 21.

152. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 557.

153. Koster, *supra* note 134, at 701-04 (“Juvenile justice facilities’ frequent use of security policies, like solitary confinement, are used to justify denying educational access to preserve inmate and staff safety.”); McCluskey, *supra* note 21 (“In some jurisdictions, young offenders in solitary receive no schoolwork at all, let alone dedicated instruction.”); Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 557.

154. McCluskey, *supra* note 21.

155. *Id.*

156. Langberg & Fedders, *supra* note 112, at 653.

157. *Id.* at 657.

158. *Id.* at 658.

159. *Id.*

suspension in the year prior to their commitment.”¹⁶⁰ This is particularly problematic for students with disabilities because 75% of students who qualify under the IDEA for special education services have been suspended or expelled at least once.¹⁶¹

Studies have not been able to produce a consistent percentage, but it is clear that a disproportionate number of students with disabilities populate juvenile delinquency centers.¹⁶² However, these numbers, as high as they can be, still cannot account for the many students who have not been, nor ever will be, identified as having a disability.¹⁶³ Such disproportionate representation in juvenile delinquency centers may have never been formally correlated to the tribulations and deficiencies that manifest from various disabilities.¹⁶⁴ However, a student with special education needs often find

160. *Id.* at 661; Koster, *supra* note 134, at 692 (also noting that “school exclusion increases the likelihood of a student’s introduction to the juvenile justice system”); Geis, *An IEP*, *supra* note 113, at 882 (“U.S. Department of Education’s Office for Civil Rights . . . reported that students who are eligible for special education under the IDEA are twice as likely to be suspended than their non-disabled schoolmates.”).

161. Geis, *An IEP*, *supra* note 113, at 881.

162. Koster, *supra* note 134, at 691-92 (noting that 17-53% of incarcerated youth have a learning disability, contrasted by the fact that students with learning disabilities make up 2-10% of the school population. 47% of incarcerated youth have been identified as having emotional disturbance, and nearly 90% of incarcerated juveniles show signs of emotional impairment with half having formally being diagnosed); Sullivan, *supra* note 116, at 181 (noting that “[u]p to 70% of incarcerated youth have learning disabilities”); Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 523-24 (“In 2014, the U.S. Department of Education reported that children diagnosed with a specific learning disability or emotional/behavioral disability represented the largest percentage of youth with disabilities in secure facilities.”); Geis, *An IEP*, *supra* note 113, at 872-73 (A 2005 study found that, depending on the state, 9.1% to 77.5% of incarcerated youth have been identified with a disability under the IDEA, which has a median of 33%. This national average is four times the number of identified students in the school setting.); Jamie Polito Johnston, *Depriving Washington State’s Incarcerated Youth of an Education: The Debilitating Effects of Tunstall v. Bergeson*, 26 SEATTLE U.L. REV. 1017, 1018 (2013) (noting that around 50% of incarcerated juveniles have a learning disability or are intellectually disabled, and another 22% have a significant mental illness); Tulman, *supra* note 14, at 7 (noting that as many as 50% of arrested and incarcerated juveniles suffer from a mental or emotional disturbance); Jackson, *supra* note 9, at 295 (noting that 85-90% of juvenile delinquents have a learning disability even though they make up only 20-25% of the school population); Karen V. Unger, *Learning Disabilities and Juvenile Delinquency*, 29 J. JUV. & FAM. CTS. 25, 27-28 (1978) (noting that 50-90% of incarcerated juveniles gave a learning disability); *Improving Outcomes for Youth With Disabilities in Juvenile Corrections*, U.S. OFF. SPECIAL EDUC. PROGRAMS, <https://osepideasthatwork.org/sites/default/files/JJ-TIB-EducationalPractices-508.pdf> [hereinafter *Improving Outcomes*] (nearly four times as many students with special needs are adjudicated delinquents versus the general population); *Juvenile Correctional Education Programs*, NAT’L CTR. EDUC., DISABILITY, & JUV. JUST., www.edjj.org/focus/education/ [hereinafter *Juvenile Correctional Education Programs*] (noting that 30-50% of incarcerated juveniles have special education needs, even though they make up 10% of the population in school).

