

# TEACH YOUR CHILDREN WELL: PROPOSED CHALLENGES TO INADEQUACIES OF CORRECTIONAL SPECIAL EDUCATION FOR JUVENILE INMATES

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## ABSTRACT

Education for all children is an oft-repeated political tagline. While politicians claim to be committed to educating all children and states devote taxpayer dollars to improving public schools, education for an entire subclass of children—those with disabilities who are incarcerated in adult prisons—is suffering. These children, entitled to receive an individually-tailored education equal to that of their nonincarcerated peers, rarely receive their legal due. This article explores the failure of states to provide special education to juveniles incarcerated in adult prisons. The article examines this issue on a national level but focuses specifically on New York and Florida—two of the three states with the most juveniles incarcerated as adults—as a microcosm for the broader scope of the problem. The article proposes various ways for advocates and policymakers to attack inadequate special education in prisons.

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INTRODUCTION

Youth incarcerated in adult prisons, especially those with learning disabilities, are often denied their right to education, despite clearly defined legal mandates to the contrary. Increasing trends of incarceration have resulted in the systemic denial of appropriate education services for countless youth, despite state and federal statutory and constitutional mandates. During the years that the state is obligated to educate these youth, they receive barely any education at all. Faced with budget shortages, staffing inadequacies, and lack of political will, prisons are falling short of their legal obligation to provide special education to all

juveniles with disabilities,<sup>1</sup> a group that comprises a significant percentage of juveniles in the American criminal justice system.<sup>2</sup>

This article addresses the education barriers that face learning-disabled juvenile inmates between the ages of thirteen and twenty-one who are incarcerated in adult prisons. Existing scholarship has discussed education and juvenile delinquency broadly<sup>3</sup> or focused on specific aspects of federal and state law and practice.<sup>4</sup> Some articles have addressed the intersection between special education and juvenile justice from an educational rather than a criminal justice perspective and have focused on juveniles in the juvenile system rather than juveniles legally treated as adults.<sup>5</sup> This article unifies these various strains of scholarship by exploring the overrepresentation of youth with education-related disabilities in the adult criminal justice system and by presenting strategies to challenge policies that threaten these young people's futures. In contrast to most other scholarship, this article restricts discussion to

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1. Throughout this paper, "disabilities" refers to educational disabilities—specifically learning and behavioral disabilities—that are covered under federal laws mandating provision of special education.

2. Recent statistics estimate that between thirty and fifty percent of youth in both the juvenile and adult criminal justice systems can be identified as learning or behaviorally disabled. ROBERT B. RUTHERFORD, JR., MICHAEL BULLIS, CINDY WHEELER ANDERSON & HEATHER GRILLER-CLARK, YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 7 (2002), available at <http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf>.

3. See, e.g., Peter E. Leone, Barbara A. Zaremba, Michelle S. Chapin & Curt Iseli, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 UDC/DCSL L. REV. 389 (1995) (exploring the high statistics of youth with disabilities in juvenile detention and positing theories of causation and effect); Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125 (2000) (providing a general overview of the intersections between the juvenile and criminal justice systems and special education law).

4. See, e.g., Moira O'Neill, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189 (2006) (focusing on the Individuals with Disabilities Education Act's (IDEA) current definition of "emotional disturbance," used in determining "disability," and therefore eligibility for IDEA's protections, and arguing that it undermines IDEA's mandate to provide special education services to disabled youth by excluding "socially maladjusted" youth from its protections); Jennie Rabinowitz, *Leaving Homeroom in Handcuffs: Why an Over-Reliance on Law Enforcement to Ensure School Safety Is Detrimental to Children*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 153 (2006) (discussing the prevalent practice of referring students with disciplinary infractions to law enforcement and suggesting alternative methods for achieving school safety).

5. See, e.g., Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3 (2003) (focusing on the failures of professionals in schools and in the juvenile and criminal justice systems to respond to children's learning disabilities and discussing how these failures lead to poor educational outcomes, including an overrepresentation of youth with disabilities in the juvenile criminal justice system).

juveniles in adult prisons.<sup>6</sup> Deprived of the benefits of a specifically-tailored system by legislation and law enforcement discretion, these youth are among the most vulnerable populations in the criminal justice system.

This article will serve as a guide for advocates to challenge inadequacies of special education in adult prisons. The first Part describes the extent of educational inequities in adult prisons, building a conceptual framework in which to understand the uniquely vulnerable position of young inmates with special education needs. Part II briefly outlines states' legal obligations to provide special education services to all youth, and Part III describes social policies that contribute to this correctional special education crisis. Part IV looks at states' correctional education systems, focusing on New York and Florida. Strategies to challenge states' failures to provide special education to incarcerated youth are presented in Part V, focusing on three strategies for change: lobbying for stricter legislative oversight, increasing public awareness through media campaigns, and bringing lawsuits in federal court seeking prospective relief.

## I.

### SCOPE OF THE ISSUE

#### *A. The Special Case of Juveniles in Adult Prisons*

Most children under the age of sixteen or seventeen who commit crimes are prosecuted in the juvenile justice system. Every state has a juvenile justice system, composed of courts and facilities to process juveniles who have been arrested.<sup>7</sup> This specialized court system, created in the early twentieth century, was based in two theories: a rehabilitative ideology that advocated treating children differently from adults when they committed crimes and a more formal belief that the state has a right to intervene in place of negligent parents.<sup>8</sup> The juvenile justice system was

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6. Other articles focusing on juveniles with disabilities in the adult criminal justice system have been narrowly focused, often examining closely a particular decision or statute without exploring the interrelations of the various systems and laws that inform the rights of juveniles to an appropriate education. *See, e.g.*, Jamie Polito Johnston, *Depriving Washington State's Incarcerated Youth of an Education: The Debilitating Effects of Tunstall v. Bergeson*, 26 SEATTLE U. L. REV. 1017 (2003) (arguing that a Washington Supreme Court case was wrongly decided under state and federal law as it denies special education to juveniles incarcerated in adult facilities); Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of Tunstall v. Bergeson*, 2003 BYU EDUC. & L.J. 193 (arguing that the Washington state statute upheld by *Tunstall v. Bergeson* is bad law).

7. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, The Justice System, <http://bjs.ojp.usdoj.gov/content/justsys.cfm#juvenile> (last visited Apr. 22, 2010). These courts "usually have jurisdiction over matters concerning children, including delinquency, neglect, and adoption." *Id.*

8. *See* Ctr. on Juvenile & Criminal Justice, Juvenile Justice History, <http://www.cjcj.org>.

originally based on concern for the offender, rather than punishment for the crime.<sup>9</sup> This perspective gave judges in juvenile proceedings more flexibility in determining case dispositions than the strict sentencing guidelines in the criminal justice system.<sup>10</sup> In the 1950s and 1960s, juvenile court procedures were formalized after concerns arose about the effectiveness of the system; these reforms included the right to an attorney and a requirement that charges be proved “beyond a reasonable doubt.”<sup>11</sup> Beginning in the 1980s, the juvenile justice system moved toward harsher punitive policies, straying from its origins because of political pressure over rising crime rates.<sup>12</sup>

The movement toward a more punitive juvenile justice system took place in both legislatures and courtrooms. Seventeen states rewrote the purpose clause of their juvenile courts to emphasize public safety and sanctions.<sup>13</sup> Many state legislatures also passed statutes mandating minimum dispositions for juvenile offenders.<sup>14</sup>

In addition to increasing the harshness of the juvenile justice system, states also began moving juveniles out of the juvenile system and into the adult criminal system for certain crimes using two strategies: enacting transfer statutes and lowering the age for adult culpability. Every state has passed some form of transfer statute that gives prosecutors and judges broad discretion to try and sentence juveniles as adults for specified (usually violent) crimes.<sup>15</sup> Most states provide for transfer of youths aged

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org/public\_education/juvenile\_justice\_history (last visited Apr. 22, 2010) (outlining the history of the juvenile justice system in the United States). The latter philosophy supporting the state’s right to intervene, also known as *parens patriae*, is the power invoked by the state to intervene as a party in child welfare cases, under the theory that the state can act as parent to children whose natural or legal parents are unable to adequately care for them.

9. *Id.*

10. *Id.*

11. *Id.* See also *In re Gault*, 387 U.S. 1, 30–31 (1967) (affirming that, while juvenile justice procedures may not necessarily need to meet all the constitutional requirements imposed on adult criminal proceedings, they nonetheless “must measure up to the essentials of due process and fair treatment,” which include adequate notice of the charges and a right to counsel).

