

THE SPECIAL NEEDS
OF
YOUTH IN THE
JUVENILE
JUSTICE SYSTEM:
IMPLICATIONS FOR
EFFECTIVE PRACTICE

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It is hoped that this manual can assist judges, attorneys and other practitioners in their work with youth in the juvenile justice system who have mental health and/or other disabling conditions. It is offered free of charge to these practitioners in order to enhance the provision of more effective advocacy and treatment for this population of young people.

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Table of Contents

Chapter 1

Recognizing Youth with Special Needs: Challenges for Practitioners	1
A. The Effect of Disabilities on the Judicial Process	1
B. Balancing Convergent and Divergent Interests on Behalf of Youth	3
C. Understanding the Special Needs of Youth and the Impact upon the Judicial Process	4

Chapter 2

Ethical Considerations for Counsel Representing Juvenile's With Special Needs	8
A. Introduction	8
B. Determining the Youth's Decision-Making Capacity	9
C. The Interplay of Substantive Rights in the Decision-Making Process	14
D. Other Ethical Considerations for the Lawyer Representing a Client of Questionable Capacity	15
E. Conclusion	17

Chapter 3

Understanding the Needs of Youth: Identification of Disabilities and Other Significant Issues	19
A. The Prevalence of Mental Health Disorders and Other Disabilities in the Juvenile Justice System	19
B. Common Mental Health Disorders and Other Disabilities in the Juvenile Justice System	22
C. Overrepresentation of Minority Youth in the Juvenile Justice System: Mental Health Considerations	35
D. Special Needs of Girls in the Juvenile Justice System	37

Chapter 4

Affirmative Educational Rights of Youth with Disabilities under IDEA and § 504	43
A. The Basic Legal Framework	46
B. The Content and Quality of Education	51
C. Educational Evaluations and Child Find Obligations	60
D. IEPs and Placement Decisions	63
E. Dispute Resolution and Parent/Student Challenges to Educational Decisions	70
F. Exclusion from School for Discipline Reasons	75
G. School-Filed Crime Reports and Delinquency Petitions	76

Chapter 5

Competency, Waiver of Rights, and Other Defenses	79
A. Developmental Issues of Youth	79
B. Competency	82

C.	Waiver of Rights And Confessions	89
D.	Children with Special Needs and Implications for Defenses.....	101
E.	Waiver of Juvenile Court Jurisdiction (Transfer).....	104

Chapter 6

Essentials of an Evaluation.....		108
A.	Forensic vs. Clinical Evaluations	108
B.	Who should perform the evaluation?	109
C.	Components of an evaluation	110
D.	Types of Evaluations	112

Chapter 7

Special Education Services in Short and Long-Term Juvenile Correctional

Facilities.....	119
A. The Case for Quality Education Programs in Juvenile Corrections	120
B. Free Appropriate Public Education (FAPE) for Youth with Disabilities in Juvenile Corrections.....	123
C. Identification and Assessment.....	125
D. IEP Development	126
E. Challenges to Providing Free Appropriate Public Education in Correctional Settings	127

Chapter 8

Ensuring the Successful Transition of Juvenile Offenders to School, Work, and the

Community	130
A. The History of Transition Services in Juvenile Justice.....	131
B. Transition to School	134
C. Transition to Employment.....	137
D. Transition to the Community	138
E. Promising Practices for the Transition of Juvenile Offenders	139

Chapter 9

Recommendations for Effective Practice	141
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Appendices:

Appendix A	146
Appendix B	155
Appendix C	156
Appendix D	158
Appendix E.....	160
Appendix F.....	163

Chapter 1

Recognizing Youth With Special Needs: Challenges For Practitioners

A. The Effect of Disabilities on the Judicial Process

The rehabilitative concept inherent in juvenile court practice has been the cornerstone of its existence since its inception over one hundred years ago. Historically the *parens patriae* doctrine of providing for the juvenile's best interest frequently lent itself to informal practices and court procedures. But, the recognition that youth should be provided basic due process rights and many of the other protections afforded to adults has been deeply rooted in our juvenile justice system since the landmark decision in *In re Gault* in 1967.¹ In a decade marked by the creation of harsher penalties for juvenile crime, mandatory transfer laws, and a penchant for "zero tolerance" policies, these basic principles have become essential to formulating legal strategies in the representation of youth in juvenile and criminal court proceedings.

The application of these protections are never simple and routine in the context of juvenile court practice, however. Nowhere is this more evident than in cases involving youth with mental health and/or other disabilities, particularly when combined with issues concerning race, ethnicity, gender, and/or age and immaturity. Practitioners involved with youth, as well as judicial decision-makers, should have a basic understanding of the nature and extent of these disabilities, as well as how they may impact every step of the judicial process. This information is critical in considering the following:

¹ 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2 527 (1967).

- Ensuring that the legal practitioner's ethical obligations to the youth client are met, including the allocation of decision-making, a determination of client capacity, and effective communication with the client;
- Investigation of a youth's conduct as criminal in nature, including implications for arrest and interrogation;
- Consideration of the youth's competency to stand trial, and to understand the nature of the proceedings and assist trial counsel in preparing a defense;
- The availability of possible defenses regarding knowing and intelligent waiver of rights, including *Miranda* rights, waiver of counsel, and plea agreements;
- The impact upon criminal culpability and other defenses such as insanity, diminished capacity or subjective standards of self-defense in making an adjudication of guilt or innocence;
- The implications of youth conduct that is a manifestation of a disability where affirmative legal duties by responsible government entities are not met;
- The necessity of evaluative data for effective disposition planning, sentencing, and/or transfer decisions regarding the youth;
- Consideration of the appropriate correctional programming and implementation of case planning for the youth, whether residential, community based and/or transitional

Consider the case of Melissa:

Melissa was 15-years-old when she was arrested with her 20-year-old boyfriend for selling drugs to an undercover narcotics officer and shoplifting. A victim of sexual abuse in her own home by her mother's boyfriend, Melissa frequently did not stay at home, choosing instead to stay with friends of her boyfriend. At school, she was retained twice, and had a long history of truancy and "disruptive" behaviors for which she was taken to court by school officials. With very limited cognitive skills, and severe attention problems, Melissa rarely achieved success in her school setting, and looked forward to the day she could quit altogether. Melissa's needs for special instruction were never identified by school officials, and she was routinely disciplined rather than receiving any individualized services. Although two separate suicide attempts resulted in psychiatric hospitalization, no ongoing mental health services were accessed by the family after the fact. Now on her third appearance in juvenile court, Melissa faces felony charges and the possibility of significant consequences being imposed.

B. Balancing Convergent and Divergent Interests on Behalf of Youth

Juvenile courts do not work within a vacuum in determining youths' treatment needs and their ability to comprehend and appreciate the nature of the proceedings against them. Appropriate interventions for youth with mental health or other disabilities require an enhanced understanding among the legal community and other disciplines of the nature and extent of these issues, and their potential effect upon the youth's conduct, mental status, comprehension, and treatment needs.

Youth in the juvenile and criminal justice systems are caught in a myriad of systems with competing goals, objectives and mandates. Government intervention, whether from the judicial, child welfare, mental health, education, or correctional system, carries with it the additional burden of administrative constraints, resource deficits, and political realisms that can impede effective interventions for these youth. Among these competing interests are:

- The rehabilitation needs of the youth balanced against protection of the community.
- Legislative mandates to prescribe punishment and/or impose penalties without consideration of independent circumstances.
- The allocation of resources for adequate identification, evaluation and treatment of youth with disabilities in the justice system.
- The allocation of responsibility among state agencies, local school districts, courts, and others for ensuring the affirmative rights of disabled youth as balanced against the youth's substantive and procedural rights in the justice system
- The public perception of youth crime, particularly in the context of school-related charges and violent crime versus actual data.²

² Brooks, K., Schiraldi, V., Zeidenberg, J., *Schoolhouse Hype: Two Years Later*, Kentucky Children's Rights Journal, Vol. VIII, No. 1, June 2000, p. 7. The report notes that during a time when youth violence and violence in schools has been on the decline, parents are becoming more afraid for the safety of their children in schools. Several opinion polls noted in this report indicate that public perception regarding fear of juvenile crime is inconsistent with actual crime data concerning juveniles, as well as data regarding school violence in general.

- The political climate in which decisions are made regarding youth in the justice system based upon myths versus reality regarding juvenile crime.³

So, how do these competing interests play out in the context of decisions being made regarding the youth's involvement in the justice system? What are the ethical, legal and moral dilemmas faced by juvenile court practitioners in addressing the needs of youth with disabling conditions? And, how should these dilemmas be resolved in the context of providing effective representation of these youth at various stages of the proceedings? Consider the case of James:

At ten (10) years old, James began his familiarity with the juvenile court system when school officials filed terroristic threatening and assault charges against him. James already had a long history of mental health problems that were diagnosed through a community mental health center, including intermittent explosive disorder and attention deficit hyperactive disorder. He was prescribed medication to control his impulsiveness and anger, but the effects were inconsistent and at times made him even more agitated. Although he ranked in the high average range of intelligence, he was failing most of his subjects and experiencing severe socialization problems with his peers and teachers. School officials provided no individualized services to James, choosing instead to place him on "homebound instruction" for the better part of a school year after the incident leading to juvenile court charges. An examination of his medical records showed that at the time, he had been taken off of all medications, and a plan was created to begin a new combination of prescriptive treatments.

C. Understanding the Special Needs of Youth and the Impact upon the Judicial Process

This manual provides an analysis of the various stages of the judicial process in which youth with significant mental health or other disabilities need effective advocacy and enlightened decision-making on the part of courts, state agencies and others involved with the young person's care, treatment, and legal status. Chapter 2 contains a discussion of special ethical considerations in representing disabled youth as clients. In particular, Chapter 2 provides

³ Mendel, Richard Less Hype, *More Help: Reducing Juvenile Crime, what Works – and What Doesn't*, American Youth Policy Forum, Child Welfare League of America, Coalition for Juvenile Justice, National Collaboration for Youth, National Crime Prevention Council, National League of Cities, National Urban League (2000). The author notes that during the 1990's America's youth set an all-time record in one telling crime category, that being negative media attention rather than violence crime, school violence or other delinquency. The report notes that the rates of juvenile crime, property crime and overall index crimes in the United States have decreased every year since 1991, just as the media coverage of crime mushroomed. The rates of youth crime have also declined every year since 1993, after rising significantly in the early part of the decade and in the late 1980's.

guidance in making the determination of the youth's capacity to make decisions regarding the representation, and suggests communication and other strategies that can assist in enhancing the capacity of a disabled youth client.

Chapter 3 provides an overview of the nature and prevalence of youth with mental health needs and other disabilities in the juvenile justice system, including a discussion of the most common disabilities found among these youth, and recommended intervention strategies that have proven effective. Chapter 3 is particularly important in understanding the characteristics of these youth, and how these characteristics result in their over-representation in the juvenile and criminal justice system.

The fact that these youth are often protected by federal and state laws as disabled individuals requires an examination of the affirmative rights that attach to their circumstances. Chapter 4 provides an overview of the relevant laws under the Individuals with Disabilities Education Act, § 504 of the Rehabilitation Act of 1974, along with the Americans with Disabilities Act, as it pertains to the identification, evaluation, provision of individualized services, and due process rights to which they are entitled. The interplay of these legal protections with the juvenile and criminal justice process is often an important element in decision-making regarding youth faced with allegations of criminal conduct.

The effect of a youth's mental health needs, or other disabilities, on the judicial process warrants discussion not only at the time decisions are made by the charging entity (i.e., police, schools or private complaintants), but as the youth is processed through the judicial system. Chapter 5 examines five separate stages of proceedings: 1) the determination of competency to stand trial and to assist trial counsel in preparing a defense; 2) waiver of rights and confessions made by the youth; 3) the effect of mental illness or culpability, diminished capacity, insanity,

and claims of self-protection; 4) consideration of mental health and/or disability issues on juvenile sentencing and dispositions; and, 5) the impact upon decisions to transfer a youth to be tried as an adult.

Consistent with the procedural aspects discussed in Chapter 5, the next chapter contains a discussion of appropriate evaluation measures that should be considered in collecting and analyzing information about the youth. Chapter 6 provides an overview of who should conduct such evaluations, the key elements of a good evaluation, and considerations for various types of evaluations.

Finally, Chapter 7 reflects upon the needs of youth under a disability during incarceration, including the rights that attach regarding their education and treatment and the importance of ongoing educational and mental health interventions necessary for rehabilitation. Consider Francisco's case:

Francisco was removed from home at the age of twelve (12) and placed in a private child-care facility. His severe mental health problems, including bipolar disorder and attention problems, combined with significant family difficulties, led to his removal and placement in a treatment facility by the juvenile court as a "dependent" child. Prior to placement in a treatment facility, Francisco made the rounds between emergency shelters, psychiatric hospitalization and temporary foster homes over a period of six months. His records had not been seen to the treatment facility and little information was available to school officials or his treatment team. After only two days at school, where he was placed in a regular classroom setting, he was arrested for fighting and destruction of school property. The school system refused to allow his return, and filed charges against him for the incident.

At the very heart of the juvenile court process is the philosophy of rehabilitation, even though it may, at times, seem contrary to the goals of public safety and punishment. Effective advocacy for youth with mental illness and other disabilities, while perhaps time consuming and costly, promotes fair and just outcomes for youth, while enhancing their abilities for rehabilitation and appropriate treatment opportunities. These youth do become adults, at which

time their options may well become more limited and less effective. Consider the prospects for Michael:

Michael grew up in foster care from the age of six (6) months, having been born to a crack-addicted mother. After years in foster care with the same family, Michael's behaviors became so severe at age five (5) that placement in a therapeutic foster home with intensive wrap-around services became necessary. Michael suffered significant developmental delays in his communication, cognitive functioning, and social skills. Eventually Michael returned home to his mother, although the lack of supervision and structure in her home, as well as continued drug and alcohol use, proved detrimental to Michael's adolescent development. He developed a pattern of delinquent behaviors, including drug usage and trafficking, gang-related activities, burglaries, and carrying a firearm. At age 14, Michael was transferred and tried as an adult after the attempted robbery of a convenience store where he brandished a gun to store employees. He received a ten (10) year sentence, the minimum, and is housed in an adult prison facility, pursuant to state law.

What Melissa, James, Francisco and Michael face is typical of most juvenile court dockets throughout the country. The challenges for practitioners and decision-makers about their futures, and the future of many similar youth, can be met with a better understanding of the individualized circumstances and special needs of each youth.

Chapter 2

Ethical Considerations for Counsel Representing Juveniles With Special Needs

A. Introduction

Youth in the juvenile justice system with special needs may present unique and challenging ethical dilemmas for practitioners providing legal representation. Recent studies have indicated that mental disorders are at least twice as common among youths in juvenile justice settings as the 18-22% prevalence rate reported for adolescents in general.¹ Further, the rates of juveniles suffering from mental disorders have risen in past decades among those referred to the justice system on delinquency or criminal charges.² Evidence suggests that while 13 or 14-year-olds may possess the basic cognitive abilities to understand the nature of the trial, their capacity for grasping the significance of decisions they must make has not yet matured to the level of the average adult defendant.³ These statistics raise significant concerns that many juveniles in the justice system do not possess the capacity required to adequately understand the legal process, including the decision-making capacity to guide their legal representation.⁴

A lawyer who undertakes the representation of a youth with special needs must be aware of the effect the juvenile's mental health or other disabilities may have on the attorney/client

¹ Thomas Grisso, *The Changing Face of Juvenile Justice*, 51 *Psychiatric Services* 99 (April 2000).

² *Id.* at 99.

³ *Id.* at 100.

⁴ *Id.* One recent study suggests that out of a sample of 136 juveniles referred by juvenile courts to a forensic evaluation center, only about one fifth of the 9-12 year olds and a little more than one half of the 13-14 year olds were judged competent by the examiners. The percentage of 15-year-olds (84%) and 16-year-olds (72%) judged

relationship. Specifically, the lawyer must determine at the outset of representation whether the client may lack competency to stand trial and to adequately assist his trial counsel in the eyes of the law. This inquiry may well end in a finding that the youth is incompetent, and thus cannot be adjudicated, or may have other viable defenses as a result.

However, a youth may in some cases be deemed competent to stand trial by the court, but nevertheless lack the mental capacity to adequately direct his or her representation. The latter situation raises various ethical challenges for the attorney regarding how to assess the youth's capacity, how to effectively communicate with the youth, and the allocation of decision-making when the youth may have impaired decision-making capacity. This chapter examines the ethical responsibilities of the attorney in representing a juvenile who may lack capacity to assist the attorney, whether or not the court has made a determination that the youth is incompetent. Specifically, it examines the attorney's responsibility to determine the youth's decision-making capacity, how decisions are made when the youth lacks capacity, and communication by the attorney with the juvenile who lacks capacity.

B. Determining the Youth's Decision-Making Capacity

Where a client possesses the mental capabilities to direct his representation, the attorney, pursuant to the Model Rules of Professional Responsibility (Model Rules), "shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued."⁵ In other words, in the normal attorney-client relationship, the attorney is guided by the client's wishes, within the confines of the law.

competent was about the same as is usually found in studies of adult defendants referred by the courts for competence evaluations.⁴

⁵ABA Model Rules of Professional Responsibility 1.2.

The ethical rules and guidelines that govern the legal practice have little to say, however, about how to proceed when the client lacks capacity. The only guidance provided by the Model Rules is for lawyers to maintain a normal attorney/client relationship with an impaired client “as far as reasonably possible.”⁶ This vague directive falls short of providing any significant guidance to attorneys who are representing an impaired client.

The lawyer’s first duty, upon undertaking representation of a juvenile, should be to determine whether or not the youth has the capacity to make decisions and to assist the attorney in his or her representation. This section focuses on how this determination should be made and identifies a set of principles to guide lawyers in their determination of the youth’s capacity to set goals and direct the representation.

Before addressing the substantive issue, however, a distinction should be made between “capacity” and “competency.” While the terms are used somewhat interchangeably, the two are not necessarily synonymous. Black’s Law Dictionary defines “competency” as, “[I]n the law of evidence, the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice . . .”⁷ As it is defined by law, “competency” is a judicial determination made by a court after consideration of information, usually from mental health professionals, regarding the individual’s ability to understand the nature or consequences of the proceedings, or to participate rationally in one’s own defense. A determination of competency may be necessary in proceedings where competency is a defense or otherwise legally significant to the substantive right.

Black’s Law Dictionary defines “capacity,” however, as “legal qualification (i.e., legal age), competency, fitness, mental ability to understand the nature and effects of one’s acts (i.e.,

⁶ *Id.* at 1.14.

capacity to sue or criminal capacity.)”⁸ As such, determination of the youth’s “capacity” is a separate and distinct determination by the attorney, regardless of whether a court has made a determination that the youth is competent to stand trial.

1) Guiding Principles for Determining a Youth’s Decision-Making Capacity Regarding Representation

In order to avoid a presumption that a youth lacks capacity because of age, immaturity, or mental health factors, an attorney should first presume the youth is competent. The ability of the youth to express a reasoned preference should constitute a threshold requirement for determining capacity. The following guiding principles have been suggested for consideration when making this determination:

- a) Neither chronological age by itself nor legal condition is determinative of capacity.
- b) A lawyer representing a juvenile should decide whether the youth has the capacity to express a position. The lawyer has a responsibility to recognize, facilitate, and maximize the youth’s capacity.
- c) In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals and others including family members, probation officers, school officials, clergy and other concerned parties, but ensuring, however, that the attorney-client relationship is not compromised in the process.
- d) The weight given to the factors in the determination of capacity may vary depending on the issue and on the nature of the proceeding.⁹

2) Fact-Finding Phase

When capacity of the youth becomes an issue, the lawyer should consider a number of factors for assessing capacity. This analysis is not intended to be a “test” for a client to pass, but

⁷ Black’s Law Dictionary (6th ed., West Publishing Co. 1990).

⁸ Black’s Law Dictionary (6th ed., West Publishing Co. 1990).

⁹ These guiding principles were developed by a Working Group at the Conference on Ethical Issues in the Legal Representation of Children hosted by Fordham University School of Law, December 1-3, 1995. See *Report of the*

rather should serve as a guide for the attorney. These factors should also assist the attorney in evaluating his or her own prejudices and misconceptions about a client as well as to illuminate the client's overall situation and the effect this has on decision-making.¹⁰ They include:

a) Developmental Stage of the Youth¹¹

- i) Cognitive ability**
- ii) Socialization**
- iii) Emotional growth**

The Commentary notes that these factors serve a function similar to the use of chronological age, yet are superior since they evaluate the youth's maturity and development in a more accurate manner.

b) Medical Status (Present)

- i) Mental**
- ii) Physical¹²**

The Commentary notes that decision-making can be significantly affected by the existence of drug abuse, alcoholism, and organic brain disease. Similarly, nutrition, hyperactivity, attention deficit disorder, or a physical disability may affect the youth's perception of the consequences of his actions.

c) Personal History

- i) Life experience**
- ii) Family background**
- iii) Medical history¹³**

Working Group on Determining the Child's Capacity to Make Decisions, 64 Fordham L. Rev. 1399, 1403-1405(1996).

¹⁰ *Id.* at 1342.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

3. Determination Phase

Only after considering the factors above in the “fact-finding” phase should the attorney make a determination about the youth’s capacity. Because of the tendency to evaluate the decision itself, a lawyer should take care to separate out the evaluation of the client’s ability to make a decision from the lawyer’s evaluation of the substance of the decision. In spite of any disagreement with the client’s position, the attorney should consider the following:

a) Expression of a Relevant Position

- i) Ability to communicate with lawyer**
- ii) Ability to articulate reason¹⁴**

The Commentary notes that these factors constitute a threshold for determining if a youth possesses capacity. A youth who cannot express a relevant preference cannot be said to be making a reasoned choice. The factor is more fully developed when the lawyer considers whether the youth can articulate reasons. While an unexplained preference may not be enough, the attorney should take care not to evaluate the client’s decision based on the attorney’s preference in the same situation.

b) Individual Decision-Making Process

- i) Influence – Coercion - Exploitation**
- ii) Conformity**
- iii) Variability and consistency¹⁵**

The Commentary notes that how a youth arrives at a decision goes to the very heart of the question regarding capacity. As such, the decision should be free from undue influence and pressure from a variety of sources, including from the attorney, familial and/or societal pressures.

¹⁴ *Id.* at 1343-44.

¹⁵ *Id.* at 1344.

c) Ability to Understand Consequences**i) Risk of harm****ii) Finality of decision¹⁶**

The Commentary suggests that an attorney should intensify the level of scrutiny of the youth's decision as the risk of harm and the duration of the decision's effect on the youth's life increases. This process presents an opportunity for the attorney to help the youth develop capacity by making sure the youth has actually thought through the long-range consequences of the decision.

The fact-finding and determination phases are particularly critical when an attorney is representing a youth with mental health or other disabilities which may impair capacity to make reasoned decisions. Not only may these factors lead to possible defenses regarding competency, culpability and/or diminished capacity, the youth's ability to make decisions is critical in determining strategies for disposition hearings, whether or not the youth will testify as part of the defense, in plea agreements, and in decisions regarding transfers to adult court.

C. The Interplay of Substantive Rights in the Decision-Making Process

The role and responsibilities of the attorney in proceedings affecting youth cannot be determined fully without careful consideration of the substantive rights of the youth in a given situation. One author suggests that the law should strive to achieve two separate goals through a juvenile's representation: 1) to ensure uniformity of behavior so that lawyers will know what is expected of them when performing their professional role, clients will receive similar services from their lawyers, and courts will obtain similar benefits from the lawyer's input; and, 2) to

¹⁶ *Id.* at 1345.

maximize the probability of advancement of the youth's legal rights.¹⁷ For instance, due process requires that like cases receive like process. In delinquency cases, in particular, youth have the right to be represented by effective counsel, and such defense should comport with basic criminal law concepts, particularly the right to be presumed innocent until the state can prove its case beyond a reasonable doubt.

The attorney for a youth who is legally competent, but yet has some degree of impaired decision-making should be guided at least in part by the substantive law to determine the rights to be protected. There should also be a determination of whether the substantive law necessitates the attorney advocate for an outcome-based result, or advances the youth's rights by procedural means. Such determination provides at least some guidance to the attorney whose client may lack some decision-making abilities, and can accomplish both the goals of uniformity of process as well as maximizing the advancement of the client's rights.

D. Other Ethical Considerations for the Lawyer Representing a Client of Questionable Capacity

As a preliminary matter, it should be noted that pursuant to Model Rule 1.1, "[a] lawyer shall provide competent representation" which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A lawyer who is not qualified -- by training or experience -- to deal with the questionably competent client may, in some circumstances, have a duty to refer the client to an attorney who is so qualified.¹⁸

Interviewing and counseling skills are particularly crucial when working with youth who may have mental health needs or other types of disabilities. In order for the youth to participate

¹⁷ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1403-1405 (1996).

¹⁸ Jan Ellen Rein, *What's an Attorney To Do? Within and Beyond the Competency Construct*, 62 Fordham L. Rev. 1101, 1141 (1994).

in the interviewing and counseling process, the youth must be verbal and have the ability to exchange information with the attorney. Good interviewing skills on the part of the attorney will likely increase the attorney's performance in meeting ethical obligations to the youth. The skill of the attorney in interviewing youth who may be somewhat impaired in their cognitive, communication or perceptive skills, can also enhance the youth's level of decision-making ability, and thus, the youth's capacity to assist the attorney in guiding the representation.

Strategies for successful interviewing will depend upon a number of factors, including the youth's developmental level, the purpose of the interview, the relationship with the interviewer, the interview setting, and the effect of the current situation on the youth.¹⁹ Some general suggestions for building rapport include:

- Don't confuse good intentions with rapport-building.
- Start conversation with non-threatening, less serious topics.
- Follow the youth's lead with the conversation.
- Recognize the youth's strengths and create a sense of "empowerment."
- Find common interests and let the juvenile talk about them.
- Do not take the youth's behavior personally if they do not respond and/or are uncooperative with you.
- Invite questions from the youth throughout the interview.
- Work on building and maintaining rapport throughout the interview.
- Don't confuse rapport-building with saying anything just to be liked.
- Avoid long questions with a lot of information loaded in them.
- Avoid giving more than one option in a question.

- Avoid questions that can be answered with “yes” or “no.”
- Ask questions when you do not understand.
- Avoid asking for abstract thinking.
- Avoid starting questions with “why” or “how could you.”²⁰

E. Conclusion

Pursuant to the Model Rules of Professional Responsibility, a lawyer “shall abide by a client’s decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.” This rule, requiring lawyers to advocate for their client’s wishes, carries with it a presumption that a client is competent, and provides little direction for an attorney who may doubt the client’s decision-making ability as a result of mental illness or other disabilities. When the client is a youth whose capacity to assist the attorney is questionable, the lawyer may be uncomfortable advocating for the youth’s expressed interests. Therefore, it is very important for a lawyer to determine whether the young person is capable of guiding the representation early on in the attorney/client relationship.

Determining whether a youth possesses the requisite capacity to establish the goals of the representation requires that the lawyer investigate various aspects of the youth’s developmental background, the mental and physical condition of the youth, and other aspects of the youth’s personal history. After this fact-finding process, a lawyer should consider how the youth was able to make decisions, including the expression of a relevant position, and the ability to articulate reasons for and choose options. It also requires the attorney to have the necessary skills to

¹⁹American Bar Association Juvenile Justice Center, *Talking to Teens in the Justice System: Strategies for Interviewing Adolescent Defendants, Witnesses and Victims*, Vol. 2 at 10 (2000).

²⁰*Id.* at 11-15.

communicate with youth with special needs in order to fully enhance their capacity to assist the attorney.

Finally, consideration should be given to the substantive rights of the youth in the proceedings against them, with adherence to procedural protections guaranteed by law. Doing so will help the attorney prevent sidestepping the attorney-client relationship in favor of a *parens patriae* approach.

Chapter 3

Understanding the Needs of Youth: Identification of Disabilities and Other Significant Issues

An increasing number of juveniles with mental health problems are being served in the juvenile justice system.¹ Understanding the implications these disabilities have on the procedures and outcomes of a given case necessitates familiarity with the characteristics of, and intervention strategies for, the most common disabilities found among these youth. Other characteristics such as race, gender and nationality may also have implications for effective decision-making throughout the court process.

This chapter provides an overview of the prevalence of developmental, mental health, and educational disabilities among youth in the juvenile justice system. It describes some of the most common disabilities and suggested interventions. The issues discussed in this chapter are critical for understanding the effect of specific disabilities on a juvenile's competency, culpability, treatment and rehabilitation needs.

A. The Prevalence of Mental Health Disorders and Other Disabilities in the Juvenile Justice System

Professionals working in the juvenile justice system are frequently faced with the challenges of meeting the needs of youth with mental health disorders and/or other disabilities. Studies of incarcerated youth suggest that as many as 70% suffer from disabling conditions.²

¹ J. Coccozza & K. Skowrya, *Youth with Mental Health Disorders: Issues and Emerging Responses*, 8 Juvenile Justice 3, 4 (2000)

² Peter Leone, B. Zaremba, M Chapin and C. Iseli, *Understanding the Overrepresentation of Youth with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389-401 (Fall 1995).

This chapter explores the recent research of prevalence rates and discusses the issues of comorbid disorders.

1) Prevalence Rates

A summary of some of the major studies reflects an increasing interest in this underserved population, and suggests that youth in the juvenile justice system are at least comparable to those being treated in community-based mental health systems.³

- In a nationally-representative sample of 95 public and private juvenile facilities, **73% of the juveniles reported mental health problems during screening, and 57% reported having prior mental health treatment.**⁴
- A representative random sample of youth from Maryland's fifteen (15) juvenile facilities indicated that 57% had a history of mental illness. Structured diagnostic interviews found **53% to have at least one current mental health diagnosis.**⁵
- A census of 17 secure detention centers in Virginia found that 8 – 10% of youth detained needed **immediate** mental health treatment (medication or inpatient treatment) for depression, anxiety or psychotic symptoms. The clinicians conducting this study estimated that **77% of the youth would meet diagnostic criteria for a mental disorder. Of this group, 55 had previously received treatment for mental health problems.**⁶
- Among a random sample of youth admitted to the Georgia Regional Youth Detention Center, structured diagnostic interviews indicated that **61% had mental disorders, including substance abuse disorders.**⁷
- Among a random sample of youth from the South Carolina Department of Juvenile Justice facilities, **72% met criteria for at least one mental health disorder diagnosis.**⁸

³ National Mental Health Association, *Prevalence of Mental Disorders Among Children in the Juvenile Justice System*, National Mental Health Assoc. (1999).

⁴ ABT Associates, Inc, *Conditions of Confinement: Juvenile Detention and Corrections Facilities*, Office of Juvenile Justice and Delinquency Prevention, Washington D.C. (1994).

⁵ D. Shelton, *Estimates of Emotional Disorder in Detained and Committed Youth in the Maryland Juvenile Justice System*, Report to the Maryland Juvenile Justice Advisory Council (1998).

⁶ Policy Design Team, *Mental Health Needs of Youth in Virginia's Juvenile Detention Centers*, Richmond, VA: Department of Criminal Justice Services (1994).

⁷ F. Marsteller, D. Brogan, L. Smith et al., *The Prevalence of Substance Use Disorders Among Juveniles Admitted to Regional Youth Detention Centers Operated by the Georgia Department of Children and Youth Services*, CSAT Final Report (1997).

⁸ D. Atkins, A. Pumariego, L. Montgomery, et al. *Psychopathology of Incarcerated Youth: An Epidemiological Study*, Journal of Child and Family Studies (In Press).

2) Severity And Comorbidity Of Disabilities

The behavioral presentation of a disability and its effect on the youth's needs for treatment varies based upon its severity or the presence of a comorbid disability. The first distinction should be drawn between mental health disorders and serious mental health disorders. Youth diagnosed with a mental health disorder meet the formal criteria of the *Diagnostic and Statistical Manual of Disorders: Fourth Edition* (DSM IV).⁹ Among the criteria for these disorders is a requirement that the symptoms cause clinically significant distress or impairment.¹⁰ A juvenile with a "serious mental health disorder" meets DSM IV criteria for a mental health disorder but is generally identified with a more severe condition that substantially interferes with their functioning in family, school, or community activities.¹¹ While estimates of the prevalence of serious mental health disorders among youth are variable, conservative projections suggest that at least one in every five youth in the juvenile justice system have serious mental health disorders.¹² These youth are likely to require long-term, intensive treatment. Some professionals have suggested that youth with serious mental health disorders should be diverted from the juvenile justice system to address these needs.¹³

There are also high percentages of comorbidity among those with mental health disorders.¹⁴ That is, many youth have two or more co-occurring mental health disorders. The presence of comorbid disorders and similar symptomatology between disorders (e.g., criteria for both Attention Deficit Hyperactivity Disorder and Depression describe difficulties concentrating) make identification and treatment more challenging as intervention strategies must be modified

⁹ American Psychiatric Association, *Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition*. Washington D.C.: American Psychiatric Association (1994).

¹⁰ *Id.* at 7.

¹¹ Cocozza, *supra* note 1 at 5-6.

¹² *Id.* at 6.

¹³ *Id.* at 8.

or adapted to include treatment of the other issues. Failure to identify a comorbid mental health disorder may negatively impact the intervention for the identified disorder as the symptoms of an undiagnosed disorder may interfere with successful implementation of the treatment.

Research is just beginning to document the prevalence of co-occurring substance abuse disorders among individuals with mental health disorders.¹⁵ Although there is little data examining the co-occurrence of substance abuse disorders among youth, one study has found that “approximately half of all adolescents receiving mental health services” in the general population are reported to have a dual diagnosis.¹⁶ Among the juvenile justice system population, the rates may be even higher.¹⁷

B. Common Mental Health Disorders and Other Disabilities in the Juvenile Justice System

Understanding the nature and extent of a young person’s disabling condition is imperative to providing meaningful interventions and appropriate accommodations within the juvenile justice system since recommended interventions are often diagnosis specific¹⁸ Concomitant with these disabling conditions are often other risk factors including chaotic family lives, school failure, drug use, gang activity and low socio-economic status. A more detailed description of some of these disorders and recommendations for intervention are provided in Appendix A. These disorders are then discussed in the context of the educational system and impact on the juvenile justice system.

¹⁴ American Psychiatric Assoc., *supra* note 9 (listing many associated features and disorders within each diagnostic category).

¹⁵ Cocozza, *supra* note 1 at 5-6.