163. Koster, *supra* note 134, at 691 (noting that anywhere between 65-70% of incarcerated youth could qualified as disabled under the ADA); Geis, *An IEP*, *supra* note 113, at 872-73 (noting that surveys do not take into account incarcerated juveniles who are under identified, misidentified as not qualifying for special education, but has a persistent mental health disorder, or those who will never be identified. The percentage of incarcerated youth with disabilities should be much higher.).

164. Jackson, *supra* note 9, at 297.

themselves on a fast-track to juvenile delinquency and life in prison because of behaviors that are directly manifested from their disability.

A simplistic reason why students with disabilities are susceptible to the juvenile justice system could be the idea that perpetual failure is a vicious cycle.¹⁶⁵ Ronald Lee Jackson eloquently noted, “‘Success induces success and failure induces failure’ is a common cliché that has particular relevance to a discussion of learning disabled children.”¹⁶⁶ Failure brings about a certain frustration, and particularly for students with a disability, that feeling manifests in aggressive behavior.¹⁶⁷ Interestingly, the IDEA is purposed to reverse the vicious cycle of failure and promote successful outcomes for students with disabilities.¹⁶⁸ Therefore, if a school district abided by their obligation to provide FAPE, students should not face habitual failure, and aggressive behaviors may never manifest, keeping juveniles out of detention centers.¹⁶⁹

Yet, as Joseph Tulman notes, “[a] factor fueling the disproportionate representation of children with education-related disabilities in the delinquency system is the failure of some school system personnel to find, evaluate, and serve children with disabilities.”¹⁷⁰ The school district’s failure in providing FAPE to the student leads to destructive behaviors that cannot be managed because they were never appropriately introduced to effective coping skills.¹⁷¹ Then, when the student misbehaves, “[s]chools often fail to implement discipline protocols to better deal with these students, whose inappropriate behaviors may be manifestations of their disabilities.”¹⁷²

Jason Lanberg and Barbara Fedders suggest that such denial of FAPE leading to the student’s manifestation of destructive behaviors and resulting in a juvenile delinquency petition by the school should be an unclean hands defense against adjudication.¹⁷³ This is an interesting spin on this issue because education plays an important role in lowering the juvenile incarceration, which is evidenced by the fact that communities with less

165. See *id. supra* note 9, at 292; Unger, *supra* note 162, at 27.

166. Jackson, *supra* note 9, at 292.

167. Unger, *supra* note 162, at 27; Langberg & Fedders, *supra* note 112, at 661 (“Students in turn feel frustrated, unwanted, and alienated, factors which contribute to further delinquency and criminal behavior, both in school and in the community.”).

168. 20 U.S.C. § 1400(d)(1)(A) (“The purposes of this chapter are – to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. . .”).

169. Mayes & Zirkel, *supra* note 121, at 156 (“properly designed and implemented regular and special education programs can reduce the incidence of antisocial behavior”).

170. Tulman, *supra* note 14, at 28.

171. Geis, *An IEP*, *supra* note 113, at 879.

172. *Id.*

173. Langberg & Fedders, *supra* note 112, at 680.

education services have higher incarceration rates.¹⁷⁴ Even though the median age of incarcerated juveniles is just above fifteen years old, the average reading level in juvenile delinquency centers is fourth grade.¹⁷⁵

Also, juveniles who struggle in school often find themselves in danger of truancy.¹⁷⁶ For example, a student with Attention-Deficit/Hyperactivity Disorder (ADHD) has difficulty paying close attention to fine details and makes “careless mistakes in schoolwork . . . or during other activities.”¹⁷⁷ This student often fails to complete school work, has difficulty with organization and avoids activities they dislike.¹⁷⁸ If this student feels that they are not succeeding in class because they have difficulty completing, focusing on, and enjoying their school work, they may decide to stop attending school. A school could then file a status offense petition against the student, and this behavior, which manifested from their ADHD, would start their journey down the school-to-prison pipeline. However, if the school district were to provide FAPE to the student, they could learn coping skills, harness their disability, enjoy their school work, have a chance to succeed with their nondisabled peers, and avoid the juvenile justice system all together.¹⁷⁹ Likewise, truancy is problematic because students who do not go to school have a higher risk of being involved with delinquent conduct.¹⁸⁰ Therefore, it is best to encourage and support students with disabilities because it will keep them in school, out of the juvenile justice system, and out of troublesome situations.