12. Ctr. on Juvenile & Criminal Justice, *supra* note 8. See also Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 1–2 (1989) (identifying perceived rising juvenile crime rates as one factor that may have influenced the shift to a more punitive juvenile justice system).

13. NAT’L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 155 (2001).

14. See Ctr. on Juvenile & Criminal Justice, *supra* note 8.

15. Juveniles can be transferred from juvenile court to criminal court to be tried and sentenced as adults in all fifty states, the District of Columbia, and under federal law. See Kirk Heilbrun, Cara Leheny, Lori Thomas & Dominique Huneycutt, *A National Survey of U.S. Statutes on Juvenile Transfer: Implications for Policy and Practice*, 15 BEHAV. SCI. &

fourteen and older.<sup>16</sup> In addition, many state legislatures have lowered the age at which adult criminal courts assume jurisdiction over young people, regardless of the crime alleged.<sup>17</sup> For instance, New York terminates juvenile court jurisdiction at fifteen years of age, sending all teenagers who are arrested at age sixteen and older directly to the adult criminal justice system.<sup>18</sup>

These statutes do more than move children's cases into a different court building. They transfer children from a putatively treatment-focused system to a system grounded in incapacitation, retribution, and punitive control.<sup>19</sup> This transfer process can deny juvenile offenders access to rehabilitative programs, including special education programs, that they would have been entitled to receive in a juvenile facility. Juvenile facilities devote more attention to educational programs than adult facilities,

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L. 125, 144 (1997). While the juvenile justice system historically provided for waivers, whereby prosecutors could seek to have specific juveniles transferred to the adult criminal system for particularly grievous offenses, many of today's transfer statutes make that transition automatic and simplify the procedures required before a transfer can be made. Ctr. on Juvenile & Criminal Justice, *supra* note 8.

16. As of 1996, in twenty-two states, the minimum age at which a youth could be transferred to adult court was fourteen for certain offenses. Heilbrun, Leheny, Thomas & Huneycutt, *supra* note 15, at 128–43 tbl.1. In addition, the collateral effects of these transfer laws are lasting—thirty-four states and the District of Columbia mandate that once a juvenile is tried as an adult in state criminal courts, she must always be tried as an adult in subsequent criminal proceedings regardless of the nature of her subsequent offenses. See HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT 110 (2006), available at <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf>.

17. See PATRICK GRIFFIN, NAT'L CTR. FOR JUVENILE JUSTICE, TRYING AND SENTENCING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER AND BLENDED SENTENCING LAWS (2003), available at <http://www.ncjservehttp.org/NCJJWebsite/pdf/transferbulletin.pdf>.

18. N.Y. FAM. CT. ACT § 301.2 (McKinney 2008); N.Y. PENAL LAW § 30.00 (McKinney 2009). See also SNYDER & SICKMUND, *supra* note 16. While the juvenile system's jurisdiction automatically terminates once an offender attains sixteen years of age, transfer is also provided for youth as young as thirteen who have been charged with certain serious crimes. N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney Supp. 2010). Note, however, that New York allows criminal courts to grant youth between the ages of sixteen and nineteen "youthful offender" treatment for certain crimes if the offense is their first felony finding and if they do not have a prior "youthful offender" finding in another felony case. N.Y. CRIM. PROC. LAW § 720.10(2) (McKinney 1995 & Supp. 2010). A "youthful offender" finding is not considered a criminal conviction, and records of the finding are required to be kept confidential. N.Y. CRIM. PROC. LAW § 720.35 (McKinney Supp. 2010). Although youthful offender treatment mitigates some of the harshness of the criminal system for teenagers, application of youthful offender status is discretionary. N.Y. CRIM. PROC. LAW § 720.20(1) (McKinney 1995).

19. Though the punitive nature of the juvenile justice system has increased, the system still retains an element of rehabilitation surpassing that found in the adult criminal system. See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 141 (2000) (noting that the juvenile detention system has traditionally placed greater emphasis on treatment than has the adult correctional system).

resulting in lower teacher-inmate ratios and higher rates of participation in educational programs.<sup>20</sup> Involvement with the criminal justice system also increases the likelihood of recidivism (at least for certain types of offenses) making transfer procedures particularly relevant to those concerned about public safety and government efficiency.<sup>21</sup>

The decision to prosecute juveniles in criminal court has dramatic consequences for their health and safety. Youth in adult prisons<sup>22</sup> are among the most vulnerable populations in the criminal justice system.<sup>23</sup> Under the Juvenile Justice and Delinquency Prevention Act, a federal law that provides funding to states that comply with guidelines in their treatment of juvenile offenders, juveniles can be confined in adult prisons “only if such juveniles do not have contact with adult inmates.”<sup>24</sup> However, this act does not apply to juveniles who are being prosecuted as adults in state court.<sup>25</sup> Juveniles in adult facilities report feeling threatened or vulnerable at higher rates.<sup>26</sup> Their fears are well-founded: rates of violent attacks against juveniles in adult prisons are significantly higher than those against juveniles in juvenile facilities.<sup>27</sup> A 1988 study found that juveniles in adult prisons are nearly twice as likely to be beaten by prison staff and five times as likely to be sexually assaulted as youth confined in juvenile facilities.<sup>28</sup> Juveniles held in adult jails commit suicide at five times the rate of nonincarcerated youth and eight times the rate of youth held in juvenile facilities.<sup>29</sup> As of 2000, “safely housing juveniles in adult facilities and protecting younger inmates from predatory, older inmates

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20. *See id.* at 140 (reporting, for example, an average teacher-student ratio of 1:100 in adult facilities and 1:15 in most juvenile facilities).

21. *See id.* at 131–32 (highlighting a study that found “substantial differences in recidivism among robbery offenders prosecuted in juvenile versus criminal court”).

22. Housing of young people prosecuted as adults varies by state. *See* JAMES AUSTIN, KELLY DEDEL JOHNSON & MARIA GREGORIOU, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 35 (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>. For the purposes of this paper, “juveniles in adult prisons” refers to the group of children who are legally allowed to be housed in adult prisons, because they are no longer considered “juveniles,” and who are also younger than eighteen years of age but older than the age of adult criminal responsibility. In New York, for example, this group would include sixteen- and seventeen-year-olds. *See* N.Y. CRIM. PROC. LAW § 510.15 (McKinney 2009) (prohibiting individuals under the age of sixteen from being detained in adult correctional facilities).

23. *See* Bishop, *supra* note 19, at 145–46 (finding, based on interviews with inmates, “that the danger of violence [is] far greater in prison than in juvenile facilities”).

24. 42 U.S.C. § 5633(a)(13) (2006).

25. *See* AUSTIN, DEDEL JOHNSON & GREGORIOU, *supra* note 22, at 14.

26. *See* Bishop, *supra* note 19, at 145–46 (reporting higher levels of violence against juveniles in adult facilities than in juvenile facilities).

27. *See* AUSTIN, DEDEL JOHNSON & GREGORIOU, *supra* note 22, at 8.

28. *Id.*

29. *Id.* at 7–8.

[continued to be] important issues for correctional administrators.”<sup>30</sup> Ten years later, there is no reason to believe they are any safer.

Despite the documented serious risks to their physical and emotional security, children continue to be incarcerated in adult prisons. The policy of confining juveniles in adult environments suggests that youths are similar to adults in maturity and emotional capacity, a proposition rejected by most other provisions in American law. Every other substantive body of U.S. law treats children protectively, under the theory that children are different from adults in maturity levels, decision-making abilities, and social and educational needs. Children under the age of majority (variously defined, but usually set anywhere from sixteen to twenty-one years old) cannot drive, vote, drink, or make decisions about their own medical care or sexual autonomy.<sup>31</sup> Underlying these restrictions is the idea that children are not capable of making responsible decisions. Yet this idea is abandoned when juveniles commit certain bad acts. While youth cannot be a complete defense to all serious crimes, the cornerstone of the juvenile justice system—that youthful unwise decisions call for treatment rather than retribution—has been increasingly abandoned in recent years, with often detrimental results.

The rising numbers of juveniles in adult facilities make the issue of appropriate education a timely one. In 2006, the number of juveniles incarcerated in adult facilities increased for the first time in over ten years.<sup>32</sup> The Department of Justice reported that over 7000 juveniles were held as adults in state jails and prisons that year.<sup>33</sup> In this state of affairs, where age becomes subject to political expediency, it is easy to forget that these numbers are children, who are entitled to a state-provided education,<sup>34</sup> regardless of the crimes they may have committed.