¹⁶ P. E. Greenbaum, L. Foster-Johnson and J. Perilla, *Co-occurring Addictive and Mental Disorders Among Adolescents: Prevalence Research and Future Directions*, 66 American Journal of Orthopsychiatry 52, 60 (1996).

¹⁷ R.K. Otto, J.J. Greenstein, M.K. Johnson and R.M. Friedman, *Prevalence of Mental Disorders Among Youth in the Juvenile Justice System*, in *RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM* 7-48 (J.J. Cocozza, ed. 1992).

¹⁸ See, W. KRONENBERGER & R. MEYER, *THE CHILD CLINICIAN’S HANDBOOK: SECOND EDITION* (2001).

1) Mental Health Disorders

a) Disruptive Behavior Disorders

Disruptive behavior disorders include Conduct Disorder and Oppositional Defiant Disorder. The behaviors associated with each differ in level of severity and specific manifestation but can be characterized as disruptive and rule breaking in the society, familial, and/or legal context.

i) Conduct Disorder

Conduct disorder is defined in the DSM IV as “a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated.”¹⁹ Specific categories include aggression to people and animals, destruction of property, deceitfulness or theft, and serious violations of rules.²⁰ Youth who show these symptoms prior to age 10 are identified as child-onset type, whereas the absence of criteria prior to age 10 is considered adolescent-onset type.²¹ Conduct disorder is often comorbid with Attention Deficit/Hyperactivity Disorder, Mood Disorders, Anxiety Disorders, Learning Disorders, and Substance-Abuse Disorders.²² Recommended interventions include family therapy, cognitive behavioral therapies such as social skills training, problem solving, and anger management, and psychosocial interventions²³

ii) Oppositional Defiant Disorder

Oppositional Defiant Disorder is defined in the DSM IV as “a recurrent pattern of negativistic, defiant, disobedient, and hostile behaviors toward authority figures.”²⁴ The

¹⁹ American Psychiatric Assoc., *supra* note 9 at 85.

²⁰ *Id.* at 90.

²¹ *Id.* at 91.

²² *Id.* at 88.

²³ Kronenberger, *supra* note 18 at 107-117.

²⁴ American Psychiatric Assoc., *supra* note 9 at 91.

behaviors are less severe than those seen in Conduct Disorder.²⁵ Behaviors include frequently losing one's temper, often arguing with adults, defiance or refusing to comply with rules, frequent anger, and deliberately annoying others.²⁶ Attention-Deficit/Hyperactivity Disorder, Learning Disorders, and Communication Disorders are often comorbid with Oppositional Defiant Disorder.²⁷ Recommended treatments are frequently the same as for Conduct Disorder.

b) Attention-Deficit/Hyperactivity Disorder

Attention-Deficit/Hyperactivity Disorder (ADHD) is “a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at comparable levels of development.”²⁸ Predominantly Inattentive Type, Predominantly Hyperactive-Impulsive Type, and Combined Type comprise the subtypes.²⁹ The hallmarks of ADHD include inattention such as difficulties concentrating, avoiding or disliking tasks requiring continued mental effort, and distractibility; hyperactivity-impulsivity such as fidgeting, talking excessively, and appearing always on the go; and impulsivity such as blurting out answers and interrupting.³⁰ ADHD frequently co-exists with Conduct Disorder and Oppositional Defiant Disorder.³¹ Learning Disorders, Communication Disorders and Anxiety Disorders. Mood Disorders are also more prevalent in youth with ADHD.³² Differentiating between ADHD and other disorders can be challenging since the behaviors associated with ADHD are often similar to those seen in other disorders.³³ The most recommended interventions

²⁵ *Id.* at 93.

²⁶ *Id.* at 93-94.

²⁷ *Id.* at 92.

²⁸ *Id.* at 79.

²⁹ *Id.* at 80.

³⁰ *Id.* at 84.

³¹ *Id.* at 81.

³² *Id.*

³³ Many of the DSM IV criteria address similar symptoms across disorders. It is the combination of the presenting symptoms, along with other relevant factors, that aid in determining a diagnosis.

for ADHD include medication, behavioral interventions (e.g., social skills training), or combined medication-behavioral interventions.

c) Mood Disorders

Mood disorders are characterized by a disturbance of mood and include Depressive Disorders and Bipolar Disorders. Within each of these categories are several related disorders. Depressive Disorders are distinguishable from Bipolar Disorders as there is no history of manic episodes in depressive disorders. This section will address those mood disorders most commonly seen in youth in the juvenile justice system.

i) Major Depressive Disorder And Dysthymic Disorder

Major Depressive Disorder is characterized by one or more major depressive episodes, defined as a period of two weeks or longer “during which there is either a depressed mood or the loss of interest or pleasure in nearly all activities.”³⁴ Dysthymic disorder tends to exhibit less severe but more chronic symptomology but is more chronic (symptoms must be present for at least one year).³⁵ Children and adolescents often show irritability rather than a depressed mood. Children are more likely to show behavioral problems while adolescents show more sleep and appetite problems, greater impairments, and suicidal ideation and attempts.³⁶ Children are more likely to have a comorbid disorder such as ADHD, or a Disruptive Behavior Disorder, rather than Major Depression.³⁷ Among adolescents, Major Depressive Disorder is associated with the Disruptive Behavior Disorders, ADHD, Anxiety Disorders, and Substance-Related Abuse Disorders.³⁸ In particular, a high percentage of young people diagnosed with

³⁴ American Psychiatric Assoc., *supra* note 9 at 320.

³⁵ *Id.* at 343.

³⁶ *Practice Parameters for the Assessment and Treatment of Children and Adolescents Depressive Disorders*, 37 Journal of the American Academy of Child and Adolescent Psychiatry 63S, 64S (1998).

³⁷ American Psychiatric Assoc., *supra* note 9 at 325.

³⁸ *Id.*

conduct disorder also have diagnoses of depression.³⁹ Recommended treatments include medication, cognitive behavioral therapies, and group therapies.⁴⁰

ii) Bipolar Disorder (Manic Depressive Disorder)

Bipolar disorders are characterized by manic, hypomanic, or mixed depressive-manic episodes.⁴¹ Manic episodes are “abnormally and persistently elevated, expansive, or irritable mood.”⁴² If the symptoms are not severe impairments in functioning, a hypomanic episode is diagnosed.⁴³ Most individuals with Bipolar Disorder also have had Major Depressive Episodes.⁴⁴ Symptomatology for a manic or hypomanic episode include decreased need for sleep, pressured speech, distractibility, and rapid changes in ideas or thinking.⁴⁵ Adolescents often show psychotic symptomatology, rapid fluctuations in mood, or significant deterioration in functioning.⁴⁶ Children are less likely to show clear episodes of manic behavior, exhibiting instead irritability, hyperactivity, and moodiness.⁴⁷ Recommended treatments include medication and psychotherapy.

d) Schizophrenia And Other Psychotic Disorders

Psychotic symptomatology is the hallmark of Schizophrenia, Schizophreniform Disorder, Schizoaffective Disorder, and Brief Psychotic Episode.⁴⁸ In the context of these disorders, “psychotic” refers to delusions, prominent hallucinations (e.g., visual, auditory),

³⁹ S. Milberger et al., Attention Deficit Hyperactive Disorder and Comorbid Disorders: Issues of Overlapping Symptoms, 152 *American Journal of Psychiatry* 1794-1799 (1995).

⁴⁰ Kronenberger, *supra* note 18 at 188-199.

⁴¹ American Psychiatric Assoc., *supra* note 9 at 317-318.

⁴² *Id.* at 328.

⁴³ *Id.* at 338.

⁴⁴ *Id.* at 351.

⁴⁵ *Id.* at 322.

⁴⁶ *Practice Parameters for the Assessment and treatment of Children and Adolescents with Bipolar Disorder*, 36 *Journal of the American Academy of Child and Adolescent Psychiatry* 157S, 157S-176S (1997).

⁴⁷ *Id.*

⁴⁸ American Psychiatric Assoc., *supra* note 9 at 273.

disorganized speech, or disorganized or catatonic behavior.⁴⁹ A specific diagnosis of Schizophrenia requires the presence of psychotic symptomatology, possibly negative symptoms such as a flat affect, a marked decrease in functioning (e.g., school, social self-care), and the presence of the signs of disturbance for at least six months.⁵⁰ Schizophreniform Disorder has similar symptoms but has a shorter duration of symptoms and does not show the same decline in functioning.⁵¹ A Brief Psychotic Disorder requires the psychotic symptoms but only is present between one and 30 days.⁵² The incidence of schizophrenia is rare in children but increases steadily during adolescence.⁵³

Substance abuse and developmental delays often are comorbid with schizophrenia.⁵⁴ Substance abuse (substance-related disorders) can often produce similar symptoms to Schizophrenia and thus, a determination as to whether the psychotic symptomatology is caused or maintained by substance abuse is necessary.⁵⁵ Additionally, as other disorders present with similar symptomatology, it is important to differentiate between the various psychotic disorders as well as between psychotic mood disorders (e.g., bipolar disorder); organic (medical) disorders; and other behavioral or emotional disorders.⁵⁶ Intervention generally needs to be multimodal and long-term, often including psychopharmacological treatments; individual, group or family therapy for both the disorder and any other associated symptoms, and structured treatment programs (e.g., partial hospitalization).⁵⁷

⁴⁹ *Id.*

⁵⁰ *Id.* at 285.

⁵¹ *Id.* at 273-274.

⁵² *Id.* at 304.

⁵³ *Practice Parameters for the Assessment and Treatment of Children and Adolescents With Schizophrenia*, 36 *Journal of the American Academy of Child and Adolescent Psychiatry* 177S, 198S (1997).

⁵⁴ *Id.* at 189S.

⁵⁵ American Psychiatric Assoc., *supra* note 9 at 283.

⁵⁶ *Practice Parameters*, *supra* note 53 at 180-181S.

e) Anxiety Disorders

Anxiety disorders include generalized anxiety, specific phobias, and physical symptoms associated with the cognitive and emotional experiences of anxiety. Post Traumatic Stress Disorder and Acute Distress Disorder specifically require the occurrence of a traumatic event for a diagnosis to be made. This section will address Post Traumatic Stress Disorder specifically as it is likely to be identified in many youth in the juvenile justice system.

i) Post Traumatic Stress Disorder (PTSD)

Youth who have experienced, witnessed, or were confronted with an event that involved actual or potential death or serious injury are at risk for PTSD.⁵⁸ The hallmarks of PTSD include re-experiencing the traumatic event, such as through nightmares, flashbacks, and recurrent and intrusive distressing thoughts of the event; persistent avoidance of stimuli associated with the traumatic event, such as avoiding activities, places or people associated with the trauma or inability to recall important aspects of the trauma; and increased physiological arousal, including sleep difficulties, irritability and anger outbursts, as well as difficulty concentrating.⁵⁹ There is an increased risk of other anxiety disorders and Major Depressive Disorder among individuals with PTSD.⁶⁰ Psychotherapy that includes developing coping techniques and re-experiencing the event so that the emotional effects can be addressed is a strongly recommended treatment for youth with PTSD.

⁵⁷ *Id.* at 190-191S (1997).

⁵⁸ American Psychiatric Assoc., *supra* note 9 at 427.

⁵⁹ *Id.* at 428.

⁶⁰ *Id.* at 425.

2) Learning Disorders And Developmental Disabilities

a) Learning Disorders

A diagnosis of a Learning Disorder (LD)⁶¹ is made when “[t]he individual’s achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence.”⁶² Specific Learning Disorders identified in the DSM IV include Reading Disorder and Disorder of Written Expression.⁶³ Between 10% and 25% of youths with Conduct Disorder, Oppositional Defiant Disorder, ADHD, and Major Depressive Disorder also have LD.⁶⁴ Many youths with LD also show demoralization, low self-esteem, social skills deficits, and high dropout rates.⁶⁵ Meeting DSM IV criteria for a Learning Disorder does not automatically qualify a youth for specialized education services; however, the juvenile must meet state eligibility criteria for specially designed instruction. Educational interventions are designed to meet the juvenile’s specific needs. Juveniles with concomitant emotional symptomatology may also require therapeutic interventions.

b) Communication Disorders

Communication Disorders include disorders of speech production and language. An Expressive Language Disorder is reflected in a significantly lower score on measures of expressive language as compared to nonverbal intellectual skills and receptive language.⁶⁶ Youth with communications disorder may show a limited range of vocabulary, word-finding

⁶¹ The abbreviation “LD” is frequently used to refer to youth with “learning disabilities”, a classification associated with eligibility for special education services under IDEA (The Individuals with Disabilities Education Act.)

⁶² *Id.* at 46.

⁶³ *Id.*

⁶⁴ *Id.* at 47.

⁶⁵ *Id.*

⁶⁶ *Id.* at 58.

difficulties, or poor grammatical sentence structure.⁶⁷ A Mixed Receptive-Expressive Language Disorder is reflected in significantly lower scores on measures of both expressive and receptive language as compared to nonverbal intelligence scores.⁶⁸ Youth with this disorder exhibit both expressive language difficulties as well as impairments in understanding the meaning of words, sentences, or types of statements.⁶⁹ These disorders have a particular impact on a youth's ability to understand or fully respond to conversation, questions, or descriptions of court proceedings. Communication disorders may co-occur with any mental health disorder, particularly ADHD.⁷⁰ Speech and language therapy and educational interventions are the typical treatment methods.

c) Mental Retardation

A diagnosis of Mental Retardation (MR) requires significantly subaverage intelligence (typically IQ scores of or below 70) and similar significant limitations in two areas of adaptive functioning (e.g., communication skills, self-care, academic skills, interpersonal skills).⁷¹ The etiologies of MR are diverse and include heredity, environment, alterations to embryonic development, and unknown factors.⁷²

There is no specific behavioral presentation of youth with MR. Some may present a quite passive or dependent demeanor, while others are aggressive or impulsive.⁷³ There is a high risk of comorbid mental disorders in individuals with MR.⁷⁴ Interventions for youth with MR depend, in part, on the degree of impairment they demonstrate. Generally, interventions may include behavioral techniques to teach skills development and special education services. Many youth

⁶⁷ Kronenberger, *supra* note 18 at 412.

⁶⁸ American Psychiatric Assoc., *supra* note 9 at 58.

⁶⁹ *Id.* at 58-59.

⁷⁰ *Id.* at 59.

⁷¹ American Psychiatric Assoc., *supra* note 9 at 39.

⁷² *Id.* at 43.

⁷³ *Id.* at 42.

with MR in the juvenile justice system will need adaptations and/or accommodations in responding to the Courts. If therapeutic interventions are indicated (e.g., there is a comorbid mental health disorder), they will need to be modified to meet the communication needs and skill level of the youth.

d) Pervasive Developmental Disorders

Pervasive Developmental Disorders (PDD) are being increasingly diagnosed in the general population. As such, it is likely that some youth with a diagnosis within the spectrum of PDD will be present in the juvenile justice population. The spectrum of PDD includes Autistic Disorder and Asperger's Disorder. The essential features of Autistic Disorder are the qualitative impairments in social interaction and communication coupled with a restrictive repetitive and stereotypic repertoire of activity and interests.⁷⁵ Individuals with Autism usually show overall cognitive scores in the range of Mental Retardation.⁷⁶ Asperger's Syndrome is characterized by significant impairment in social interaction and circumscribed interests and unusual behaviors.⁷⁷ Although significant impairments in communication are not typical in Asperger's Disorder, the individual's communication style may be seen as tangential and verbose with an unusual rate of speech or fluency.⁷⁸ Such difficulties in communication are likely to have great impact on the youth's ability to relate his or her thoughts and ideas to those involved with his or her case. Specific interventions depend upon the behavioral patterns and level of functioning a youth with PDD presents. Interventions typically include focus on the development of language and communication skills, behavioral interventions, and building social interactive skills.

⁷⁴ *Practice Parameters for the Assessment and Treatment of Children, Adolescents and Adults with Mental retardation and Comorbid Mental Disorders*, 38 *Journal of the American Academy of Child and Adolescent Psychiatry* 5S, 6S (1999).

⁷⁵ American Psychiatric Assoc., *supra* note 9 at 70-71.

⁷⁶ DONALD J. COHEN & FRED R. VOLKMAR, *HANDBOOK OF AUTISM AND PERVASIVE DEVELOPMENTAL DISORDERS: SECOND EDITION* 29 (1997).

⁷⁷ *Id.* at 94.

3) Traumatic Brain Injury

A brain injury is “...any disruption in the brain structure or physiology.”⁷⁹ A traumatic brain injury can be an open-head injury, in which the skull is penetrated, or a closed head-injury, in which the skull is not penetrated.⁸⁰ The effects of a traumatic brain injury are quite diverse in presentation and severity. Specific symptomatology depends upon multiple factors including the location and extent of the injury and the youth’s prior functioning.⁸¹ Cognitive effects may include disorders of attention, concentration, planning, judgment, memory and communication.⁸² Behavioral correlates can be a result of the injury, reactions to difficulties coping with the injury, reflective of preexisting personality, or a combination of these.⁸³ Adolescents with Attention Deficit Hyperactivity Disorder or other types of psychological problems may be more likely to suffer traumatic brain injuries compared to youth without these problems.⁸⁴ Youth with a history of alcohol abuse may have greater difficulties compensating for the effects of the brain injury than those who have not abused alcohol.⁸⁵ Considerations in developing an intervention plan for youth with traumatic brain injury include the youth’s premorbid functioning, his or her current level of functioning, and environmental factors (e.g., school and family environment).⁸⁶

⁷⁸ *Id.* at 103.

⁷⁹ Sattler, Jerome S. Children with Brain Injuries. In Clinical and Forensic Interviewing of Children and Families: Guidelines for the Mental Health, Education, Pediatric, and Child Maltreatment Fields (Jerome S. Sattler Publisher, Inc. 1998) at 615.

⁸⁰ *Id.* at 619.

⁸¹ *Id.* at 620.

⁸² *Id.* at 621.

⁸³ *Id.* at 626.

⁸⁴ *Id.* at 619.

⁸⁵ *Id.* at 642.

⁸⁶ *Id.* at 642-643.

4) The Link Between Mental Health, Learning and Developmental Disorders, and Education

Many youth with mental health disorders, learning disabilities, and developmental disabilities are eligible for specially-designed instruction and related services under the Individuals with Disabilities Act (IDEA).⁸⁷ Specifically, youth with an identified or suspected disability are entitled to a free and appropriate public education, including identification, evaluation, specially designed instruction, related services, and due process protections at each step of the process.⁸⁸ These rights are explained in greater detail in Chapter 4.

The United States Department of Education reports that 8.6 % of public school students have been identified as having disabilities that qualify them for special education services.⁸⁹ By comparison, youth in the juvenile justice system are much more likely to have both identified and undiscovered disabilities. Studies of incarcerated youth suggest that as many as 70% suffer from disabling conditions.⁹⁰ Youth with learning disabilities and/or emotional disabilities are arrested at higher rates than their non-disabled peers.⁹¹

5) The Effect Of Mental Health And Educational Disabilities In The Juvenile Justice System

A number of common traits found among many disabled youth make them more susceptible to involvement in the juvenile justice system. More specifically, youth with suspected or identified cognitive, emotional, or social interactive disabilities are often prone to:

- Make poor decisions and social judgments that lead to involvement in crime;

⁸⁷ Individuals with Disabilities Act (IDEA), 20 U.S.C. 1400, et seq.

⁸⁸ See generally, IDEA, specifically Chapter 4 on Affirmative Rights of Disabled Youth IDEA, 504 of the Rehabilitation Act, 20 U.S.C. 794 (1973) and the Americans with Disabilities Act, 42 U.S.C. 1210 et seq. (1990).

⁸⁹ U.S. Dept. of Educ., *To Assure the Free Appropriate Public Education of All Children with Disabilities: Twentieth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, Washington, D.C. (1998).

⁹⁰ Leone, *supra* note 2 at 389-401.

⁹¹ Chesapeake Institute, *National Agenda for Achieving Better Results for Children and Youth with Serious Emotional Disturbance*, Washington D.C., U.S. Dept. of Educ., Office of Special Education and Rehabilitation Services (1994).

- Have weak, or no, avoidance techniques that lead to detention and eventual arrest (i.e., they are more likely to get caught);
- Have social skill deficits that result in harsher treatment once in the justice system; and,
- Have learning difficulties that almost ensure increased recidivism (i.e., it is more difficult to them to “learn their lesson” and reform their ways).⁹²

Once youth with disabilities enter the juvenile justice system, they often receive harsher treatment at arrest, adjudication and disposition than their non-disabled peers.

- Learning disabled youth are 200% more likely to be arrested than non-disabled youth for comparable delinquent activity.
- Adjudication has been found to be 220% more likely if the offender has a learning disability. Non-adjudicated youth averaged two years higher in school achievement than those adjudicated delinquent, despite similar backgrounds of offenses.
- Despite similar records of prior offenses, once adjudicated delinquent, the term of incarceration and/or probation is 2-3 years longer for those with disabilities as compared to their non-disabled peers.⁹³

6) Implications For Cases Involving Youth With Disabilities

Mental health disorders, learning disorders, and developmental disorders are prevalent in the juvenile justice system and may impact every phase of the process. These disabilities may significantly impact a youth’s ability to understand, among other issues, the consequences of his behavior, *Miranda* warnings, court proceedings, or potential legal strategies. These disabilities may interfere with recall of vital information that may aid their case. Without intervention specifically targeted to the disability, the success of other rehabilitative interventions may be significantly compromised. Thus, identification and treatment of these disabilities is

⁹² Youth Law Center, *Disabilities that Compromise Their Ability to Comprehend, Learn and Behave, in Understanding Adolescents: A Juvenile Court Training Curriculum* 12, ABA Juvenile Justice Center (2000).

⁹³ N. Cowardin, *Punishing Disabilities* in THE SENTENCING PROJECT (M. Young, ed., In Press 2001).

important for both the integrity of the youth's case and his or her ability to benefit from case decisions.

C. Overrepresentation of Minority Youth in the Juvenile Justice System: Mental Health Considerations

In an era where juvenile crime, even violent crime, has been declining,⁹⁴ legislators have increasingly supported more punitive responses to youthful misconduct. The weight of these punitive juvenile justice policies falls disproportionately on juveniles of color. Minority youth are not only over-represented at each stage of the juvenile justice process, the numbers become even more amplified from arrest to secure confinement and transfer to adult court. Although African American youth between the ages of 10 and 17 constitute only 15% of the population in this country, they account for:

- 26% of juvenile arrests;
- 32% of delinquency referrals to juvenile court;
- 41% of juveniles detained in delinquency cases;
- 46% of juveniles committed to secure institutions; and,
- 52% of juveniles transferred to adult criminal court.⁹⁵

1) Identifying Mental Health Needs Of Minority Youth

Overrepresentation is exacerbated by the fact that juveniles of color are generally underserved by the mental health system. The National Mental Health Association (NMHA) reports that these youth have often not received services, or have been poorly served by the mental health system prior to their entry into the juvenile justice arena.⁹⁶ For example:

⁹⁴ Melissa Sickmund, et al. *Juvenile Offenders and Victims: 1997 Update on Violence* 42, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (1997).

⁹⁵ *Id.* at 91.

⁹⁶ National Mental Health Association, *Mental Health of Youth of Color in the Juvenile Justice System*, www.nmha.org/children/justjuv/colorjj.cfm (2000).

- African American youth with mental health problems tend to be diagnosed with more severe disorders, including disorders less amenable to treatment.⁹⁷
- The rates among African American adolescents for psychiatric hospitalization are likewise two to three times higher than other youth, suggesting that prevention and early intervention may be less available to this population.⁹⁸
- African American adolescents, particularly males, are more likely to be referred to juvenile court rather than the treatment system,⁹⁹ and are less likely than their white counterparts to have previously received mental health services.¹⁰⁰
- Historically, Mexican Americans and other immigrant groups have shown low rates of use of mental health services, in part due to language difficulties and lack of neighborhood-based services.¹⁰¹

2) Implications For Treatment And Services

NMHA suggests several important considerations for addressing the mental health needs of minority youth in the juvenile justice system:

- Increased access to early intervention services is important, and should be done in such a manner that integration of service systems is enhanced between the mental health, juvenile justice, education and child welfare systems.
- Early identification of mental health disorders must be made more readily available to minority youth involved in the juvenile justice system, with diversion into the treatment system whenever possible.
- Programs emphasizing the role that families and kinship networks play in the social functioning of young people are important, as is the need to assess family structure and level of acculturation, particularly among Hispanic youth and families.
- Economic status, education, health care, housing, racism and other ecological factors which affect the adolescent's functioning and his or her family must be

⁹⁷ M. Isaacs, *Assessing the Mental Health Needs of Children and Adolescents of Color in the Juvenile Justice System: Overcoming institutionalized Perceptions and Barriers* in RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM (J. Coccozza, ed. 1992).

⁹⁸ H. Myers, *Urban Stress and Mental Health in Afro-American Youth: An Epidemiological and Conceptual Update*, in BLACK ADOLESCENTS (R. Jones, ed. 1990).

⁹⁹ T. Cross, et al. *Toward a Culturally Competent System of Care: A monograph on Effective Services for Minority Children who are Severely Emotionally Disturbed*, Georgetown Univ. Child Development Center, Washington, D.C. (1989).

¹⁰⁰ Marsteller, *supra* note 7.

¹⁰¹ JEWELLE GIBBS, LARKE HUANG, et al., *CHILDREN OF COLOR: PSYCHOLOGICAL INTERVENTIONS WITH MINORITY YOUTH* (1989).

addressed as external systems which can affect developing psychological problems.

- Cultural competence is essential in the service delivery system, including culturally appropriate assessment instruments, adequate training of mental health and juvenile justice providers, and focus on the strengths and protective factors available to culturally diverse youth, their families and extended families.¹⁰²

D) Special Needs of Girls in the Juvenile Justice System

In spite of overall declining arrest and incarceration rates among juvenile offenders, the rates for adolescent girls under the age of eighteen (18) years who were arrested by police from 1993 to 1997 have risen, accounting for 26% of total juvenile arrests for the year 1997.¹⁰³ Most girls are still arrested for non-violent crimes, with the highest numbers being for larceny (usually shoplifting) and running away from home.¹⁰⁴ The most significant increases in girls' arrests between 1993 and 1997 were for drug abuse and curfew violations.¹⁰⁵

While a diverse group, female offenders present challenges to the juvenile justice system as a result of academic difficulties, high incidences of victimization (physical, sexual and/or emotional) and significant health issues. Often, involvement with the juvenile justice system exacerbates the difficulties girls face during adolescence.

1) Identifying The Special Needs Of Girls

A number of treatment issues have been identified that are important for practitioners to consider when working with this population of offenders:

¹⁰² National Mental Health Association, *supra* note 96.

¹⁰³ H. Snyder, *Juvenile Arrests 1997*, Juvenile Justice Bulletin 3, Office of Juvenile Justice and Delinquency Prevention (OJJDP); Washington D.C. (1998).

¹⁰⁴ E. Poe-Yamagata & J. Butts, *Female Offenders in the Juvenile Justice System*, OJJDP, Washington, D.C. (1996).

¹⁰⁵ Snyder, *supra* note 103.

a) Adolescent female offenders exhibit high rates of mental health problems.

Girls have higher rates of depression and are more likely to attempt suicide than boys during adolescence. Low self-esteem, negative body image, and substance abuse are also common problems for adolescent females. Suicide attempts and self-mutilation are particularly problematic for female juveniles who are incarcerated, in part due to the characteristics of a detention environment such as seclusion and loss of privacy.¹⁰⁶

b) Substance abuse treatment and other health-related issues of females involved in the justice system are particularly acute.

Adolescent female arrests for drug abuse violations have increased significantly over the past few years.¹⁰⁷ Studies indicate that from 60% to 87% of female adolescent offenders need substance abuse treatment.¹⁰⁸ Many young women may be self-medicating with illegal substances as a method of coping with stress or mental health problems such as depression or anxiety.

Many girls involved in the juvenile justice system are pregnant or already parents, and must encounter separation from their young children, which creates additional emotional and practical difficulties. Nearly one third (1/3) of the girls in a study conducted by the National Council on Crime and Delinquency (NCCD) had been pregnant one or more times and 16% had been pregnant while in custody.¹⁰⁹ Many also tested positive for a sexually transmitted disease or

¹⁰⁶ Snyder, *supra* note 103.

¹⁰⁷ Snyder, *supra* note 103.

¹⁰⁸ L. Prescott, *Improving Policy Practice for Adolescent Girls with Co-occurring Disorders in the Juvenile Justice System*, GAINS Center, Delmar, NY (1998).

¹⁰⁹ L. Acoca & K. Dedel, *No Place to Hide: Understanding and Meeting the Needs of Girls in the California Juvenile Justice System*, National Council on Crime and Delinquency, San Francisco, CA (1998).

other chronic health condition.¹¹⁰ It is not uncommon for girls to fail to report significant health problems because of fear, lack of trust, and embarrassment.¹¹¹

c) Female adolescents in the juvenile justice system report extraordinarily high levels of abuse and trauma.

Girls who are incarcerated report significantly higher rates of physical and sexual abuse than boys. A 1998 study on girls in the juvenile justice system in California conducted by the NCCD revealed that 92% reported they had been subjected to some form of emotional, physical and/or sexual abuse.¹¹² Female adolescents who have been sexually abused have been shown to have more serious problems than do males with self-image, sexual attitudes, family relationships, vocational and educational goals and mastering their environment.¹¹³

As a result of repeated exposure to multiple forms of violence and trauma, Posttraumatic Stress Disorder (PTSD) is prevalent among adolescent females in the juvenile justice system, with nearly 50% meeting diagnostic criteria for PTSD.¹¹⁴

d) Adolescent girls have significant challenges with parenting and other interpersonal relationships.

The NCCD study also revealed that the families and caretakers of girls in the juvenile justice system were subject to a wide range of stress factors, including poverty, death, and an intergenerational pattern of arrest and incarceration. More than 95% of the girls were

¹¹⁰ OJP Coordination Group on Women, *Women in Criminal Justice: Special Report*, Journal of the Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (1998).

¹¹¹ L. Ravoira, *Investing in Girls: A 21st Century Strategy*, Journal of the Office of Juvenile Justice and Delinquency Prevention (1999).

¹¹² Acoca, *supra* note 109.

¹¹³ D. P. Orr & M.D. Downes, *Self-Concept of Adolescent Sexual Abuse Victims*, 14 Journal of Youth and Adolescence 401, 410 (1985); R. Matthews, et al., *Juvenile Female Sexual Offenders: Clinical Characteristics and Treatment Issues*, 3 Sexual Abuse 187-199 (1997).

¹¹⁴ E. Cauffman, et al., *PTSC Among Female Juvenile Offenders*, 37 Journal of the American Academy of Childhood and Adolescent Psychiatry 11 (1998).

assessed to lack a stable home environment, and more than half reported having mothers who had been arrested or incarcerated.¹¹⁵

e) School failure and high drop out rates are prevalent among girls in the juvenile justice system.

The NCCD study concluded that school failure was almost as universal an experience as victimization in the lives of those girls interviewed. Ninety-one percent (91%) reported that they had experienced one or more of the following:

- Suspension or expulsion;
- Repeating one or more grades; and/or,
- Being placed in a special classroom.¹¹⁶

Many girls described school as a battle ground in which sexual harassment, racism, interpersonal rivalries with peers, and inattention from adult professionals made dropping out appear to be a necessary means of escape.¹¹⁷

2) Developmental Perspective In Relation To Girls' Offenses

Trauma alters the normal developmental stages of female offenders, and their offenses reflect less mature thinking and self-definition than many of their peers.¹¹⁸ Dynamics typical of delinquent girls include:

- Needing the approval of others as a result of the lack of a stable identity and lack of self-confidence;
- Reacting to threats with self-protection in a manner similar to that of younger children, often failing to anticipate harm as an unintended consequence of their actions;
- Minimizing criminal behavior in lieu of higher moral principles of loyalty and fairness;

¹¹⁵ Acoca, *supra* note 109.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Marty Beyer, Delinquent Girls, *A Developmental Perspective*, 9 Kentucky Children's Rights Journal (In Press).

- Inability to function maturely and maintain certain moral values and/or ethical reasoning typical of their age while intoxicated;
- Intimidation by males from whom they seek parenting, approval, and sometimes intimate relationships;
- Lack of intent to use a weapon, and failure to anticipate and appreciate the potential outcome and risk in carrying one.¹¹⁹

3) Implications For Cases Involving Delinquent Girls

The characteristics of female juvenile offenders necessitate an approach that focuses on relationship building with adults. Girls often perceive that individuals “let them down,” by failing to produce certain outcomes or not spending enough time with them.¹²⁰ They often need reassurance and demonstrations that an adult is working on their behalf, and require additional support to balance their habits of self-protection and dependency.¹²¹ Consistent, long-term relationships are important, often making it difficult for them to transition to new attorneys, probation officers or counselors as their case progresses.¹²²

Even when attorneys or other service providers make special attempts to form and build relationships with female offenders, lack of maturity may make it difficult for them to adequately assist in their own defense. Signs of this immaturity may be manifested in several ways:

- Wanting to be liked and being so compliant that they cannot express independent opinions. Some may do whatever their families advise them to do.
- Viewing their offense as unintentional and inconsistent with their identity.
- Preoccupation with fairness, which distorts the view of her rights.
- Loyalty-driven belief that informing on others is morally wrong.

¹¹⁹ Acoca, *supra* note 109 at 11-13.

¹²⁰ *Id.* at 13.

¹²¹ *Id.* at 14.

¹²² *Id.* at 14.

- Insistence that her lack of intention means she should not be sanctioned.
- Lack of trust in lawyers and the court process.¹²³

For those delinquent females whose immaturity may interfere with their understanding of the judicial process, these factors may also affect their understanding of *Miranda* rights, and the impact of statements they make to the police.¹²⁴ They may be more susceptible to providing information based on intense and perhaps irrational loyalty (i.e., to protect a boyfriend), or out of fear resulting from past abuses.¹²⁵

Other treatment needs of girls, as recommended by the National Mental Health Association, include:

- Structuring services for girls to accommodate their unique needs concerning health care, education, mental health treatment, mutual support and mentoring opportunities, prenatal care and parenting skills, substance abuse prevention and treatment, job training, and family support/ strengthening services.
- Services for girls, given their sometimes conflictual relationships with family members, boyfriends/relationship partners and children, should include treatment that addresses these types of family issues, including such issues as domestic violence and conflict in dating relationships.
- Many adolescent girls will not seek mental health treatment or other forms of support for themselves, instead they rely upon internalization, avoidance and self-harm as coping strategies. Treatment that does not re-traumatize girls who have been abused or otherwise victimized is essential,¹²⁶ while encouraging them to learn appropriate coping strategies and constructively explore and resolve their feelings.¹²⁷

¹²³ *Id.* at 15.