It must also be noted that students with disabilities are particularly susceptible to probation.¹⁸¹ Probation may seem like a successful outcome for an adjudicated delinquent.¹⁸² However, a common condition for probation can require the student to “attend[] school regularly and obey[] all school rules and regulations of the school.”¹⁸³ Students with disabilities can have behavioral issues that lead to both school absences and violations of school rules. Under probation terms, such students would violate probation, and be subsequently placed in a juvenile detention facility.¹⁸⁴

174. Sullivan, *supra* note 116, at 167.

175. *Id.* at 167.

176. *Id.* at 169.

177. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 59 (5th Ed. 2013).

178. *Id.*

179. Sullivan, *supra* note 116, at 169.

180. Tulman, *supra* note 14, at 37.

181. Lisa F. Grumet, *Special Education Law: Past, Present, and Future: Court-to-School Pipelines: Meeting Special Education Needs for Students on Juvenile Probation in New York*, 63 N.Y.L. SCH. L. REV. 73, 80-81 (2018-2019).

182. *Id.*

183. *Id.* at 81.

184. Grumet, *supra* note 181, at 84.

It is apparent that this type of system is set against the student with a disability. The school district fails to assess and address a student's disability needs. The student violates the school's code of conduct for actions that likely manifest from the disability, and charges are filed. If the juvenile court puts the student on probation, one of the terms is to refrain from student code of conduct violations, but because the student is not properly supported, the cycle continues and they end up in a detention facility.¹⁸⁵ Whereas probation may seem to work against a student's rehabilitative needs, a far greater evil also exists within the school walls, and that is zero tolerance.

c. Zero Tolerance

Zero tolerance is a policy implemented by the school district that "mandates predetermined consequences or punishments for specific offenses."¹⁸⁶ After implementation of such policies, expulsions and suspensions greatly increased.¹⁸⁷ These policies have targeted students with special education needs at a higher rate and have disrupted their education due to expulsions and suspensions.¹⁸⁸ Even though these policies were aimed to reduce violence in schools, studies show "very little change in school-violence rates."¹⁸⁹ Most notably, Lisa Geis argues that zero tolerance policies are in direct conflict with the IDEA because zero tolerance, by definition, establishes pre-determined punishment for certain infractions, and these punishments will be implemented without "consideration of individual circumstances or needs."¹⁹⁰

With zero tolerance policies came the influx of the infamous School Resource Officer (SRO) in the schools.¹⁹¹ Nearly 17,000 SROs are assigned to schools at a full-time basis.¹⁹² Studies show that administrators have taken greater interest in staffing the schools with SROs and increase security in the name of school safety.¹⁹³ Meanwhile education services that actually need funding, such as individualized services for students with special education needs, are underfunded and budgets for educational social programs are cut.¹⁹⁴

185. *Id.*

186. Geis, *An IEP*, *supra* note 113, at 883 (quoting U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *Indicators of School Crime and Safety 2000*, at 133, 135 (2000)).

187. *Id.* at 883; Langberg & Fedders, *supra* note 112, at 655.

188. Geis, *An IEP*, *supra* note 113, at 879.

189. *Id.* at 883; Langberg & Fedders, *supra* note 112, at 655 ("... [R]esearch belies these claims. Zero tolerance punishments do not deter disruptive behavior, and do not improve student behavior or school safety.")

190. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 533.

191. Langberg & Fedders, *supra* note 112, at 656.

192. *Id.*

193. *Id.*

194. *Id.* at 657.