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30. *Id.*

31. See generally Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769 (2002) (examining the flaws of a legal system that prohibits health care decision making by adolescents and categorizes individuals as either adults or children without recognizing the spectrum of maturity that exists); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000) (identifying the various rights of and restrictions on children as expressed in the law and the policies that are informed by them).

32. WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 4 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf>.

33. *Id.* at 4 tbl.7, 5 tbl.9 (reporting 4836 juveniles (under eighteen years old) held as adults in state jails and 2364 juveniles held in adult state prisons in 2006).

34. See discussion *infra* Part II.A.1 (regarding the legal requirements defining this entitlement).

### *B. High School Dropouts and Criminal Activity*

Though politicians may pay education ample lip service, education for young inmates is rarely a political priority. The numbers show, however, that education in prison is critical—over half of state prison inmates dropped out of high school before entering prison.<sup>35</sup> Education in prison is particularly crucial for younger inmates because they have, on average, even lower rates of educational attainment than the general prison population. Over half of inmates aged twenty-four or younger have not graduated from high school or obtained a GED before arrest, compared to about a third of inmates over the age of forty-five.<sup>36</sup> In stark contrast, less than ten percent of all sixteen- to twenty-four-year-olds do not have a high school diploma or GED,<sup>37</sup> while eighteen percent of the general population has not finished high school.<sup>38</sup> When compared to the adult prison population and the general population, juvenile inmates are at a significant educational disadvantage.<sup>39</sup>

### *C. Disabilities, Criminal Activity, and Educational Achievement*

High school dropout rates, criminal behavior, and disabilities converge in the criminal justice system. Just over half of all students with disabilities graduate with regular diplomas, and students with emotional or behavioral disabilities are twice as likely to drop out of school as their classmates without disabilities.<sup>40</sup> Dropping out of school places these students at high

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35. In 1997, sixty-eight percent of state prison inmates did not have a high school diploma. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf>. Roughly forty percent had neither finished high school nor held a GED. *Id.* at 3 tbl.2. Specific indication of whether inmates who have attained an Individualized Education Program (IEP) diploma (a certificate indicating that a student with disabilities has met specific goals in her IEP, as opposed to completing grades nine through twelve) are considered to have graduated from high school is lacking. At least in New York, inmates who have received an IEP diploma are still eligible to participate in GED classes in prison, indicating that IEP diploma holders are not likely included in the group “high school graduates.” See N.Y. Dep’t of Corr. Servs., Directive No. 4805, Special Educational Services 3 (2002) [hereinafter Directive No. 4805] (stating that inmates with IEP diplomas are “encourage[d] . . . to continue with their education until they receive a GED”), *available at* <http://www.docs.state.ny.us/Directives/4805.pdf>.

36. HARLOW, *supra* note 35, at 1.

37. Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Educ., Fast Facts, <http://nces.ed.gov/fastfacts/display.asp?id=16> (last visited Apr. 22, 2010).

38. HARLOW, *supra* note 35, at 1.

39. One researcher estimates that eighty-five percent of the youth who pass through the juvenile justice system have dropped out of high school. Rebecca Powell Stanard, *High School Graduation Rates in the United States: Implications for the Counseling Profession*, 81 J. COUNSELING & DEV. 217, 219 (2003).

40. CAMILLA A. LEHR, DAVID R. JOHNSON, CHRISTINE D. BREMER, ANNA COSIO & MEGAN THOMPSON, NAT’L CTR. ON SECONDARY EDUC. & TRANSITION, ESSENTIAL TOOLS:

risk of entering the criminal justice system.<sup>41</sup> Youth with disabilities are disproportionately institutionalized in both the criminal justice system and the juvenile justice system.<sup>42</sup> The precise correlation or causation between dropping out of high school, disabilities, and criminal behavior is hard to determine. It is possible that youth with disabilities are more inclined to engage in criminal activity or that this population has higher levels of contact with law enforcement for various reasons, or a combination of these or other factors. Whatever the cause, approximately nine percent of all students aged six to twenty-one receive special education services nationally,<sup>43</sup> but juvenile offenders qualify for these services at almost four times that rate.<sup>44</sup>

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INCREASING RATES OF SCHOOL COMPLETION: MOVING FROM POLICY AND RESEARCH TO PRACTICE 7 (2004), available at <http://www.ncset.org/publications/essentialtools/dropout/dropout.pdf>.

41. *Id.* at 7, 69 (finding that “arrest rates of youth with disabilities who dropped out were significantly higher than those who graduated,” with an arrest rate of seventy-three percent for seriously emotionally disturbed youth within three to five years after graduation).

42. RUTHERFORD, BULLIS, ANDERSON & GRILLER-CLARK, *supra* note 2, at 7; Mary Magee Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher & Jeffrey M. Poirier, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD 339 (2005).

43. Quinn, Rutherford, Leone, Osher & Poirier, *supra* note 42, at 342. The percentage of students receiving special education services is likely to be much lower than the percentage of students eligible for such services due to systemic failures to provide services to all who qualify.

44. *Id.* (finding that 33.4% of youth in juvenile corrections qualify for special education services and noting that this figure is most likely an underestimate). In particular, the most prevalent disabilities for incarcerated youth are specific learning disabilities and emotional disturbances. A specific learning disability is legally defined (for the purposes of the Individuals with Disabilities Education Act) as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” SUE BURRELL & LOREN WARBOYS, U.S. DEP’T OF JUSTICE, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 2 (2000) (quoting 20 U.S.C. § 1401(26)(A) (current version at 20 U.S.C. § 1401(30)(A) (2006))), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf>. This includes dyslexia, perceptual disabilities, or minimal brain dysfunction, but does not include a learning disability that is a “result of environmental, cultural, or economic disadvantage.” *Id.* Emotional disturbances include conditions characterized by: “inability to learn that cannot be explained by intellectual, sensory, or health factors”; “inability to build or maintain satisfactory interpersonal relationships with peers and teachers”; “[i]nappropriate types of behavior or feelings under normal circumstances”; “general pervasive mood[s] of unhappiness or depression”; or “tendency to develop physical symptoms or fears associated with personal or school problems.” *Id.* Conditions such as schizophrenia fall under that category, but “[t]he term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.” *Id.* While emotional disturbance is ranked third among most prevalent education-related disabilities affecting youth between the ages of fourteen and twenty-two nationally, it is ranked second for the number of youth with disabilities who drop out of high school, below specific learning disabilities. Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Educ., Digest of Education Statistics, at tbl.106, <http://>

In the face of this reality, less than forty percent of state prisons nationally provide special education services for inmates.<sup>45</sup> In New York, only twenty percent of public correctional facilities have special education programs for inmates under twenty-one.<sup>46</sup> Other states fare only slightly better: for instance, approximately thirty-five percent of Florida state correctional facilities provide special education services to eligible inmates.<sup>47</sup> States are failing to provide special education services to eligible juvenile inmates, creating a substantial underclass of uneducated youth in prisons across the country.

These children will be released from prison without the tools needed to build a life apart from crime.<sup>48</sup> Providing special education to juvenile inmates is not only an obligation under state and federal law,<sup>49</sup> it promotes the state's interest in public safety. Inmates who are educated while incarcerated are less likely to reoffend.<sup>50</sup> Not only does adequate special education for inmates have a favorable impact on public safety, but it is also the most economically efficient crime prevention technique.<sup>51</sup>

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nces.ed.gov/programs/digest/d06/tables/dt06\_106.asp (last visited Apr. 22, 2010).

45. STEVEN KLEIN, MICHELLE TOLBERT, ROSIO BUGARIN, EMILY FORREST CATALDI & GINA TAUSCHEK, MPR ASSOCIATES, INC., CORRECTIONAL EDUCATION: ASSESSING THE STATUS OF PRISON PROGRAMS AND INFORMATION NEEDS 8 (2004), *available at* [http://www.cedatanetwork.org/pdf/corred\\_report.pdf](http://www.cedatanetwork.org/pdf/corred_report.pdf).

46. There are sixty-nine state correctional facilities in New York. N.Y. State Dep't of Corr. Servs., Facility Listing, <http://www.docs.state.ny.us/faclist.html> (last visited Apr. 22, 2010). Fourteen of these facilities provide special education classes. N.Y. STATE DEPT. OF CORR. SERVS., EDUCATION ANNUAL REPORT 13 (2005) [hereinafter N.Y. EDUCATION ANNUAL REPORT] (on file with author).