¹²⁴ *Id.* at 16.

¹²⁵ *Id.*

¹²⁶ Prescott, *supra* note 108.

¹²⁷ National Mental Health Association, *Mental Health and Adolescent Girls in the Justice System*, Alexandria Va. (1999).

Chapter 4

Affirmative Education Rights of Youth With Disabilities Under IDEA and §504

Youth with disabilities share with all other youth the education rights created by state constitutional and statutory law, be they rights to an education in general, rights to education of a certain quality, or rights and protections in the context of school discipline. In addition, eligible youth with disabilities have affirmative education rights under two critical bodies of federal law: (1) the Individuals with Disabilities Education Act (IDEA)¹ and the regulations implementing it,² which address the provision of special education and related services to eligible youth with disabilities, and (2) Section 504 of the Rehabilitation Act of 1973,³ which prohibits recipients of federal funds from discriminating on the basis of disability, and the U.S. Department of Education regulations implementing it.⁴ These federal laws are supplemented by state special education statutes (and regulations), many of which have been enacted in order to implement IDEA in the state in question.⁵

¹ 20 U.S.C. §1400 *et seq.*

² 34 C.F.R. part 300.

³ 29 U.S.C. §794.

⁴ 34 C.F.R. part 104. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, which prohibits disability-based discrimination in state and local government services regardless of whether federal funds are involved, also protects public school students with disabilities (as well as youth with disabilities being educated in public institutions, or by other public agencies). As the U.S. Department of Education §504 regulations address education rights with far more specificity than do the Title II regulations, which were promulgated by the U.S. Department of Justice to implement Title II in all contexts, this chapter focuses on §504. Note that the Title II regulations state that they are not to be construed as applying a lesser standard than those applied under section 504 or the 504 regulations issued by any federal agency. *See* 28 C.F.R. §35.103(a).

⁵ In exchange for the receipt of funds under IDEA, states – all 50 of which accept IDEA monies – must comply with the substantive and procedural provisions of the federal law. Inconsistent state laws that undermine student IDEA rights are thus invalid. However, state laws that grant students greater rights are deemed to be “incorporated” into

These laws create a complex system of intertwined student rights and public agency responsibilities. The core IDEA right to an individualized “free appropriate public education,” including special education and related services, for example, is a right of all eligible children with disabilities in the state, whether they are enrolled in local schools, involved with the courts, or placed in a detention or other juvenile or adult facility.⁶ The corresponding governmental responsibility to provide a “free appropriate public education,” and to do all that that entails under IDEA, applies not only to local school districts and state departments of education, but to all “public agencies.” For the purposes of IDEA, “public agencies” include all political subdivisions of the state that are involved in the education of youth with disabilities, including departments of mental health and welfare, and state and local juvenile and adult correctional facilities.⁷

Given such a comprehensive and complex legal scheme, the decisions made at various points in juvenile proceedings cannot help but implicate IDEA and §504 rights and responsibilities. Particular decisions may preclude, or seriously compromise, a youth’s receipt of the appropriate special education and related services these laws require.⁸ Since the concept of education under IDEA “embodies both academic instruction and a broad range of associated services traditionally grouped under the general rubric of ‘treatment,’”⁹ in some cases, the services and supports a youth is entitled to receive from the local school system may offer courts

IDEA, valid, and enforceable as federal rights under that statute. See *infra* note 54 and cases cited therein.

⁶ See 20 U.S.C. §1412(a)(2). The IDEA rights of some youth incarcerated in adult correctional facilities may be circumscribed in certain respects. Such exceptions to general IDEA rules are discussed below as relevant.

⁷ See 34 C.F.R. §§300.2(b), 300.22.

⁸ For example, a particular placement or facility under consideration, although perhaps bound by law to provide the appropriate, individualized special education and related services IDEA requires, may in fact be unable to do so in a given case.

⁹ *Babb v. Knox Co. School System*, 965 F.2d 104, 109 (6th Cir. 1992) (discussing mental health services).

alternatives to detention, incarceration, or rehabilitation through the juvenile justice system.¹⁰ A particular placement might, due to geography, preclude the parental involvement in educational planning that the Supreme Court has deemed central to IDEA. Where charges arise out of in-school and perhaps disability-related behavior, judges might be alerted to the possibility that the relevant issues are educational ones best addressed through the special education laws and processes, rather than criminal ones for the juvenile court.¹¹ Further, the school may have mishandled the juvenile's disability and special education needs.¹²

¹⁰ See, e.g., Joseph B. Tulman and Joyce A. McGee, eds., *Special Education Advocacy Under the Individuals with Disabilities Education Act For Children in the Juvenile Delinquency System* (University of the District of Columbia School of Law 1998).

¹¹ See, e.g., *Morgan v. Chris L.*, 1997 U.S. App. Lexis 1041, 25 Individuals with Disabilities Educ. L. Rep. 227, 230 (6th Cir.), *cert. denied*, 520 U.S. 1271, 117 S.Ct. 2448 (1997), *affirming* 927 F. Supp. 267 (E.D. Tenn. 1994) ("the school system's filing of the petition is at odds with its obligation to provide Chris with a free and appropriate education under the IDEA...Chris began the...school year without the special education and supportive and corrective services to which IDEA entitled him...school officials continued to treat him as a disciplinary problem...accordingly, the juvenile delinquency petition...must be viewed as a breach of the school system's obligation under the IDEA to identify, evaluate, and appropriately educate Chris as a child with disabilities"). See also statement of Sen. Harkin, at 143 Cong. Rec. S4403 (May 14, 1997) explaining that provision of IDEA Amendments of 1997 regarding crime reports by schools, codified at 20 U.S.C. §1415(k)(9), "authorizes...proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals do not circumvent the school's responsibilities under IDEA." Cf. *North v. District of Columbia Bd. of Ed.*, 471 F. Supp. 136, 140 (D.D.C. 1979) (it would be inappropriate to proceed with neglect proceedings where real issue concerned school district's failure to provide special education and related services to which child was entitled); *In the Matter of Ruffel P.*, 582 N.Y.S.2d 631 (Family Court Orange Co. 1992) (dismissing "in the interests of justice" Person In Need of Services petition brought by school principal alleging violent behavior by student, where school had refused to certify child as eligible for special education, failed to try different teaching approaches, and responded solely with disciplinary actions); *In the Matter of Shelly Maynard*, 453 N.Y.S.2d 352 (Family Court Monroe Co. 1982) (where child was found to have a disability after being adjudicated a Person in Need of Services on the basis of truancy at the behest of school officials, school would be required to fulfill its obligation to provide appropriate special education and related services; court would renew involvement only if child failed to attend an appropriate placement made pursuant to special education law); *Flint Bd. of Ed. v. Williams*, 276 N.W.2d 499 (Mich. App. 1979) (school system may not ask probate court to take jurisdiction over children with disabilities pursuant to state statute regarding students who repeatedly violate school rules or are truant until proceedings under special education law have terminated and a final decision made that no program within the school system can serve the child's needs).

¹² See *Morgan, supra*, 25 Individuals with Disabilities Educ. L. Rep. at 230 ("[w]hen school systems fail to accommodate a disabled student's behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA"); *Lamont X. v. Quisenberry*, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984) ("...we cannot help but be troubled by the decision to prosecute the minor plaintiffs for the August disturbances, particularly when prosecution was combined with removal from the classroom for several months. Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action in such instances as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the EAHCA [now IDEA]"); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive

This chapter provides an overview of those aspects of IDEA and §504 most relevant to court-involved youth. It begins by setting forth the basic legal framework created by IDEA and §504, and then moves on to discuss in greater detail the obligation to locate, identify and evaluate students with disabilities; the meaning and content of a “free appropriate public education;” individualized education programs (IEPs); educational decision-making and parent involvement; along with dispute resolution and student and parent challenges to school decisions. Finally, this chapter will highlight the relevance of IDEA and §504 to school discipline, including the IDEA prohibition on suspension or expulsion without educational services, and to school-filed crime reports and delinquency petitions.

A. The Basic Legal Framework

1) The Individuals With Disabilities Education Act (“IDEA”)

Congress enacted Public Law 94-142, the Education for All Handicapped Children Act, in 1975 in response to the widespread failure of public school systems to provide appropriate, or in many cases, any, education to youth with disabilities. The Act, which was renamed the Individuals With Disabilities Education Act (IDEA) in 1990, provides states with funds to assist in providing specialized educational services for students with disabilities. In return, a state accepting these funds, as well as local school systems and other public agencies in the state involved in educating youth, must comply with the Act’s substantive and procedural requirements. These include providing all eligible youth with a free appropriate public education

behavior”); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, “was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance”); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior); *Inquiry of Fields*, Educ. Handicapped L. Rep. 211:437 (U.S. Dept. of Ed./Office of Special Education Programs 1987) (OSEP “would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed....”).

(FAPE), which comprises, among other things, specialized instruction and related services, in the least restrictive environment.

Only a student who is a “child with a disability” within the meaning of IDEA is entitled to its protections. For purposes of IDEA,

“[t]he term ‘child with a disability’ means 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.”¹³

The regulations implementing IDEA define each of these conditions in detail.¹⁴ For example, the regulations explicitly include attention deficit disorder and attention deficit hyperactivity disorder as examples of conditions that may trigger IDEA eligibility under the category of “other health impairment.”¹⁵

Any juvenile who falls within the IDEA definition of a “child with a disability” is protected by IDEA and entitled to the education and services it guarantees, even if he or she is advancing from grade to grade.¹⁶ Generally, states must serve all youth with disabilities aged three through twenty-one years unless, with respect to three through five-year-olds and 18 through 21-year-olds, this requirement would be inconsistent with a state law or practice or a court order.¹⁷ A 1997 amendment to IDEA, however, allows states to pass laws denying IDEA services to some 18 through 21-year-olds who are incarcerated in adult correctional facilities. Such state laws may exclude these youth from services if, in their last educational placement

¹³ 20 U.S.C. §1401(3)(A).

¹⁴ See 34 C.F.R. §§300.7(c), 300.541.

¹⁵ See 34 C.F.R. §300.7(c)(9).

¹⁶ 34 C.F.R. §300.121(e)(1).

¹⁷ 20 U.S.C. §1412(a)(1)(B); 34 C.F.R. §300.300.

before being incarcerated, they were not identified as a “child with a disability” under IDEA, and did not have an IDEA “individualized education program.”¹⁸

A student’s eligibility for services under IDEA may end in one of three ways. First, eligibility may end if a proper evaluation determines that he or she no longer meets the definition of a “child with a disability,” either because the student no longer has one of the listed disabilities, or because even though he or she still has one of them, the student no longer needs special education and related services as a result. Secondly, eligibility ends when a youth reaches the maximum age of entitlement under federal and state law. Finally, eligibility also ends once a student graduates with a regular high school diploma.¹⁹ Thus a youth’s right to services continues even after receipt of a certificate of completion or attendance, a “special education” diploma, or a General Education Development certificate (GED).

2) Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 (§504) is a civil rights statute designed to prohibit discrimination on the basis of disability. Modeled after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which address racial or national origin and sex discrimination, respectively, it applies to recipients of federal funds. Section 504 as amended²⁰ provides in relevant part that “[n]o otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...”²¹

¹⁸ 20 U.S.C. §1412(a)(1)(B)(ii); 34 C.F.R. 300.122(a)(2). Note that these youth may be denied IDEA services only if the state has affirmatively passed a law excluding them. 34 C.F.R. §300.122(b)(2).

¹⁹ 34 C.F.R. §300.122(a)(3).

²⁰ 29 U.S.C. §794.

²¹ 29 U.S.C. §794(a).

The U.S. Department of Education regulations implementing §504 in the preschool, elementary and secondary education context operate in two basic ways: (1) by generally prohibiting certain practices as discriminatory ones; and, (2) by requiring school districts and other recipients to take certain affirmative steps to ensure that students with disabilities receive an appropriate public education.²² As discussed in further detail below, the latter include requirements for identification, provision of free appropriate education, evaluation and placement, procedural safeguards, and non-academic services. Many specific §504 requirements concerning issues such as the evaluation and placement of pupils with disabilities, the components of a free appropriate public education, the circumstances under which a student with disabilities may be removed from the regular education setting and procedural safeguards, mirror or complement IDEA mandates.

For purposes of §504, an “individual with a disability” is one who “..(i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”²³

“Major life activities” means activities such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.²⁴ Courts have found other activities to be “major life activities” for §504 purposes as well, including,

²² See 34 C.F.R. §§104.4(b), 104.31-39.

²³ 29 U.S.C. §705(20)(B).

²⁴ 34 C.F.R. §104.3(j)(2)(ii).

handling stressful situations, interacting with others and engaging in typical social relationships.²⁵

Virtually all youth eligible for special education and related services under IDEA fall within the above-described definition of an “individual with a disability” and are protected by §504 as well. Because the §504 definition of an “individual with a disability,” is broader than the IDEA definition of a “child with a disability,” §504 covers many youth who are *not* IDEA-eligible. For example, a juvenile who has an “other health impairment,” such as epilepsy or AIDS, but who does not need specialized instruction, is not a “child with a disability” within the IDEA definition. Such a juvenile is covered by §504 and its implementing regulations if the condition “substantially limits” a “major life activity.” Similarly, a juvenile who does not have any of the kinds of disabilities required for IDEA eligibility might have an impairment that substantially limits a major life activity, or have a history of such an impairment, or be regarded as having such an impairment, and be covered by §504.²⁶

²⁵ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196 (1998) (reproduction); *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999), as amended by 201 F.3d 1211(2000), *cert. denied*, 120 S.Ct. 2689 (2000) (sleeping, interacting with others, engaging in sexual relations); *Doe v. New York University*, 666 F.2d 761, 775 (2nd Cir. 1981) (handling stressful situations); *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) (“normal [sic] social relationships”); *Perez v. Philadelphia Housing Authority*, 677 F. Supp. 357 (E.D. Penn. 1987), *aff’d. without opinion*, 841 F.2d 1120 (3rd Cir. 1988) (walking, sitting, standing, driving, caring for home and child, and engaging in leisure pastimes). Note that *Bragdon* and *McAlindin* interpreted the term “major life activity” as used in the Americans with Disabilities Act (“ADA”). However, as the ADA definition of “individual with a disability” was drawn almost verbatim from the Rehabilitation Act definition, “major life activity” should have the same meaning under both laws. See *Brangdon*, 524 U.S. at 631-32, 118 S.Ct. At 2202.

²⁶ For example, a student who has been erroneously classified as having mental retardation or who has a record of “incorrigible” behavior might be “regarded as having...an impairment” or have “a record of...an impairment” for purposes of §504. In addition, a child who does not have any of the disabilities listed in IDEA might nonetheless have an actual, current “impairment” for §504 purposes. A child who is HIV positive but asymptomatic — and so not “other health impaired” as defined by IDEA — would fall within this category. See *Bragdon*, *supra*.

B. The Content and Quality of Education

1) “Free Appropriate Public Education”

IDEA requires each state to have policies and procedures in effect that ensure all juveniles with disabilities have available to them a “free appropriate public education.”²⁷ The §504 regulations likewise require public school systems to provide juveniles with disabilities a “free appropriate public education.”²⁸ The meaning of this term differs for IDEA and §504 purposes.

a) IDEA

Under IDEA, “free appropriate public education” means “special education and related services” that:

- Are provided at public expense, under public supervision, and without charge;
- Meet the standards of the state educational agency;
- Include an appropriate preschool, elementary, or secondary school education in the state involved; and,
- Are provided in conformity with an Individualized Education Program.²⁹

“Special education,” means “...specially designed instruction...to meet the unique needs of a child with a disability....”³⁰ “Specially designed instruction” means “adapting...the content, methodology, or delivery of instruction...[t]o address the unique needs of the child that result from...disability...and..[t]o ensure access...to the general curriculum, so that he or she can meet the educational standards...that apply to all children.”³¹ Consistent with these definitions,

²⁷ 20 U.S.C. §1412(a)(1).

²⁸ See 34 C.F.R. 104.33(a).

²⁹ 20 U.S.C. §1401(8).

³⁰ 20 U.S.C. §1401(25) (emphasis added); see also 34 C.F.R. §300.26.

³¹ 34 C.F.R. §300.26(b)(3).

“special education” is a kind of instruction, not a placement. Once instruction for an individual student has been tailored as required to address his or her needs, it may, depending upon those needs, be provided in a variety of settings, including the regular education classroom.

For purposes of IDEA, “related services” are defined as:

“...transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.”³²

This definition comes from the IDEA statute. The IDEA regulations give “parent counseling and training” as an additional example of a related service that may be required.³³

The lists of related services in the statute and regulations offer examples only. They are not meant to be exhaustive. If a youth needs a particular service in order to benefit from special education and the service is a developmental, supportive or corrective one, it is also a “related” one and should be provided regardless of whether it is expressly listed in IDEA or its regulations.³⁴

³² 20 U.S.C. §1401(22). For definitions of particular related services listed in the definition, see 34 C.F.R. 300.24(b).

³³ 34 C.F.R. §§300.24(a), 300.24(b)(7).

³⁴ See 34 C.F.R. part 300, Appendix A, paragraph 34.

b) §504

The free appropriate public education required by the §504 regulations may consist of “regular *or* special education and related aids and services.”³⁵ The §504 regulations do not define these terms, but do provide that special education and related services developed and delivered in accordance with IDEA dictates will ordinarily satisfy the §504 requirements as well.³⁶ In addition, the “regular or special education and related aids and services” provided must meet the individual needs of students with disabilities as well as the needs of nondisabled students, and be consistent with provisions of §504 regarding educational setting, placement, evaluations, and procedural safeguards.³⁷

2) Learning in the General Curriculum

IDEA and §504 require that youths with disabilities be given full opportunity to participate, and meaningful opportunities to learn in, the “regular,” or “general,” curriculum regardless of the kind of setting (placement) in which they are receiving their special education and related services. This means the curriculum that the state or school system has adopted for all students. This mandate flows from a number of statutory and regulatory provisions, including the IDEA definition of FAPE,³⁸ the requirement, found in both IDEA and the §504 regulations, that students with disabilities receive their education in regular education classes to the maximum extent feasible in light of their individual needs;³⁹ and the §504 prohibition on discrimination in general, as well as the §504 regulations mandating comparable benefits and

³⁵ 34 C.F.R. §104.33(b) (emphasis added).

³⁶ See 34 C.F.R. §104.33(b)(2).

³⁷ 34 C.F.R. §104.33(b)(1).

³⁸ As noted above, FAPE includes special education and related services that, among other things, provide an appropriate elementary or secondary education in the state involved and meet state standards. See 20 U.S.C. §1401(8)(B), (C).

³⁹ See 20 U.S.C. §1412(a)(5); 34 C.F.R. §104.34(a). This requirement is discussed in further detail below.

services for students with disabilities, including equally effective programs and services.⁴⁰ The right to full opportunity to participate and meaningful opportunities to learn in the general curriculum is also reflected in numerous provisions added to IDEA in 1997, including those addressing evaluations, Individualized Education Program (IEP) content, IEP team composition, and state-wide and district-wide assessments.⁴¹

3) The Broad Concept of Education and Services to Address Behavior

Concern for youths whose disabilities involve behavioral manifestations was a key impetus behind the 1975 enactment of what is now called IDEA. In passing that legislation, Congress explicitly acted to implement the equal protection rights that had been recognized in *Mills v. District of Columbia Board of Education*.⁴² This was class litigation brought on behalf of children with disabilities “labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive....,”⁴³ who were excluded from school or relegated to segregated programs with inadequate services. Congress also had before it statistics showing that 82% of those children classified as emotionally disturbed were unserved, and that many of those who were served were receiving inappropriate services.⁴⁴ At hearings concerning the proposed law, many people spoke of the lack of educational support services that prevented students with behavioral manifestations from participating in and benefiting from education programs.⁴⁵

⁴⁰ See 34 C.F.R. §104.4(b).

⁴¹ See 20 U.S.C. §§1414(b)(2)(A), (c)(1)(iv) (regarding evaluations); 20 U.S.C. §1414(d)(1)(A), (d)(4) (regarding IEPs); 20 U.S.C. §1414(d)(1)(B) (regarding IEP team composition); 20 U.S.C. §1412(17) (regarding state- and district-wide assessments).

⁴² 348 F. Supp. 866 (D.D.C.).

⁴³ *Id.* at 368.

⁴⁴ H.R. Rep. No. 332, 94th Cong., 1st Sess., at n.12 (1975); S. Rep. No. 168, 94th Cong., 1st Sess., at 5-8 (1975), reprinted in 1976 U.S.C.C.A.N. 1425. See also *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citing legislative history).

⁴⁵ These services included specialized diagnostic evaluations, individualized tutoring, behavioral support programs, psychological counseling, and self-help and self-care skills training programs. See *Education for All Handicapped Children Act, 1973-74: Hearings on S.6 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. (1973-74) at 45, 87, 797, 809, 813, 790, 833.

This recognition that, for youth with behavioral manifestations, access to school must be accompanied by programming that takes into account behavioral needs is reflected in the broad concept of education under IDEA. That is, education under the Act encompasses not only academic needs, but self-help, social, emotional and behavioral needs as well.⁴⁶ For youth whose disabilities entail behavioral consequences, FAPE requires “special education” (specially designed instruction) aimed at behavioral issues, as well as any necessary behaviorally-related “related services.”⁴⁷

Depending upon the circumstances, the duty to address behavioral manifestations of disability as a component of FAPE may extend to behavior exhibited outside of school. In one case, the court held that the school system’s proposed placement did not provide a free appropriate public education because, although the student did relatively well in the familiar and contained environment of the school, in less familiar settings, or where relatively unsupervised, he had significant problems with self-control in his interactions with others.⁴⁸ Similarly, in another case, a court rejected as insufficient and a denial of FAPE a school’s attempt at behavior

⁴⁶ *County of San Diego v. California Special Education Hearing Office*, 24 IDELR 756 (9th Cir. 1996) (“educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization”); *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (“[e]veryone agrees that A.S. is exceptionally bright and thus able to test appropriately on standardized tests. This is not the sine qua non of ‘educational benefit,’ however. The term ‘unique educational needs’ [shall] be broadly construed to include...academic, social, health, emotional, communicative, physical and vocational needs”). See also, e.g., *Babb v. Knox County School System*, 965 F.2d 104, 109 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 380 (education under IDEA encompasses “both academic instruction and a broad range of associated services traditionally grouped under the general rubric of ‘treatment’”); *Timothy W. v. Rochester School District*, 875 F.2d 954, 962 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (“the Act’s concept of special education is broad, encompassing not only traditional cognitive skills, but basic functional skills as well”).

⁴⁷ Provisions added to IDEA in 1997 underscore one aspect of this duty to address behavior: as what the legislation calls a “special factor,” “in the case of a child whose behavior impedes his or her learning or that of others,” the IEP team shall “consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” 20 U.S.C. §1414(d)(3)(B). See also 20 U.S.C. §1415(k)(1)(B) (requiring functional behavior assessment and implementation/revision of behavioral intervention plan after disciplinary actions).

⁴⁸ *David D. v. Dartmouth School Committee*, 775 F.2d 411, 423 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790 (1986).

management, noting that to the extent that the student at times behaved appropriately in class, “it is only because a teacher or other adult is literally standing over him,” and that “[c]learly such a dependency building approach does nothing and in fact may make it more difficult to enable [the student] to behave in a regular classroom or in the real world.”⁴⁹

4) Effectiveness in Meeting Individual Needs

a) IDEA

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, the Supreme Court held that a package of special education and related services is “appropriate” within the meaning of IDEA if: (1) it includes an appropriate preschool, elementary or high school education in the state involved; (2) the child’s total education meets the standards of the state education agency; (3) the student’s Individualized Education Program (IEP) was developed in accordance with the procedures set forth in the statute (including those governing resolution of disputes between parents and school systems); and, (3) it is “reasonably calculated to enable the child to receive educational benefits.”⁵⁰ Trivial benefit does not meet the latter standard; rather, the IEP must be one “under which educational progress,” “significant learning,” and “meaningful benefit” are likely, in light of individual abilities and potential.⁵¹ This should include meaningful progress in learning what all other students are expected to know and

⁴⁹ *Chris D. and Cory M. v. Montgomery County Bd. of Ed*, 753 F. Supp. 922 , 933 (M.D. Ala. 1990).

⁵⁰ 458 U.S. 176, 188-189, 206-207 (1982).

⁵¹ *Ridgewood Bd. of Ed. v. N.E.*, 172 F.3d 238, 247-8 (3rd Cir. 1999); *Board of Education of East Windsor Regional School District v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986). See also *San Diego v. California Special Education Hearing Office*, 93 F.3d 1458 (9th Cir. 1996) (“benefit” alone insufficient; progress towards IEP goals required); *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1391 (1991) (child must benefit meaningfully within his or her potential); *Hall v. Vance County Board of Education*, 774 F. 2d 629, 636 (4th Cir. 1985) (“[c]learly, Congress did not intend that a school system could discharge its duty...by providing a program that produces some minimal academic advancement, no matter how trivial”).

be able to do, as reflected in the general curriculum.⁵² *Rowley* also held that IDEA does not require states and school systems to provide education designed to maximize a student's potential.⁵³ States may set higher quality and benefit standards, by statute, regulation, judicial decision, or state constitutional provision. Because special education and related services must meet the standards of the state educational agency, where a higher state quality standard exists, it is automatically "incorporated" into IDEA as the operative quality standard.⁵⁴

b) §504

As noted above, the §504 regulations address educational quality by reference to the quality of services provided to non-disabled students, requiring that the individual needs of students with disabilities be met as adequately as are the needs of their nondisabled peers.⁵⁵ The regulations also provide that it is illegal for schools to afford a disabled student an opportunity to participate in or benefit from an aid, benefit or service that is not equal to that afforded others, or to provide a disabled student with an aid, benefit or service that is not as effective as that provided to others.⁵⁶

5) Maximum Appropriate Integration/Least Restrictive Environment

Both IDEA and the §504 regulations afford youth with disabilities the right to participate in both regular classroom and extra-curricular activities with non-disabled students to

⁵² See 20 U.S.C. §§1412(a)(16(A)(ii), 1412(17)(A), 1414(b)(2)(A), 1414(c)(1)(iii), 1414(d)(A)(i)(I), 1414(d)(1)(A)(ii)(I), 1414(d)(1)(A)(iii)(II). See also *Carter v. Florence County School District No. 4*, 950 F.2d 156, 160 (4th Cir. 1991), *aff'd on other grounds*, 510 U.S. 7, 114 S.Ct. 361 (1993) (goal of four months' progress per year in reading and mathematics was inadequate for high school student in question, allowing her to continue to fall behind classmates at alarming rate).

⁵³ 458 U.S. at 200, 102 S.Ct. at 3048.

⁵⁴ *School Committee of Town of Burlington v. Department of Education*, 736 F.2d 773, 789 (1st. Cir. 1984), *aff'd on other grounds*, 471 U.S. 359, 105 S. Ct. 1996 (1985). See also *Seattle School District No. 1*, *supra*, 82 F.3d at 1499 n.2; *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S.Ct. 1685 (1991); *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 620 (6th Cir. 1990); *Geis v. Board of Education of Persippamy-Troy Hills*, 774 F.2d 575, 581 (3rd Cir. 1985); *Students of California School for the Blind v. Honig*, 736 F.2d 538, 544-545 (9th Cir. 1984), *vacated as moot*, 471 U.S. 148, 105 S.Ct. 1928.

⁵⁵ See 34 C.F.R. §104.3(b)(1)(i).

the maximum extent appropriate in view of their individual needs, with the use of supplementary aids and services and/or modification of the regular education curriculum if necessary. Specifically, IDEA requires states and school systems to ensure that “[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only 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.”⁵⁷ This language creates what courts have called a legal “presumption” of, or a statutory “preference” for, education in regular education classrooms with non-disabled peers.⁵⁸ The §504 regulations similarly provide that students with disabilities shall be educated with non-disabled persons “to the maximum extent appropriate” and shall be placed in the regular program “unless it is demonstrated by the recipient that the education of the person in the regular

⁵⁶ 34 C.F.R. §104.4(b)(ii)-(iii).

⁵⁷ 20 U.S.C. §§1412(5); *see also* 34 C.F.R. §§300.550-556.

⁵⁸ *Hartmann v. Loudon Co. Bd. of Ed.*, 118 F.3d 996, 1001 (4th Cir. 1997), *cert. denied*, 522 U.S. 1046, 118 S.Ct. 688 (1998) (“mainstreaming provision establishes a presumption”); *Bd. of Ed. Sacramento City Unified School District v. Holland*, 14 F.3d 1398, 1403 (9th Cir.), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2679 (1994) (provision sets forth Congress’s preference for educating children with disabilities in regular classrooms with their peers”), *affirming* 786 F. Supp. 874, 878 (“strong preference for mainstreaming which rises to the level of a rebuttable presumption”); *Oberti v. Bd. of Ed. of Borough of Clementon School District*, 995 F.2d 1204, 1214 (3rd Cir. 1993) (“presumption in favor of mainstreaming”); *Greer v. Rome City School District*, 950 F.2d 688, 695 (11th Cir. 1991), *opinion withdrawn and remanded on other grounds*, 956 F.2d 1025 (11th Cir. 1992), *previous opinion reinstated by rehearing en banc*, 967 F.2d 470 (11th Cir. 1992) (“[w]ith this directive...Congress created a statutory preference for educating handicapped children with nonhandicapped children”); *Daniel R.R. v. State Bd. of Ed.*, 874 F.2d 1036, 1045 (5th Cir. 1989) (“presumption in favor of mainstreaming”); *Lachman v. Illinois Bd. of Ed.*, 852 F.2d 290, 295 (7th Cir.), *cert. denied*, 488 U.S. 925, 109 S.Ct. 308 (1988) (“strong preference”); *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 162 (8th Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 144 (1987) (“strong congressional preference”); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196 (1983) (“very strong Congressional preference”). *See also* 34 C.F.R. part 300, Appendix A, question 1 (“IDEA presumes that the first placement option considered for each child by his or her placement team is the regular education classroom in the school the child would attend if not a child with a disability, with appropriate supplementary aids and services.”).

environment with the use of supplementary aids and services cannot be achieved satisfactorily.”⁵⁹ School systems proposing to exclude a student from the regular education setting bear the burden of proving that such an exclusion, whether total or partial, is justifiable in view of these requirements. This determination must be based upon consideration of the individual student’s unique needs and abilities, in tandem with the full range of specialized instruction, related services and supplementary aids and services IDEA requires schools to make available.⁶⁰

In addition to protecting the right of students with disabilities to participate in regular education classes and activities, the requirement of maximum appropriate integration protects youth whose needs cannot be met in regular education classes from overly restrictive and isolated placements. Thus, for example, IDEA and §504 integration requirements would be violated if a student who could be educated appropriately in a classroom located within a “regular” education elementary school and serving other students with disabilities, were nonetheless placed in a segregated school for students with disabilities.⁶¹

In 1997, Congress added one exception to IDEA’s least restrictive environment mandate. That is, the Individualized Education Program (IEP) team⁶² of a youth convicted of a crime as an adult under state law, and incarcerated in an adult prison, may modify his or her placement notwithstanding these requirements if the state has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.⁶³

⁵⁹ 34 C.F.R. §104.34(a). Section 504 also prohibits the provision of different or separate educational services to students with disabilities or to any class of students with disabilities unless those services are necessary to provide students with disabilities with services that are as effective as those provided to others. See 34 C.F.R. §104.4(b)(iv).

⁶⁰ *Oberti v. Bd. of Ed. of Borough of Clementon Schl. Dist.*, 995 F.2d 1204 (3rd Cir. 1993); *Greer, supra*, 950 F.2d at 696; *Daniel R.R., supra*, 874 F.2d at 1048 *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 458 (3rd Cir. 1981), *cert. denied*, 458 U.S. 1121; *Holland, supra*, 786 F. Supp. at 878. See also 34 C.F.R. §104.34(a) (regarding §504); 34 C.F.R. part 300, Appendix A, question 1.

⁶¹ See, e.g., *Roncker, supra*.

⁶² The role and composition of IEP teams under IDEA are discussed below.

⁶³ 20 U.S.C. §1414(d)(6)(B); 34 C.F.R. §300.311(c).

C. Educational Evaluations and Child Find Obligations

1) Duty to identify and evaluate

Both IDEA and §504 require state, local school systems and other “public agencies” to take affirmative steps to identify, locate and evaluate all youth within their jurisdictions who may have disabilities and need special education and related services.⁶⁴ Under IDEA, this obligation is known as the “child find” requirement. It extends to all youth aged birth through 21, including highly mobile youth, such as migrant and homeless youth, and students who are advancing from grade to grade, but may have a disability and need services nonetheless.⁶⁵ Both laws also require that a comprehensive, individual evaluation meeting certain criteria be conducted before special education and related services are provided to a student for the first time.⁶⁶

The legal duty to identify and evaluate students who need, or may need, special education or related services lasts for as long as the individual remains of school age. IDEA requires that a student be reevaluated whenever conditions so warrant, or if a parent or teacher requests a reevaluation.⁶⁷ At a minimum, a reevaluation must be conducted at least once every three years.⁶⁸ A reevaluation also must be conducted before determining that a student is no longer a “child with a disability” under IDEA, meaning that he or she no longer needs special education and related services as a result of having one of the disabilities listed in the Act.⁶⁹ The §504 regulations require “periodic reevaluation of students who have been provided special education and related services,” as well as evaluations prior to any “significant change in placement.”⁷⁰

⁶⁴ 20 U.S.C. §§1412(a)(3)(A) and 1413(a)(1); 34 C.F.R. §§300.125; 34 C.F.R. §104.32.

⁶⁵ 34 C.F.R. §300.125(a)(2).

⁶⁶ 20 U.S.C. §1414(a)(1); 34 C.F.R. §300.531; 34 C.F.R. §104.35(a).

⁶⁷ 20 U.S.C. §1414(a)(2)(A); 34 C.F.R. §300.536(b).

⁶⁸ *Id.*

⁶⁹ 20 U.S.C. §1414(c)(5); 34 C.F.R. §300.534(c)(1).