It is interesting that better education trends in more prosperous students, and a more prosperous society, and yet the first spending option to be minimized in the budget to make way for greater security is the very programs that lead the student to such success.¹⁹⁵ Likewise, zero tolerance places “education ‘on lockdown’. . . law enforcement intervenes in minor incidents formally viewed as typical childish behavior and ‘teachable moments’ from which students might grow without suffering from the permanent, negative and long-term consequences of police involvement.”¹⁹⁶ Essentially, zero tolerance is a reaction to a tragic, yet unlikely chance of severe school violence, but, in turn, has disproportionately targeted students with special education needs, who are now detained more frequently for minor school offenses.¹⁹⁷ These behaviors will never be corrected if they are shuffled off to detention centers because education in juvenile detention centers is appallingly lackluster.

d. Lack of Individualized Education in Detention Centers

The IDEA is applicable in juvenile delinquency centers, and any qualifying student with a disability who is incarcerated has a right to FAPE.¹⁹⁸ The IDEA also requires juvenile detention centers to be responsible for child find obligations for any student who is suspected of needing extra services.¹⁹⁹ However, juvenile detention facilities provide very little services to juveniles with special education needs let alone abide by their child find obligation.²⁰⁰ A root cause of this issue may derive from staffing needs or the philosophy of a detention center, which is to favor security measures over education.²⁰¹ A juvenile detention center’s denial of FAPE, in turn, “deprives juveniles of a critical resource that can assist them in becoming productive members of society upon release.”²⁰²

A 2018 study shows that whereas 96% of traditional high school students have access to Algebra I, only 82% of juvenile delinquents have access to the same topic.²⁰³ Likewise, 95% of traditional students have access to Geometry class and 92% to Algebra II, but only 67% of juvenile delinquents have access

195. Langberg & Fedders, *supra* note 112, at 656-657.

196. *Id.* at 657.

197. Geis, *An IEP*, *supra* note 113, at 883.

198. *Id.*

199. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 550.

200. Sullivan, *supra* note 116, at 181.

201. Koster, *supra* note 134, at 674 (“A correctional facility that favors employing ‘restrictive security programs,’ while restricting access to educational programs, fails to consider its legal mandates to provide an education with the appropriate accommodations for those with disabilities.”).

202. Johnston, *supra* note 162, at 1018.

203. Hailly T.N. Korman & Lisa Pilnik, *How Does Education in the Juvenile-Justice System Measure up? It Doesn't.*, EDWEEK (Oct. 25, 2018), <https://www.edweek.org/leadership/opinion-how-does-education-in-the-juvenile-justice-system-measure-up-it-doesnt/2018/10>.

to Geometry and 55% of them are able to take Algebra II.²⁰⁴ The effectiveness of class instruction in these two settings is evident by the fact that 95% of traditional students will pass Algebra I, but only 61% of incarcerated juveniles will pass the same subject.²⁰⁵ This failure could contribute to the low re-enrollment rate into school after release.²⁰⁶

In addition to regular educational needs, juvenile delinquency centers report the fewest education services available to juveniles, including special education services, GED preparation and job training.²⁰⁷ In fact, less than half of juveniles in need of special education receive specialized services while incarcerated.²⁰⁸ Reasons for this disparity involves staffing concerns and lack of parent participation in the rendering of specialized services.²⁰⁹ However, the IDEA does not pause for staffing issues or uninvolved parents.²¹⁰

Sadly, if a juvenile is subjected to solitary confinement, they may not receive any education at all.²¹¹ Education in solitary confinement may consist of a photocopied workbook that may or may not be corrected or reviewed.²¹² In some delinquency facilities, the education program is not nationally accredited, the teachers are not certified, lessons are taught by regular staff members, who are not specifically trained to teach any subject matter.²¹³ Therefore, education in a detention facility may consist of watching movies,²¹⁴ which many may remember as the relaxing day at school.