47. Twenty-four out of seventy Florida correctional facilities provide special education programs. FLA. DEP'T OF CORR., 2006-2007 ANNUAL REPORT 35-36 [hereinafter FLA. ANNUAL REPORT], *available at* <http://www.dc.state.fl.us/pub/annual/0607/index.html>. Four additional facilities offer special education programs only for inmates in close management, *id.*, which is a form of restrictive custody for inmates determined to pose security risks to the general prison population, Fla. Dep't of Educ., Frequently Asked Questions Regarding Close Management, <http://www.dc.state.fl.us/oth/inmates/cm.html> (last visited Apr. 22, 2010).

48. *See, e.g.*, Forst, Fagan & Vivona, *supra* note 12, at 11 ("During the years when the transition from adolescence to adulthood occurs, when social skills and cues are learned, these youth will know little else other than the institutional world.").

49. *See infra* Part II.

50. DANIEL KARPOWITZ & MAX KENNER, BARD COLL., EDUCATION AS CRIME PREVENTION: THE CASE FOR REINSTATING PELL GRANT ELIGIBILITY FOR THE INCARCERATED 4 ("Prison-based education is the single most effective tool for lowering recidivism."), *available at* [http://www.bard.edu/bpi/images/crime\\_report.pdf](http://www.bard.edu/bpi/images/crime_report.pdf). *See also* STEVEN J. STEURER & LINDA G. SMITH, EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY 12 (2003) (reporting that inmates who participated in educational programs had statistically significant lower rates for re-arrest, reconviction, and reincarceration than those who did not participate in such programs), *available at* [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/36/f3.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/36/f3.pdf).

51. *See* ACLU, ACLU Fact Sheet on the Juvenile Justice System (July 5, 1996), <http://www.aclu.org/crimjustice/juv/10091res19960705.html> [hereinafter ACLU Juvenile

Consider this: the state saves money by educating a young inmate with learning disabilities as opposed to reincarcerating her if she commits another crime—approximately \$11,500 for one year of special education<sup>52</sup> compared to between \$35,000 and \$64,000 to incarcerate a juvenile in an adult facility for a year.<sup>53</sup> Providing alternatives to crime through education could save states hundreds of thousands of dollars.

## II. LEGAL FRAMEWORK

Most state constitutions contain some provision recognizing the importance of public education for all children in the state.<sup>54</sup> Additionally, under federal law, states must provide a Free Appropriate Public Education (FAPE) to every child with disabilities between the ages of six and twenty-one.<sup>55</sup> FAPE must meet grade-level requirements established

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Justice Fact Sheet] (“[C]rime prevention [including measures such as graduation incentives] costs less than imprisonment.”).

52. MARTHA L. THURLOW, MARY F. SINCLAIR & DAVID R. JOHNSON, NAT’L CTR. ON SECONDARY EDUC. & TRANSITION, *STUDENTS WITH DISABILITIES WHO DROP OUT OF SCHOOL—IMPLICATIONS FOR POLICY AND PRACTICE 2* (2002), available at [http://www.ncset.org/publications/issue/NCSETIssueBrief\\_1.2.pdf](http://www.ncset.org/publications/issue/NCSETIssueBrief_1.2.pdf).

53. ACLU Juvenile Justice Fact Sheet, *supra* note 51.

54. ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, pt. 2, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, §§ 1–2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1–2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, §§ 3–4; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VA. CONST. art. I, § 15, art. VII, § 3; WASH. CONST. art. IX, §§ 1–2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. *But see* ALA. CONST. art. XIV, § 256 (“[N]othing in this Constitution shall be construed as creating or recognizing any right to education . . .”).

55. 20 U.S.C. § 1401(9) (2006); 20 U.S.C. § 1412(a)(1)(A) (2006) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”). The FAPE requirement guarantees every child with disabilities an educational program specifically tailored to her needs from which she will benefit at public expense. *See* § 1401(9) (defining “free appropriate public education”). The requirement of educational benefit has been interpreted by courts to mean more than a de minimis education, but not necessarily the best education possible—an adequate education is all that is required. *See* Bd. of Educ. v. Rowley *ex rel.* Rowley, 458 U.S. 176, 200 (1982) (“Implicit in the congressional purpose of providing access to a free appropriate public education is the requirement that the education to which access is provided be sufficient to

by the state<sup>56</sup> and must “prepare [the student] for higher education, employment, and independent living.”<sup>57</sup>

Juvenile detention facilities and adult prisons are all required to provide special education to school-aged inmates with disabilities.<sup>58</sup> They must comply with all provisions<sup>59</sup> of the Individuals with Disabilities Education Act (IDEA)<sup>60</sup> and related regulations,<sup>61</sup> section 504 of the Rehabilitation Act of 1973,<sup>62</sup> and Title II of the Americans with Disabilities Act (ADA).<sup>63</sup>

#### A. *Special Education Eligibility Under IDEA*

In 1975, Congress established formal legal guidelines to govern special education in public schools by passing the Education for All Handicapped Children Act (EHA), an earlier version of what is now IDEA.<sup>64</sup> Before the EHA, only one in five children with disabilities had access to special

confer some educational benefit upon the handicapped child.”); *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir. 1998) (finding that an appropriate public education is one that opens “the door of public education . . . for a disabled child in a meaningful way” and “is likely to produce progress, not regression”) (citations omitted).

56. § 1401(9)(B).

57. 20 U.S.C. § 1400(d)(1)(A) (2006).

58. § 1412(a)(1)(A) (requiring that a free appropriate public education be made available to all disabled children in the state, “including children with disabilities who have been suspended or expelled from school”); 34 C.F.R. § 300.2(b)(1)(iv) (2009) (including “State and local juvenile and adult correctional facilities” among the state agencies subject to the provisions of the Individuals with Disabilities Education Act). The exceptions listed in 20 U.S.C. § 1414(d)(7)(A) (2006) (excluding children with disabilities who are convicted as adults and incarcerated in adult prisons from selected provisions of the Individuals with Disabilities Education Act) and 20 U.S.C. § 1415(m)(D) (2006) (specifically including children with disabilities in correctional facilities in transfer of parental rights at age of majority) imply that children with disabilities incarcerated in adult facilities are protected by all other sections of the law.

59. *But see infra* Part II.A.2 (detailing certain exceptions).

60. IDEA is the federal statute governing special education services in the United States. Individuals with Disabilities Education Act, Pub. L. 91-230, 84 Stat. 191 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

61. 34 C.F.R. § 300 (2009).

62. Section 504 of the Rehabilitation Act of 1973 prohibits exclusion from or discrimination in federally-funded programs on the basis of disabilities. 29 U.S.C. § 794 (2006).

63. The ADA prohibits discrimination by both federally-funded agencies and businesses and public accommodations that do not receive federal funding. Title II applies to federal, state, and local public services. 42 U.S.C.A. §§ 12131–12134 (West 2009). *See also* 34 C.F.R. § 300.2(b)(iv) (2009).

64. The EHA became known as IDEA in 1997 after a reauthorization act was passed. *See* OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 4–5 (2000) [hereinafter TWENTY-FIVE YEARS OF PROGRESS], available at <http://www.ed.gov/policy/spced/leg/idea/history.pdf>.

education.<sup>65</sup> The purposes of the EHA, and the present-day IDEA, are to ensure that all children with disabilities receive education tailored to their individual needs; to protect the rights of these children and their families; to assist providers of special education programs, educators, and families; and to monitor state special education programs at the federal level.<sup>66</sup> Another goal of the EHA and IDEA was to increase special education services for marginalized populations—communities of color and children with physical and mental disabilities.<sup>67</sup> Research since the initial passage of the EHA has promoted consideration of special education students' diverse environments rather than a unilateral application of educational principles, lending support to the provision of special education in diverse institutional environments.<sup>68</sup> Special education for incarcerated youth finds support within these goals of IDEA.

IDEA provides a comprehensive system of educational protections for children with disabilities. To receive special education services under IDEA, a child must be diagnosed with a disability as defined by the statute.<sup>69</sup> A "disability" for IDEA purposes includes mental retardation; hearing, visual, speech, or language impairments; orthopedic impairment; serious emotional disturbance; learning disabilities; autism; traumatic brain injury; or other health impairments or specific learning disabilities.<sup>70</sup> The child's disability must adversely affect her academic performance to the point where she "needs special education and related services."<sup>71</sup>

In the twenty-five years since IDEA was passed, the Act has changed the special education landscape dramatically. Most children with disabilities are now educated in local public schools alongside their non-disabled peers, high school graduation and employment rates for youth with disabilities have increased dramatically, and youth with disabilities have begun to enroll in postsecondary education in increasing numbers.<sup>72</sup> Despite the overall gains in special education, compliance with IDEA standards in correctional facilities is weak.