⁷⁰ 34 C.F.R. §104.35(a), (d).

Various developments over the course of a student's school career may trigger the need for an initial or reevaluation. For example, a sudden change in academic performance or behavior may suggest the need for an evaluation, whether or not the student has previously been identified as having a disability and/or needing special education or related services.⁷¹ Similarly, psychiatric hospitalization should trigger an evaluation of a student's need for services under IDEA, or for special or regular education and related services under §504.⁷²

2) Nature, scope, procedures and protections

The evaluation (or reevaluation) has three purposes: 1) to determine whether the student has a disability; 2) to gather information about the student's educational needs; and, 3) to help determine effective strategies for meeting those needs.⁷³ The evaluation must be comprehensive, and must assess the student in all areas related to his or her disabilities (or suspected disabilities) including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.⁷⁴ The evaluation must be comprehensive enough to identify all special education and related services needs, regardless of whether or not they are commonly linked to the youth's particular disability category.⁷⁵

If a youth is found eligible under IDEA or §504, or in the case of a reevaluation, still eligible, evaluation results will be used to identify his or her educational needs, academic and

⁷¹ See 34 C.F.R. 300.536(b). See also 34 C.F.R. §104.35(a) as interpreted by OCR in *School Administrative Unit 19 (NH)*, 16 EHLR [Education for the Handicapped Law Report] 86 (OCR 1/4/89)(poor academic performance should trigger evaluation); *Akron (OH) City School District*, 19 IDELR 542 (OCR 11/18/92) (academic and behavioral difficulties, and school's awareness of Attention Deficit Disorder diagnosis should have triggered evaluation); *Mineral County (NV) School District*, 16 EHLR 668 (OCR 3/16/90) (inappropriate and/or disruptive behavior should trigger evaluation).

⁷² Community Unit School District #300 (IL), EHLR 353:296 (OCR 1989).

⁷³ 20 U.S.C. §1414(b)(2)(A), (3)(D); 34 C.F.R. §300.532(b), (d).

⁷⁴ 20 U.S.C. §1414(b)(2)(C), (3)(C); 34 C.F.R. §300.532(g). See also 34 C.F.R. §104.35(c) (regarding §504 requirements).

⁷⁵ 34 C.F.R. §300.532(h).

otherwise; develop corresponding educational goals, along with intermediate objectives or benchmarks; design specialized instruction to allow the juvenile to meet the academic and other disability-related goals (e.g., speech and language, behavior, mobility) and to achieve in the general curriculum; decide upon the educational settings where he will receive educational services; and determine what kind of related services, aids and supplementary services will be necessary. In interpreting and using evaluation results, school districts and other public agencies must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background and adaptive behavior; ensure that information obtained from all of these sources is carefully documented and considered; and ensure that people knowledgeable about the meaning of the evaluation data participate in decisions regarding the student's educational program.⁷⁶

IDEA and, to a lesser extent, the §504 regulations set forth specific procedures to be followed in planning and carrying out evaluations and reevaluations.⁷⁷ In many jurisdictions, they are supplemented by consistent state statutes and regulations. IDEA and the §504 regulations also include extensive safeguards intended to ensure that evaluations are valid and unbiased. These two laws include a number of overlapping provisions.⁷⁸ Additional key IDEA provisions in this area require tests and other evaluation tools: 1) be chosen and administered so as not to be racially or culturally discriminatory;⁷⁹ 2) be administered in the student's native language or other primary way in which the student communicates, unless this is clearly not

⁷⁶ 20 U.S.C. §1414(b)(4)(A); 34 C.F.R. §300.535(a); 34 C.F.R. §104.35(c).

⁷⁷ See 20 U.S.C. §1414(a) - (c); 34 C.F.R. §§300.533 - 300.543; 34 C.F.R. §104.35.

⁷⁸ For common requirements, see 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. §§300.532(c), (d) and (e); 34 C.F.R. §104.35(b).

⁷⁹ 20 U.S.C. §1414(b)(3)(A)(i); 34 C.F.R. §300.532(a)(1)(i). Racially discriminatory testing and evaluation methods may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, and the Title VI regulations. See 34 C.F.R. §100.3(b).

feasible;⁸⁰ and, 3) regarding those with limited English proficiency, be chosen and administered in a way that ensures that they measure the student's disability and special education needs, rather than his or her English language skills.⁸¹ Finally, under IDEA parents who disagree with an IDEA evaluation conducted by or for a school system or other public agency may obtain an independent evaluation at public expense, unless the public agency initiates a due process hearing under that statute and demonstrates that its own evaluation was appropriate.⁸²

D) IEPs and Placement Decisions

The Individualized Education Program (IEP) is “the centerpiece of the statute’s educational delivery system for disabled children,”⁸³ serving as a blueprint for the special education and related services an eligible student is to receive. An IEP must be developed for each eligible youth with a disability before special education and related services begin for the first time.⁸⁴ Thereafter, a valid IEP must be in effect at the start of each school year.⁸⁵ IDEA sets forth detailed requirements concerning both the content of the IEP and the process for developing it. Failure to develop an IEP for an eligible youth, as well as failure to follow the specific procedures set out in IDEA and the regulations for doing so, is a failure to provide the free appropriate public education IDEA requires, and a violation of the Act.⁸⁶

1) IEP Content

The IEP sets out, among other things, the student’s educational needs arising from his or her disability, and the services, strategies and supports that will be provided to address those

⁸⁰ 20 U.S.C. §1414(b)(3)(A)(ii); 34 C.F.R. §§300.532(a)(1)(ii).

⁸¹ 34 C.F.R. §300.532(a)(2). See also 20 U.S.C. §1414(b)(2)(A) and 34 C.F.R. §300.532(b) (requiring use of a variety of assessment tools and strategies), and 20 U.S.C. §1414(b)(2)(B) and 34 C.F.R. §300.532(f) (prohibiting use of a single test or other procedure to decide disability status or designing educational program).

⁸² 34 C.F.R. §300.502(b). IDEA provisions regarding due process hearings are discussed below.

⁸³ *Honig, supra*, 484 U.S. at 311, 108 S.Ct. at 598.

⁸⁴ 34 C.F.R. §300.342(b)(1)(i); 34 C.F.R. part 300, App. A, para. 14.

⁸⁵ 20 U.S.C. §1414(d)(2)(A); 34 C.F.R. §300.342(a).

⁸⁶ 20 U.S.C. §§1401(8)(D), 1412(a)(4); 34 C.F.R. §§300.13(d), 300.535(b); *Rowley, supra*, 458 U.S. at 206-207, 102

needs. The IEP must include all of the services needed by the student, not just those available within the school system.⁸⁷ The school system must then arrange to provide all of the services included in the IEP.⁸⁸

IEPs must be based upon the evaluation data and other relevant information about the student, and, except in the case of certain youth incarcerated in adult prisons,⁸⁹ must always include the following seven elements:

- A statement of the student's current level of educational performance, including how disability affects his or her progress in the general curriculum;
- Measurable annual goals, with benchmarks or short-term objectives, addressing progress in the general curriculum and all other needs resulting from the youth's disability;
- An explanation of how progress toward the annual goals will be measured, and how parents will be regularly informed of that progress;
- A statement of the special education, related services and supplementary aids and services to be provided to the student (or on his or her behalf), and the program modifications or supports for school personnel to be provided;⁹⁰
- An explanation of the extent, if any, to which the student will not be educated in regular education classes;
- A statement of any individual modifications the student will need in the administration of state-wide or district-wide assessments of student achievement;⁹¹ and,

S.Ct. at 3035.

⁸⁷ See, e.g., *Todd D. v. Andrews*, 933 F.2d 1576, 1580-81 (11th Cir. 1991) (district court erred by ordering alteration of IEP goals so that IEP could be implemented at existing placement, rather than ordering school system to provide placement that could implement IEP as written).

⁸⁸ 20 U.S.C. §1401(8)(D); 34 C.F.R. §300.350(a)(1); 34 C.F.R. part 300, Appendix A, question 31.

⁸⁹ IDEA allows the IEP team of a child convicted as an adult under state law and incarcerated in an adult prison to modify his or her IEP or placement notwithstanding the following seven requirements if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. See 20 U.S.C. §1414(d)(6)(B); 34 C.F.R. §300.311(c).

⁹⁰ These are all to be designed so as to permit the child to attain the annual goals, progress in the general curriculum, participate in extracurricular and other nonacademic activities, and be educated and participate with other children with and without disabilities. 20 U.S.C. §1414(d)(A)(iii); 34 C.F.R. §300.347(a)(3).

⁹¹ If the IEP team determines that a child will not participate in a particular state- or district-wide assessment, the IEP must also include a statement explaining why the particular assessment is not appropriate for the student, and how he will be assessed. 20 U.S.C. §1414(d)(1)(A)(v)(II); 34 C.F.R. §300.347(5)(ii).

- The projected date for the beginning of the services, modifications, etc., described in the IEP, and the anticipated frequency, location and duration of each.⁹²

As students grow older and approach adulthood and independence, IEPs are to include three additional components. First, beginning at age 14, the IEP must include a statement of the student's "transition service needs" focused on his or her course of study, for example, participation in advanced placement courses or a vocational education program.⁹³

Second, beginning no later than age 16, the IEP must include a statement of needed "transition services."⁹⁴ The term "transition services" under IDEA means a coordinated set of activities for a student that: (i) promotes movement from school to post-school activities (including post-secondary education, vocational training, employment, continuing and adult education, adult services, independent living, or community participation); (ii) is based upon the student's individual needs, preferences and interests; and, (iii) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.⁹⁵ These transition planning and services requirements, however, do not apply to youth with disabilities who are convicted as adults under state law and incarcerated in an adult prison if their eligibility for IDEA services will end, because of age, prior to their release from prison, based upon consideration of their sentence and eligibility for early release.⁹⁶

⁹² 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347. In addition, to address past implementation problems, Congress in 1997 added provisions to IDEA expressly requiring IEP teams to consider five "special factors" when designing IEPs: the need for behavioral supports; the language needs of children with limited English proficiency; Braille instruction for children with visual impairments; the communication needs of students with hearing impairments and all other students; and the need for assistive technology devices or services. *See* 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2), (c).

⁹³ 20 U.S.C. § 1414(d)(1)(A)(vii)(I); 34 C.F.R. § 300.347(b)(1).

⁹⁴ 20 U.S.C. § 1414(d)(1)(A)(vii)(II); 34 C.F.R. § 300.347(b)(2).

⁹⁵ 20 U.S.C. § 1401(30); 34 C.F.R. § 300.29.

⁹⁶ 20 U.S.C. § 1414(d)(6)(A)(ii); 34 C.F.R. § 300.311(b)(2).

Third, regarding older students, changes made to IDEA in 1997 address the transfer of IDEA rights regarding notice, consent, participation in educational planning, and dispute resolution, from parent to student when the student reaches the age of majority under state law.⁹⁷ Beginning at least one year before the student reaches the age of majority, the IEP must include a statement that the he or she has been informed of the IDEA rights that will transfer when he or she becomes an adult.⁹⁸

2) Individual Education Plan Development and Parent and Student Participation

Individual Education Plans (IEPs) are developed at meetings by IEP teams. The IEP teams includes the student's parents; at least one of the student's regular education teachers; at least one of the student's special education teachers or providers; a representative of the school system who is knowledgeable about the general curriculum, is knowledgeable about the school system's resources, and is qualified to provide, or supervise the provision of, specially designed instruction to meet the needs of youth with disabilities; an individual who is qualified to interpret the instructional implications of evaluation results; other individuals who have knowledge or special expertise regarding the student, at the discretion of the parent or school system; and whenever appropriate, the student.⁹⁹ In addition, the student must be invited to any IEP meeting where transition services will be discussed, as must a representative of any agency that is likely to be responsible for providing or paying for transition services.¹⁰⁰

IDEA has stressed parent participation in educational decision-making since its inception. In its first case interpreting IDEA, the Supreme Court observed that Congress had "sought to protect individual children by providing for parental involvement...in the formulation

⁹⁷ See 20 U.S.C. §1415(m); 34 C.F.R. §300.517.

⁹⁸ 20 USC §1414(d)(1)(A)(vii)(III).

⁹⁹ 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. §§300.343. 300.344.

of the child's individual educational program," and had intended "to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."¹⁰¹ Public agencies are responsible under the law for initiating IEP meetings and ensuring that parents are given a meaningful opportunity to attend and participate.¹⁰² The IDEA regulations detail the specific steps that public agencies must take toward this end.¹⁰³

3) Placement Decisions

Once a youth's needs have been identified through evaluation and appropriate services and goals developed through the IEP process, a placement capable of providing those services and achieving those goals can be selected. Placement decisions must be individualized for each student, based upon his or her unique needs and abilities. Placement decisions may not be based upon category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.¹⁰⁴

Placements must be determined at least annually, must be consistent with IDEA's presumption in favor of placement in regular education classes with appropriate supplementary aids and services, and must be based upon the IEP.¹⁰⁵ All placements must be chosen by a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options.¹⁰⁶ School systems and other public agencies required to comply with IDEA

¹⁰⁰ 34 C.F.R. §300.344(b).

¹⁰¹ *Rowley, supra*, 458 U.S. at 209, 102 S.Ct. at 3052 (citations omitted). *See also Honig, supra*, 484 U.S. at 311-12, 108 S.Ct. at 598.

¹⁰² 34 C.F.R. §§300.343, 300.345.

¹⁰³ *See* 34 C.F.R. §§300.345, 300.503(c).

¹⁰⁴ 34 C.F.R. Part 300, Appendix A, question 1.

¹⁰⁵ 34 C.F.R. §300.552.

¹⁰⁶ 34 C.F.R. §300.552(a). The regulations implementing Section 504 of the Rehabilitation Act of 1973 also include this requirement. *See* 34 C.F.R. §104.35(c)(3).

must have available a continuum of alternative placements to meet individual needs for special education and related services, including regular classes, regular classes with supplementary services, special classes, special schools, home instruction and instruction in hospitals and institutions.¹⁰⁷ If placement in a residential program is necessary to provide special education and related services, it must be provided, including non-medical care and room and board, at no cost to parents or student.¹⁰⁸

Parents must be part of any group that makes placement decisions.¹⁰⁹ Similar to the case with IEP development, the IDEA regulations mandate that public agencies take certain steps in order to ensure that parents have a meaningful opportunity to participate in this group.¹¹⁰ If neither parent can participate in a meeting at which a decision relating to placement is to be made, the school system (or other public agency) must find other ways to ensure their participation, such as individual or conference telephone calls.¹¹¹ A placement decision may be made without parents' involvement only if school personnel try, and fail, to involve them.¹¹²

4) Review and revision

a) Periodic or annual reviews:

School districts must periodically initiate and conduct meetings to review and, if appropriate, revise a student's IEP.¹¹³ In addition, parents have the right to request an IEP meeting at any time.¹¹⁴ IEP review meetings should be held as often as necessary to address the student's needs.¹¹⁵ At least one review meeting must be held each year.¹¹⁶ The above-described

¹⁰⁷ 34 C.F.R. §300.551.

¹⁰⁸ 34 C.F.R. §300.302.

¹⁰⁹ 20 U.S.C. §1414(f); 34 C.F.R. §300.501(c).

¹¹⁰ See 34 C.F.R. §300.501(c)(2), (3), (5).

¹¹¹ 34 C.F.R. §300.501(c)(3).

¹¹² 34 C.F.R. §300.501(c)(4).

¹¹³ 20 U.S.C. §1414(d)(4)(A); 34 C.F.R. §300.343(c).

¹¹⁴ 34 C.F.R. part 300, App. A, question 20.

¹¹⁵ *Id.*

requirements regarding IEP team members, meeting participants, meeting notice and parent participation rights apply to IEP review meetings as well.¹¹⁷

Based upon its review, the IEP team must revise the IEP as needed to address any lack of expected progress in the regular curriculum; any lack of expected progress toward the annual goals in the IEP; new evaluation results, including information provided by parents; the student's anticipated needs; or other matters.¹¹⁸

b) Revisions:

Once an IEP has been developed and agreed upon, school personnel may not unilaterally change it. In order to revise an IEP or change a placement, public agencies must follow the above-described meeting and team processes.¹¹⁹ They must also give parents prior written notice of the proposed change.¹²⁰ The IDEA regulations set out detailed requirements governing the content of this notice, which also must be given any time an agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education to a student.¹²¹

Parents may request an IEP or placement change, or a meeting to consider making a change, at any time. When a school system or other public agency refuses to make a change sought by a parent, it must provide the written notice described above. Parents may challenge any refusal to modify an IEP or change a placement by invoking IDEA's dispute resolution procedures.¹²²

¹¹⁶ 20 U.S.C. §1414(a)(5); 34 C.F.R. §300.343(d).

¹¹⁷ 34 C.F.R. §300.344(a).

¹¹⁸ 20 U.S.C. §1414(d)(4)(A); 34 C.F.R. §300.343(c).

¹¹⁹ 34 C.F.R. §300.343(a); 34 C.F.R. part 300, App. A, question 20.

¹²⁰ 20 U.S.C. §1415(b)(3); 34 C.F.R. §300.503.

¹²¹ 34 C.F.R. §300.504(a).

¹²² These procedures include requesting a due process hearing, filing a complaint with the state education agency, seeking mediation and bringing a lawsuit. *See* 20 U.S.C. §1415(b)(6), (e), (f), (g), (i)(2); 34 C.F.R. §§300.660 - 300.662, and discussion *infra*.

E) Dispute Resolution and Parent/Student Challenges to Educational Decisions

IDEA contains an elaborate scheme of procedural safeguards designed to ensure that parents are involved in decisions affecting their child's education. These safeguards also provide that when disputes develop, the parent can challenge school system (or other public agency) decisions.¹²³ The Supreme Court has stressed that these procedural safeguards are the primary mechanism through which IDEA seeks to guarantee that the "appropriate" education it promises is in fact delivered.¹²⁴ Among the Act's critical procedural safeguards are those concerning prior notice of educational decisions, the opportunity to present complaints, mediation, due process hearings and lawsuits.

While less specific than IDEA, the regulations implementing §504 also require entities operating public school programs to establish and implement a system of procedural safeguards meeting certain criteria.¹²⁵ Compliance with IDEA procedural safeguards is one way of meeting this §504 obligation.¹²⁶

1) Prior Notice

Parents must be notified in writing within a reasonable time before the school proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or placement of a youth with disabilities or the provision of a free appropriate education to the youth.¹²⁷ IDEA notice must contain a description of the proposed or refused action, including an explanation for the school's decision; a description of other options considered, along with an explanation of why these options were rejected; a description of each evaluation procedure, test,

¹²³ As noted *supra*, these rights ordinarily transfer to students when they reach their state's legal age of adulthood.

¹²⁴ *Rowley, supra*, 458 U.S. at 205-06, 102 S. Ct. at 3050-51.

¹²⁵ 34 C.F.R. §104.36.

¹²⁶ *Id.*

¹²⁷ 20 U.S.C. §§1414(b)(1), 1415(b)(3); 34 C.F.R. §300.503(a). *See also* 34 C.F.R. §104.36 (regarding §504 notice requirements).

report or other factor relied upon in making the decision in question; information about organizations that can help parents understand their and their children's rights under IDEA; and information about procedural rights and safeguards.¹²⁸ The notice must be written in understandable language, and in the parent's native language unless clearly not feasible.¹²⁹ Schools also must take steps to ensure that notice is effectively communicated where the parent's mode of communication is not a written language.¹³⁰

2) Complaints and due process hearings

Under IDEA, a parent is entitled to complain "with respect to 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."¹³¹ IDEA entitles a parent to an impartial due process hearing concerning any such complaint or, alternatively, concerning any proposal to initiate or change, or refusal to initiate or change, the identification, evaluation, or placement of the student or the provision of a free appropriate public education under IDEA.¹³² School districts, too, may initiate hearings.¹³³ The §504 regulations also provide for parent complaints and require a hearing system.¹³⁴

Depending upon state law, IDEA due process hearings may be conducted by either the state education agency or by the public agency (e.g., local school district) directly responsible for

¹²⁸ 20 U.S.C. §1415(c), (d); 34 C.F.R. §§300.503(b), 300.504.

¹²⁹ 20 U.S.C. §1415(b)(4), (d)(2); 34 C.F.R. §300.503(c)(1).

¹³⁰ 34 C.F.R. §300.503(c)(2).

¹³¹ 20 U.S.C. §1415(b)(6).

¹³² 20 U.S.C. §1415(f); 34 C.F.R. §300.507(a).

¹³³ 34 C.F.R. §300.507(a).

¹³⁴ 34 C.F.R. §104.36. Parents and others believing IDEA or §504 rights have been violated may take advantage of two other administrative complaint mechanisms, neither of which afford hearing rights. First, the regional offices of the U.S. Department of Education/Office of Civil Rights investigate complaints alleging violations of §504. For the pertinent regulations, see 34 C.F.R. §104.61, incorporating by reference 34 C.F.R. §§100.6-100.10. Second, state education agencies must adopt written procedures for resolving complaints alleging that a school system or other public agency has violated IDEA or the regulations implementing it. State complaint procedures must meet requirements set forth in the IDEA regulations. See 34 C.F.R. §§300.660-300.662.

the student's education.¹³⁵ The statute and regulations provide for an impartial hearing officer, and delineate the rights and obligations of the parties.¹³⁶ The due process hearing decision is final and binding unless a state review,¹³⁷ where available, is requested, or a civil action is filed.¹³⁸

5) Civil Action

IDEA provides that a party aggrieved by a due process hearing or review decision may bring a civil action in federal district court or a state court of competent jurisdiction.¹³⁹ In such actions, the court receives the records of the administrative proceedings, hears additional evidence at the request of a party and bases its decision on the preponderance of the evidence.¹⁴⁰ While courts must give "due weight...to...[state administrative] proceedings,"¹⁴¹ they must also make an independent decision based upon the evidence before them, and are free to reject the findings of the due process hearing or review after careful consideration.¹⁴² Where IDEA violations are found, courts are to grant such relief as they deem appropriate.¹⁴³

6) Remedies

Due process hearing officers, review officers and courts can order that any number of actions be taken as relief for violations of IDEA, including modifying an IEP, implementing an

¹³⁵ 20 U.S.C. §1415(f)(1).

¹³⁶ See 20 U.S.C. §1415(f), (h); 34 C.F.R. §§300.507 - 300.509.

¹³⁷ If, pursuant to state law, the initial due process hearing was not conducted by the state education agency, any aggrieved party can appeal the decision to that agency, which must conduct an impartial review of the due process hearing decision. 20 U.S.C. §1415(g). For the rights and procedures applicable to such reviews, see 20 U.S.C. §1415(g); 34 C.F.R. §300.510(b). The review decision is final and binding unless a civil action is filed. 20 U.S.C. §1415(i)(1)(B).

¹³⁸ 20 U.S.C. §1415(i)(1)(A).

¹³⁹ 20 U.S.C. §1415(i)(2)(A); 34 C.F.R. §300.512.

¹⁴⁰ 20 U.S.C. §1415(i)(2)(B).

¹⁴¹ *Rowley, supra*, 458 U.S. at 206, 102 S. Ct. at 3051.

¹⁴² See, e.g., *Town of Burlington, supra*, 736 F.2d at 792 ("The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.") See also *Rowley, supra*, 458 U.S. at 205, 102 S.Ct. at 3050 (quoting legislative history to the effect that "courts were to make 'independent [decisions] based on preponderance of the evidence.'").

existing IEP that educators have failed to carry out, providing a particular placement, providing particular related services, etc. In addition, compensatory education¹⁴⁴ or reimbursement¹⁴⁵ for special education and related services, obtained at the parents' expense, are available remedies under proper circumstances. The law is unsettled as to whether damages are available.¹⁴⁶

7) Student's Status While Due Process Hearings and Lawsuits are Pending

While due process or judicial proceedings are pending, the student is to remain in his or her current educational placement unless the state or local education agency and the student's parents agree to another arrangement.¹⁴⁷ This IDEA provision is often referred to as the "stay put" provision, and has been characterized as "unequivocal" by the Supreme Court.¹⁴⁸ Stay-put rights apply to all changes in placement, including graduation.¹⁴⁹ There are, however, limited statutory exceptions to the stay-put rule for some students involved in certain kinds of

¹⁴³ 20 U.S.C. §1415(i)(2)(B).

¹⁴⁴ See, e.g., *M.C. v. Central Regional School District*, 81 F.3d 389 (3rd Cir. 1996); *Pihl v. Massachusetts Department of Education*, 9 F.3d 184 (1st Cir. 1993); *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, 499 U.S. 923, 111 S. Ct. 1317 (1991); *Burr v. Sobol*, 863 F.2d 1071 (2nd Cir. 1989), *vacated and remanded* 492 U.S. 902, 109 S. Ct. 3209 (1989), *on remand, aff'd. per curiam*, 888 F.2d 258 (2nd Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990); *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986). See also *Jackson v. Franklin County School Board*, 806 F.2d 632,631 (5th Cir. 1986) (on remand "...the district court must determine what damages, either monetary, or in the form of remedial education services...would be appropriate at this time").

¹⁴⁵ *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996 (1985). See also 20 U.S.C. §1412(a)(10)(C).

¹⁴⁶ Compare, e.g., *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995), and *Sellers v. School Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 525 U.S. 871.

¹⁴⁷ 20 U.S.C. §1415(j).

¹⁴⁸ *Honig*, 108 S. Ct. at 604.

¹⁴⁹ *Cronin v. Board of East Ramapo Central School District*, 689 F. Supp. 197 (S.D.N.Y. 1988); *Stock v. Massachusetts Hospital School*, 392 Mass. 705, 467 N.E.2d 448 (1984), *cert. denied*, 474 U.S. 844 (1985); *Inquiry of Richards*, 17 EHLR 288 (OSEP 1991).

disciplinary incidents involving dangerous weapons, illegal drugs, or behavior substantially likely to cause injury to self or others.¹⁵⁰

Where a parent challenges a school system's placement proposal and prevails at the due process hearing level (or, where relevant, the state-level review), the favorable placement decision becomes an agreement between the parents and the state or local education agency within the meaning of the stay-put rule.¹⁵¹ The placement thus must be implemented at public expense even if the school system files a civil action to appeal the hearing or review decision.¹⁵²

IDEA regulations issued on March 12, 1999 purport to limit the right to implementation of a favorable administrative decision pending appeal to hearing decisions rendered in a hearing conducted by the state education agency, and review decisions rendered by a state review official.¹⁵³ This interpretation appears to be inconsistent with the language of 20 U.S.C. §1415(j), as well as the analysis underlying *Town of Burlington* and the other cited cases, particularly *A.W.* and *T.H.*¹⁵⁴

¹⁵⁰ See 20 U.S.C. §1415(j), (k)(7); 34 C.F.R. §300.526. It is also important to note that the stay-put provision prohibits *school systems* and other covered public agencies from unilaterally changing a student's placement pending due process and judicial proceedings. Parents have more latitude. The Supreme Court has observed that the stay-put provision "is located in a section [of the statute] detailing procedural safeguards which are largely for the benefit of the parents and the child," and it is doubtful "that this provision would authorize a court to order parents to leave their child in a particular placement." *Town of Burlington, supra*, 471 U.S. at 373, 105 S.Ct. at 2004. See also *Susquenita, supra*, 96 F.3d at 84 (stay-put provision "was drafted to guard the interests of parents and their children").

¹⁵¹ *Town of Burlington, supra*, 471 U.S. at 372.

¹⁵² See, e.g., *St. Tammany Parish School Board v. State of Louisiana*, 142 F.3d 776 (5th Cir. 1998); *Susquenita School District v. Raelee S.*, 96 F.3d 78 (3rd Cir. 1996); *Clovis Unified School District v. California Office of Administrative Hearings*, 903 F.2d 635 (9th Cir. 1990); *Mohawk Trail Regional School District v. Shaun D.*, 35 F. Supp.2d 34 (D. Mass. 1999); *A.P. v. McGrew*, 28 IDELR 19 (N.D. Ill. 1998); *T.H. v. Bd. of Ed. of Palatine Community Consolidated School District*, 29 IDELR 471 (N.D. Ill. 1998); *Board of Education of Montgomery Co. v. Brett Y.*, 959 F. Supp. 705 (D. Md. 1997).

¹⁵³ See 34 C.F.R. §300.514(c).

¹⁵⁴ But see *Murphy v. Arlington Central School District*, 86 F. Supp. 2d 354 (S.D.N.Y. 2000) (applying 34 C.F.R. §300.514(c)); *Bd. of Oak Park and River Forest High School District v. Illinois State Bd. of Ed.*, 10 F. Supp. 971 (N.D. Ill. 1998) (using, without analysis, review decision rather than due process hearing decision as critical date for implementation purposes).

8) Mediation

In addition to the complaint and hearing rights described above, states and school systems must set up a system of mediation for IDEA disputes.¹⁵⁵ Neither parents nor the school can be forced to take part in mediation, and mediation may not be used to deny or delay a parent's right to a hearing.¹⁵⁶ Mediation sessions must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.¹⁵⁷

F. Exclusion from School for Discipline Reasons

IDEA and §504 limit the circumstances under which youth with disabilities may be suspended or expelled from school and/or denied education for discipline reasons, and address the conditions of any disciplinary exclusion. While a full discussion of this topic is beyond the scope of this publication, four points particularly relevant to many court-involved youth bear mention.¹⁵⁸

- Both IDEA and §504 prohibit schools from suspending or expelling students for behavior that is a manifestation of disability. While there may be disagreement as to whether non-emergency suspensions of up to ten school days are permissible for disability-related conduct, the law is clear that suspensions exceeding ten days, or expulsion, are not permissible.¹⁵⁹ Alternative measures, such as proposing appropriate changes in the student's IEP and/or placement, are permitted.
- Under IDEA, even a student who has permissibly been suspended or expelled from school remains entitled to a free appropriate public education meeting the full IDEA definition of the term. This means education and services of the same scope and quality that youth with disabilities who have not been suspended or expelled from school are entitled to receive.¹⁶⁰

¹⁵⁵ 20 U.S.C. §1415(e)(1); 34 C.F.R. §300.506.

¹⁵⁶ 20 U.S.C. §1415(e)(2)(A); 34 C.F.R. §300.506(b)(1).

¹⁵⁷ 20 U.S.C. §1415(e)(2)(A); 34 C.F.R. §300.506(b)(1), (c).

¹⁵⁸ For a more thorough discussion of discipline issues, see Eileen L. Ordovery, *Disciplinary Exclusion of Students with Disabilities*, 34 CLEARINGHOUSE REV. 50 (2000). As this publication was going to press in June 2001, Congress was considering legislation that would significantly changes IDEA's discipline provisions. Readers should be aware of any potential subsequent developments.

¹⁵⁹ See 20 U.S.C. §1415(k)(5)(A); 34 C.F.R. §300.524(a); Memorandum of Oct. 28, 1988 to OCR Senior Staff from L.S. Daniels, Assistant Secretary for Civil Rights, reprinted at EHLR 307:05 (regarding §504).

¹⁶⁰ 20 U.S.C. §§1412(a)(1)(A), 1415(k)(5)(A).

- Students not previously identified by the school system as having a disability may raise IDEA rights, including protections in discipline, if, before the incident giving rise to the suspension or expulsion, the school system “had knowledge” that he or she was a student with a disability.¹⁶¹ Even if the school system did not have knowledge, it must conduct an evaluation of the student, if requested to do so.¹⁶² If the student is determined to be IDEA-eligible, the school system must provide him or her with a free appropriate public education meeting IDEA requirements.¹⁶³
- Parents and students may request an IDEA due process hearing, and invoke the stay-put provision, to challenge decisions to suspend or expel, manifestation determinations, the nature or quality of the education and services a student is to receive during periods of exclusion, or any other matter regarding the provision of a free appropriate public education.¹⁶⁴

G. School-Filed Crime Reports and Delinquency Petitions

The 1997 IDEA Amendments added language addressing the reporting of crimes allegedly committed by students with disabilities. Entitled “Referral to and Action By Law Enforcement and Judicial Authorities,” this provision states, “[n]othing in this part shall be construed to prohibit an agency from *reporting a crime* committed by a child with a disability to *appropriate authorities* or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.”¹⁶⁵ The legislative history of the 1997 law clarifies that

¹⁶¹ 20 U.S.C. §1415(k)(8). *See also* 34 C.F.R. §300.527.

¹⁶² 20 U.S.C. §1415(k)(8)(C)(ii); 34 C.F.R. §300.527(d)(2)(i).

¹⁶³ 20 U.S.C. §§1412(a)(1)(A), 1415(k)(8)(C)(ii); 34 C.F.R. §300.527(d)(2)(iii). In addition to, and apart from, IDEA rights, any student who is or may be an “individual with a disability” within the meaning of §504 is fully protected against suspensions and expulsions that are improper as a §504 matter, regardless of whether the school district has yet identified him or her as such. *See, e.g., Templeton (CA) Unified School District*, 17 EHLR 859 (OCR 3/19/91); *Prince George’s County (MD) Public Schools*, 17 EHLR 875 (OCR 3/22/91); *Lumberton (MS) Public School District*, 18 IDELR 33 (OCR 6/24/91). Generally, some reason on the school’s part to believe that a child may have a disability is required before a school is found to have violated these §504 rights. *See, e.g., Napa Valley (CA) Unified Sch. Dist.*, 27 IDELR 505 (OCR 6/5/97); *Akron (OH) City Sch. Dist.*, 19 IDELR 542 (OCR 11/18/92); *Mineral County (NV) Sch. Dist.*, 16 EHLR 668 (OCR 3/16/90).

¹⁶⁴ 20 U.S.C. §§1415(b)(6), (f), (k)(6)(A)(i); 34 C.F.R. §§300.507(a)(1), 300.525(a)(1). *See also* 34 C.F.R. §104.36 (regarding §504 hearing rights).

¹⁶⁵ 20 U.S.C. § 1415(k)(9)(A) (emphasis added).

schools may not report crimes to even appropriate authorities where doing so would circumvent the school's obligations to the student under IDEA.¹⁶⁶

The provision on crime reports thus raises three key questions: (1) what constitutes "reporting a crime," (2) what are "appropriate authorities," and, (3) when does "reporting" to "appropriate authorities" circumvent a school's obligations under IDEA?