Due to the juvenile's denial of FAPE in public school, which leads to their eventual detention, where they receive very little individualized services, "[l]arge numbers of incarcerated juveniles are marginally literate or illiterate and have experienced school failure and retention."²¹⁵ A majority of incarcerated juveniles are at least two years behind in their academic skills.²¹⁶ For example, a study revealed that "32% of students in detention centers read at or below a 4th grade level, 27% at 5th- or 6th-grade level, 20% at 7th-or 8th grade level, and 21% at or above 9th grade level."²¹⁷ Sadly,

204. *Id.*

205. *Id.*

206. *Id.* (noting about 60% of students who are released from juvenile detention "will never re-enroll in school upon release").

207. Sawyer, *supra* note 142.

208. *Improving Outcomes*, *supra* note 162.

209. *Id.*

210. *See* 20 U.S.C. § 1414.

211. McCluskey, *supra* note 21.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Juvenile Correctional Education Programs*, *supra* note 162.

216. *Id.*

217. Sullivan, *supra* note 116, at 182.

roughly 75% of juveniles do not advance a grade level each year they are incarcerated.²¹⁸

The extreme lack of education services, particularly special education services, in juvenile detention centers is another major player that keeps the school-to-prison pipeline running.²¹⁹ Yet, one solution would be to implement appropriate special education services that could truly rehabilitate and keep the juvenile integrated into society.²²⁰ As this comment moves through the cycle that makes up the school-to-prison pipeline, it is essential to note the aftermath of a school district's failure to adhere to IDEA procedures and the juvenile justice system's perpetuation of that violation of FAPE.²²¹ Children do not learn while they are incarcerated, and they are released back into the world with no support, only to find themselves back where they started.

e. Transition Services After Incarceration and Recidivism

Perpetual failure of students with disabilities both inside and outside of juvenile detention centers is the fuel that keeps the school-to-prison pipeline going.²²² However, just as an appropriate IEP can help a student with a disability stay out of juvenile delinquency facilities, an appropriate transition or rehabilitative program used by juvenile delinquency centers could reduce the recidivism rate of juvenile delinquents by 20-25%.²²³ In fact, the United States stands to save two million dollars per juvenile successfully rehabilitated and transitioned back into the community.²²⁴ Yet, studies show that juvenile delinquency facilities' transition services for juveniles are mediocre at best.²²⁵

In 2015, the Council of Juvenile Correctional Administrators and the Council of State Governments surveyed all fifty states to determine what kind of educational and vocational services were provided to incarcerated youth, what data is collected to analyze the outcome of these juveniles, and what the states do to ensure a successful transition back into the community.²²⁶ First, they found that most incarcerated youth are not provided the same vocational services as traditional students.²²⁷ Second, many states do not track and

218. *Id.*

219. Tulman, *supra* note 14, at 40.

220. *Id.* at 24.

221. *See* discussion *infra* Section IV.

222. *See* Jackson, *supra* note 9, at 292; Unger, *supra* note 162, at 27-28.

223. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 561.

224. Sullivan, *supra* note 116, at 165.

225. *See Locked Out*, *supra* note 16.

226. *See id.* at 2.

227. *See id.* at 3 (Only 26% of states provide the same educational services to incarcerated juveniles and only 18% of states provide the same vocational services to incarcerated juveniles.).

report the outcome data of incarcerated juveniles.²²⁸ If the state does collect data, it is not routinely reported to state legislatures or to the judiciary.²²⁹ Lastly, the survey concluded that the policies and practices of juvenile delinquency facilities make transitioning back into society difficult for juveniles.²³⁰

Half the states do not have any agency designated to overseeing transition services for incarcerated youth, and only 22% of states have an education transition liaison staffed to assist the juveniles in transitioning back into society.²³¹ 34% of states collect data pertaining to enrollment for GED or job-related programs.²³² The lack of transition services available to incarcerated youth is outstanding because the IDEA is purposed to assist a disabled student to succeed in post-graduate endeavors and requires an IEP to provide appropriate transition services.²³³

Another cause for the high rate of recidivism for juvenile delinquents with special education needs is the probation conditions which may require obedience in the community and in school.²³⁴ If a student has not received the proper educational and transition services while they are incarcerated, they likely have not learned to manage their behaviors, and are therefore more likely to inadvertently violate the school code of conduct.²³⁵ It is clear that “[i]f society wants to prepare juvenile offenders for professional training and adjusting to life outside of detention centers, education is the solution.”²³⁶