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65. *See id.*

66. *See* 20 U.S.C. § 1400(d) (2006). *See also* TWENTY-FIVE YEARS OF PROGRESS, *supra* note 64, at 4.

67. *See* TWENTY-FIVE YEARS OF PROGRESS, *supra* note 64, at 5–6.

68. *See id.* (noting the findings of IDEA-supported Minority Handicapped Research Institutes "that culturally and linguistically diverse students" require "culturally relevant assessment and intervention practices" in order to thrive).

69. 20 U.S.C. § 1401(3) (2006).

70. *Id.* *See also* 34 C.F.R. § 300.8 (2009) (defining disability for purposes of IDEA).

71. 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1).

72. *See* TWENTY-FIVE YEARS OF PROGRESS, *supra* note 64, at 1–2.

### 1. States' Obligations

States must comply with IDEA's comprehensive regulation of special education and related services.<sup>73</sup> State Educational Agencies (SEAs)<sup>74</sup> (often the state boards of education) are the designated agencies responsible for implementing and monitoring special education requirements in all public schools; this responsibility includes educational programs located in adult prisons.<sup>75</sup> The Office of Special Education and Rehabilitative Services<sup>76</sup> (a division of the Federal Department of Education), as well as parents of children protected by IDEA, can hold SEAs liable for failing to provide adequate special education services.<sup>77</sup>

In order to comply with these requirements, a state department of education must take several steps. First, a state has a continuing obligation to identify children within its jurisdiction who may have disabilities (the "Child Find" requirement). This includes identifying children who may need special education, evaluating their needs, and monitoring to ensure they are receiving appropriate services.<sup>78</sup> Once children have been identified, the state must then evaluate each child, at either the state's or the parent's initiation, to determine if she has a disability.<sup>79</sup> If the child is found to have a disability, the state must develop an Individualized Education Program (IEP).<sup>80</sup> An IEP contains a written statement of the child's present level of academic performance and defines annual educational goals, describes the progress that has been made toward the annual goals, and summarizes the services that are to be provided.<sup>81</sup> For children sixteen years of age and older, the IEP must also include transition assessments to facilitate high school graduation and entry into postsecondary education or employment.<sup>82</sup> The IEP must be developed by

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73. "Related services" are non-academic programs that will assist the disabled child in her education. 20 U.S.C. § 1401(26). They include transportation, speech pathology, interpretation services, and social work therapy. *Id.*

74. § 1401(32).

75. 20 U.S.C. § 1412(a)(11) (2006). *See generally* Antonis Katsiyannis & Francie Murray, *Young Offenders with Disabilities: Legal Requirements and Reform Considerations*, 9 J. CHILD & FAM. STUD. 75 (2000) (summarizing federal legislation applicable to incarcerated juveniles with special needs and suggesting strategies for reform).

76. 20 U.S.C. § 1402 (2006).

77. 20 U.S.C. § 1415(b)(6) (2006).

78. § 1412(a)(3).

79. 20 U.S.C. § 1414(a)(1) (2006). If the State initiates the evaluation process, it must obtain informed parental consent prior to any evaluation. § 1414(a)(1)(D).

80. 20 U.S.C. §§ 1401(14), 1412(a)(4) (2006).

81. § 1414(d)(1)(A). In developing the IEP, the child's strengths and needs and the parents' concerns must be considered. § 1414(d)(3)(A).

82. § 1414(d)(1)(A)(i)(VIII).

a team of the child's parents, at least one of her general education teachers (if general education is being considered), at least one special education teacher, a school representative qualified in special education and familiar with general education, and, if appropriate, the child.<sup>83</sup> The state is obligated to review each child's IEP at least annually to ensure that the IEP is still appropriate and to measure progress towards the IEP's goals.<sup>84</sup>

As part of the IEP, the team must determine an appropriate educational placement for the child.<sup>85</sup> The child must be placed in the Least Restrictive Environment available (LRE), meaning that she must be placed as close to home as possible and educated as much as possible with non-disabled children.<sup>86</sup> She can be placed into separate classes or schools "only when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>87</sup> The statute requires that children with disabilities be provided with educational opportunities specifically tailored to their learning needs so that they are given as equal an opportunity to succeed as their non-disabled peers.

## 2. *Exceptions to the Special Education Requirement*

Juveniles incarcerated in adult prisons constitute a distinct class for the purposes of IDEA. These children are excluded from two of the law's requirements—participation in general assessments and transition planning.<sup>88</sup> The extent to which these exceptions are used in practice to deny special education to students whom the state is required to educate is hard to determine. It is clear, however, that these exceptions, which apply only to juveniles incarcerated in the adult correctional system, make prosecution and placement decisions even more critical to the future educational and professional opportunities of juveniles with disabilities.

These exceptions, added by the 1997 amendments to IDEA, specifically target juvenile inmates with disabilities in adult facilities. While states are required to provide general assessments to juveniles in juvenile facilities, states are exempted from fulfilling this obligation for juveniles in adult correctional facilities.<sup>89</sup> States are also not required to

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83. § 1414(d)(1)(B).

84. § 1414(d)(4)(A)(i); 34 C.F.R. § 300.116(b)(1)–(2) (2009).

85. 34 C.F.R. § 300.116(b)(2). *See also* 20 U.S.C. § 1414(e) (requiring that parents be included in decisions about their child's placement).

86. 20 U.S.C. § 1412(a)(5)(A) (2006); 34 C.F.R. §§ 300.114(a)(2), .116(b)(3) (2009).

87. 20 U.S.C. § 1412(a)(5)(A).

88. 20 U.S.C. § 1414(d)(7). These exceptions do not apply to children with disabilities who are held in the juvenile justice system or who are being detained in the adult system prior to conviction.

89. § 1414(d)(7)(A)(i).

provide transition planning to inmates who will age out of IDEA protection before the expiration of their sentences.<sup>90</sup> Transition planning is particularly important for young inmates, especially those without a high school diploma. Young inmates face significant reentry challenges, such as enrolling in school, finding appropriate medical and mental health care, and locating a suitable living situation;<sup>91</sup> this last obstacle is particularly difficult if the youth's family is living in public housing.<sup>92</sup> While adult inmates face these hurdles as well, juveniles, who are more likely to lack education and job skills and may have never lived independently, generally have a harder time overcoming them.<sup>93</sup>

Additionally, the state is not required to provide special education services to incarcerated youth between the ages of eighteen and twenty-one if they did not have an IEP in their last educational placement or were not identified as disabled before arrest.<sup>94</sup> As young students' disabilities are often undetected<sup>95</sup>—especially in low-income school districts, from which incarcerated youth are predominantly drawn<sup>96</sup>—this provision has the potential to deny special education to a large number of incarcerated youth. The prevalence of unidentified disabilities makes it likely that a youth with disabilities who is over the age of eighteen will not receive special education services if she enters the criminal justice system.<sup>97</sup> Given the strong relationship between disabilities and criminal activity, it follows that a significant number of youth with disabilities are being denied the

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90. § 1414(d)(7)(A)(ii).

91. David M. Altschuler & Rachel Brash, *Adolescent and Teenage Offenders Confronting the Challenges and Opportunities of Reentry*, 2 YOUTH VIOLENCE & JUV. JUST. 72, 78–81 (2004).

92. Federal law requires public housing providers to terminate the lease of any individual if she or a member of her household engages in criminal activity that threatens the peace and safety of other tenants or engages in any drug-related criminal activity, on or off the premises. 42 U.S.C. § 1437d(j)(6) (2006).

93. *See generally* Altschuler & Brash, *supra* note 91 (identifying the specific challenges that young offenders face upon release).

94. 20 U.S.C. § 1412(a)(1)(B)(ii) (2006).

95. *Cf.* Quinn, Rutherford, Leone, Osher & Poirier, *supra* note 42, at 342 (noting likely underestimation of number of incarcerated juveniles eligible for special education services due to inadequacy of Child Find mechanisms).

96. *Cf.* SNYDER & SICKMUND, *supra* note 16, at 7 (discussing correlation between poverty and juvenile crime).