The term "reporting a crime" is not defined in the statute. If given its ordinary meaning, this phrase refers to notifying the law enforcement entities to which crimes ordinarily are reported (i.e., the police, sheriff, etc.). The 1997 law does not authorize school officials to file juvenile delinquency petitions, nor does it condone such actions. The use of the phrase "*appropriate* authorities" reinforces this limitation, as law enforcement entities such as police, rather than the courts, ordinarily are the appropriate authorities to receive crime reports. The use of the word "appropriate" also suggests that reports may only be made to such authorities as are appropriate in light of the purposes of IDEA.¹⁶⁷ Depending upon the particular situation, reporting behavior to police (or using the behavior as a basis for a delinquency petition) may not be appropriate in light of the purposes of IDEA, and so would not constitute the reporting to "appropriate" authorities.

There are a variety of situations in which a school's reporting of a crime would appear to circumvent the school's IDEA obligations to the student. Using broad definitions of crimes to characterize as criminal behavior which is typically associated with a particular disability, and for which a school system is legally responsible for providing special education and related

¹⁶⁶ See statement of Sen. Harkin, one of the legislation's co-sponsors, at Cong. Rec. May 14, 1997 at S4403 ("The bill also authorizes...proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals, do not circumvent the school's responsibilities under IDEA").

¹⁶⁷ Cf. *Town of Burlington*, *supra*, 471 U.S. at 369, 105 S.Ct. at 2002 (where IDEA, then known as the Education of the Handicapped Act, grants courts authority to "grant such relief as the court determines is appropriate," "appropriate" relief is relief that is appropriate in light of the purposes of the Act).

services, is one example. Responding to such behavioral manifestations by filing crime reports (or delinquency petitions) rather than by providing appropriate special education and related services, consistent with IDEA substantive and procedural requirements, is another example. This is particularly evident where a school fails to provide appropriate services and treats the resulting behavior as a discipline problem and a crime.¹⁶⁸

¹⁶⁸ See, e.g., *Morgan v. Chris L.*, 927 F. Supp. 267 (E.D. Tenn. 1994), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997), *Sixth Circuit decision reported in full*, 1997 U.S. App. Lexis 1041, 25 IDELR 227, which upheld an IDEA due process hearing decision ordering a school system to seek dismissal of the delinquency petition it had filed against a student with Attention Deficit Hyperactivity Disorder (ADHD) accused of kicking a water pipe. The Sixth Circuit found that the school system had breached its duty under IDEA to identify, evaluate and provide the student a free appropriate public education; had unlawfully attempted to secure a program for him from the juvenile court, instead of providing services itself; and had, by filing the petition, improperly sought to change his educational placement without following IDEA's change-in-placement procedures. See 1997 U.S. App. Lexis 1041 at 14-17, 25 IDELR at 230. In addition, the court, like the lower court and hearing officer, expressly held that the filing of the delinquency petition constituted a change in educational placement, entitling the student to IDEA procedural protections, including the convening of an IDEA team meeting prior to such a proposed placement change. *Id.*

Chapter 5

Competency, Waiver of Rights, and Other Defenses

Youth in the juvenile justice system vary in their developmental status and experiences generally. Youth with mental health disorders or other disabilities, however, require additional consideration by juvenile court practitioners where these factors may impact upon the youth's competence to stand trial and make decisions, the validity of a waiver of rights or confession, and the use of several other defenses. Consideration of these legal issues in the context of the unique status of juveniles is important to assure that youth with disabilities are able to adequately participate in the legal process (e.g., forming their defense, making decisions) and attain an outcome appropriate to the situation and his or her needs.

This chapter begins with a brief discussion of the aspects of child and adolescent development. The impact of a youth's disabilities in determining competency, decision-making, waiver of rights, and implications for other defense will then be examined in light of these developmental factors. Finally, suggestions will be offered concerning essential elements necessary for a proper forensic evaluation of youth with disabilities.

A. Developmental Issues of Youth

Children and adolescents are different than adults in their thinking, behavior, and rights. Although this may be an obvious statement, the impact these differences have on youth in the juvenile justice system is not as clear. A youth's age, immaturity, impulsivity in thought and action, and the ability to identify long-term consequences are often considerations in every aspect of the juvenile justice process. Research on the impact of these developmental issues

within the juvenile justice system has been limited, if present at all.¹ Summarized below are some of the issues that differentiate between youth and adults. Most of these descriptions are based upon the compilation of several studies. It is important to note that these research studies have not been based upon youth with disabilities. Thus, while informative, the results do not reflect the impact a youth's disability may have on these issues.

Studies Examining General Child and Adolescent Development

- Adolescents show less independence in making decisions compared to adults, in part because they are more likely to respond to the influence of peers or parents.²
- Adolescents are more likely to engage in riskier behavior and decisions, show less perceptions of risk, and focus more upon short-term consequences compared to adults.³

Tentative conclusions based upon review of theories and literature suggest that early adolescents show differences in responsibility (e.g., autonomy, individual identity), temperance (e.g., evaluating a situation before acting), and perspective (e.g., understanding the complexity of a situation) compared to later adolescents and adults.⁴

Studies Evaluating Differences Between Youth and Adults Related to the Justice System

- Youth age 14 or younger are less likely than older adolescents to have familiarity with basic court-related functions (e.g., the role of a judge). There is even evidence that delinquent youths, aged 14-16 are less knowledgeable than adults.⁵
- Delinquent youth appear to have an incomplete understanding of the concept of rights compared to adults.⁶

¹ Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychology, Public Policy, and Law 3, 20 (1997).

² E. Scott, N. Peppucci, J. Woolward, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law and Human Behavior 221, 230 (summarizing multiple research studies).

³ *Id.* at 231-2, (summarizing multiple research studies).

⁴ L. Steinberg & E. Cauffman, *Maturity of Judgement in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 Law and Human Behavior 249, 252, 267 (1996).

⁵ Grisso, *supra* note 1, at 10, (making a conclusion based upon the review of several studies).

⁶ *Id.* at 11, (making a conclusion based upon review of several studies).

- Younger adolescents have poorer understanding of *Miranda* rights compared to older adolescents even when provided simpler descriptions.⁷
- Juvenile defendants are skeptical of the benefits of having legal counsel, although this has not shown to be significantly different than adults' perceptions.⁸
- Problem solving of younger adolescents (under 14) is significantly different than older adolescents and adults. When older adolescents' decision-making is different from adults, it is more likely due to stress, differences in motivations, and individual differences in cognitive development. Differences in problem solving between adolescents and adults may also arise based upon situational contexts.⁹
- An analysis of evaluations conducted with 17 juveniles revealed immaturity in cognitive development as these youth minimized danger, failed to anticipate consequences, perceived only one solution, and reacted based upon fear; immaturity in identity development as they sought the approval of others, were intimidated by others, and were unable to form independent opinions because they wanted to be liked; and immaturity in moral development as the youths acted out of loyalty to others, had a "him or me" view, and believed lack of intention meant they should not be punished.¹⁰

These differences between youth and adults have implications for professionals working with youth in the juvenile justice system. It may impact how information should be presented, how responses should be perceived, or how options for decision-making should be presented. For the youth with a disability, these descriptions take on additional meanings. Cognitive deficits, learning or communication disabilities, or severe emotional distress likely impact acquisition of, or application of, typical developmental skills. What can be expected of the typical youth may be an inaccurate representation of the abilities and difficulties of a youth with disabilities. It is these unique characteristics of youth with disabilities that provide the often

⁷ *Id.* at 12, (making a conclusion based upon review of several studies).

⁸ *Id.* at 16, (making a conclusion based upon the review of several studies).

⁹ E. Scott, & T. Grisso, *Symposium on the future of the Juvenile Court: The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 160 (1997).

¹⁰ Marty Beyer, *Immaturity, Culpability, & Competency in Juveniles: A Study of 17 Cases*, Criminal Justice 27, 35 (Summer 2000).

challenging tasks of determining their ability to effectively participate, or how to facilitate their participation, in the juvenile justice process.

B. Competency

This section defines competency, describes some of the aspects of juvenile competency that should be considered, and examines the relationship between a youth's disabilities and competency.

1) Competency Defined

In criminal court, competency requires that the individual have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have a "rational as well as factual understanding of the proceedings against him."¹¹ The Court in *Drope v. Missouri* explained this further in reference to individuals with a mental condition: "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial."¹² While these cases examined only issues of adult competency, the requirement that one must be competent to stand trial has been extended to juveniles in many states, either by case law or statute.¹³ A juvenile's right to be competent to stand trial is found in *In re Gault*, which afforded juveniles many of the due process rights guaranteed adults.¹⁴ In particular, juveniles were determined to have the right to notice of the charges against them, appointment of counsel, and the right against self-

¹¹ *Dusky v. United States*, 362 U.S. 402 (1960).

¹² *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

¹³ E.g., *In Re Williams*, 687 N.E.2d 570, (Ohio App 1997); *In the Interest of S.H.*, 469 S.E. 2d 810, 811 (Ga. App. Ct. 1996); *In the Matter of W.A.F.*, 573 A.2d 1264, 1267 (D.C. App. Ct. 1990); *In the Matter of the Welfare S.W.T.*, 277 N.W. 2d 507, 511 (Minn. 1979); *In Re Causey*, 363 So. 2d 472, 476 (LA 1978); but see *G.J.I. v State*, 778 P.2d 485, 487 (Okla. Crim. App., 1989) (as an example of the only state that does not afford juveniles the right to be competent to stand trial).

¹⁴ 387 U.S.1, 87 S.Ct. 1428, 18 L.Ed.2 527 (1967).

incrimination.¹⁵ The specific right to be competent to understand the nature of the proceedings and assist counsel was soon viewed as fundamental to ensure these rights.¹⁶ The issue of competence has been found applicable to the right not to be tried or convicted,¹⁷ waiver of Fifth Amendment rights,¹⁸ and transfer hearings.¹⁹ In all aspects of the court proceeding, competence is measured under the standard set forth in *Dusky v. United States*.²⁰

In sum, competence requires that an individual be reasonably able to consult with his/her lawyer and have a rational and factual understanding of the proceedings.²¹ When examining this concept with youth with disabilities, this test will require consideration not only of how the youth's disability may affect his or her ability to understand and participate in the legal process, but also the impact developmental progress has on an individual's participation in legal proceedings.

2) The Competence Of Juveniles

A competency evaluation is required when the court has a reasonable concern regarding the defendant's competency (e.g., visible signs of incompetence).²² Courts have varied in their specific criteria to determine competency in juveniles. Factors identified by the courts as relevant to the determination of competency in juveniles include:

- Mental illness²³
- Mental Retardation²⁴

¹⁵ *Id.*

¹⁶ *E.g., State ex rel Dandoy v. Superior Court in & for Pima County*, 619 P.2d 12, 15 (Ariz. 1980), (a want of competence renders the other rights meaningless); *In the Matter of the Welfare S.W.T.*, *supra* note 13, at 511; *In the Interest of S.H.*, *supra* note 13, at 811.

¹⁷ *E.g., In the Matter of W.A.F.*, *supra* note 13, at 1267.

¹⁸ *In the Matter of the Welfare S.W.T.*, *supra* note 13, at 513.

¹⁹ *Briones v Juvenile Court*, 534 P.2. 624, 625 (1975).

²⁰ *Godinez. V. Moran*, 509 U.S. 389, 400-401 (1993).

²¹ *Dusky*, *supra* note 11, at 402.

²² *Drope*, *supra* note 12, at 180; *Pate v. Robinson*, 383 U.S. 375, 385-386 (1966); *Iowa v. Kempf*, 282 N.W. 2d 704, 706-707 (Iowa 1979).

²³ *E.g., Briones*, *supra* note 19, at 626.

²⁴ *E.g., Iowa*, *supra* note 22, at 709; *In the interest of S.H.*, *supra* note 13, at 812.

- Immaturity or youthfulness²⁵
- Difficulty recalling basic events in one's life²⁶
- Age²⁷

These factors may be viewed together to show circumstances giving rise to a reasonable question of competency and no one factor is determinative.²⁸ Currently, age is probably the most controversial factor. Courts generally see age as a factor, but not in itself necessarily sufficient to show incompetence, at least for adolescents.²⁹ That is, “there is a vast qualitative difference between being a minor and being incompetent to stand trial...”³⁰ Thus, each factor must be examined in reference to the particular facts or circumstances of the case. For example, cognitive limitations are often a significant reason for finding a youth to be incompetent.³¹ However, if the youth is able to understand the nature of the proceedings, despite cognitive deficits, he or she may be identified as competent.³²

Research has supported the court's identification of these factors as important to determining the competency of juveniles. Although not a random sample, Cowden and McKee conducted a case study review of juveniles evaluated for competency at a clinic that conducted competency evaluations for the state and families of South Carolina.³³ Among their findings:

- Age significantly correlated with competency to stand trial as youth determined competent had a higher mean age than those judged incompetent. Of youth between the ages of 10 and 12, less than one-third were determined competent. Among youth aged 13, slightly more than 50% of them were identified competent. By age 15, a fairly large majority were determined competent.

²⁵ *In Re Causey*, *supra* note 13, at 477; *In the Matter of Carey*, 615 N.W. 2d 742, 747 (Mich. App. 2000).

²⁶ *E.g.*, *Iowa*, *supra* note 22, at 709.

²⁷ *E.g.*, *In the Matter of the Welfare of D.D.N.*, 582 N.W. 2d 278 (Minn. App. 1998).

²⁸ *Iowa*, *supra* note 22, at 709.

²⁹ *In the Matter of the Welfare of D.D.N.*, *supra* note 27, at 278; *In the interest of S.H.*, *supra* note 13, at 812.

³⁰ *In the Interest of S.H.*, *supra* note 13, at 812.

³¹ *E.g.*, *Id.*; *Washington v. E.C.*, 922 P.2d 152, 153 (Wash App. 1996).

³² *In the Matter of the Welfare of D.D.N.*, *supra* note 27, at 278. (finding that despite limited intellectual abilities, the juvenile was competent to stand trial).

³³ V. Cowden & G. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity in the Attorney-Client Relationship*, 33 U. of Louisville J. of Fam. L. 629 (1995).

- Current symptoms of severe diagnoses were significantly correlated with a determination of incompetence whereas juveniles with no or only a moderate diagnoses were more likely to be identified as competent. A history of mental health services was not related to whether a youth was determined competent.
- A history of receiving special education services or having disrupted school achievement was significantly correlated with being identified as incompetent to stand trial.
- The race or gender of the juvenile, severity of the charges, and history of contact with the juvenile justice system were not correlated with a decision of competence or incompetence.³⁴

These findings complement the recommendations provided by Thomas Grisso and his colleagues concerning when a juvenile's competence should be questioned. Specifically, they suggest that the issue of competency should be advanced when the juvenile meets *any* of these criteria:

- The juvenile is 12-years-old or under.
- There is a history of diagnosis or treatment of mental retardation or mental illness.
- Educational or medical records describe borderline intelligence or learning disabilities.
- The juvenile is exhibiting deficits in memory, attention, or reality testing.³⁵

An equally important consideration that should be taken into account when evaluating a youth's competence is which areas to assess. These include both the current assessment of the juvenile's competence and potential methods of remediation, if possible. Thomas Grisso presents an outline for comprehensively evaluating the competency of juveniles. A brief overview of this is warranted as the unique attributes of the juvenile with a disability may significantly impact one or more of these areas. The specific components will be discussed in the later section pertaining to the essential elements of evaluation. A comprehensive evaluation of competency should include:

³⁴ *Id.* at 652-655.

- Assessment of the functional abilities (e.g., understanding of the charges, capacity to participate with an attorney).
- A causal explanation for the deficits in abilities (e.g., are the deficits due to learning difficulties, immaturity).
- Situational demands that may be impacting the functional abilities.
- Prescription of remediation of the competence deficits (e.g., the likelihood of change and the time and method suggested for change).³⁶

Thus, in determining the competence of juveniles, consideration must be given not only to the attributes of the juvenile, but also to the demands placed upon him or her that arise from participation in the juvenile justice process.

3) Competency and Youth with a Disability

When a youth with special needs is present in the juvenile justice system, the question of his or her ability to participate in the process becomes more imperative and more complex. Specific consideration of youths' disabilities and their general development provides for a more individualized focus on the issue of competency and potential methods of facilitating a youth's competence to participate in the juvenile justice process.

Review of case law suggests that mental retardation and mental illness in youth are among the most salient reasons for identifying a youth as incompetent.³⁷ Yet, in both juvenile proceedings and adult criminal court, neither are automatic indicators of incompetence.³⁸ Rather, it is the specific impact the disability has on the individual's ability to effectively participate in the court process that determines whether the person is competent. For the juvenile, a disability

³⁵ Thomas Grisso, M. Miller & B.Sales, *Competency to Stand Trial in Juvenile Court*, 10 International Journal of Law and Psychiatry 1, 15 (1987).

³⁶ THOMAS GRISSO, *Juveniles' Competence to Stand Trial*, in Forensic Evaluations of Juveniles 91-96 (1998).

³⁷ See E.g., *Iowa*, *supra* note 22, at 709; *In re Causey*, *supra* note 13, at 477; *In the Matter of Carey*, *supra* note 25, at 747; *Briones*, *supra* note 19, at 626; *In the interest of S.H.*, *supra* note 13, at 812; *State ex rel Dandoy*, *supra* note 16, at 12.

³⁸ See E.g., *In the Matter of the Welfare of D.D.N.*, *supra* note 27, at 278; *Godinez*, *supra* note 20, at 389.

may exacerbate those deficits attributed to children and adolescents in general (e.g., decision-making ability, problem solving).

A youth with mental retardation shows cognitive delays compared to aged peers. A juvenile with communication deficits or learning disabilities evidences weakness in specific areas of functioning (e.g., reading, expressive language). While identifying these deficits in terms of current functional level (e.g., age equivalents) provides a description of the youths' abilities, it does not fully delineate the youths' skills. Although these youth have had more experiences than typically developing juveniles at the same age of functioning, their learning styles may be quite different, and their understanding of complex problems may be different. For example, as adolescents approach adulthood their decision-making is increasingly similar to adults, but may be more impacted by situational and developmental variables.³⁹ This suggests that both time and teaching may facilitate acquisition of these competencies.⁴⁰ For youth with specific learning or cognitive deficits, this hypothesis may well not be true. The specific cognitive or learning deficits may impact if or how such skills are acquired. Thus, for the youth with delays in cognitive and learning development, understanding both the current developmental skills and learning styles will assist in determining the question of competency and whether competent skills can be attained.

When youth present with mental health disorders, different issues impact the question of competence. The typical youth who is more focused on the immediate benefits of an action may make decisions or offer information without realizing the impact it may have on his or her future, a factor that could have direct implications on the decision to plead guilty, or accept a

³⁹ E.g., L. Steinberg & E. Cauffman, *Maturity of Judgement in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 *Law and Human Behavior*, 249-272, 252, 267 (1996).

sentencing offer. If that youth is identified with a behavioral or emotional disorder characterized by impulsivity or attentional difficulties, this type of responding may be exaggerated. The juvenile may be unable to fully consider the complexities necessary for making the important decisions required at various stages of a case. A youth with severe emotional distress may be unable to effectively relate or consider important information because the emotional effects are so overwhelming as to cause avoidance of the situation or memory deficits. A juvenile who is depressed or extremely anxious may look to others for decisions and acquiesce to what he or she believes is expected as opposed to exhibiting a thoughtful, considered response. Thus, the factors associated with disabilities can affect decision-making, understanding, and reasoning that are elements of competency. If these disabilities are severe enough, the youth may be incompetent to participate in the justice process. Alternatively, the disabilities may point to additional supports (e.g., presenting information using different methods or in different ways; counseling to address the behavioral issues) that would facilitate the youth's adequate participation in proceedings.

Juveniles come to the juvenile justice system with different understandings, problem solving skills, and responses to potential consequences than adults. The youth with special needs may evidence these differences to a greater degree. These youth may also show cognitive, behavioral, or emotional factors that also impact their ability to participate in the justice process. Consideration of these factors will assist the professional in determining the youth's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have a "rational as well as factual understanding of the proceedings against him."⁴¹

⁴⁰ See generally, SIEGLER, R CHILDREN'S THINKING 2ND EDITION (1991), (describing studies in which children have been taught skills generally thought to be beyond their developmental level).

⁴¹ *Dusky*, note 11, at 402.

C. Waiver of Rights and Confessions

One of the most important rights of individuals involved in the justice system is the right against self-incrimination.⁴² The case of *Miranda v. Arizona* requires that adults in a custodial interrogation must be informed of the right to remain silent, of the right have an attorney present, and that statements made to police can be used as evidence against him or her at trial.⁴³ *In re Gault* extended these and other rights to youth in juvenile justice proceedings.⁴⁴

When an individual waives his constitutional rights (e.g., by confessing or refusing an attorney) the waiver must be made “voluntarily, knowingly, and intelligently.”⁴⁵ Any confession made must also be voluntary.⁴⁶ Although there is considerable overlap in examining the validity of a waiver of rights and confessions, each presents unique considerations for professionals evaluating juvenile statements. As such, waiver of rights and voluntariness of confessions will be individually examined and then the totality of the circumstances test will be examined with respect to both issues.

1) Waiver of Constitutional Rights: *Miranda*

a) The Validity of Waivers

A waiver of constitutional rights must be made “voluntarily, knowingly, and intelligently.”⁴⁷ In determining whether a waiver is knowing and voluntary, the court must assess whether the individual understands both the significance and consequences of the waiver

⁴² U.S. Const. Amend. V.

⁴³ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

⁴⁴ *In Re Gault*, 387 U.S. 1, 55-56 (1967) (“The constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults”).

⁴⁵ *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Minnesota v. Williams*, 535 N.W.2d 277, 287 (Minn. 1995).

⁴⁶ E.g., *Haley v. Ohio*, 332 U.S. 596, 597-601 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Minnesota*, *supra* note 45, at 287.

⁴⁷ E.g., *Johnson*, *supra* note 45, at 468; *Miranda*, *supra* note 43, at 444; *Fare v. Michael C.*, 442 U.S. 707, 725-726 (1979); *Cooper v. Griffin*, 455 F.2d 1142, 1145-1146 (1972).

and whether the juvenile has made this decision without coercion.⁴⁸ The assessment of voluntariness specifically does not require that the waiver be made of free will but, rather, it requires a deliberate choice free of coercion.⁴⁹ A totality of the circumstances test determines whether the waiver was voluntary and knowing.⁵⁰ Relevant factors to be considered include the youth's age, experience, intelligence, and his capacity to understand the warnings.⁵¹ As the totality of the circumstances test is similar to that used in assessing whether a confession was voluntary, this test will be examined separately in section 3.

b) Special Issues Related to Juveniles and Waiver of Rights

While the principles for determining the validity of a waiver of rights is applicable to juveniles, it has also long been recognized that there may be special problems or differences of techniques when examining a youth's waiver of rights.⁵² Despair or fright,⁵³ cognitive limitations,⁵⁴ emotional disturbance⁵⁵ and age⁵⁶ may all combine to impair a youth's ability to knowingly or intelligently waive rights or render the youth more vulnerable to perceived coercion.

The question of whether a juvenile can understand *Miranda* rights is central to determining whether he or she knowingly waived those rights. Case law has indicated that juveniles with cognitive limitations are often found to be unable to comprehend these rights.⁵⁷ A

⁴⁸ *Godinez, supra* note 20, at 401 (footnote explaining the knowing and voluntary inquiry necessary to assess validity of pleading guilty or waiving counsel).

⁴⁹ *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

⁵⁰ *E.g., Fare, supra* note 47, at 725-26; *Minnesota v. Ouk* N.W.2d 180, 184 (Minn. 1996).

⁵¹ *Fare, supra* note 47, at 725-26.

⁵² *E.g., In re Gault, supra* note 44, at 55; *Ohio v. Bell* 358 N.E.2d 556 (1978).

⁵³ *In re Gault, supra* note 44, at 55.

⁵⁴ *E.g., Cooper, supra* note 47, at 1144-46.

⁵⁵ *E.g., In the Matter of the Welfare of S.W.T., supra* note 13, at 513; *In re J.J.C.*, 689 N.E.2d 1172, 1180-1181 (Ill App. Ct. 1998).

⁵⁶ *Ohio, supra* note 52, at 556.

⁵⁷ *E.g., Cooper, supra* note 47, at 1144-46; *In the Matter of the Welfare of S.W.T., supra* note 13, at 513.

study comparing male juveniles in either detention or delinquency treatment programs and male adults in halfway houses following prison terms revealed differences based upon age and cognitive skills. Specifically, youths ages 14 and younger generally showed significantly poorer understanding compared to older juveniles and adults while the older juveniles (ages 15-16) were fairly similar in comprehension to the adults. When cognitive functioning was examined, the older youths with intelligence quotients (IQ) below 80 (average IQ is 100) showed comprehension similar to the younger adolescents and worse than adults with the same IQ scores.⁵⁸ Thus, for juveniles with disabilities, cognitive limitations impacting the comprehension of *Miranda* rights may render it impossible for them to knowingly and intelligently waive these rights unless methods to improve understanding are successfully employed.

Another issue particularly relevant to juveniles is the issue of custody. Statements given in custody are only admissible at trial if the individual was informed of his or her *Miranda* rights prior to the interrogation.⁵⁹ Custody is identified as “when a defendant is taken into custody or otherwise deprived of his freedom by the authorities in any significant way.”⁶⁰ For juveniles, custody can occur in a variety of environments including:

- Being interviewed in a school’s faculty room, where the juvenile had previously been disciplined, by a School Resource Officer who had authority to question students about delinquent behavior. In this case, the court reasoned that children the defendant’s age (10-years-old) would likely perceive themselves as in custody as most would not view the setting as familiar and most would likely not feel free to leave.⁶¹

⁵⁸ Grisso, *supra* note 36, at 68 (the specific study is described in Thomas Grisso, *Juvenile’s Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 California Law Review 1134 (1980)).

⁵⁹ *Miranda*, *supra* note 43, at 479.

⁶⁰ *Id.*

⁶¹ *Idaho v. Doe*, 948 P.2d 166, 173-174 (Id. 1997).

- Being interviewed in an assistant principal's office by a police officer with the assistant principal and school social worker present when the youth was only informed that he did not have to answer questions.⁶²
- Being interviewed in the bedroom of one's home where the body of a murder victim was found. The court in this case specifically found that a reasonable 10-year-old would have perceived himself to be in custody.⁶³

These cases suggest that close consideration should be given to the youth's perspective in determining custody. In particular, asking whether the juvenile would perceive, or have previously experienced, the situation as one in which he or she was in the custody of an authority figure may be a crucial component in determining whether the youth should have been apprised of his or her rights.

Thus, when evaluating whether a waiver of rights was given knowingly, intelligently, and voluntarily, special consideration should be given to youths based upon their juvenile status, whether they understood the rights provided, and whether alternative environments may also be considered custody.

2) Waiver of Constitutional Rights: Confessions and Statements

An individual often waives his or her rights by offering a confession or other statements. However, a waiver of rights and a voluntary confession can also be two different issues, and should be examined individually.⁶⁴ When examining the validity of a confession, courts pay particular attention to the voluntariness of the confession. In *Colorado v. Connelly*, a case involving an adult who claimed he confessed because he was instructed by the voice of God, coercive police activity was identified as a "necessary predicate to the finding that a

⁶² *State v. D.R.*, 930 P.2d 350 (Wash. App. Ct. 1997).

⁶³ *Matter of Chad L.*, 131 A.D.2d 760 (N.Y. 1987).

⁶⁴ See, *In re Gault*, *supra* note 44, at 55 (identifying that an admission must be voluntary); *Minnesota v. Galt*, *supra* note 45, at 287 ("Whether an accused has knowingly, intelligently, and voluntarily waived his right to remain silent and

confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.”⁶⁵ However, the United States Supreme Court historically has identified that scrutiny and care is required in examining juveniles’ confessions.⁶⁶ *In re Gault* specifically differentiated that voluntariness required not only an absence of coercion but also a finding that the confession was not a result of fright, fantasy, or despair.⁶⁷ Thus, the Court seemed to be suggesting that youths may be particularly vulnerable to subtle coercion that could render an involuntary admission. Case analysis of decisions both prior to and following *Connelly* provide support for examining both considerations in examining youth confessions. Specifically, the totality of the circumstances test is typically utilized to determine whether a youth’s confession or statements were made voluntarily, knowingly, and intelligently.⁶⁸

3) The Totality of the Circumstances Test and Its Application to Waiver of Rights and Voluntariness of Confessions

The totality of the circumstances test has been applied to both waiver of rights and confessions. The test requires consideration of both the attributes of the juvenile and the specific circumstances that resulted in the waiver or confession to determine the validity of a waiver or confession.⁶⁹ Factors relevant to identifying whether a youth made a voluntary waiver of rights or voluntary confession include:

- Age
- Maturity
- Intelligence

whether he has voluntarily confessed are two separate issues”); *Ohio v. Bunn*, 1999 Ohio App. Lexis 3146, 3149 (Ohio App. Ct. 1999).

⁶⁵ *Colorado*, *supra* note 49, at 167.

⁶⁶ *Hayley*, *supra* note 46, at 599-600; *Gallegos*, *supra* note 46, at 55.

⁶⁷ *In re Gault*, *supra* note 44, at 55 (“...the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair”).

⁶⁸ *E.g.*, *Fare*, *supra* note 47, at 725; *Minnesota*, *supra* note 45, at 287.

⁶⁹ *E.g.*, *Fare*, *supra* note 47, at 725; *United States v. Doe*, 226 F.3d 672, 679 (6th Cir. 2000); *Minnesota*, *supra* note 45, at 287; *In re G.O.*, 727 N.E.2d 1003, 1012-1013 (Ill. 2000).

- Education
- Mental illness
- Prior criminal experience
- Physical deprivations during interrogation
- Presence of parents
- Length of the detention

Examples from case law provide insight as to how courts examine the impact of these multiple factors:

Cases finding that the totality of the circumstances test rendered a waiver of rights or confession invalid

- In a case prior to *Miranda* and *Gault*, the Court stressed that a juvenile can be overwhelmed by events that would not impact an adult and the combination of the youth's **age** (15), the **time of interrogation** (12:00 AM to 5 A.M.), the fact that he was **prevented from seeing his mother or lawyer** for several days, and the **callous attitude of the police** rendered the youth's confession not sanctioned by law.⁷⁰
- In another case prior to *Miranda* and *Gault*, a youth's **age** (14), an **extended detention time** (five days), and **preventing him from visiting with his mother**, who tried to see him, and **not consulting with a lawyer were sufficient** to render his confession a violation of due process.⁷¹ The Court noted that a youth is unequal in status compared to an adult and that a youth would have no way of knowing the consequences of his actions without adult advice and he would be negatively impacted by his immaturity.⁷²
- Waivers of rights by two brothers prior to their interrogation were determined to be invalid because they were not knowingly and intelligently made. The brothers were **ages 15 and 16**, had **mental retardation**, and had **no previous experience in the criminal process**. The court specifically emphasized that it was doubtful the boys could comprehend the *Miranda* warnings or appreciate the options or consequences presented them.⁷³
- A 12-year-old with **borderline cognitive functioning** (an 8-year, 8-month old level) and **emotional disturbance** was found incapable of understanding or

⁷⁰ Hayley, *supra* note 46, at 599-600.

⁷¹ Gallegos, *supra* note 46, at 55.

⁷² *Id.*

⁷³ Cooper, *supra* note 47, at 1144-46; See, *In the Interest of Holifield* 219 So.2d 471, 473 (La. App. Ct. 1975) for a similar case in which the court ruled that a 14 year-old with an IQ of 67 did not have the capacity to waive rights or sign a voluntary confession.

intelligently waiving Fifth Amendment rights even though the boy nodded to his mother that he understood each right provided him.⁷⁴

- A 16-year-old youth's **psychiatric and learning disorders** (he had been attending special education classes for years), coupled with the **recent withdrawal of psychotropic medication**, rendered him vulnerable, but not necessarily incapable, of waiving his rights and voluntarily confessing. However, the combination of these factors, the youth's **lack of experience with the court system** and the fact that the **authorities had frustrated the parents' attempt to confer with their son** before and during questioning rendered his statements involuntary.⁷⁵
- The guilty plea of a 16-year-old was determined invalid as the youth showed **borderline intelligence with limited emotional development, a limited grasp of reality, and poor memory**, and pleaded guilty against his attorney's advice. The court found these factors to be evidence that he did not appreciate the charges or understand the proceedings and the guilty plea could not be permitted to stand.⁷⁶

Cases in which the totality of the circumstances supported a valid waiver or confession

- The fact that a youth, almost 18, provided a statement in "clear, concise, and uninterrupted terms," later provided the police with clothing worn during the crime, and accompanied police to inform his family of the arrest, was sufficient to support a finding that the youth's confession was voluntary.⁷⁷
- Leg shackles were not coercive towards either the waiver of rights or confession when the youth was 17½-years-old, had average grades while consistently attending school, and was composed and thoughtful while making her statements.⁷⁸
- The waiver of rights and confession of a 16-year-old were held to both be valid as he was held in a detention cell for only six and one-half hours, was provided both personal and medical care, had extensive experience with the criminal justice system, and was questioned with hypotheticals.⁷⁹ These considerations were also considered to show voluntariness of a confession by a 13-year-old boy.⁸⁰

⁷⁴ *In the Matter of the Welfare of S.W.T.*, *supra* note 13, at 513.

⁷⁵ *In Re J.J.C.*, *supra* note 55, at 1180-81.

⁷⁶ *Iowa*, *supra* note 22, at 709-10.

⁷⁷ *Mayes v. Kentucky*, 563 S.W.2d 4, 11 (1978).

⁷⁸ *Ohio*, *supra* note 64, at 11-13.

⁷⁹ *Minnesota*, *supra* note 45, at 288; *Minnesota v. Scott*, 584 N.W.2d 412, 419 (Minn. 1998); *Minnesota v. Jones*, 566 N.W.2d 317, 325 (1997) (with similar factors and conclusions of voluntariness of the confession or waiver).

⁸⁰ *In Re G.O.*, *supra* note 69, at 1013.

- Failure to provide access to a parent or other responsible adult was not sufficient to render a youth's confession as made unknowingly when the court found him to be an older adolescent (17-years-old) with previous court involvement and he did not claim that the confession was coerced.⁸¹
- Because a 13-year-old who was able to define the *Miranda* warnings, showed age-appropriate reading skills, and exhibited at least a low average intelligence, he was able to knowingly and intelligently waive *Miranda* rights.⁸²

These cases make it clear that a close examination of the unique experiences and attributes of a juvenile is necessary in order to decide whether his or her waiver of rights or confession is valid. Generally, no one factor will render a waiver or confession valid or invalid. Rather, consideration of how these factors impact each other is necessary for determining whether the circumstances support the validity of a waiver or confession.