The cycle is apparent: A student with a disability does not receive adequate services in public school and is unable to manage their behaviors; the schools district charges the student for behaviors that manifest from their disability; the student is adjudicated as a delinquent and sent to a detention facility; they do not receive adequate educational or transition services at the delinquency center; they are not prepared to reenter society, and they mimic the same behaviors that resulted in their charge in the first place; and the cycle continues.²³⁷ These children are labeled as bad kids, and society thinks they deserve the sledgehammer of justice.²³⁸ However, it is not justice to funnel

228. *See id.* at 9 (arguing that juvenile delinquency centers should collect data that measures high school credit accumulation, improvement on assessment scores, average daily attendance, school discipline, and educational or vocational credit attainment).

229. *See id.* at 8 (half the states share outcome data with the state legislature and governor and only 24% of delinquency centers share outcome data with the judiciary).

230. *Id.* at 11.

231. *See Locked Out*, *supra* note 16, at 11.

232. *See id.*

233. *See* 20 U.S.C. § 1414(d)(1)(A)(VIII)(aa-bb); 34 C.F.R. §§ 300.43, 300.324(c).

234. Grumet, *supra* note 181, at 81.

235. *See Locked Out*, *supra* note 16, at 5-6, 11; Geis, *An IEP*, *supra* note 113, at 881.

236. Sullivan, *supra* note 116, at 166.

237. *See McCluskey*, *supra* note 21.

238. *Id.*

these children through a system that degrades them further. These children are not a failure to society, but the system is a failure to them.²³⁹ The subsequent section of this comment proposes how to use the IDEA to stop this vicious cycle in its tracks and prevent these children from being charged as delinquents.²⁴⁰

IV. THE SOLUTION: STRICT IDEA ENFORCEMENT WILL KEEP SPECIAL EDUCATION STUDENTS AWAY FROM THE JUVENILE JUSTICE SYSTEM

The juvenile delinquency system is no place for any child, let alone a child with a disability. At this point, it should be obvious that the IDEA has put in place several safeguards that are meant to provide any qualifying student with a disability FAPE in the LRE.²⁴¹ FAPE requires that the student receive an IEP that is appropriately ambitious and reasonably calculated to enable the child to progress through the education system.²⁴² The most important aspect of the IDEA is that it requires instruction to be “‘*pecially designed*’ to meet a child’s ‘*unique needs*’ through an ‘*individualized education program*.’”²⁴³ This recognizes the fact that each disabled child will learn, process information, and manifest behaviors differently than a nondisabled student.

“[N]early 75% of ‘students who qualif[y] for special education services’” under the IDEA face disciplinary procedures and have been “suspended or expelled at least once.”²⁴⁴ Due to the unique nature of how each disability manifests itself in each student, the cause for this correlation is endless. For example, the student with Autism Spectrum Disorder typically has an “inflexible adherence to routines” and can be highly fixated to the details of various interests.²⁴⁵ Therefore, if this student’s has difficulties with transitions, their schedule is abruptly changed, or they are redirected to stay on task that differs from their preferred task, they may engage in behaviors, which may include physical aggression. Another student with Major Depressive Disorder may experience extreme depression daily, exhibits significant weight loss or weight gain, insomnia, fatigue, and feelings of worthlessness.²⁴⁶ This student may fall behind in class due to their fatigue, unable to keep pace with the regular education classroom. They could be

239. *See id.*

240. *See discussion infra* Section IV.

241. *See discussion supra* Section II. b.

242. *Endrew*, 137 S.Ct. at 1000-01.

243. *Id.* at 999.

244. Geis, *An IEP*, *supra* note 113, at 881.

245. AM. PSYCHIATRIC ASSOC., *supra* note 177, at 50.

246. AM. PSYCHIATRIC ASSOC., *supra* note 177, at 160-61

tardy many days and eventually stop coming to school, resulting in truancy charges.