97. Correctional facilities often have trouble obtaining inmates' records from their prior schools, making it difficult to determine whether they had been assessed as disabled previously. Poor communication between schools and correctional facilities, absence of parental consent to release student records, and delays in the transmission of records often result in an inability by both juvenile and adult correctional facilities to obtain school records. *See* Nat'l Ctr. on Educ., Disability & Juvenile Justice, Special Education in Correctional Facilities, [http://www.edjj.org/Publications/pub05\\_01\\_00.html](http://www.edjj.org/Publications/pub05_01_00.html) (last visited Apr. 22, 2010).

protections of IDEA.<sup>98</sup>

Finally, another IDEA exception allows the state to modify a juvenile inmate's IEP if it demonstrates "a bona fide security or compelling penological interest that cannot otherwise be accommodated."<sup>99</sup> Regulations do not provide a specific definition of a "bona fide security or compelling penological interest," but clarify that it must be a fact-specific determination and cannot include cost control.<sup>100</sup> These modifications are meant to be temporary and "are to be reviewed whenever there is a change in the State's bona fide security or compelling penological interest and at least on a yearly basis."<sup>101</sup> While this exception may not have been intended to permit states to evade their obligation to provide FAPE to all youth, in practice it could give state prisons discretion to manipulate special education provisions. For example, the vagueness in the law could be used to avoid providing costly special education services: if a young inmate consistently commits minor infractions, correctional staff could, based on subjective considerations in the name of security, reduce the amount of special education services provided to that individual. Despite the narrow wording of the applicable regulation, "security interest" can be applied to a wide range of situations with little to no accountability in prison environments. This exception puts too much discretion over special education services in the hands of prison officials, even though IDEA directs states to ensure the provision of "full educational opportunity to all children with disabilities,"<sup>102</sup> regardless of conviction record. Furthermore, the exception ignores the established links between disabilities and behavioral infractions.<sup>103</sup> In a public school outside prison, a student would

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98. See *supra* notes 40–44 and accompanying text. Despite the growing phenomenon of trying and sentencing juveniles as adults, over ninety-nine percent of those in the adult criminal justice system are over eighteen years old. See AUSTIN, DEDEL JOHNSON & GREGORIOU, *supra* note 22, at 7.

99. 20 U.S.C. § 1414(d)(7)(B) (2006); 34 C.F.R. § 300.324(d)(2) (2009). The exceptions provided for in IDEA represent the minimum threshold at which states must provide services; states are free to impose more stringent requirements on their services, and some have. For example, currently, the only exception to inmates' right to education under New York law is for security threats. An eligible inmate's participation in educational services can be denied if the inmate presents a "clear threat to himself/herself, the safety of other inmates and/or the safety of educational or facility staff" or in emergency situations that interfere with the provision of educational services. N.Y. COMP. CODES R. & REGS. tit. 9, § 7070.7(c) (2009). Even a denial based on security or emergencies should be discussed in advance with the inmate's instructor and must be documented in writing. § 7070.7(d)–(e).

100. FAPE Requirements for Students with Disabilities in Adult Prisons, 64 Fed. Reg. 12,577 (Mar. 12, 1999).

101. *Id.*

102. 20 U.S.C. § 1412(a)(2) (2006).

103. *Cf.* 20 U.S.C. § 1415(k) (2006) (outlining the procedures required for determining the relationship between a child's misbehavior and her disability; such review is necessary

be entitled to a manifestation determination review to ascertain whether her behavioral infraction was a direct result of her disability before a significant sanction was applied.<sup>104</sup> In a correctional facility, however, these reviews do not occur before sanctions are imposed, significantly disadvantaging these students because of their incarceration.

In addition to the above exceptions for individual inmates, other provisions of IDEA remove incentives for states to educate incarcerated juveniles. School districts can opt out of providing special education to juvenile inmates in adult prisons without risking total loss of IDEA funds.<sup>105</sup> School districts can transfer responsibility for providing special education for juvenile inmates to any other public agency.<sup>106</sup> If the contracted agency does not comply with IDEA, the U.S. Department of Education does not have to completely withhold funding from the district, but can withhold only the proportion of IDEA funds equal to the proportion of children served by that other agency.<sup>107</sup> This exception removes incentives for districts to ensure that marginalized students, including incarcerated juveniles, are receiving legally-sufficient special education. As a result, states may simply contract legal responsibility to other public agencies and wash their hands of the consequences.

The number of juvenile inmates in adult prisons who are affected by these exceptions is hard to determine. However, the application of these exceptions to any juvenile inmate is extremely harmful to her future prospects for reintegrating. Therefore, the effects of these exceptions, which apply solely to juveniles incarcerated in adult facilities, support a strong argument against laws that transfer juveniles to the adult criminal justice system. In a juvenile facility, special education is mandated by federal law, but due to the exceptions discussed above, those services are essentially not mandatory in an adult prison. Trying a juvenile as an adult thus reaches beyond the years of sentence, as the lost educational opportunities may never be made up, even after the child is released (particularly true given the age limit on IDEA's protections). The decision to try youths as adults can mean deprivation of vital services, such as special education for learning disabled youth.

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before a child can be removed from her placement for violating a code of student conduct).

104. *Id.*; 34 C.F.R. § 300.530(e) (2009). *See also* Nat'l Res. Ctr. on AD/HD, IDEA (The Individuals with Disabilities Education Act), <http://www.help4adhd.org/en/education/rights/idea> (last visited Apr. 22, 2010) (explaining manifestation determination reviews).

105. *See* 20 U.S.C. § 1416(h) (2006) (stating that the reduction of funds for failing to provide services to children with disabilities who are convicted as adults and incarcerated in state facilities shall be proportionate to the number of eligible children with disabilities who are in adult prisons, and that any withheld funds shall be withheld only from the specific agency responsible).

106. 20 U.S.C. § 1412(a)(11)(C).

107. § 1416(h).

### B. Section 504 and the ADA

IDEA is not the only legal protection of children with disabilities; other federal laws prohibit discrimination on the basis of disability. Even if a child is not eligible for special education under IDEA, for example, section 504 of the Rehabilitation Act of 1973 and the ADA may still protect her from education discrimination on the basis of her disability.<sup>108</sup> Section 504 of the Rehabilitation Act and the ADA, in its applications to public services, are identical in their protections of children with disabilities.<sup>109</sup> Once correctional facilities have established any type of educational program, section 504 and the ADA prohibit excluding any student from those programs by reason of her disability. Congress passed the Rehabilitation Act two years before the EHA, primarily to increase job opportunities and training for disabled adults.<sup>110</sup> The ADA, passed in 1990, extends the protections of the Rehabilitation Act by prohibiting discrimination against people with disabilities in the private sector as well as in publicly-funded programs.<sup>111</sup> These statutes do not create an additional source of funding for these special education programs and so they had limited effects on special education at the time they were passed.<sup>112</sup> Congress passed the EHA to address these concerns.

Section 504 provides: “No otherwise qualified individual with a disability . . . 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.”<sup>113</sup> Section 504’s definition of “disability” now reflects the ADA’s definition,<sup>114</sup> and the ADA and section 504 have been interpreted similarly by courts.<sup>115</sup> By articulating a policy against discrimination on the basis of disability, section 504 and the ADA prohibit a state prison receiving federal funding from excluding juveniles (or adults) with disabilities from special education programs or any other type of remedial

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108. 29 U.S.C. § 794 (2006).

109. Peter Wright & Pamela Wright, Wrightslaw, Key Differences Between Section 504, the ADA, and the IDEA (Mar. 2, 2008), <http://www.wrightslaw.com/info/sec504.summ.rights.htm>.

110. DAVID M. RICHARDS, AN OVERVIEW OF § 504, at 1 (2000), *available at* [http://www.hopkinton.k12.ma.us/newweb2/administration/civil\\_rights/prolaws/pdfs/504%20Overviewcesd.pdf](http://www.hopkinton.k12.ma.us/newweb2/administration/civil_rights/prolaws/pdfs/504%20Overviewcesd.pdf).

111. 42 U.S.C.A. §§ 12111–12117 (West 2009) (prohibiting discrimination on the basis of disability in employment); 42 U.S.C.A. §§ 12131–12134 (West 2009) (prohibiting discrimination on the basis of disability by governmental entities). *See also* Tulman, *supra* note 5, at 15.

112. RICHARDS, *supra* note 110, at 2.

113. 29 U.S.C. § 794(a).

114. *See* 29 U.S.C.A. § 705(20)(B) (West 2009).