There are several related issues particularly relevant in examining the validity of waivers and confessions. For a minority of courts, there is an exception to the totality of the circumstances test with regard to parent participation in the interrogation. Some states require a parent, guardian, or interested adult be present when the juvenile is questioned.⁸³ The majority of courts, however, consider parental participation as only one factor in determining whether or not a waiver or confession is valid. In other words, even without parent participation in the interrogation, a waiver or confession is valid if the other circumstances support its validity.⁸⁴

The issue of coercion requires careful consideration when dealing with juvenile confessions.⁸⁵ Determination of what is coercive seems to require understanding the perception

⁸¹ *Doe*, *supra* note 69, at 680.

⁸² *Illinois v. Kolakowski*, 2000 Ill. App. Lexis 49.

⁸³ *E.g.*, *Commonwealth v. A Juvenile*, 449 N.E. 2d 654, 657-658 (Mass. 1983); *In re E.T.C.*, 449 A.2d 937, 939 (Vt. 1982); Me. Rev. Stat. Ann. Tit. 15 § 3204.

⁸⁴ *E.g.*, *In re G.O.*, *supra* note 69, at 1013; *See also Mayes*, *supra* note 77, at 11; *Ohio*, *supra* note 64, at 11-13 (where the parent was not present but the waiver and/or confession was valid).

⁸⁵ *In Re Gault*, *supra* note 44, at 55 ("...the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair").

of the juvenile. Extensive time interrogating the youth,⁸⁶ actively preventing consultation with parents,⁸⁷ or the combination of these factors coupled with the emotional and/or cognitive functioning of the juvenile may render a confession involuntary.⁸⁸ Some youth may be easily overwhelmed by an interrogation simply because of their status as juveniles. That is, they may view adults as authority figures who must be answered. A youth with only limited understanding of the situation may succumb to suggestions to confess in an effort to escape the immediate confusion or distress. A juvenile who is accustomed to having parents present to assist in decision-making in important aspects of his or her life may likewise be unable to cope with the perceived pressures of an unfamiliar adult asking questions or accusing him of a crime. These situations can be avoided if the following steps are taken: 1) determine the juvenile's understanding of the situation and his rights; 2) ensure that the juvenile is provided adequate care; 3) limit questioning periods; and, 4) encourage parents to be present during the questioning.

The veracity of the confession is also a necessary consideration in evaluating a youth's confession. Youth and adults have been found to give later-proven or highly probable false confessions.⁸⁹ Described circumstances surrounding the confessions of juveniles include repeated or extensive questioning of the youths, possible physical maltreatment or threats, and/or the lack of a parent or an attorney present.⁹⁰ In several of the reported cases, the youths were under 15, had cognitive or learning deficits or had alibis (including one whose records indicated

⁸⁶ *E.g.*, *Haley*, *supra* note 46, at 599-600; *Gallegos*, *supra* note 46, at 55.

⁸⁷ *Id.*

⁸⁸ *E.g.*, *Thomas v. North Carolina*, 447 F.2d 1320, 1322 (4th Cir. 1971); *In re J.J.C.*, *supra* note 55, at 1180-81.

⁸⁹ See *E.g.*, Leo & Ofshe, *Criminal Law: The Consequences of False confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998); Steven A. Drizin, B. Colgan, K. Shank, *The Problem of False Confessions in Illinois: A Report of the Northwestern University Legal Clinic's Children and Family Justice Center*.

⁹⁰ Drizin, *supra* note 89.

that he was incarcerated when the crime occurred).⁹¹ False confessions can result in both placement in detention settings prior to the adjudication hearing and an adjudication of guilt. In an examination of proven, highly probable, and probable false confessions, 48% of the individuals (both adults and adolescents) were wrongfully convicted of the crime, either because they pleaded to a lesser crime to avoid harsher penalty or they were convicted by a jury.⁹² In all of the cases there was no physical or other evidence supporting the individual's guilt. The state's evidence was comprised predominantly of the admissions, the individual's factual innocence was supported by evidence, and there was no credible evidence corroborating or supporting the individual's admission.⁹³ Leo and Ofshe suggest these three questions when determining the reliability of a confession:

- Does the statement lead to the discovery of evidence unknown to police?
- Does the statement include identification of highly unusual elements of the crime that have not been made public?
- Does the statement include an accurate description of the mundane details of the crime scene that are not easily guessed and have not been publicized?⁹⁴

“Yes” answers suggest knowledge that would be expected of a perpetrator.⁹⁵ In contrast, if a statement does not offer new information or is incorrect about elements of the crime, it may support the falsity of the confession.⁹⁶ Thus, similar consideration of the circumstances of the confession, particularly as it relates to the factual information of the crime, is valuable in assuring that a confession is voluntary.

⁹¹ *Id.*

⁹² Leo & Ofshe, *supra* note 89, at 477-479.

⁹³ *Id.* at 435.

⁹⁴ *Id.* at 439.

⁹⁵ *Id.* at 439.

⁹⁶ *Id.* at 435.

In sum, the validity of a waiver of rights or confession is an important consideration when working with juveniles. The totality of the circumstances test identifies factors relevant to determine whether a waiver of rights is knowing and voluntary or a confession voluntary. While no one factor is determinative, careful evaluation of both the juvenile's personal attributes and the circumstances surrounding the situation in question will assist professionals in deciding this often complex question. Consideration of these factors, as well as the specific details of the youth's confession, will facilitate the determination of whether a confession was coerced and/or truthful.

4) Wavier and Confessions and the Juvenile with Special Needs

Many of the factors identified by the courts that would render a youth's waiver of rights or confession invalid pertain specifically to the youth's cognitive or emotional functioning. Thus, when a youth with special needs presents in the juvenile justice system, the question of validity of a waiver or confession is likely to be a central issue. Without the ability to comprehend the rights afforded to an individual, these rights cannot be knowingly and intelligently waived. A youth with Mental Retardation or Learning Disabilities simply may not be able to understand the meaning of the rights afforded to him because the concept is too abstract. Alternatively, a youth with Mental Retardation may too readily agree with questions as opposed to providing an accurate response. A juvenile with severe emotional distress or a psychological disorder may not be capable of understanding or applying these rights because the severity of the disorder interferes with his or her concentration and reasoning. To ascertain that the youth is able to understand the significance of the rights and the consequences of waiving them, more than just acquiescence to the question of whether he or she understands these rights seems necessary. Asking the juvenile to define relevant terms and having the youth apply these

meanings to his or her own situation or other hypothetical situations should reveal whether the youth comprehends the rights enough to knowingly and intelligently waive them. Such efforts will also aid in identifying under what circumstances or with what type of assistance the youth may be able to comprehend these rights now or in the future.

When examining the voluntariness of a confession or waiver, consideration of the youth's disability is relevant to determining what may be considered coercive. A juvenile with limited understanding of the situation due to cognitive limitations or immaturity may find an unknown adult or environment to be incredibly coercive. Questions may be seen as a demand for answers that cannot be refused because they are issued by an authority figure. Time spent in detention or away from trusted others may be particularly devastating to a youth with limited independence such that he or she feels coerced to confess in an effort to return to a predictable, familiar environment. Similarly, for the youth with emotional or behavioral distress, an unfamiliar environment may render him more susceptible to viewing questions as demands requiring answers or even hypothetical suggestions as some type of coercive tactic compared to peers without such distress. Awareness of these issues will enable those interviewing or working with the juvenile to either structure the situation to prevent coercion (e.g., interviewing in a familiar or comforting environment, assuring that trusted people are with the juvenile) or identify when it has occurred.

In sum, consideration of the totality of the circumstances is required in determining whether a waiver of rights or confession is valid. For the youth with special needs, application of these principles necessitates examination of how his or her disabilities impact each of the relevant factors. When a youth's disabilities are identified and described, professionals will be better able to assess whether the youth is able to knowingly, intelligently, or voluntarily waive

rights or voluntarily confess or, alternatively, how to facilitate valid waivers or confessions by providing adequate support or assistance.

D. Children with Special Needs and Implications for Defenses

Unique issues are likely to arise when a youth with a disability raises defenses regarding diminished capacity, culpability, or insanity. While these defenses may be codified by statute for individuals tried in criminal cases, there is frequently no specific statement regarding their application in the juvenile court system. Case law varies on whether a defense is admissible in a juvenile court adjudication. This section will highlight some of the issues related to the use of these defenses in juvenile proceeds.

1) Criminal Culpability

There has been much discussion about the impact one's juvenile status has on culpability. In *Thompson v. Oklahoma*, the Supreme Court described youth as less culpable due, in part, to their greater inability to control their behavior and more limited experience.⁹⁷ Particular characteristics identified as reducing youths' culpability include their incomplete development, callow judgement, and still malleable character.⁹⁸ These characteristics have given rise to the presumption that a youth's criminal acts are more a reflection of developmental factors than an individual choice to act as would be associated with adulthood.⁹⁹

For the youth with special needs, the question of reduced culpability may take on greater significance. The developmental characteristics that point to reduced culpability may be exacerbated by the youth's disability. Cognitive limitations may render reasoning more similar

⁹⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988).

⁹⁸ Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 Va. J. Soc. Pol'y & L. 389, 396 (1999).

⁹⁹ Elizabeth Scott & Thomas Grisso, *Symposium on the Future of the Juvenile Court: The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. 7 Criminology 137, 171 (1997).

to a younger child or even different in its process. For example, the youth, although able to identify wrongful conduct, may base such a determination on more concrete or extraneous factors. While the youth may still be responsible for that behavior, one may question whether it is to the same extent as an adult or even same-aged peer who has more developed reasoning skills. Similarly, a specific learning deficit may effect how a youth understands and responds to a situation. An emotional or behavioral disorder may exacerbate the poor judgement or impulsivity typically seen in youth. Thus, the deficits or limitations of some youth with disabilities may interfere with their ability to fully distinguish right from wrong or act intentionally. Consideration of how the juvenile analyzes right from wrong, evaluates a situation and plans a response will provide insight to the extent of culpability that should be imposed upon the youth.

2) Not Guilty by Reason of Insanity and Diminished Capacity

A youth's defense of not guilty by reason of insanity has been treated inconsistently by different jurisdictions. In some jurisdictions, statutes or case law specify that an insanity defense may be used in juvenile court proceedings.¹⁰⁰ Other jurisdictions do not explicitly grant or deny juveniles this defense.¹⁰¹ Two jurisdictions prohibit the insanity defense in juvenile proceedings on the basis that there is no constitutional right to plead such a defense,¹⁰² or that the purpose of dispositional hearings are for identifying treatment rather than criminal responsibility.¹⁰³

¹⁰⁰ *E.g.*, Cal. Penal Code § 25(b) 2001; *In re Winburn*, 145 N.W.2d 178, 185 (Wis. 1966); *In the Matter of Stapelkempr*, 562 P.2d 815, 195 (Mont. 1977).

¹⁰¹ *E.g.*, KRS § 504.020 (2000) (identifies that mental illness or retardation may negate responsibility for criminal conduct but neither this provision or the Juvenile Code identifies its applicability to juveniles.)

¹⁰² *Va. V. Chatman*, 538 S.E.2d 304, 307-8 (2000).

¹⁰³ *In the Matter of C.W.M.*, 407 A.2d 617, 623 (D.C. App. Ct. 1979).

Those advancing the right of a juvenile to plead insanity have identified this right as fundamental¹⁰⁴ such that it is protected under due process of law.¹⁰⁵ Specifically, they identify this right as necessary to meet the constitutional rights of effective counsel and fairness that were afforded juveniles in the landmark cases of *In re Gault* and *Kent v. United States*.¹⁰⁶ Although the specific measure of insanity may vary between jurisdictions, the criteria often requires that the individual show an inability, or substantial lack of capacity, to understand or appreciate the nature (criminality) of their act.¹⁰⁷

For the juvenile with special needs, a determination of the youth as insane is likely to be impacted by factors such as age and cognitive functioning. While many youth are more likely to show impulsivity in reasoning or failure to consider potential effects of their act compared to adults, this is not typically adequate to show insanity. However, a youth who demonstrates severe cognitive limitations or learning deficits may show understanding and reasoning more similar to a much younger child rendering his appreciation of a situation quite compromised. Coupled with severe mental illness, the youth may evidence such severe deficits in reasoning, comprehension, or emotional/ behavioral modulation such that he is unable to effectively control his behavior or even understand his acts. Thus, evaluating the juvenile's capacity to appreciate his conduct in the context of his cognitive, emotional, or behavioral limitations will provide insight as to whether the youth can be declared not guilty by reason of insanity.

¹⁰⁴ E.g., *In the Interest of Causey*, *supra* note 13, at 476; *In re Winburn*, *supra* note 100, at 185.

¹⁰⁵ E.g., *In the Matter of Two Minor Children*, 592 P.2d 166, 169 (Nev. 1979).

¹⁰⁶ See E.g., *In re Winburn*, *supra* note 100, at 185. *In the Matter of Stapelkempr*, *supra* note 100, at 816; *Id.* (citing and describing *In re Gault*, *supra* note 44); *Kent v. United States*, 383 U.S. 541 (1969) (as the source of the right to plead insanity).

¹⁰⁷ See E.g., KRS § 504.020 (2000).

If a youth with special needs is determined to be legally sane, the impact of his mental illness, learning disabilities, or cognitive limitations may still diminish his or her capacity to appreciate the nature of the conduct. That is, severe emotional distress, poor reasoning due to learning or cognitive disabilities, or behavioral dysregulation can negatively impact how the youth perceives and understands his or her actions. Although the youth may be able to identify the act as criminal, he may be unable to fully comprehend the severity of the act or control his immediate response to the situation. These endogenous characteristics may serve to reduce one's responsibility for his or her actions. In working with a juvenile with a disability, examination of the extent of the youth's understanding of the nature and consequences of the act will provide valuable information as to his or her capacity.

E. Waiver of Juvenile Court Jurisdiction (Transfer)

A juvenile public offender is entitled to a transfer hearing before being transferred to adult, criminal court.¹⁰⁸ Transfer has "tremendous consequences for the juvenile," including a lengthy incarceration, abuse in adult prison, and the possibility of execution for capital offenses.¹⁰⁹ Each state achieves waiver via statute by one or a combination of three methods: judicial waiver, legislative (statutory) waiver, and prosecutorial waiver.¹¹⁰ Legislative waiver demands transfer when certain elements are met. For example, all offenders over 16 years of age that have committed rape, assault, or homicide may be transferred to adult court in some states. Prosecutorial waiver rests transfer within the discretion of the prosecuting attorney, and judicial

¹⁰⁸ *Kent, supra* note 106, at 543.

¹⁰⁹ *Id.* at 554

¹¹⁰ Brenda Gordon, *A Criminal's Justice or a Child's Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the flaws in the Arizona Response*, 41 *Ariz. L. Rev.* 193, 194, Spring, 1999

waiver rests the decision to transfer, upon a transfer hearing, exclusively in the hands of the presiding judge.¹¹¹

The most prevalent practice in the United States is judicial waiver. Forty-eight (48) states and the District of Columbia utilize a judicial waiver statute.¹¹² The judge's decision to transfer a juvenile to criminal court is influenced by a number of factors, including the mental development, mental maturity, and mental health of the juvenile, including any mental illness. Although a majority of states' statutes include mental maturity or mental development as a factor in the decision to transfer, only ten (10) states and the District of Columbia include mental health or illness as a listed factor that should be considered in the transfer hearing.¹¹³ These include, "the child's mental capacity,"¹¹⁴ "the child's physical, mental, and emotional condition,"¹¹⁵ and "the emotional and mental health of the child."¹¹⁶

In these states, the mental health of the juvenile is an important, listed factor in determining waiver of juvenile court jurisdiction. Alternatively, many other states statutorily prohibit transfer unless the juvenile is not amenable to rehabilitation through the juvenile justice process.¹¹⁷ Many statutes (following the guidelines in *Kent*) list the likelihood of rehabilitation as a factor, not a prohibition to transfer.¹¹⁸ A significant factor in determining amenability to rehabilitation is the juvenile's mental condition.¹¹⁹ The rationale is a juvenile with deficient mental health may have a greater chance at rehabilitation, because once the deficiency is

¹¹¹ *Id.*

¹¹² *Id.* at 204.

¹¹³ Kirk Heilbrun et al., *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 Behav. Sci. & L. 125, 145 (1997).

¹¹⁴ 42 Pa. Cons. Stat. Ann. § 6355(a) (West 1982 & Supp. 1995).

¹¹⁵ 17B Ariz. Rev. Stat. Juv. R.P. 14 (C)(7)(1994).

¹¹⁶ Or. Rev. Stat. § 419C.349(d)(B)(1999)

¹¹⁷ 42 Pa. Cons. Stat. Ann. § 6355(a)(4)(G)(West 1982 and Supp. 1995); Ohio Stat. Juv. Proc. R. 30(c)(1997).

¹¹⁸ *Kent*, *supra* note 1 at 561-63. (The juvenile's likelihood of rehabilitation was one of eight "determinative factors" listed in the "policy memorandum" attached to the appendix of the opinion); Ky. Rev. Stat. 640.010(2)(b)(7)(2000).

effectively treated, the juvenile is substantially less likely to re-offend. For example, in *Deel v. Jago*, the court reasoned that a “very significant range” of programs, including psychiatric and psychological services available to serious juvenile offenders, greatly reduce the incentive to transfer.¹²⁰ The opinion of the psychologist as to whether the juvenile is amenable to rehabilitation in the juvenile justice system is “often the critical component in the decision to transfer.”¹²¹

Other jurisdictions preclude transfer of a juvenile who is “committable” to an institution for mentally ill persons.¹²² “Committable” is defined as a juvenile that is a danger to his/herself or others as a result of mental illness and is unable to accept voluntary treatment.¹²³ These states require a mental evaluation of the juvenile to determine “committability.”¹²⁴

Jurisdictions that support transfer without consideration of mental health justify their position by stating that the juvenile has the opportunity to raise affirmative defenses, including insanity, in criminal court.¹²⁵ However, it is not justifiable to refuse admission of evidence of mental illness at the transfer hearing merely because the accused can later plead insanity in criminal court.¹²⁶ Most mental illnesses are not grounds for insanity, and the burden of proof is significantly more substantial in proving insanity than in showing mental illness.¹²⁷

¹¹⁹ 42 Pa. Cons. Stat. Ann., *supra* note 117, at (a)(4)(G)(2); Ohio Stat. Juv. Proc. R., *supra* note 117, at (F)(1).

¹²⁰ 967 F.2d 1079, 1089 (6th Cir. 1991).

¹²¹ Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 Harvard C.R.-C.L. L. Rev. 507, 538 (1995).

¹²² *In re Appeal in Coconino County Juvenile Action*, 157 Ariz. 81, 84, 754 P.2d 1356, 1359 (Ariz. App. Ct. 1987); Ala. Code § 12-15-34 (1996).

¹²³ *Id.* at 86, 1361.

¹²⁴ *Id.* at 88, 1363. *Ex parte H.P.W.*, 628 So.2d 514, 517 (Ala. 1993).

¹²⁵ Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearing*, 33 Wake Forest L. Rev. 595, 640 (1988).

¹²⁶ *Briones*, *supra* note 19, at 626.

¹²⁷ *Id.*

Whether statutorily listing mental health as a direct factor for a transfer determination or including mental health as a factor for a juvenile's amenability to rehabilitation (as a prohibition to or factor of transfer), many jurisdictions include mental health and illness as an important aspect in the crucial decision to transfer a juvenile to adult criminal court. The goal of the juvenile justice system is rehabilitation, not punishment, and juveniles with a mental illness are generally considered more likely to be rehabilitated.¹²⁸ "Transfer should only be used as a safety valve for those who cannot be treated by the juvenile justice system" not as the routine or preferred course of action.¹²⁹

¹²⁸ *Kent, supra* note 108, at 554.

¹²⁹ *Guttman, supra* note 121, at 509.

Chapter 6

Essentials of an Evaluation

An evaluation of a juvenile may become necessary at different phases of the judicial process. For example, an evaluation may be warranted when determining whether a juvenile will be transferred to criminal court, whether the juvenile is competent to stand trial, the validity of the juvenile's waiver of the rights, or the best method of rehabilitation.¹ The type of assessment needed will depend on the reason(s) that give rise to the evaluation. Who conducts the evaluation is just as important as the type of evaluation conducted. This chapter describes the types of evaluations a youth may receive, the qualifications of the evaluator, and the components of a comprehensive evaluation as it pertains to the type of evaluation sought.

A. Forensic vs. Clinical Evaluations

A psychologist, psychiatrist, or other mental health professional conducts clinical evaluations for a variety of reasons, including diagnosis of emotional, cognitive, or behavioral difficulties and treatment planning. A purely clinical evaluation is appropriate when determining if a juvenile is experiencing a mental health disorder, has cognitive deficits, or exhibits a learning disorder. Appendix A describes many of the risk factors that would suggest the need for such an evaluation. A forensic evaluation may include many of the same components of a clinical evaluation, but is “... performed specifically for use in a legal forum or agency to assist in decision-making about a case.”² Thus, in a forensic evaluation, the mental health professional will be asked to examine the youth in the context of specific legal questions. For example, does

¹ See e.g., Thomas Grisso, *Preparing for Evaluations in Delinquency Cases*, in *Forensic Evaluations of Juveniles* 21-24 (1998).

the youth have cognitive deficits and does this affect his or her competency to stand trial? Because a forensic evaluation pertains to specific legal issues or questions, there must be a detailed reason for referral to the professional evaluating the youth. The legal question at issue often points to different methods or measures of evaluation. Identifying the reason for the referral in sufficient detail allows the professional evaluating the juvenile to perform a comprehensive evaluation that offers focused, detailed descriptions and interpretations relevant to the legal question in a particular case.

B. Who Should Perform the Evaluation?

Upon identification of the need for an evaluation and determination of the question(s) that need to be answered by the evaluation, selection of the appropriate professional to conduct the evaluation is important. Two key components to this selection are knowledge and experience in the field of forensic evaluations and in child/adolescent evaluations. A professional conducting a forensic evaluation should be familiar with the structure of the juvenile justice system, theories about adolescent offenders, relevant laws or concepts, and how to communicate these results with sufficient detail to facilitate their application in the justice process.³ Also of great importance is the professional's familiarity with child and adolescent development and psychopathology. The diagnostic presentation of some mental health disorders varies between youths and adults. Developmental factors impact the interpretation of a youth's responses along with how the professional approaches the evaluation. Finally, evaluating a youth often requires more extensive consideration of environmental factors, such as educational opportunities and family dynamics. Ideally, when a youth exhibits signs of cognitive deficits or learning disorders, a professional experienced in this particular field should be sought so that appropriate

² *Id.* at 23-27.

³ *Id.* at 23, 24.

consideration of these deficits' impact on behavioral and emotional functioning can be made. Identifying a psychologist, psychiatrist, or other professional with experience in these diverse areas can be challenging.⁴ However, there are ethical and specialty guidelines and certifications in forensic psychology and psychiatry that can be helpful in making this determination.⁵ Individuals trained in child/adolescent development and psychopathology may also seek additional training to develop competency in conducting forensic evaluations with this population.

C. Components of an Evaluation

1) Basic Components of an Evaluation

The necessary components of an evaluation will be determined by the question or questions sought to be answered by the evaluation. All evaluations require the following basic information:

- Referral question: why the evaluation is being sought and who is seeking the evaluation?
- Identifying information: the juvenile's age, grade, residence.
- The means of evaluation: tests used, interviews.
- Review of school records and testing.
- Review of mental health treatment history.
- Review of family history.
- Amount of face-to-face contact.

When the juvenile is referred by the court or an attorney, the evaluation should include:

- The current charges.
- The youth's understanding of the purpose of the evaluation and confidentiality.
- The youth's legal history.

⁴ *Id.* at 26, 27 (suggests that there is little information concerning professionals who conduct these evaluations or available training programs in this area).

⁵ *E.g.*, *Specialty Guidelines for Forensic Psychologists*, Committee on Ethical Guidelines for Forensic Psychologists, 15 Law and Human Behavior 655 (1991); *Ethical Principles of Psychologists and Code of Conduct*, American Psychological Association (1992); *Ethical Guidelines for the Practice of Forensic Psychiatry*, American Academy of Psychiatry and the Law (1989).

- The legal questions presented.⁶

2) Assessment of Cognitive, Emotional and Behavioral Functioning

Clinical and forensic evaluations will often assess the youth's cognitive, emotional, and behavioral status. This assessment is particularly important when a youth is suspected to have a mental health disorder, cognitive or learning deficit, or educational disability. An evaluation of these factors is likely to include:

- Cognitive functioning tests.
- Measures of specific skills, such as memory, language skills, or reasoning.
- Academic skills tests.
- Learning styles.
- Adaptive functioning measures.
- Personality measures.
- Assessment of moral and emotional functioning.
- Diagnostic interviews.

The results of these assessment methods will be interpreted in light of the background information compiled by the profession. How these factors are described or applied in the professional's report will depend on the referral question. That is, if the referral question is to diagnose whether the youth has a disabling condition, the report will likely describe the factors that suggest or refute the presence of a disorder or deficit. In contrast, if the evaluation is to answer specific legal questions or make treatment recommendations, the cognitive, emotional and developmental attributes of the youth will be applied to the identified issue. Specifically, the relationship to or the impact on these factors to the legal question should be described.

⁶ *Mental Health Assessments in the Justice System: How to Get High-Quality Evaluations and What to do With Them in Court*, Understanding Adolescents: A Juvenile Court Training Curriculum H2 (Lourdes M. Rosado ed. vol. 3, A.B.A. Juvenile Justice Center, Juvenile Law Center, Youth Law Center).

D. Types of Evaluations

1) Competency to Stand Trial

When determining whether a youth is competent to stand trial, the issue is whether he or she has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.”⁷ Factors indicating the necessity of a competency evaluation include:

- Difficulty communicating with the youth about the case.
- The age of the youth.
- The presence of cognitive deficits or limitations.
- A history of poor academic achievement.
- A history of emotional or behavioral problems.
- The youth is to be tried in adult court.⁸

When a youth is referred for a competency evaluation, specific questions regarding the juvenile’s functional abilities, the cause or source of identified deficits, the interaction between the youth’s skills and the situation, the professional’s conclusion about competency, and potential interventions, need to be addressed.⁹ Dr. Thomas Grisso describes a format that may be particularly helpful in both forming the questions to be given to the professional evaluating the juvenile and in providing the needed information. The functional abilities that should be assessed include the youth’s:

- Understanding of the charges and potential consequences.
- Understanding of the trial process.
- Capacity to participate with the attorney in developing a defense.
- Potential for courtroom participation.¹⁰

Examining these questions in light of other information acquired through the evaluation process will provide information as to whether deficits noted in these abilities are due

⁷ *Dusky v. United States*, 362 U.S. 402 (1960).

⁸ *Understanding Adolescents*, *supra* note 7, at 4.

⁹ Thomas Grisso, *Juveniles’ Competence to Stand Trial*, in *Forensic Evaluations of Juveniles* 90-96 (1998).

¹⁰ *Id.* at 91-92.

to cognitive deficits, emotional difficulties, or lack of experience. The source of these deficits will impact whether a youth can gain competency over time or with assistance, or whether the deficits are so severe that competency may never be achieved.¹¹ Also of importance are the situational demands that could impact the juvenile's competence, including the complexity or length of trial, whether the trial will be held in juvenile or adult court, and whether the youth will have to testify.¹² A youth may be competent to understand the court process and reasonably participate when the legal question(s) or decision(s) are fairly simple, but unable to do so when the legal issues presented are complex or require consideration of a variety of strategies or factors.

Within the framework of assessing the specific question of competence and the global developmental, cognitive, and emotional functioning of the youth, the professional evaluating the juvenile's competency should be able to provide detailed information about the youth's functional abilities, the cause of any deficits, factors that may impair or build competence, and his/her perception of the youth's competence in light of these multiple factors. See Appendix B for a summary of questions to be answered regarding a youth's competency to stand trial.

2) Evaluation of Waiver of Miranda Rights and Confessions

When a youth waives his/her *Miranda* rights, the question is whether the waiver was made "voluntarily, knowingly, and intelligently."¹³ If the youth confessed, the critical issue is whether the confession was voluntary.¹⁴ Factors that indicate the necessity of an evaluation of the youth's ability to intelligently waive *Miranda* rights or voluntarily confess include:

- The age of the child.
- Cognitive deficits.

¹¹ *Id.* at 93-95.

¹² *Id.* at 93, 94.

¹³ *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

¹⁴ *E.g.*, *Haley v. Ohio*, 332 U.S. 596, 597-601 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

- Poor verbal, expressive skills.
- Difficulties communicating with other youth.
- A history of poor academic achievement.
- The youth was under the influence of substances during the interrogation.
- A history of emotional or behavioral problems.
- The parents were not present during the interrogation, and the youth meets one of the factors listed immediately above.¹⁵

Similar to a competency evaluation, determination of the validity of a confession or waiver will require consideration of the youth's functional abilities, the cause or source of identified deficits, the interaction between the youth's skills and the situation, and the professional's conclusion about the validity of the waiver.¹⁶ Dr. Thomas Grisso identifies three functional abilities that should be assessed in determining if a youth was able to validly waive his or her rights or confess:

- The ability to understand the warnings.
- The ability to understand the function and significance of their rights.
- The ability to apply their knowledge towards making a decision to waive their rights or confess.¹⁷

There are several standardized assessments that measure an individual's understanding of the *Miranda* warnings and their significance.¹⁸ In interpreting these scores and abilities, the professional evaluating the youth will consider not only factors related to the youth, as ascertained by the other parts of the evaluation, but also the circumstances of the waiver or confession. Important situational variables may include: the circumstances of the arrest; the mode of transportation to the police station; the method, situation, and length of questioning; and parental or other adult involvement.¹⁹ See Appendix C for specific factors to be considered.

¹⁵ *Understanding Adolescents*, *supra* note 7, at 3.

¹⁶ Thomas Grisso, *Juveniles' Waiver of Miranda Rights*, in *Forensic Evaluations of Juveniles* 50-54 (1998).

¹⁷ *Id.* at 50, 51.

¹⁸ *Id.* at 65, 66 (for a description of these measures).

¹⁹ *Id.* at 60; Youth Advocacy Project Key Components in Evaluation of Miranda Waivers (Sept. 2000).

Malingering and feigning, along with poor understanding are also relevant to the assessment.²⁰

Examining these multiple factors and their impact on each other will assist the professional in making an inference concerning the youth's ability to waive his or her rights intelligently, knowingly, and voluntarily at the time the waiver or confession was given.²¹

3) Evaluations of Transfer to Adult Courts

When a youth is being evaluated to determine whether he or she should be transferred to adult court for trial, the basic questions of the evaluation are whether the youth presents a risk to the public and whether the youth is amenable to treatment.²² Factors that indicate the necessity of an evaluation to determine if the juvenile should be transferred to adult court include:

- A history of emotional and behavioral problems.
- A history of violence.
- A significant delinquency history.
- The nature of the current, alleged offense.
- The youth's age.
- A history of abuse and/or neglect.²³

In examining whether the youth poses a danger to the public, relevant questions include:

- The safety of other youths or staff in the juvenile facility.
- The likelihood of the youth escaping from the juvenile facility, and if he or she does, the danger to the public.
- Whether this is the type of youth who will terrorize the public when he/she becomes an adult.²⁴

In examining the youth's amenability to treatment, relevant factors include:

- The characteristics of the youth and the youth's social circumstances.
- The state's rehabilitation methods.

²⁰ *Id.* at 72, 73.

²¹ *Id.* at 77.

²² *Understanding Adolescents, supra* note 7, at 3.

²³ *Id.*

²⁴ Thomas Grisso, *Evaluations for Waiver for Transfer to Criminal Court*, in *Forensic Evaluations of Juveniles* 202 (1998).

- The time available to the juvenile system to try to accomplish the rehabilitative goals.²⁵

Personal characteristics that impact a youth's amenability to treatment include: discomfort or dissatisfaction with his/her relations with others; the capacity for attachment to adults; and the chronicity of the personality characteristics that are the focus of rehabilitation.²⁶ The availability and type of community support and the quality of rehabilitation services also affect a youth's amenability to treatment.²⁷

Thus, in evaluating the appropriateness of transfer to adult court, factors pertaining to the characteristics of the youth, the youth's needs, and potential rehabilitation options must be considered. While the specific factors to be examined are often determined by state statute, it is the combination of these factors that help to determine whether the youth should be transferred to adult court. A format for evaluations of juveniles at risk of being transferred that considers the youth's developmental and personality factors, the youth's needs, the youth's rehabilitation history, and current rehabilitation options has been developed by Dr. Marty Beyer.²⁸ See Appendix D for this format.

4) Mental Status/Sanity

When the youth's mental status at the time of the offense is in question, at issue is whether the youth shows an inability or substantial lack of capacity to understand or appreciate the nature of his/her act.²⁹ Factors that indicate an evaluation of the youth's mental status at the time of the criminal act include:

²⁵ *Id.* at 202, 203.

²⁶ *Id.* at 217-222.

²⁷ *Id.* at 223, 224.

²⁸ Marty Beyer, *Experts for Juveniles at Risk of Adult Sentences*, More than Meets the Eye: Rethinking Assessment, Competency and Sentencing for a Harsher Era of Juvenile Justice 21,22 (Juvenile Justice Center American Bar Association Criminal Justice Section 1997).

²⁹ See, for example, Ky. Rev. Stat. Ann. § 504.020 (2000).

- The age of the youth.
- Cognitive deficits or limitations.
- A history of poor academic achievement.
- A history of emotional and/or behavioral problems.
- Information from others concerning unusual, bizarre, and/or disorganized behavior by the youth at or around the time of the offense.

5) Evaluations to Assist in Determining Disposition or Sentencing

In determining a youth's disposition, questions concerning the youth's treatment and programming needs, based upon his/her involvement in the justice process, must be addressed.³⁰

Much of the information gathered during a clinical or forensic evaluation of the juvenile can be applied to making recommendations for rehabilitation. A professional preparing such a report can utilize this information, in conjunction with information about available rehabilitation methods, to develop recommendations that can assist the court in identifying how to serve the youth's individual needs in order to prevent recidivism. Dr. Thomas Grisso describes four factors that should be examined in evaluating a youth's rehabilitation needs:

- The youth's characteristics.
- Changes in the youth and his or her environment that will be needed to prevent future delinquent behavior.
- Available interventions.
- The likelihood of change if provided the interventions.³¹

In evaluating the youth's characteristics, consideration will be given to factors such as the youth's cognitive and academic functioning, emotional and behavioral functioning, environmental background, legal history, past response to treatment, and risk of harm to others.³²

Recommendations for placement or services are then identified based on how the rehabilitation method would address the youth's needs and ultimately the goal of preventing recidivism.³³

Finally, based upon this comprehensive information, the professional evaluating the youth can

³⁰ *Understanding Adolescents, supra* note 7, at 4.