These behaviors surface through no fault of their own. Rather, they are a manifestation of their disability, which should be evaluated, assessed, and addressed in a comprehensive IEP which uniquely targets their behaviors.²⁴⁷ Yet, an inordinate number of juvenile delinquents spend hard time in high security delinquency centers for low-level infractions.²⁴⁸ In the wake of zero-tolerance policies, schools have begun to focus more on security measures rather than funding education.²⁴⁹ These rules disproportionately affect students with disabilities and fast track them to the school-to-prison pipeline.²⁵⁰

Section III of this comment evidences that there is no justice in sending these children through the juvenile justice system.²⁵¹ They neither receive adequate education, nor do they receive transition services, leaving them destined to a cycle of repetitive inappropriate behaviors that are never assessed or addressed.²⁵² This cycle must stop. The answer is not simple – it would require school districts to examine in detail the shift necessary to change the focus from authoritative administration and reallocate resources back to general and special education services.

Yet, “appropriate special education and related services might be a reasonable accommodation that would enable qualified youth with disabilities to remain in the community.”²⁵³ School districts must be held accountable for failing to assess and address educational and behavioral needs of students who qualify for services under the IDEA.²⁵⁴ If a student engages in behavior that results in their adjudication as a juvenile delinquent, then this alone should be considered a de facto violation of FAPE. This proposal, of course, would surrender to the special circumstances provided in § 1415(k)(1)(G) of the IDEA.²⁵⁵

The IEP must, among other things, set measurable goals targeted to enable the student to succeed in their education, list SDIs and program modifications that will give the student the tools they need to meet their goals, and ensure that the child can learn in the least restrictive environment.²⁵⁶

247. See discussion *supra* Section II. b.

248. Sawyer, *supra* note 142.

249. See Langberg & Fedders, *supra* note 112, at 656 (noting that zero-tolerance brought an influx of SROs into the schools full time).

250. See *id.* at 657.

251. See discussion *supra* Section III.

252. See Tulman, *supra* note 14, at 28.

253. See Tulman, *supra* note 14, at 24.

254. McCluskey, *supra* note 21.

255. § 1415(k)(1)(G).

256. § 1414(c)(1)(B)(iv).

Likewise, the IEP must consider the concerns of the parents, and address the academic, functional, and developmental needs of the child.²⁵⁷ The IEP is meant to be revised as often as needed.²⁵⁸ The IDEA's child find provision is supposed to ensure that any student with a disability is appropriately identified so that they receive the services they need as soon as possible.²⁵⁹ If the child is never identified or evaluated properly, they cannot be rehabilitated.²⁶⁰

The IDEA enumerates a specific and detailed process that is meant to safeguard the student and ensure they receive services that meet their needs.²⁶¹ Therefore, if properly implemented, the students are supposed to advance into society, not regress in a delinquency center. If the student can successfully be identified, maintain a proper and conducive IEP with specially designed instruction in the least restrictive environment, which allows them to meaningfully benefit from their education, and receive transition planning, they are aligned for success.²⁶² If they are not advancing, the IDEA mandates that the IEP be revised or a reevaluation be ordered to assess and address why the student is not making meaningful progress.²⁶³ Thus, a new plan can be implemented that will help the child progress.²⁶⁴

Failure to abide by these procedures is a denial of FAPE, which is an actionable due process claim.²⁶⁵ So, why are school districts not held accountable when their failure to provide FAPE results in the adjudication of a disabled student with manifested behaviors? The IDEA may allow the district to file charges in juvenile court for these behaviors,²⁶⁶ but that does not excuse the district for failing to address these behavior concerns *before* they escalate.

Granted, strict compliance with the IDEA can be costly. The school districts will need to fund evaluations conducted by "trained and knowledgeable personnel"²⁶⁷. The IEP may require one-to-one instruction, or costly private programs. However, the school districts already have a duty to provide these services at no cost to the student under the IDEA.²⁶⁸ If the school districts are hard-pressed to find the funds for such services, they may

257. § 1414(b)(3)(A)(ii).

258. § 1414(d)(4).

259. § 1412(a)(3)(A); 34 C.F.R. § 300.8(a)(1).