115. RICHARDS, *supra* note 110, at 2.

education.<sup>116</sup> A juvenile inmate with disabilities is entitled to the same education to which she would have been entitled were she not incarcerated.<sup>117</sup>

The definition of disability used in section 504 and the ADA is more inclusive than under IDEA. A person may claim the protections of section 504 and the ADA if she possesses any “physical or mental impairment that substantially limits one or more major life activities,” “has a record of such an impairment,” or is “regarded as having such an impairment.”<sup>118</sup> While IDEA has been the primary special education statute since its enactment, under section 504 and the ADA, more juvenile inmates are eligible to challenge inadequate special education in adult prisons. More physical and mental impairments are covered under section 504 and the ADA than under IDEA. Under IDEA, an individual is covered only if her disability necessitates special education,<sup>119</sup> whereas under section 504 and the ADA, an individual may be covered as long as her disability “substantially limits” her in one or more “major life activities” or she is regarded as having such an impairment, whether or not she requires special education. For example, children with chronic communicable diseases such as AIDS or hepatitis, with allergies or asthma, or with drug or alcohol addictions could be covered by section 504 and the ADA, but would not be eligible for special education under IDEA.<sup>120</sup>

While the protected class of section 504 and the ADA is broader than that of IDEA, IDEA is the sole source of the right to an appropriate and individual education for disabled children.<sup>121</sup> Consequently, while section 504 and the ADA protect against discrimination, including by requiring reasonable accommodations, IDEA creates substantive rights for children with disabilities. IDEA is also the sole legal source mandating IEPs for disabled children.<sup>122</sup> Evaluations to determine eligibility for services under

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116. See Mayes & Zirkel, *supra* note 3, at 153.

117. See *supra* Part II.A (detailing the special education rights of children with disabilities confined in state juvenile and adult correctional facilities).

118. 42 U.S.C.A. § 12102 (West 2009). This definition comes from the ADA and was adopted into the Rehabilitation Act at 29 U.S.C.A. § 705(20)(B).

119. 20 U.S.C. § 1401(3)(A)(ii) (2006).

120. Ohio Legal Servs., Section 504 & Disability Discrimination in Schools, [http://www.ohiolegalservices.org/public/legal\\_problem/students-schools/education-accommodation-for-disabilities/qandact\\_view](http://www.ohiolegalservices.org/public/legal_problem/students-schools/education-accommodation-for-disabilities/qandact_view) (last visited Apr. 22, 2010).

121. See Wright & Wright, *supra* note 109 (“The child who receives Section 504 protections has fewer rights than the child who receives special education services under the IDEA. The child who receives special education services under the IDEA is automatically protected under Section 504.”). Section 504 and the ADA only provide a right to the same education services provided to non-disabled children; under IDEA, eligible children are entitled to education services that are tailored to their disabilities and that provide an educational benefit.

122. *Id.*

the statutes are substantively different.<sup>123</sup> Section 504 and the ADA allow changes in placement with less procedural protection.<sup>124</sup>

For some children, though, the broader definitions of section 504 and ADA are more advantageous. Eligibility for section 504 and the ADA includes all types of remedial education, not only special education as defined in IDEA. Consequently, a juvenile inmate whose disability does not qualify for IDEA coverage might be able to obtain other remedial measures, such as one-on-one tutoring, reading assistance, or special classroom accommodations that would not be considered special education.<sup>125</sup> Section 504 and the ADA mandate that prisons provide all juveniles who meet these qualifications with the same opportunity to achieve educational accomplishments as youth without disabilities.<sup>126</sup>

### III. CONTRIBUTING SOCIAL POLICIES

The story of failing special education for juvenile inmates in adult prisons is not just about negligence or willful failures. Over the years, social and educational policies have contributed to the current mass of

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123. For example, under IDEA, parents and eligible children are entitled to “an independent educational evaluation at public expense,” a right that is not afforded under section 504. *Id.*

124. Under IDEA, parents are entitled to written notification and a meeting before their child’s placement may be changed, but this right is not provided in section 504. *Id.*

125. The Connecticut Department of Corrections, for example, provides students who qualify for accommodations under section 504 with Individualized Accommodation Plans (IAP). CONN. DEP’T OF CORR. UNIFIED SCH. DIST. #1, ANNUAL PERFORMANCE REPORT 2006-2007, at 12, available at <http://www.ct.gov/doc/lib/doc/PDF/PDFReport/EducationStatistics0607.pdf>. An IAP outlines methods of accommodating the child’s disability within the regular classroom so that she receives equal benefit from the education environment as do non-disabled students. While the standard of equal education opportunity under section 504 is more comprehensive than the adequate education required by IDEA, see *supra* Part II.A, IAPs are less extensive than IEPs and are governed by fewer procedural regulations. Section 504 focuses on fairness; that is, ensuring that disabled students are not discriminated against because of their differences from non-disabled students—receiving an equal education to nondisabled peers is the intended effect of that statute. In contrast, an adequate education is all that is required under IDEA—not the best education, or an education even equal to those of a similar child without disabilities, but an education specifically tailored to meet a particular child’s disabilities and needs. IDEA establishes a boundary (adequate education) below which education for each disabled student cannot fall and from which each student must receive benefit, whereas section 504 intends to ensure equal opportunity in federally-funded educational establishments. See Christopher J. Walker, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 STAN. L. REV. 1563, 1598–99 (2006).

126. See 34 C.F.R. § 104.33(b)(3) (2009) (defining an appropriate education as one “designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met”). Cf. Tulman, *supra* note 5, at 14 (“Section 504 also applies to state and local government delinquency facilities that receive federal funding.”).

educationally-deprived juveniles in prisons including zero-tolerance policies in schools, which have the effect of moving youth from the school system into the criminal justice system, and policies that deny access to education after criminal convictions.

Educational policies intended to make schools safer may actually increase rates of crime and thereby increase the number of juveniles in the criminal justice system. Suspensions, made more frequent by the adoption of zero-tolerance policies, interrupt a student's learning and make it more likely that she will fall behind the rest of her classmates.<sup>127</sup> Furthermore, in some states, public schools consider a suspension of a certain length to be an expulsion, resulting in a permanent removal from a school.<sup>128</sup> These policies also increase the chances that youth will be arrested.<sup>129</sup> These suspension policies may disproportionately affect youth with disabilities, since this group commits behavioral infractions at higher rates than the general education population does.<sup>130</sup> These suspension policies also disproportionately affect youth of color: African-American students are more than three times as likely to be suspended from school as compared to white students.<sup>131</sup> Youth with disabilities then become victims of this cycle of infractions, expulsions, and crime, known as the "school-to-prison pipeline."<sup>132</sup>

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127. *E.g.*, Tara M. Brown, *Lost and Turned Out: Academic, Social, and Emotional Experiences of Students Excluded from School*, 42 URB. EDUC. 432 (2007) (examining the experiences of suspended and expelled students and the negative effects of school exclusion on student academic, social, and emotional well-being); Annette Fuentes, *Discipline and Punish: Zero Tolerance Policies Have Created a "Lockdown Environment" in Schools*, NATION, Dec. 15, 2003, at 17, 17 ("Excluding kids from school for two days or two months increases the odds of academic failure and dropping out.").

128. According to one survey, thirteen states consider a suspension of longer than ten days an expulsion. Texas is the only state that considers a suspension of more than three days to be an expulsion. RUSSELL SKIBA, JESSICA EATON & NAOMI SOTO, CTR. FOR EVALUATION & EDUC. POLICY, FACTORS ASSOCIATED WITH STATE RATES OF OUT-OF-SCHOOL SUSPENSION AND EXPULSION, at tbl.1 (2004), *available* at <http://ceep.indiana.edu/ChildrenLeftBehind/pdf/2b.pdf>.

129. *See generally* Terence P. Thornberry, Melanie Moore & R.L. Christenson, *The Effect of Dropping Out of High School on Subsequent Criminal Behavior*, 23 CRIMINOLOGY 3 (1985) (finding a correlation between dropping out of high school and later criminal involvement).

130. *See, e.g.*, RUTHERFORD, BULLIS, ANDERSON & GRILLER-CLARK, *supra* note 2, at 14; Nat'l Ctr. on Educ., *supra* note 97.

131. *See* Dalun Zhang, Antonis Katsiyannis & Maria Herbst, *Disciplinary Exclusions in Special Education: A 4-Year Analysis*, 29 BEHAVIORAL DISORDERS 337, 340 fig.1 (2004).

132. *See generally* Johanna Wald & Daniel Losen, Civil Rights Project at Harvard Univ., *Defining and Redirecting a School-to-Prison Pipeline* (unpublished framing paper for the School-to-Prison Pipeline Research Conference held May 16–17, 2003) (discussing factors and trends within, and consequences of, the "school-to-prison pipeline"), *available* at [http://www.justicepolicycenter.org/Articles%20and%20Research/Research/testprisons/SCHOOL\\_TO\\_%20PRISON\\_%20PIPELINE2003.pdf](http://www.justicepolicycenter.org/Articles%20and%20Research/Research/testprisons/SCHOOL_TO_%20PRISON_%20PIPELINE2003.pdf).