³¹ Grisso, *supra* note 17, at 166.

offer opinions concerning the likelihood that the rehabilitation method will meet the court's objective.³⁴ In a recent article, Dr. Marty Beyer describes a comprehensive evaluation of the youth in determining disposition in which treatment alternatives are examined against the backdrop of the youth's development.³⁵ Specifically, the youth's cognitive, emotional and moral development are examined to identify his/her strengths and the reasons for the behaviors.³⁶ Based upon this information, appropriate services are identified.³⁷ Appendix E contains a detailed summary of a disposition evaluation.

Evaluation of a youth in the juvenile justice system can provide insights as to the youth's functioning and its impact on his or her understanding and participation in all phases of the justice process. Based upon such information, intervention strategies can be developed to enhance the youth's participation or rehabilitation success. Providing the professional evaluating the youth with detailed objectives for the evaluation will facilitate a product that is comprehensive and appropriate to the referral question.

³² *Id.* at 167-180.

³³ *Id.* at 187-191.

³⁴ *Id.* at 192.

³⁵ Marty Beyer, *Recognizing the Child in the Delinquent*, 8 Kentucky Children's Rights Journal 16, 21, 122 (1999).

³⁶ *Id.*

³⁷ *Id.*

Chapter 7

Special Education Services in Short and Long-Term Juvenile Correctional Facilities

More than 125,000 youth are in custody in nearly 3,500 public and private juvenile correctional facilities in the United States.¹ The majority of youth enter correctional facilities with a range of intense educational, mental health, medical, and social needs. Large numbers of incarcerated juveniles are either marginally literate or illiterate and have experienced school failure and retention.² These youth are also disproportionately male, poor, minority, and have significant learning and/or behavioral problems that entitle them to special education and related services. All youth in juvenile corrections, those in short-term detention and those committed to correctional facilities following an adjudicatory hearing, are entitled to education services.³ In addition, youth with disabilities are entitled to specific substantive and procedural rights associated with special education assessment and service delivery, as discussed in more detail in Chapter 4.⁴

¹ See, H.N. Snyder, *Juvenile arrests 1997*, Washington, DC: Office of Juvenile Justice and Delinquency Prevention (1998).

² See, Center on Crime, Communities, and Culture, *Education as Crime Prevention*, Occasional Paper Series No. 2 (1992).

³ General education entitlements in most states do not exempt programs for juveniles in correctional facilities from requirements of providing minimal levels of services. See, Peter Leone & S. Meisel, *Improving education services for students in detention and confinement facilities*, 17 Children's Legal Rights Journal, 1-12 (1997).

⁴ 20 U.S.C. 1401 et seq.; 34 C.F.R. 300 et seq. In response to a request from a U.S. District Court Judge in South Carolina, the Civil Rights Division of the U.S. Department of Justice developed a "Statement of Interest of the United State Department of Education regarding the interpretation of Federal education statutes." Among other things, the "Statement" affirms the state education agency's responsibility to ensure that the requirements of IDEA are carried out. The "Statement" also indicates "The regulations make it clear that the reference to 'all programs' includes State correctional facilities and that the requirements of IDEA apply to such facilities. 34 C.F.R. Sec. 300.2(b)(4)." See, Letter from Deval L. Patrick, Assistant Attorney General, by Jeremiah Glassman, Deputy Chief,

A. The Case for Quality Education Programs in Juvenile Corrections

Because education is critical to rehabilitation for troubled youth, it is considered the “foundation for programming in most juvenile institutions.”⁵ Helping youth acquire educational skills is also one of the most effective approaches to the prevention of delinquency and the reduction of recidivism. Literacy skills appear to be an essential component of education to meet the demands of a complex, high-tech world. Higher levels of literacy are associated with lower rates of juvenile delinquency, re-arrest, and recidivism.

While illiteracy and poor academic performance are not direct causes of delinquency, empirical studies consistently demonstrate a strong link between marginal literacy skills and the likelihood of involvement in the juvenile justice system. Most incarcerated youth lag two or more years behind their age peers in basic academic skills, and have higher rates of grade retention, absenteeism, and suspension or expulsion. For example, a national study found that more than one-third of youth incarcerated at the median age of 15.5 read below the fourth-grade level.⁶ The negative consequences of marginal literacy extend beyond the greatly heightened risk for incarceration among adolescents.

The rate of poverty among those in the labor force without a high school diploma is approximately three times that of high school graduates.⁷ Eighteen to twenty-three year-olds least proficient in the basic skills of reading and mathematics are more likely to be unemployed, living in poverty, and not enrolled in any type of schooling. Despite compelling evidence that

Educational Opportunities, Litigation Section, Civil Rights Division, U.S. Department of Justice to Honorable Joe F. Anderson, Jr., U.S. District Court Judge, District of South Carolina, Columbia Division, South Carolina.

⁵ Office of Juvenile Justice and Delinquency Prevention, *Conditions of confinement: Juvenile detention and Corrections Facilities* 29, Washington, DC (1994).

⁶ Project READ (1978), *To make a difference*, In M. S. Brunner (Ed.), *Reduced Recidivism and Increased Employment Opportunity through Research-Based Reading Instruction*, Office of Juvenile Justice and Delinquency Prevention (NCJ Publication No. 141324).

⁷ See, U. S. Department of Labor, *Profile of the Working Poor*, Bureau of Justice Statistics; William T. Grant Foundation (1989). *The Forgotten Half: Non-College Youth in America*, Washington, D.C.

increased literacy skills promote pro-social outcomes, education programs in many juvenile correctional facilities are inadequate. Appropriate educational services in juvenile corrections may not be a priority when the school program and security functions have to compete for limited resources.

Education services for youth with disabilities in juvenile correction settings are shaped by institutional practices and policies and by the quality of general academic and vocational education services in the facility. Among other things, appropriate special education services for youth with disabilities involve implementation of instructional strategies to address learning or behavioral problems; involvement of parents, guardians, or surrogates; and transition services for youth released to the community. In addition, disciplinary accommodations for youth with disabilities need to identify whether or not behavioral problems are a manifestation of a disabling condition. Youth with learning disabilities, attention deficit hyperactivity disorder (ADHD), and developmental disabilities are more likely to have difficulty complying with and responding to rules and regulations within corrections. Youth with disabilities who do not receive appropriate special education and related services may receive more disciplinary infractions for alleged misbehavior, be more vulnerable to exclusion from the correctional education program and be subject to disciplinary confinement.⁸ When juvenile correctional education programs fail to identify and assess youth suspected of having disabling conditions and fail to develop or implement IEPs (individualized education programs), they violate both state and federal statutes and regulations for special education services.⁹

Unfortunately, the lack of attention to the educational rights of delinquent youth is part of a disturbing trend in corrections to provide youth with minimal services. In recent years,

⁸ See, Peter Leone, *Education Services for Youth with Disabilities in a State-Operated Juvenile Correctional System: Case Study and Analysis*, 28 *Journal of Special Education*, 43-58 (1994).

advocates have initiated class-action litigation to challenge inadequate educational practices in juvenile correctional facilities in over 20 states.¹⁰ Although juvenile crime rates continue to decline, the media's negative portrayal of troubled youth distorts the extent and nature of delinquency and may also erode public support for correctional education programs.¹¹ While appropriate education services are provided to incarcerated youth in some states, many jurisdictions struggle to implement appropriate education programs in juvenile corrections.

1) Jails, Detention Centers, and Other Short-term Facilities

Although the average length of stay in juvenile correctional facilities is eight months, many youths are confined in jails, detention centers, and other short-term facilities where lengths of stay may range from several days to several months. Effective education programs in short-term facilities should focus on literacy, life skills training, and an extensive diagnostic system for the educational, vocational, and social, emotional, and behavioral assessment of youths. With regard to literacy, educators in detention centers and jails need to use a range of materials and strategies to ensure that all youth have successful experiences in the classroom. For example, newspapers, driver education manuals, and popular magazines all contain information that most adolescents find interesting. Similarly, life skills training centered on topics such as alcohol and other drug use, sexually transmitted diseases, legal rights and responsibilities, and career exploration, can provide content for stimulating presentations and discussions in a detention center classroom.

In detention centers and jails where the lengths of stay are highly variable and student turnover is high, a short-term curriculum based on literacy, life skills, and comprehensive

⁹ Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et. seq.; 34 C.F.R. § 300 et seq.

¹⁰ Leone & Meisel, *supra* note 3 at 3.

¹¹ H.N. Snyder, *Juvenile arrests 1998*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention (1999).

assessment can be structured to permit students with a wide range of ability levels to receive quality education services. Teachers can break activities into units that may last a day or two and that provide the opportunity for students at differing achievement levels to experience success. The education program in a short-term facility can also provide a positive school experience for youth who may have very negative feelings about formal education and teachers.

2) Training Schools and Other Long-term Facilities.

In contrast to programs in short-term facilities, education programs in training schools or long-term facilities need to offer a range of programs and options for youth. At a minimum, correctional education programs in long-term facilities need to provide:

- Literacy and functional skills instruction for students with significant cognitive, behavioral, or learning problems;
- Special education services and supports;
- Academic courses associated with Carnegie units (or units of instruction that meet state standards) designed to enable students to meet state performance and graduation standards for students likely to return to public schools, or who may earn a diploma while incarcerated;
- GED preparation and testing for students not likely to return to public schools; and
- Pre-vocational and vocational education related to student interests and meaningful employment opportunities in the community.

B. Free Appropriate Public Education (FAPE) for Youth with Disabilities in Juvenile Corrections

Although incarcerated youth eligible for special education services are entitled to the same substantive and procedural rights afforded youth in public schools, correctional facilities have been slow to respond to the requirements of the Individuals with Disabilities Education Act

(IDEA),¹² Americans with Disabilities Act (ADA),¹³ Section 504 of the Vocational Rehabilitation Act,¹⁴ and other applicable laws. In the twenty-five years since the passage of the IDEA (formerly known as PL 94-142 and the Education for All Handicapped Children Act), the predominant concern in public schools has shifted from providing access to special education services to ensuring quality outcomes for youth with disabilities. In contrast, providing basic access to adequate special education services continues to be a challenge in many juvenile correctional facilities.

While nearly all states have compulsory attendance laws and provide education services through local school districts, children with disabilities are entitled to special education services through federal legislation and corresponding state statutes or regulations.¹⁵ The Individuals with Disabilities Education Act (IDEA), through the spending power of Congress, mandates that states receiving federal support for education of disabled students, ensure that all eligible students receive a free appropriate public education.¹⁶ IDEA was landmark legislation that granted parents of disabled students and those suspected of having disabilities, procedural and substantive rights concerning the assessment, identification, and education of these students. Specifically, IDEA requires that public schools and state-operated programs such as juvenile correctional facilities, provide each eligible student with a free appropriate public education in the least restrictive environment. The education program must use a non-discriminatory evaluation process to identify youths who are eligible for services and parents must consent to the assessment process and have

¹² 20 U.S.C. 1401 et seq.; 34 C.F.R. 300 et seq.

¹³ ADA, 42 U.S.C.S. 12111 et. Seq.

¹⁴ Section 504 of the Vocational Rehabilitation Act of 1973.

¹⁵ See, A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION* (1974).

¹⁶ IDEA, a reauthorization of Public Law 94-142, the Education for All Handicapped Children's Act, was passed in 1975 and went into effect in 1977. Among other things and as a condition of receiving federal funds, states guarantee that all children with disabilities will receive a free appropriate public education in the least restrictive environment. Additionally, IDEA provides a number of procedural rights to parents and requires that schools use nondiscriminatory procedures to assess children suspected of having a disability. For a detailed discussion of the original law and the forces

the opportunity to contribute to decisions concerning the development of an individualized education program.

Although the provisions of IDEA have applied to all states receiving federal financial assistance since its passage in 1975, many states have been slow to provide special education services to incarcerated youths with disabilities and to extend procedural rights required by law.¹⁷ One of the problems associated with providing education services and special education services in correctional settings has been the myriad of administrative and funding mechanisms governing education for incarcerated juveniles across the United States.¹⁸

C. Identification and Assessment

Under IDEA, youth with disabilities are defined as having “mental retardation, hearing impairments, including deafness, speech or language impairments, visual impairments including blindness, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deafness, blindness, or multiple disabilities.”¹⁹ Students must meet two criteria under this definition: (1) the juvenile must have one or more of the listed disabilities; and (2) the juvenile’s disability must adversely affect his education.

Specifically, IDEA requires that public schools and state-operated programs, such as juvenile correctional facilities, base eligibility determinations on nondiscriminatory assessments and parents must consent to the assessment and evaluation process. In order to assess students suspected of having a disability, correctional education programs must obtain parents’

that precipitated its passage, see Levine & Wexler PL 94-142: An Act of Congress, (1981).

¹⁷ All states and the District of Columbia currently receive funding under IDEA. At one time New Mexico declined to participate in this program.

¹⁸ A recent study of education programs in 20 state juvenile justice agencies found a range of service delivery and funding options. One quarter of the states surveyed, were not able to calculate the average per pupil costs for education services. See, B.I. Wolford, *Juvenile justice education: Who is Educating the Youth*. Richmond, KY: Training Resource Center, Eastern Kentucky University (2000).

¹⁹ 34 CFR § 300.7(a)(1).

permission to evaluate, use a variety of non-discriminatory assessment tools to conduct the evaluation, and must conduct the evaluation in the student's native language. Timelines vary among jurisdictions. In general, students must be assessed and an eligibility determination meeting must be held no later than 60 days after referral. Students must be reassessed at least once every three years, but parents and teachers may request a reevaluation at any time.²⁰

Many youth who are detained or committed to juvenile corrections have previously been assessed and identified as eligible for special education services. Many youth in juvenile corrections were receiving special education and related services in the public school prior to their incarceration. A difficulty faced by many correctional education programs is the failure of public schools to send records to correctional facilities in a timely manner. Youth in juvenile corrections may have been out of school prior to their incarceration, so locating recent records for those youth can be difficult. Still others in juvenile corrections have never been identified or referred for special education services in spite of a history of school failure and characteristics that might be associated with disabling conditions.

D. IEP Development

Under IDEA, free appropriate public education means a program designed to provide "educational benefit" to the student.²¹ The program may include related services such as counseling or speech therapy, if required for the student to benefit from specially designed instruction. IEPs are usually developed at a meeting that includes the student, his or her parents or guardian, teachers, and other school representatives. Typically, educators develop a draft of the IEP before the meeting and solicit input from other team members. An IEP should include a statement of

²⁰ 20 U.S.C. § 1414(a)-(c); 34 C.F.R. § 300.532-300.543.

²¹ 20 USC § 1412(4) [state education agencies must ensure that local education agencies maintain records of the IEP for each child with disabilities]; 20 USC 1414(a)(5) [local education agencies must provide assurances to the state that it provides an IEP to each eligible child and review IEPs at least annually].

the student's current level of educational performance, annual goals, short-term instructional objectives, and special education and related services that will be provided. The anticipated duration of services and criteria and procedures to assess attainment of objectives are also components of the IEP. In addition, the IEP should document the persons in attendance at the meeting convened to discuss eligibility and develop the IEP.²² Reauthorization of IDEA in 1990 required that for juveniles age 16 and over, transition goals and objectives must be included in each IEP.

Students incarcerated in short-term detention centers are entitled to the education services specified on their IEPs. Rather than going through a lengthy process of developing a new IEP, existing IEPs that approximate the level and type of services previously provided may be implemented in detention settings.²³

E. Challenges to a Free Appropriate Public Education in Correctional Settings

Problems implementing quality academic programs within juvenile corrections are frequently associated with characteristics of incarcerated youth, the operation of the facilities, and the connections between the public schools and the correctional education program. Youth enter correctional settings with skill deficits, behavior problems, and substance abuse issues that present difficulties in educational programming. At the same time, juvenile correctional institutions often have limited capacity to support appropriate educational interventions for the youth confined to their care and custody. Lack of adequate space, overcrowding, insufficient fiscal resources, and ineffective governance all interfere with providing appropriate education

²² 20 USC § 1414(a)(5).

²³ "In the case of short-term, temporary confinement, the State may meet its obligation under IDEA and Section 504 to ensure that a free appropriate public education is provided to all children with disabilities by implementing the IEP from the previous school district or placement instead of developing a new one. The IEP must be implemented to the extent possible in the temporary setting. To the extent that implementation of the old IEP is impossible, services that approximate, as close as possible, the old IEP must be provided ("Statement of Interest..", pp. 5-6, Appendix B.)" at 4.

services to youth. Too many correctional education programs have unqualified and underpaid teachers who are isolated from the public schools and who do not have access to adequate staff development opportunities. Lack of collaboration among treatment, security, and education staff within juvenile correctional facilities compounds other problems. Without adequate staff and support, the education services frequently fail to meet the minimal standards required by IDEA and related state statutes and regulations.²⁴

Typically, education services in juvenile corrections, whether operated by a juvenile corrections agency, the state department of education, or a local school district, are a low priority for many correctional administrators. In order to provide education services for youths with disabilities, juvenile corrections programs need to meet minimum standards associated with public school programs. The infrastructure needed to support quality education programs is missing in many jurisdictions. Correctional education programs often do not have the autonomy, administrative arrangements, and fiscal resources necessary to provide a quality education to incarcerated youths. In order to strengthen programs and ensure eligible youths receive special education services, correctional education programs need to do the following: 1) develop stronger ties to public school programs; 2) have fiscal and administrative autonomy from the correctional agency; and, 3) meet standards associated with public school programs.

F. Results for Students

Youth in juvenile corrections are entitled to appropriate education services by state and federal statutes. More importantly though, appropriate services that assist youth with disabilities become academically more competent, that spark a career interest, or provide new possibilities for

²⁴ See, Peter Leone, & S. Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, 17 Children's Legal Rights Journal, 1-12 (1997); Peter Leone, *Education Services for Youth with Disabilities in a State-Operated Juvenile Correctional System: Case Study and Analysis*, 28 Journal of Special

the future, have the potential to help youth escape from a dead-end cycle of delinquency and failure. Well-developed and adequately supported academic programs can assist some youth in becoming literate and other youth to consider post-secondary education and training. Prevocational and vocational programs can expose youth to job options, teach employability skills, and provide entry-level training.

In spite of a host of problems associated with education services in juvenile corrections, quality programs have been developed in some facilities. Several studies provide evidence that incarcerated students with a history of school failure, disabilities, and poorly developed academic skills can make significant achievement gains with intensive instruction in a short period of time.²⁵ Correctional institutions can support education by making reading and literacy a high priority, providing opportunities for students to do homework on the living units, inviting community members to serve as mentors to youth, and celebrating academic achievements, both large and small, of their students.

Educational attainment is highly correlated with rates of re-offending.²⁶ Higher levels of academic competence are associated with lower rates of recidivism. Communities and Courts that are serious about keeping delinquent youth from re-offending and out of adult corrections, will ensure that the education programs in juvenile corrections meet statutory requirements and enable youth to develop new skills. While these steps will not deter all youth from further troubles, well-developed education programs for youth with disabilities and other students in juvenile corrections, will ensure that fewer youth persist in criminal behavior.

Education, 43-58 (1994).

²⁵ See, Malmgren, K., & Leone, P. E. *Effects of a Short-Term Auxiliary Reading Program on the Reading Skills of Incarcerated Youth*. 23 *Education and Treatment of Children*, 239-247 (2000); Drakeford, W. *The impact of an Intensive Program to Increase the Literacy Skills of Youth Confined in Juvenile Corrections*. Doctoral Dissertation, University of Maryland, College Park (2001).

²⁶ See Center on Crime, Community, and Culture, *supra* at 2.

Chapter 8

Ensuring the Successful Transition of Juvenile Offenders to School, Work, and the Community

The successful transition of juvenile offenders from correctional facilities to the appropriate school, work, or community setting is not easily accomplished. The passage of recent legislation, including the 1997 Amendments to the Individuals with Disabilities Education Act,¹ has played a major role in focusing added attention on the transition process. It has also highlighted the need for a comprehensive approach to transition services for youth within the juvenile justice system.

Transition generally refers to an outcome-based set of aftercare services for youth with disabilities. However, transition takes on a broader definition when discussing youth within the juvenile justice system. In this sense, transition refers to the passage of a juvenile offender from the community to a correctional facility and back again. Transition services help youth achieve social adjustment, employment, and educational success once they leave the juvenile justice system. The ultimate goal of transition is to promote the successful reintegration of juvenile offenders into the community.² However, in order to provide appropriate transition services to youth within the juvenile justice system, it is imperative that service providers and practitioners are aware of what interventions or practices work to promote successful transitions.

¹ 20 U.S.C § 1400 et seq.

² R. B. Rutherford, S. R. Mathur & H. Griller-Clark, *Transition Planning and Services*, The National Center on Education, Disability, and Juvenile Justice (2001). <<http://www.edjj.org>>

A. The History of Transition Services in Juvenile Justice

Although there is a general consensus that education programs containing effective transition components aid in the post-release success of both juvenile and adult offenders, it is a challenge to provide these services within a correctional setting. Correctional organizations and the people within them frequently have different philosophies about incarceration, education, and transition that shape the ways in which individuals view troubled youth and the interventions developed to help those youth.³

There are three accepted theories or philosophies on delinquent youth.⁴ Micro theory focuses on the behavior of the individual and states that the responsibility for change resides with that individual. Systems theory shifts the attention from the individual to the relationship between the individual and his/her environment. Finally, macro theory examines the institutions, culture, and other social forces active in the youth's environment.⁵

Knowledge of these theories is essential in understanding why different education and transition programs exist within the same field. In addition, "an understanding of how professional roles and institutional forces support or inhibit successful transition of youth to community settings can suggest how to remove institutional barriers that interfere with successful transitioning."⁶ For example, the most important aspect of transition for a parole officer may be a reduction in the amount of delinquent or criminal behavior, while the most important aspect of transition for an educator may be the academic or vocational transition of the student.

³ P. E. Leone, M. B. Walter, & E. B. Edgar, *Multidisciplinary Perspectives on the Transition of Troubled Youth to Community Settings: Results of a Delphi Survey*, National Conference on Transitional Services for Troubled Youth (ed. ERIC Document Reproduction Service 1990).

⁴ *Id.*

⁵ *Id.*

In addition to the different theories correctional employees and educators have of transition, there are different definitions as well. The U.S. Office of Special Education and Rehabilitative Services (OSERS) defined transition in 1984 as an outcome-orientated process encompassing a broad array of services and experiences that lead to employment. In 1990, this definition was revised to include a broader conceptualization of transition outcomes, not just employment.⁷ Today, some argue that transition is not movement from school to post-school activities, but a part of career development, which is a lifelong process.⁸ Most definitions of transition refer to youth with disabilities, so the term has never been clearly defined for youth within the juvenile justice system. However, in this sense, transition is generally referred to as, “the passage of a juvenile offender from the community (home, school, etc.) to a correctional program setting and back again.”⁹

In addition to dealing with competing theories and definitions, there are several other challenges facing correctional employees and educators in successfully providing transition services to youth within the juvenile justice system. For example, some have argued that the amount of time covered by transition is arbitrary.¹⁰ It is not clear when the regular public school district’s responsibility to provide services has ended when the correctional facility’s has begun. Still others maintain that the successful transition of a student in one area, such as employment,

⁶ *Id.*

⁷ M. R. Benz & A. S. Halpern, *Vocational and Transition Services Needed and Received by Students with Disabilities During Their Last Year of High School*, 16 *Career Development for Exceptional Individuals* 197-211 (1993).

⁸ E. Szymanski, *Transition: Life-span and Life-space Consideration for empowerment*, 60 *Exceptional Children* 402-10 (1994).

⁹ O. D. Coffey & M.G. Gemignani, *Effective Practices in Juvenile Correctional Education: A Study of the Literature and Research, 1980-1992*, The National Office for Social Responsibility. Washington D.C.: U.S. Department of Justice (1994).

¹⁰ Benz, *supra* note 7.

is not correlated with success in other areas like education.¹¹ Furthermore, the agency responsible for correctional education differs across states making it difficult to enact standard guidelines and responsibilities.¹² Finally, there is often no clear consensus on who should provide transition services.

Providing transition services to youth with disabilities in the juvenile justice system is even more difficult. For example, although the delivery of appropriate transition services to special needs youth is mandated by law, the role of special education programming in corrections has only recently been recognized.¹³ In 1985, it was reported that less than 10% of all state departments of juvenile and adult corrections were in compliance with the regulations outlined in P.L. 94-142.¹⁴ Although programming for special needs juvenile offenders increased in both quality and quantity from 1985 to 1986 transition programming continues to be critically neglected for youth with disabilities.¹⁵ This may be due to several factors. First, special needs youth have greater social, emotional, and learning needs than their peers.¹⁶ Second, special needs youth do not receive the transition services they need.¹⁷ Third, there is great diversity in the

¹¹ A. S. Halpern, *Transition: A Look at the Foundations*, 51 *Exceptional Children* 479-86 (1985).

¹² R. B. Rutherford, M. C. Nelson & B. I. Wolford, *Special Education Programming in Juvenile Corrections*, 7 *Remedial and Special Education* 27-33 (1986).

¹³ R. B. Rutherford, H. Griller-Clark & C. W. Anderson, *Treating Adult and Juvenile Offenders with Educational Disabilities*, in *Treating Adult And Juvenile Offenders With Special Needs* 221-45 (Ashford, Sales & Reid eds., 2001).

¹⁴ R. B. Rutherford, M C. Nelson & B. I. Wolford, *Special Education in the Most Restrictive Environment: Correctional/special Education*, 19 *The Journal of Special Education* 59-71 (1985).

¹⁵ Rutherford, *supra* note 12.

¹⁶ R. R. Pollard, C. J. Pollard & G. Meers, *Determining Effective Transition Strategies for Adjudicated Youth with Disabilities: A National Delphi Study*, 45 *Journal of Correctional Education* 190-95 (1994).

¹⁷ Benz *supra* note 7; E. B. Edgar, *Providing Ongoing Support and Making Appropriate Placements: An Alternative to Transition Planning for Mildly Handicapped Students*, *Preventing School Failure* 35,36-39 (1991); C. A. Kochhar & L. L. West, *Future Directions for Federal Legislation Affecting Transition Services for Individuals with Special Needs*, 17 *The Journal for Vocational Special Needs Education* 85-93 (1995); K. S. Lewis, G. M. Schwartz & R. N. Ianacone, *Service Coordination Between Correctional and Public School Systems for Handicapped Juvenile Offenders*, 55 *Exceptional Children* 66-70 (1988); J. M. Taymans, S. Corbey & L. Dodge, *A National Perspective of State Level Implementation of Transition Policy*, 17 *The Journal for Vocational Special Needs Education* 98-102 (1995).

types of transition services and interventions delivered.¹⁸ Finally, a continuum of care, including partnerships between schools, families, communities, and businesses has not been fully established.¹⁹

Although much attention has focused on the transition process, few transition programs have proven to be successful for adjudicated youth. A review of the literature, however, reveals several effective or promising practices that promote the successful transition of these youth to school, work, and the community.

B. Transition to School

A proven means of successfully rehabilitating offenders and reducing recidivism is through education.²⁰ There is a strong correlation between education and lower recidivism rates.²¹ Inmates who receive either vocational/technical training or a General Equivalency Diploma (GED) while incarcerated have the highest rates of employment after release.²² However, youth within the juvenile justice system need assistance to return to public, alternative, or charter schools. For example, a study in Washington found that only 21% of youth released

¹⁸ W. D. Holloran & M. Y. Simon, *The Transition Services Requirement: A Federal Perspective on Issues, Implications and Challenges*, 17 *The Journal for Vocational Special Needs Education* 94-97 (1995); Kochhar *supra* note 17; Taymans *supra* note 17.

¹⁹ Holloran *supra* note 18.

²⁰ S. L. Anderson, D. B. Anderson & R. E. Schumaker, *Correctional Education, a Way to Stay Out: Monitoring and Evaluating the Services for Correctional Inmates*, Illinois Council on Vocational Education (1988); *Alabama Correctional Education Research*, Alabama Department of Post-Secondary Education, (1992); T. H. Black *et al.*, *Natural Bridge Transition Program Follow-Up Study*, 47 *Journal of Correctional Education* 4-11 (1996); M. D. Harer, *Recidivism Among Federal Prison Releasees in 1987: A Preliminary Report*, Federal Bureau of Prisons, Office of Research and Evaluation (U.S. Government Printing Office 1994); J. Lillis, *Prison Education Programs Reduced*, 19 *Corrections Compendium* 1-4 (1994); M. O'Neil, *Corrections Higher Education: Reduced Recidivism?*, 41 *Journal of Correctional Education* 28-31 (1990).

²¹ Harer *supra* note 20.

²² Anderson *supra* note 20.

from correctional institutions were in school six months after release.²³ In addition, a Wisconsin study found that only 1.6% of released juvenile offenders returned to school and graduated.²⁴

The problems encountered by youth within the juvenile justice system who are returning to school are even further exacerbated when those youth have special needs.²⁵ For example, one study found that between 25% and 50% of identified transition needs were not addressed during the transition planning process for youth with disabilities.²⁶ In addition, learning disabled and emotionally disturbed students were almost always the least likely to have their transition needs met.²⁷ One author contends that this gap between youth with disabilities and their peers cannot be overcome solely with instruction, but must be augmented with additional transition services.²⁸

There is no clear consensus on who should provide transition services to youth within the juvenile justice system. Therefore, it may be a parole officer, a probation officer, a teacher, a caseworker, a transition specialist, a counselor, a registrar, or a myriad of other professionals who should provide these services. These professionals are often described as the “sending agency” and the “receiving agency.” The “sending agency” has primary responsibility for the youth before the transition process begins. Correctional institutions and detention centers are usually the sending agency for youth within the juvenile justice system.²⁹ The “receiving agency” takes over primary responsibility for the youth from another agency. Public, alternative, and charter

²³ M. E. Maddox & S. Webb, *The Juvenile Corrections Interagency Transition Model: Moving Students From Institutions into Community Schools*, 7 Remedial and Special Education 56-61 (1986).

²⁴ M. Haberman & L. M. Quinn, *The High School Re-entry Myth: A Follow-up Study of Juveniles Released from Two Correctional High Schools in Wisconsin*, 37 Journal of Correctional Education 114-17 (1986).

²⁵ Benz *supra* note 7; Edgar *supra* note 17; Maddox *supra* note 23; Lewis *supra* note 17; Pollard *supra* note 16.

²⁶ Benz *supra* note 7.

²⁷ *Id.*

²⁸ Edgar *supra* note 17.

²⁹ E. B. Edgar *et al.*, *Issues in Transition: Transfer of Youth from Correctional Facilities to Public Schools*, in *Special Education in the Criminal Justice System* (C. M. Nelson *et al.* eds. 1987).

schools or community and employment agencies are usually the receiving agency for youth transitioning out of the juvenile justice system.³⁰

The following six issues have been identified as critical to the successful transition of youth from the juvenile justice system to school: awareness, eligibility criteria, exchange of information, program planning before transition, feedback after transition, and written procedures. For example, sending and receiving agencies need to know about one another's programs. Transition can be greatly improved if each agency knows what services the other offers, what the other facilities are like, what the other agency's mission and philosophy are, and what types of programs are available. Site visits, in-service training, and written materials can help promote awareness among programs. In addition, sending agencies need to have an understanding of the eligibility criteria for each educational entity. This ensures that valid and realistic referrals are made. The sending agency should also ensure that enrollment information gets to the receiving agency. This exchange of information, prior to transition, ensures that the student is eligible for referral to the receiving agency. Furthermore, joint pre-placement planning promotes continuity in service. It also prevents students from falling through the cracks. This information can provide data for program evaluation and alteration. It can be collected through surveys of students, parents, teachers, parole officers, and/or counselors. Finally, formal, written procedures improve transition efforts. This ensures that policies and procedures are not overlooked or forgotten. In addition, it makes procedures easier to evaluate and provides documentation for individual responsibilities.

³⁰ *Id.*

C. Transition to Employment

There is very little research in the area of employment preparation and transition to employment for youth in the juvenile justice system.³¹ However, most of the youth in the juvenile justice system will not return to high school and graduate. Therefore, youth in the juvenile justice system need to be prepared for employment.³²

Transition services do decrease the unemployment rate for individuals with disabilities.³³ Fifteen practices have been identified as critical to employment preparation of youth in the juvenile justice system.³⁴ These include training in basic skills, thinking skills, and personal qualities. It is also suggested that staff development opportunities be made available to all education staff to ensure that they have adequate knowledge of the current and future labor market, its implication for education of youth, and how to incorporate new subject matter, skills, and techniques in their programs to enhance the employability of their students. In addition, it is suggested that all students be assessed in terms of their current degree of “employability” and that programs and strategies be built into their individual education plans to enhance their employability. Students must also be made aware of the changing labor market and the components of “workplace know-how” and should be shown how this impacts their academic and vocational preparation. In addition, teachers should help students connect knowledge and skills to the workplace. Students should be given opportunities to apply knowledge in real-life situations, work experience, internships, apprenticeships, mentorships, or “shadowing” workers on a job. Furthermore, the correctional education program should teach job finding and job

³¹ Coffey *supra* note 9.

³² *Id.*

³³ Sitlington, P. L., Clark, G. M., & Kolstoe, O. P., *Transition Education and Services for Adolescents with Disabilities*, Allyn & Bacon, Boston, MA (2000).