260. Geis, *Courtroom, Classroom, Commitment*, *supra* note 53, at 533-34 ("successful rehabilitation . . . is nearly impossible without appropriate services that are specific to meet an individual child's needs").

261. *See* discussion *supra* Section II.

262. Johnston, *supra* note 162, at 1038.

263. 20 U.S.C. § 1414(b)(4).

264. § 1414(b)(4).

265. 34 C.F.R. § 300.507(a)(1).

266. 20 U.S.C. § 1415(k)(6)(A).

267. § 300.304(e)(1)(iv-v).

268. § 1415(a).

find the money in the security budget used to implement their zero-tolerance policies.²⁶⁹ Reallocating that money would better serve these students, and it would push towards a more successful society.

Also, the IDEA specifically mandates that a State is eligible for assistance if they can assure that they are providing FAPE to all qualifying children ages three to twenty-one, regardless of if they are suspended or expelled from school.²⁷⁰ Successfully providing FAPE and correctly rehabilitating the student before their behaviors escalate to the point where the juvenile justice system is involved, stands to save the State the money it costs to incarcerate these children.²⁷¹ Not to mention, if money is a factor in determining whether a child receives a particular special education service, then such discussion would be contrary to the purpose of the IDEA.²⁷²

The premise is simple: adherence to the IDEA will keep a majority of students with disabilities out of the juvenile justice system. Proper implementation of an IEP and PBSP will ensure that the student is appropriately challenged in areas of weakness and taught how to manage their disability. These children are not unteachable “bad” children who just need a “firm fist.” They are children who need a more support and services. They are *children* who need *adults* to take the time to understand why they behave the way they do. That is the duty of the school district, and that duty should not be abdicated to the student and his or her parents to then aimlessly flounder in a system that has little regard for its charges much less to rehabilitate and to educate.²⁷³

This proposal is looking at a proactive approach to eliminating the school-to-prison pipeline. The IDEA explicitly provides clear procedures, that if followed, are meant to lead to success.²⁷⁴ The presence of a juvenile with a disability in a delinquency center is direct evidence that the child’s landscape was more a minefield than a path. Such violation should no longer be tolerated. It is time to hold school districts accountable for their own failure. This not only will promote a safer and more intelligent society, but it will save so many innocent children who get lost in the school-to-prison pipeline.

V. CONCLUSION

The purpose of the IDEA is to ensure free appropriate public education for all children with disabilities so they can advance not only from grade to

269. See Langberg & Fedders, *supra* note 112, at 656.

270. § 1412(a)(1)(A).

271. Sullivan, *supra* note 116, at 165.

272. 34 C.F.R. § 300.1(a).

273. 20 U.S.C. § 1415(a).

274. § 1400(d)(1)(A).

grade, but move to further education, employment, and independent living.²⁷⁵ Yet, a grossly disproportionate number of children with special education needs populate juvenile delinquency centers.²⁷⁶ A root cause of these disproportionate rates is the school district's failure to adequately provide FAPE to these students.²⁷⁷ School districts are the ones filing these juvenile delinquency and status offense petitions.²⁷⁸ The school districts would rather punish than educate.

This comment proposes that instead of shuffling children with disabilities off to the ruthless jaws of the juvenile delinquency centers for behaviors beyond their control, we hold the districts accountable.²⁷⁹ The IDEA demands all students be provided FAPE, which is meant to target their unique needs.²⁸⁰ Such proposal will not only keep these children out of the juvenile justice system but will promote a more well-rounded society and give these children an opportunity to be the best versions of themselves. All children deserve to achieve their goals. Some just need extra support. Juvenile delinquency is not the answer. IDEA enforceability and school district accountability is the best means to destroy the school-to-prison-pipeline and ensure a brighter future for children who deserve so much more.

275. *Id.*; see also 34 C.F.R. § 300.1(a).

276. See discussion *supra* Section III. b.

277. See discussion *supra* Section III. d.

278. See discussion *supra* Section III. a.

279. See discussion *supra* Section IV.

280. 20 U.S.C. § 1412(a)(1)(A).