³⁴ Coffey *supra* note 9.

keeping skills, in theory and practice, and stress the work ethic. All prevocational and vocational courses should teach up-to-date skills and knowledge and use the tools, materials, and equipment currently in use in the labor market. In addition, students should develop a portfolio, which includes credentials, work samples, work history, resume, letters of recommendation, relevant community service, and extra-curricular experiences. Especially important is that students with special needs should be provided employment preparation programs and services, and curricula, instruction, and equipment that are adjusted as appropriate. Furthermore, students should have opportunities to receive counseling related to employment and/or employment preparation. Transition programs, while encouraging and assisting students to go back to a school, should include information and services for students moving directly into the labor market. In addition, interagency cooperative relationships should be developed between the school and agencies and organizations in the community that provide skill development, on-the-job training, and job placement, in order to enhance programs and provide post-release linkages and support services for students. Finally, partnerships should be developed between the school and employers in the community in order to enhance current programs to provide post-release linkages and support for students.³⁵

D. Transition to the Community

The transition of youth with disabilities to the community from the juvenile justice system is not only an outcome-oriented process, it is also a multidimensional service-delivery system.³⁶ However, this service-delivery system is usually not coordinated to assist youth with disabilities in successfully transitioning from the juvenile justice system to the community.

³⁵ *Id.*

³⁶ Halpern *supra* note 11; Sitlington *supra* note 33.

Coordination of this service-delivery system can only be accomplished through interagency collaboration and cooperation.

Successful transition to the community includes training and/or support in the following areas: independent living, daily living skills, budgeting, health and hygiene, transportation, personal relationships, substance abuse prevention and maintenance and counseling.³⁷

E. Promising Practices for the Transition of Juvenile Offenders

Despite an increase in compliance with federal mandates, the need for effective implementation of transition programming for youth with and without disabilities in the juvenile justice system continues to be at the forefront of much discussion. As a response to this need, the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) produced a body of research in 1994 entitled *Documented Effective Practices in the Education of At-risk and Delinquent Youth*.³⁸ This research outlines fifteen effective transition practices that have proven to be pragmatic through research or practical application. These effective practices have been reviewed, expanded and classified into promising practices for long-term and short-term correctional facilities by The National Center on Education, Disability, and Juvenile Justice.³⁹

The transition mandates in the Individuals with Disabilities Education Act provide for documenting transition services in the IEPs of students age 14 or older by including: 1) a statement of the needed transition services for the student, including, if appropriate, a statement of the interagency responsibilities or any needed linkages; 2) a statement of the activities that are

³⁷ Cook, L., *Collaboration and Cooperation: Key Elements in Bridging Transition Gaps for Adjudicated Youth*, presented at the 1988 National Conference on Transitional Services for Troubled Youth, 9ERIC Document Reproduction Service ED 319923 (1990).

³⁸ Coffey *supra* note 9.

³⁹ Rutherford *supra* note 2.

designed through an outcome-oriented process, that promotes movement from school to post-school activities that includes: post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, and community participation; and, 3) transition services that are based on the student's needs and take into account the student's preferences and interests.⁴⁰ In addition to ensuring that correctional facilities are adhering to these transition mandates, the juvenile courts can promote the application of short-term and long-term promising practices in correctional facilities as described in Appendix F.

⁴⁰ 20 U.S.C. 1414(d)(1)(A) and (d)(6)(A)(ii)

Chapter 9

Recommendations for Effective Practice

Many youth in the juvenile justice system have needs that require involvement with multiple agencies and services, each with its own set of mandates, resources and philosophical basis. For those youth with special needs, the interactive and collaborative efforts of those entities charged with the care and treatment of the youth are critical for effective intervention. This includes not only juvenile courts, but school systems, mental health providers, state agencies providing child welfare and juvenile justice programming, social service agencies, prosecutors, defense attorneys and school officials. Many barriers can interfere with effective service delivery, including:

- Failure of participating agencies to adequately understand the role and responsibilities of other systems.
- Time constraints and heavy caseloads for those professionals charged with providing services.
- Funding constraints and lack of resources to provide individualized attention, care and treatment of youth.
- Lack of information about the youth and/or failure to communicate information among providers.
- Statutes and regulations of state agencies and/or local school districts that are at times inconsistent and/or unclear as to roles and responsibilities.
- Lack of identification and proper evaluations of youth with mental health and/or other disabling conditions.
- The failure of critical stakeholders to participate in problem solving for the youth.
- “Zero tolerance” policies in school-to-court referrals, mandatory transfers and/or disposition and sentencing.

- Lack of parental involvement in key decision-making and implementation of programs and services for the youth.
- Lack of training and understanding among service providers and court officials regarding the nature and extent of disabling conditions among youth in the system, and the implications for effective practice.
- Lack of understanding of cultural differences experienced by many youth and families in the juvenile justice system, and the implications for effective practice.
- Lack of adequate programming for incarcerated youth and those transitioning back into communities

Barriers such as these can significantly impede a young person's representation in the juvenile justice system, as well as his treatment, education and aftercare services. Systemic changes that can help to reduce these barriers must come from a variety of sources. At a minimum, these recommendations include:

School systems should:

- Find ways to provide appropriate education services to all students including students at-risk and those involved in the juvenile justice system who are detained or committed to juvenile correctional facilities.
- Develop more effective mechanisms to identify students who have disabilities or are otherwise "at-risk" and provide earlier, multidisciplinary intervention services.
- Develop mechanisms to break down cultural barriers with students and parents through training, practices, and staff composition.
- Address truancy issues using more creative "best practices" rather than relying upon the court systems, and by including services to address attendance problems in the Individualized Educational Program as required by the Individuals with Disabilities Education Act
- Develop mechanisms to overcome the mistrust and intimidation that some parents experience in dealing with educators.
- Develop proactive, positive instructional discipline policies including primary prevention and classroom management techniques that can aid teachers in effective interventions with youth who have mental health or other disabling conditions.

- Ensure that the Individualized Education Programs mandated by the IDEA address emotional, social and behavioral needs, as required by law, including positive strategies to aid the student and classroom teacher(s) on a day-to-day basis. Provide classroom teachers with the resources and supports necessary to effectively address the needs of students with behavioral manifestations while fostering learning for all children.
- Increase access for youth to other positive behavioral supports such as intervention specialists, mental health professionals and others.
- Re-examine the need for and quality of alternative education programs, including which students should utilize this resource, the goals of the program, and its effectiveness. Where alternative programs are in place, ensure placements and services are consistent with rights and requirements under the IDEA and § 504.
- Avoid the “zero tolerance” approach to discipline, including law enforcement and court referrals, in lieu of individualized consideration of the child's needs and circumstances, including ensuring that the discipline and other protections of the IDEA, § 504 and state laws and regulations.
- Adopt policies and procedures under which staff having concerns or complaints about the behavior of a student with a disability – including behavior that might otherwise prompt consideration of a court involvement – will relay them to the appropriate special education staff so that they may be addressed by the student's IEP team. Concerned staff members should participate in the IEP team's discussion and decision- making regarding appropriate positive strategies, supports, and services for addressing the behavior in question.

State agency officials providing juvenile justice and correctional treatment should:

- Provide more training opportunities for professionals working with youth with disabilities to better understand the needs of these youth, as well as the laws that protect them.
- Provide opportunities for practitioners through case conferencing and planning to bring together the various disciplines involved with the youth.
- Ensure that all facilities in which youth are detained or committed provide educational programming consistent with state and federal laws, including the IDEA and § 504, and that appropriate monitoring and quality assurance measures are in place to ensure compliance
- Obtain the educational records of detained and incarcerated youth from their prior school systems in a timely manner

- Strengthen cultural awareness to better serve the needs of minority youth and families.
- Use education advocates as needed for youth to ensure they receive the protections afforded to them by law.
- Participate in inter-agency collaboration among policy makers to examine issues such as confidentiality of information, resource development and allocation, and other cross-discipline coordination.

Juvenile court systems should:

- Promote and provide training to court workers, judges, prosecutors and others about the needs and rights of disabled students, as well as effective services for this population.
- Examine intake policies on school-related referrals and develop with local providers, responses to inappropriate school referrals to juvenile court, as well as other options in lieu of court involvement.
- Work collaboratively as part of the service delivery system for those youth to find or develop effective community-based educational services.
- Recognize the need for proper identification and evaluation of youth with mental health and/or other disabilities and ensure that appropriate systems maintain responsibility for obtaining this information.
- Ensure that youth with disabilities are afforded the protections to which they are entitled by law. Deliberations should include consideration of the impact of a disability on issues such as competency, waiver of rights, criminal culpability, transfer to adult court, and disposition or sentencing.
- Ensure that youth with disabilities receive individualized attention and consideration in lieu of a “zero tolerance” approach that does not give adequate deference to the implications of the youth's mental health or other disabling condition.

The defense bar should:

- Provide training for attorneys representing youth in the justice system to better understand the needs and rights of disabled students, and to advocate for effective mechanisms to provide services for these youth.
- Play an active role in community collaboration to seek effective service delivery models for these youth, including youth in residential treatment, detention and youth transitioning back to the community.

- Ensure that youthful clients are properly identified and evaluated when suspected or identified with mental health or other disability issues.
- Ensure that procedural protections are appropriate for youth who have disabling conditions that may affect their competency to stand trial, waiver of rights, criminal culpability, transfer to adult court, and disposition and sentencing.
- Advocate for appropriate treatment and education services for youth with mental health or other disabling conditions during periods of incarceration and transitioning back to the community.

Mental health providers and other private agencies should:

- Strive for inclusion in education and treatment planning for the youth that is inclusive of appropriate mental health services.
- Develop interdisciplinary intervention models that support community-based services, treatment while incarcerated, and services to re-integrate youth back into the community after incarceration.
- Lend expertise to other service providers about the needs and characteristics of youth with disabilities, as well as appropriate intervention techniques.
- Provide training on the needs and rights of youth with special needs to assist educators, juvenile justice workers, attorneys and others in the juvenile justice system with developing more effective means of providing education and treatment.
- Provide appropriate evaluation services for youth in the juvenile justice system based on research and innovative models.

Appendix A

Common Mental Health Disorders Among Youth in the Juvenile Justice System with Characteristics and Possible Interventions

These descriptions attempt to provide the reader with some of the characteristics youth experiencing these disorders may express. These are not exhaustive lists as each youth will be unique in his or her presentation of symptoms. Nor will a youth show all of these characteristics. It is when the child or adolescent is exhibiting a number of these characteristics, they are quite severe, and/or they represent a deterioration from previous functioning that evaluation and treatment should be sought. Similarly, the suggested interventions are those that are recommended by authorities in the field of child and adolescent psychology and psychiatry. The specific treatment approach designed for a youth will depend upon that youth's current needs.

Conduct Disorder

Descriptions and risk factors

- Bullies, threatens, or initiates physical fights
- Used a weapon to cause serious harm
- Physically cruel to people or animals
- Confronted another to steal items
- Forced another into sexual activity
- Deliberately destroyed property or set fires to destroy property
- Broken into another's house, car, stolen items, lied to obtain goods
- Truancy from school
- Repeated running away¹

Suggested Interventions

- Generally must be long term
- Family therapy that includes parent training
- Individual therapy using behavioral and/or cognitive strategies
- Group therapy
- Skills training
- Peer intervention: promoting socially appropriate peer networks
- Vocational or independent-living skills training
- Mentor groups such as Big Brothers and Big Sisters²

¹ American Psychiatric Assoc., *supra* note 9 at 90.

² *Practice Parameters for the Assessment and Treatment of Children, Adolescents and Adults with Conduct Disorder*, 36 Journal of the American Academy of Child and Adolescent Psychiatry 122S, 134S (1997).

Oppositional Defiant Disorder

Descriptions and risk factors

- Frequently loses temper
- Arguing with adults
- Actively defying rules
- Deliberately annoying others
- Blaming other for his or her mistakes
- Easily angered or resentful
- Spiteful³

Suggested Interventions

- Clear rules and consequences for behavior
- Behavior management strategies such as star charts or token economies
- Parent training in behavior management
- Social skills training

Attention Deficit Hyperactivity Disorder (ADHD)

Description and Risk Factors

- Inattention:
 - Fails to give close attention to details
 - Difficulty sustaining attention
 - Not listening or being easily distracted
 - Not following through or tasks or activities
 - Difficulty organizing
- Hyperactivity
 - Fidgeting
 - Being “on the go” or acting as though driven by motor
 - Talking excessively
- Impulsivity
 - Interrupting
 - Blurting out responses
- Issues specific to Adolescents
 - Restlessness often more prevalent than hyperactivity
 - Inattention
 - Poor impulse control
 - Poor organizational skills
 - Difficulty setting and keeping priorities
 - Poor problem-solving strategies
 - Low self-esteem
 - Poor peer relationships
 - Increased likelihood of dangerous impulsivity and poor judgment⁴

³ American Psychiatric Assoc., *supra* note 9 at 94.

Interventions

- Medication
- Behavior Modification: specific contingencies for behavior, token economies;
Target specific behaviors, contingencies should follow consistently, vary reinforcements for appropriate behavior
- Social skills training
- Academic skills training
- Self-monitoring/self-evaluation training
- Education about ADHD
- Support groups
- Recreational therapies⁵

Major Depressive Disorder and Dysthymia**Description and Risk Factors**

- Depressed or irritable mood
- Loss of interest and pleasure
- Changes in patterns of appetite, weight, sleep or energy
- Decreased motivation
- Low self-esteem
- Decreased school performance
- Withdrawal from enjoyed activities
- Less frequent peer interaction

Children

- Show more anxious symptomatology
- May show irritability with temper tantrums or behavior problems

Adolescents

- Sleep and appetite disturbances
- Delusions
- Suicidal ideation and attempts
- Greater impairment than children⁶

⁴ *Practice Parameters for the Assessment and Treatment of Children, Adolescents and Adults with Attention Deficit Disorder*, 36 *Journal of the American Academy of Child and Adolescent Psychiatry* 85S, 103S (1997).

⁵ *Id.* at 110S.

⁶ *Practice Parameters for the Assessment and Treatment of Children, Adolescents Depressive Disorders*, 37 *Journal of the American Academy of Child and Adolescent Psychiatry* 63S, 64S (1997).

Suggested Interventions

- Always take any suicidal gestures seriously: assess functional impairment, degree of hopelessness, availability of support, availability of method, consider treatment in a restrictive setting
- Education of the youth and his/her family about the disorder
- Individual therapy
- Group therapy
- Medication intervention

Bipolar Disorder (Manic Depressive Disorder)

Description and Risk Factors of Mania (See also description of Depressive Symptomatology)

Children

- Labile and erratic changes in mood, psychomotor agitation, and mental excitement
- Irritability
- Belligerence
- Mixed features of mania and depression
- Because of developmental and social limitations, children may show school failure, fighting, and dangerous play that is more severe in its presentation than typical aged behaviors

Adolescents

- Psychotic symptoms: paranoia, marked thought disorder, hallucinations
- Extremely labile moods that may have mixed depressive and manic features
- Deterioration in behavior⁷

Suggested Interventions

- Medication
- Assess suicide risk
- Education about the disorder
- Long-term treatment plans that include psychotherapy, support groups, educational and vocational services⁸

Schizophrenia and Other Psychotic Disorders

Descriptions and Risk Factors

- Marked deterioration in social, occupational and self-care functioning compared to previous levels or descriptions of functioning

⁷ *Practice Parameters for the Assessment and Treatment of Children, Adolescents with Bipolar Disorder*, 36 Journal of the American Academy of Child and Adolescent Psychiatry 157S, 159S-160S (1997).

⁸ *Id.* at 171S.

- Marked change in mental status
- Delusions
- Hallucinations (e.g., auditory, visual)
- Disorganized speech
- Flat affect
- Paucity of thought or speech⁹
- Inappropriate affect
- Loss of interest or pleasure in activities (e.g., eating)
- Disturbances in sleep
- Unusual psychomotor movements (e.g., pacing, apathetic immobility)¹⁰

Suggested Interventions

- **Always** seek assessment for differential psychiatric diagnosis (e.g., bipolar disorder), risk of suicide, comorbid disorders, and medical causes (e.g., neurological or substance abuse)
- Medication therapy
- Education of the child and family concerning the nature of the illness, prognosis, and treatment needs
- Social skills training
- Problem solving training
- Individual, group, family therapy
- Inpatient hospitalization if symptoms are severe or potentially dangerous
- Partial hospitalization or day treatment programs
- Residential treatment
- Special education services
- Vocational training
- Upon transition to the community, services may include a case manager, in-home services, family support¹¹

⁹ *Practice Parameters for the Assessment and Treatment of Children and Adolescents Schizophrenia*, 36 Journal of the American Academy of Child and Adolescent Psychiatry 177S, 179S-180S (1997)

¹⁰ American Psychiatric Assoc., *supra* note 9 at 273.

¹¹ Practice Parameters, *supra* note 131 at 188-192.

Post Traumatic Stress Disorder

Description and Risk Factors

- Extreme stress that involves experiencing or witnessing an event that is capable of causing death or severe injury, or a threat of injury or death, or learning about a significant other involved in such a situation
- Re-experiencing the event such as through thoughts or nightmares
- Avoiding talking about, being with people, or going to places associated with the event
- Amnesia for important aspects of the trauma
- Withdrawal from friends and usual activities
- Hyperarousal and hypervigilance
- Difficulties concentrating
- Adolescents with chronic PTSD may show dissociative features, self-injurious behavior, substance abuse, or suicidal behavior, or other anxious symptoms¹²

Suggested Interventions

- If appropriate, assess whether these behaviors are malingering
- Treatment may be short or long-term depending on the youth's needs
- Education about the disorder and available treatments
- Relaxation techniques
- Trauma-focused therapy: explore and discuss the traumatic events
- Behavioral modification to address related behavioral difficulties
- Cognitive-behavioral methods to control intrusive thoughts
- Group therapy
- Medications if appropriate¹³

Learning and Communication Disorders

Note: as Learning Disorders have many diverse causes, each youth with a Learning Disorder is likely to present with very different behaviors. The following are some global descriptions to be considered

Descriptions and Risk Factors

- Significant difference between academic achievement in some areas and overall intelligence
- Difficulties for specific academic skills such as reading comprehension, spoken language, or writing
- Hyperactivity
- Inattention
- Impulsiveness
- Poor organization

¹² Practice Parameters for the Assessment and Treatment of Children, Adolescents with Posttraumatic Stress Disorder, 37 *Journal of the American Academy of Child and Adolescent Psychiatry* 5S, 7S (1998).

¹³ *Id.* at 16S-17S.

- Difficulties organizing and integrating thoughts
- Problems with social interactions¹⁴

Suggested Interventions

- Have a structured environment with clear expectations
- Use short sentences¹⁵
- Comprehensive assessment to identify and describe the specific area(s) of difficulty
- Tutoring and specialized instruction for the specific area of difficulty
- Limit daily TV viewing and substitute reading activities when the youth has reading difficulties
- Provide multisensory information (e.g., providing the information in writing while also verbally telling the youth)
- Allow the youth to use a computer for written information
- Daily study times in a designated area¹⁶

Mental Retardation

Description and Risk Factors

Note: as Mental Retardation has many diverse causes, each youth with Mental Retardation is likely to present with very different behaviors. The following are some global descriptions to be considered

- Difficulties in accurate self-reporting
- Readily agreeing with leading questions
- Noncompliant or aggressive behaviors
- History of delayed developmental milestones
- Significant academic difficulties¹⁷

Suggested Interventions

- Multi-modal treatments that include community based intervention
- Use clear, concrete communications
- Use familiar examples to aid understanding
- Assess understanding of questions/statements
- Avoid yes/no questions as often the last statement will be endorsed
- Adapt conversation to youth's level of communication

¹⁴ National Information Center for Children and Youth with Disabilities. Fact Sheet #7 General Information about Learning Disabilities (2000)

¹⁵ *Id.*

¹⁶ General Information on Academic Difficulties. Information sheet compiled by Mary Ann Mulcahey, Ph.D.

¹⁷ *Practice Parameters for the Assessment and Treatment of Children, Adolescents and Adults with Mental retardation and Comorbid Mental Disorders*, 38 Journal of the American Academy of Child and Adolescent Psychiatry 5S, 16S (1997).

- Provide assurance and support during interviews/ interventions
- Thorough assessment of personal strengths and weaknesses to aid treatment planning
- Educational support
- Vocational training
- Social skills training including how to resist peer pressure
- Developing coping methods
- Training in self-care, community and home living
- Always asses for comorbid mental health disorders
- Medication for comorbid mental health disorders¹⁸

Pervasive Developmental Disorders

Descriptions and Risk Factors

Note: Youth with Pervasive Developmental Disorders will vary in the severity and range of behaviors. Accurate identification of many of these behaviors will require historical information about the youth. The following are global descriptions to be considered

- Little interest in peer relationships
- If interested in friendships, a lack of understanding of social norms and rules
- Preference for solitary activities
- Little awareness of others' feelings or needs
- Difficulty initiating or sustaining conversations
- Repetitive use of words, phrases, or themes
- Difficulty understanding conversation, jokes, or questions
- Few interests but these interests are intense
- Extreme distress when there are changes in routine or transitions from activities
- Unusual body movements (e.g., rocking, hand movements)¹⁹

Suggested Interventions

Note: If the youth also is identified with Mental Retardation, many of the same interventions apply

- Use clear, concrete communications
- Use familiar examples to aid understanding
- Assess understanding of questions/statements
- Adapt conversation to youth's level of communication
- Provide assurance and support during interviews/ interventions
- Thorough assessment of personal strengths and weaknesses to aid treatment planning
- Educational support

¹⁸ *Id.* at 17S, 21S.

¹⁹ American Psychiatric Assoc., *supra* note 9 at 66-67.

- Vocational training
- Social skills training
- Developing coping methods
- Training in self-care, community and home living

Traumatic Brain Injury

Description and Risk Factors

Note: as Traumatic Brain Injury has many diverse causes, each is likely to present with very different behaviors. Following are some global descriptions to be considered:

- Symptomatology may be subtle
- Symptomatology may not surface for several years
- Potential difficulties for attention and concentration
- Potential difficulties for planning
- Potential difficulties of judgment or perception
- Possible learning and memory problems
- Possible communication or language difficulties
- Perseverative and avoidant behaviors
- Emotional and behavioral symptomatology such as anxiety, emotional lability, or depression²⁰

Suggested Interventions

- A neurological evaluation to assess functioning and needs
- A neuropsychological evaluation to assess functioning and needs
- Psychotherapy to assist the youth and his or her family
- Modification of the school environment for the youth's needs²¹

The following suggestions are described by Jerome Sattler, citing DePompei, Blosser, & Zarski, 1989 and Lubinski, 1981:

- Face the youth when talking
- Talk about concrete topics
- Provide time for the youth to comprehend the information provided
- Ascertain the youth's understanding of conversations
- Repeat important ideas in multiple ways to enhance comprehension
- Use nonverbal cues such as gestures or pictures if possible²²

²⁰ Sattler, Jerome S. Children with Brain Injuries. In *Clinical and Forensic Interviewing of Children and Families: Guidelines for the Mental Health, Education, Pediatric, and Child Maltreatment Fields* (Jerome S. Sattler Publisher, Inc. 1998) at 624-626, 633.

²¹ Id. at 630, 647, 651

²² Id. at 633-634, citing DePompei, Blosser, & Zarski (1989) and Lubinski (1981)

Appendix B

Specific Questions to Be Answered in Evaluating a Youth's Competency to Stand Trial

This format is presented by Thomas Grisso in Juvenile Competence to Stand Trial in *Forensic Evaluations of Juveniles* (1998) pg. 91-92. This is adapted from McGarry, L. Competency to Stand Trial and Mental Illness (Publication No. ADM 77-103). Rockville, MD: Department of Health, Education, and Welfare (1973).

Understanding of the Charges and Potential Consequences

- The youth's ability to understand and appreciate the charges and their seriousness
- The youth's ability to understand possible dispositional consequences of guilty, not guilty, and not guilty by reason of insanity
- The youth's ability to realistically appraise the likely outcomes

Understanding of the Trial Process

- The youth's ability to understand, without significant distortion, the roles of participants in the trial process
- The youth's ability to understand the process and potential consequences of pleading and plea bargaining
- The youth's ability to grasp the general sequence of pretrial and trial events

Capacity to Participate with the Attorney in a Defense

- The youth's ability to adequately trust or work collaboratively with the attorney
- The youth's ability to disclose to the attorney reasonably coherent description of facts pertaining to the charges, as perceived by the defendant
- The youth's ability to reason about available options by weighing their consequences, without significant distortion
- The youth's ability to realistically challenge prosecution witnesses and monitor trial events

Potential for Courtroom Participation

- The youth's ability to testify coherently, if testimony is needed
- The youth's ability to control own behavior during trial proceedings
- The youth's ability to manage the stress of trial

Appendix C

Factors to be Considered in Determining if a Youth's Waiver of Miranda Rights or Confession are Valid

This format is presented by Thomas Grisso in Juvenile Waiver of Miranda Rights in *Forensic Evaluations of Juveniles* (1998) pg. 60-61

Circumstances in Days Prior to Arrest

- Significant stresses in youth's and family's life
- The mental status of the youth
- The time of day of the arrest

Circumstances at the Time of Arrest

- Where and how the arrest occurred
- The officers who were involved and what was said
- The mental/emotional state of the youth, including impact of alcohol or drugs
- The parents' involvement and actions

Transportation to the Police Station

- The mode of transportation
- Who went with the youth
- When did the youth arrive at the police station

At the Station Prior to Questioning

- The time of arrival and time of questioning
- The physical conditions during the waiting period

Questioning

- The physical properties of the room
- Who was present during questioning
- The physical arrangement of seating
- What was said in preparation for questioning
- How the Miranda warnings were given

Parent and Youth Communications Prior to Waiver

- Whether the youth asked the parent any questions
- What the parent advised and why

Sequence and Description of the Questioning Process

- Observations of behavior and emotions of the youth
- Observations of behavior and emotions of the officers
- The parents' reflections on their own behavior, thoughts, emotions and expectations

Appendix D

Factors to be Considered in Evaluating a Youth at Risk of Transfer to Adult Court

This checklist is excerpted from Beyer, Marty *Experts for Juveniles at Risk of Adult Sentences More than Meets the Eye: Rethinking Assessment, Competency and Sentencing for a Harsher Era of Juvenile Justice*. A report of the Juvenile Justice Center American Bar Association Criminal Justice Section (1997) pg. 21-22

1. Youth's Thought Process

- Magical Thinking
- Protecting self from perceived harm (fear; racism)
- Failure to anticipate (surprised; "happened to" child)
- Minimized danger? Did not see potential harm?
- Choice making

2. Moral Development

- View of laws and social rules
- Appreciating mutual respect and responsibility
- Family and religious values
- Conscience and responsibility for role in the alleged offense
- Conflict between moral values and rules of the street

3. Unresolved Trauma

- Victim of abuse and/or neglect
- Unresolved losses
- Difficulty trusting

4. Identity

- Patchwork self due to trauma, failure, inconsistent attention
- Disloyalty to family, including cultural issues

5. Purpose(s) Served by Behavior

- Express anger at past maltreatment?
- Release frustration about school failure?
- Attention-seeking?
- Relieve depression?

- Achieving a sense of belonging?
- To be in control?

6. School Experience

- Attendance, grades, standardized scores
- How do the youth's measured intelligence and "street smarts" affect his/her behavior

7. Strengths (including what the youth is best at)

8. Needs

- Emotional needs (including family)
- Educational needs
- Cultural needs
- Gender-related needs
- Medical needs
- Where is the youth developmentally? In what areas is he/she still developing?

9. Services the youth has received. Did they meet his/her needs?

10. Effective rehabilitation: services to meet needs and build on strengths (amenability to treatment)

11. Potential harm from incarceration in adult facility

Appendix E

Factors to be Considered in Determining Disposition/Sentencing

This evaluation format is excerpted from Beyer, Marty. Recognizing the Child in the Delinquent. 8 *Kentucky Children's Rights Journal* 16 (1999).

1. What are this young person's strengths?

2. What are the thought processes of the youth?

- How mature are this young person's thought processes?
- At the time of the offense, to what extent was this young person anticipating outcomes?
- Was he or she reacting to threat, minimizing, or seeing only one choice?
- Could this young person foresee the consequences of his/her actions?
- Was this young person able to plan like an adult, and under stress, how did he/she react if things did not occur as planned?
- If the young person was carrying a weapon, to what extent had he/she envisioned using the weapon to cause injury?
- What else is informative about this young person's intent at the time of the offense?

3. What are the moral values of the youth?

- What moral values was this young person brought up with in his/her family?
- What is this young person's understanding of fairness, rights, and responsibility?
- Does this young person consider loyalty a higher moral principle than conventional views of right and wrong?
- How does this young person view the wrongfulness of the offense, and how does he/she explain if the offense was a violation of his/her moral values?

4. What are the relationships of the youth?

- Who is this young person most attached to?
- Does the young person feel a sense of belonging?

5. Describe the youth's empathy

- Who does this young person show the most empathy for?
- What are the young person's feelings for his/her victim?
- Are this young person's adolescent bravado and/or his/her view of the offense as accidental misinterpreted as a lack of remorse?

6. What is the impact of prior trauma?

- What connection, if any, exists between his/her childhood trauma and the offense?

- Does this young person need help recognizing that he/she is not to blame for childhood neglect, physical or sexual abuse, or domestic violence?
- Does he/she need help getting out of a victim role?
- How much loss has the young person experienced?
- To what extent has the young person grieved these losses?
- Is this young person unusually controlling because of early victimization?

7. What is the youth's learning style?

- What connections, if any, exist between this young person's history of school problems and the offense?
- Is this young person primarily an auditory learner, a visual learner, or someone who learns best by doing?
- Does he/she need to develop compensatory skills for difficulties in processing visual or spoken information?
- What is this young person's current reading and math skill level?
- What is this young person's school history, including most recent IEP objectives?
- Does he/she feel picked on by teachers or students?
- Is school nonattendance caused by boredom or being embarrassed by lack of skills?
- Does this young person have sports/music/art or other special interests that should be built on?

8. Describe the youth's anger and fears.

- Does this young person have an anger cycle or a fear cycle?
- Does this young person overreact to perceived hostility from others?
- Does this young person need to improve the ability to regulate specific behaviors?
- Does this young person need to improve the ability to express him/herself in effective, non-aggressive ways?
- In what ways, if any, was this young person's anger cycle or fear cycle operating during the offense?

9. What are the reasons for the delinquent behavior?

- Is this young person's delinquent behavior a method of getting attention?
- Is this young person's delinquent behavior a methods of gaining control?
- Does this young person's delinquent behavior express anger?

10. Describe characteristics of the youth

- To what extent is this young person's delinquency driven by a need for approval?
- What is this young person good at?
- Does this young person have a positive view of him/herself in the future?
- What type of vocational instruction and/or employment assistance would fit this young person's need for success?

11. Does the youth abuse substances?

- What connections, if any, exist between this young person's substance abuse and the offense?
- What is the extent of this young person's use of alcohol and drugs?
- Does this young person use substances to relieve depression or hopelessness?

12. What are appropriate services based upon identification of the youth's needs and strengths?

- What are the specific services that would meet his/her emotional, educational, and other developmental needs and build on those strengths?
- What setting is likely to have the identified services to meet these needs and build on those strengths?
- What setting would not meet this young person's needs or would be harmful to this young person?

13. What is the youth's amenability to treatment?

- How amenable is the young person to the treatment recommended?
- Does he/she want to change?
- Does she have a desire for approval that could lead to change?
- What is the prognosis for this young person if these services are provided?

Appendix F

The National Center on Education, Disability, and Juvenile Justice **Promising Practices in Transition for Youth in the Juvenile Justice System** **Long Term Correctional Facilities**

- Staff awareness of and familiarity with all county, state, local, and private programs that receive and/or send youth to/from long-term correctional facilities.
- To the extent possible, individualized pre-placement planning prior to the transfer of youth from jails, detention centers, or other programs to long-term correctional facilities should exist.
- The immediate transfer of youth's educational records from jails, detention centers, or other programs to long-term correctional facilities.
- A variety of specific educational programs are provided including: academics, vocational and job related skills, social skills, independent living skills, and law-related education.
- A variety of support services are provided including: work experience and placement, alcohol and drug abuse counseling, anger management, vocational counseling, health education, and training for parenthood.
- External resources such as speakers, tutors, mentors, vocational trainers, substance abuse counselors, employers, volunteers, and job counselors are used.
- Students in long-term correctional facilities should have access to a resource center, which contains a variety of materials related to transition and support.
- Special funds are earmarked for transition and support services.
- Interagency meetings, cooperative inservice training activities, and crossover correctional and community school visits are held regularly to ensure awareness of youth and agency transition needs.
- A process exists for the immediate identification, evaluation, and placement of youth with disabilities.
- An individualized education program is developed for each student with disabilities that includes a transition plan.
- An individual transition plan is developed with all students, which includes the student's educational and vocational interests, abilities, and preferences.

- A transition planning team is formed immediately upon student entry into a long-term correctional facility to design and implement the individual transition plan.
- The immediate transfer of youth's educational records from long-term correctional facilities to community schools or other programs.
- Coordination with parole to ensure a continuum of services and care is provided in the community.
- Coordination with public and private school educational program personnel to ensure that they advocate for these youth, cultivate family involvement, maintain communications with other agencies, and place students in classes with supportive teachers.
- A community based transition system exists for maintaining student placement and communication after release from a long-term correctional.
- The existence of a system for periodic evaluations of the transition program and all of its components.

The National Center on Education, Disability, and Juvenile Justice
Promising Practices in Transition for Youth in the Juvenile Justice System
Short Term Jails and Detention Centers

- Staff awareness of and familiarity with all county, state, local, and private programs that receive and/or send youth to/from jail or detention center.
- The immediate transfer of youth's educational records from public and private educational programs to jails or detention centers.
- The existence of an extensive diagnostic system for the educational, vocational, and social, emotional, and behavioral assessment of youth.
- Students in jails or detention centers should have access to a resource center which contains a variety of materials related to transition and support services.
- Special funds are earmarked for transition and support services.
- Interagency meetings, cooperative inservice training activities, and crossover correctional and community school visits are held regularly to ensure awareness of youth and agency transition needs.

- A process exists for the immediate identification, evaluation, and placement of youth with disabilities.
- An individualized education program is developed for each student with disabilities that includes a transition plan.
- An individual transition plan is developed with all students which includes the student's educational and vocational interests, abilities, and preferences.
- To the extent possible, individualized pre-placement planning prior to the transfer of youth from jails or detention centers to the community or long-term correctional facilities should exist.
- The immediate transfer of youth's educational records from jails or detention centers to community schools, long-term correctional facilities, or other programs.
- Coordination with probation to ensure a continuum of services and care is provided in the community.
- Coordination with public and private educational program personnel to ensure that they advocate for these youth, cultivate family involvement, maintain communications with other agencies, and place students in classes with supportive teachers.
- The existence of a system for periodic evaluations of the transition program and all of its components.