### A. Zero-Tolerance Policies

Public school zero-tolerance policies exemplify this misalignment of crime control and education. Under these policies, which have been adopted in some form by public schools in every state,<sup>133</sup> school officials have the discretion to expel a student after one minor disciplinary infraction,<sup>134</sup> even if committed outside school grounds (in some states).<sup>135</sup> With few alternative education programs provided for expelled teens, most find themselves with large amounts of unsupervised time.<sup>136</sup> Expulsion begins the cycle of criminal justice involvement: more free time and less structure lead teenagers to become involved in illicit activities, and possibly lead to arrest and incarceration.<sup>137</sup> Often, students are arrested and prosecuted for the same acts for which they were suspended, leading to a double punishment for these acts and ensuring juvenile justice involvement.<sup>138</sup> Depending on the offense, some of these teenagers will be tried as adults and sentenced to adult prisons, as at least forty states since 1991 have made it easier for juveniles to be tried as adults.<sup>139</sup> These mechanisms place juveniles in a system with inadequate special education, almost ensuring that juveniles with disabilities will not receive education comparable to what they would have received if they had remained in their schools or if they had been placed in juvenile detention.

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133. See Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 68–72 (2003) [hereinafter Blumenson & Nilsen, *One Strike*] (tracing the origin and prevalence of zero-tolerance policies in public schools). At least one study estimates that “approximately eighty percent of students charged with drug or alcohol infractions are suspended or expelled from school.” Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61, 62 (2002) [hereinafter Blumenson & Nilsen, *War on Education*].

134. Zero-tolerance policies have been used in some school districts to control tardiness and truancy, disrespect, smoking cigarettes, and even bringing objects such as geometry compasses and Advil to school. See Blumenson & Nilsen, *One Strike*, *supra* note 133, at 71–72.

135. *Id.* at 66.

136. While federal law requires that all special education students be provided with an appropriate alternative educational setting upon suspension or expulsion, this provision does not apply to general education students. See 20 U.S.C. § 1412(a)(1)(A) (2006). See also 34 C.F.R. §§ 300.530–.532 (2009). This failure to adequately account for the educational needs of all students carries significant consequences for the children who are excluded, and it is part of a larger, disturbing trend of excluding “problem” students from the benefits of education. See Tulman, *supra* note 5, at 40 (discussing obstacles to reintegration into schools after a child with disabilities has been released from incarceration).

137. Blumenson & Nilsen, *One Strike*, *supra* note 133, at 82–83.

138. See, e.g., Sara Rimer, *Arrested in School*, N.Y. TIMES UPFRONT, Mar. 22, 2004, at 12.

139. *Id.* at 74. See also Bishop, *supra* note 19, at 84–85.

In recent years, as a corollary to zero-tolerance policies, many public schools have prevented juveniles with criminal convictions from re-enrolling after release,<sup>140</sup> frustrating their attempts to reintegrate into their communities. These policies, working in concert, have created a sizable population of formerly-incarcerated individuals with low levels of education.<sup>141</sup> Schools' policies of expulsion after one infraction have far-reaching effects: they create permanent roadblocks that deny children access to education, future employment, and financial security.

Zero-tolerance policies do not control student misbehavior. Reducing a student's access to consistent education does not improve behavior; it merely transfers authority to deal with the misbehavior from school officials to law enforcement. Not surprisingly, this movement creates more crime in both the short and long term, as youth who drop out of school are statistically at higher risk for increased criminal activity.<sup>142</sup> Nor have schools become safer by removing these students; in the years following the implementation of stricter policies, school crime rates have not changed dramatically.<sup>143</sup> Zero-tolerance policies allow police and prosecutors to address student misconduct rather than leaving behavior control to education professionals, who are, or should be, better trained to suggest appropriate solutions for student misconduct.<sup>144</sup>

*B. Limited Access to Education: A Collateral Consequence of Conviction*

Two other policies that reduce access to higher education while masquerading as public safety laws are the Drug Free Student Loans Act of 1998 and the Violent Crime Control Law Enforcement Act of 1994. The Drug Free Student Loans Act of 1998 (also known as the Souder Amendment to the Higher Education Act of 1965) excludes students convicted of any drug offense while they were receiving federal financial aid from receiving such aid in the future. Ineligibility is temporary for first

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140. See Tulman, *supra* note 5, at 40. These refusals to readmit appear to be discretionary policies of individual schools rather than district or statewide mandates.

141. See, e.g., UNITED WAY OF GREATER CLEVELAND, UNITED WAY CONSUMER INVESTMENT STRATEGY: PERSONS WHO WERE FORMERLY INCARCERATED 2, available at <http://www.unitedwaycleveland.org/atf/cf/%7B65CE9287-73ED-4996-A94C-DC1EE40971F1%7D/SS06.pdf> (“[The] average education attainment level [of adult offenders] at sentencing was grade 7 . . .”).

142. See generally Thornberry, Moore & Christenson, *supra* note 129.

143. See, e.g., Blumenson & Nilsen, *One Strike*, *supra* note 133, at 76 (citing results of a study showing that the number of high school students threatened or injured with a weapon in school remained steady in the six years following the adoption of zero-tolerance policies for weapons offenses).

144. See *id.* at 69.

time offenses and permanent for repeat offenses.<sup>145</sup> The bill's sponsor, Congressman Mark Souder, expressed his hopes for the amendment's effect: "Actions have consequences, and using or selling drugs will ruin your future."<sup>146</sup> Ironically, Souder ignores the reality that his own policy has ruined thousands of futures by denying access to higher education. The Souder Amendment ensures that at least some released inmates will not be able to go to college because of financial constraints, even if they managed to earn a GED or high school diploma while incarcerated.

The second piece of legislation that has impeded access to education for individuals involved in the criminal justice system is the Violent Crime Control Law Enforcement Act of 1994, which declares state and federal prisoners ineligible for Pell grants while in prison.<sup>147</sup> Pell grants provide need-based federal aid for higher education. This act practically eliminates higher education opportunities for incarcerated individuals, since most inmates cannot afford college courses during their incarceration. Senator Kay Bailey Hutchinson justified this policy by saying that giving Pell grants to prisoners shortchanged 100,000 students with no criminal record who were denied such grants because of lack of funds—one of the most common objections to government aid for correctional education.<sup>148</sup> Her argument (against prisoners' receipt of money for higher education) assumes that students without criminal records are more deserving of access to higher education than incarcerated students, regardless of intellect, ambition, or economic need. Though Hutchinson's argument ultimately prevailed, her contention is simply not supported by the facts.<sup>149</sup> According to the General Accounting Office, which conducted a study in response to the proposed amendment eliminating these grants to prisoners, Pell grants awarded to prisoners did not affect the provision or

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145. The Souder Amendment states in relevant part: "A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance . . . shall not be eligible to receive any grant, loan, or work assistance . . . from the date of that conviction for [a] period of time [correlated with the nature of the offense]." 20 U.S.C. § 1091(r)(1) (2006). The statute provides for a one-year period of ineligibility for first possession offenses, two years of ineligibility for second possession offenses, and permanent ineligibility for third possession offenses, whereas a second sale offense yields permanent financial aid ineligibility. *Id.*; 34 C.F.R. § 668.40 (2009). *See also* Blumenson & Nilsen, *War on Education*, *supra* note 133, at 62 ("Under the Drug Free Student Loans Act of 1998, students who have ever been convicted of a drug offense are either temporarily or permanently ineligible for federal college loans and grants.").

146. Mark Souder, *Actions Have Consequences*, USA TODAY, June 13, 2000, at 16A.

147. Violent Crime Control Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (amending 20 U.S.C. § 1070a(b)(8) (Supp. V 1988)).

148. Blumenson & Nilsen, *War on Education*, *supra* note 133, at 74.

149. KARPOWITZ & KENNER, *supra* note 50, at 8 (citing OFFICE OF CORR. EDUC., U.S. DEP'T OF EDUC., PELL GRANTS FOR PRISONERS: FACTS/COMMENTARY (1995) (reporting that of the total amount awarded for Pell grants in 1993, approximately \$5.3 billion, only about \$34 million, less than one-tenth of one percent, was awarded to inmates)).

availability of these grants to nonincarcerated students.<sup>150</sup> The report noted, “If incarcerated students received no Pell grants, no student currently denied a Pell award would have received one and no award amount would have been increased.”<sup>151</sup> The awards are based on financial need and structured so that every eligible student received some amount of money.<sup>152</sup>

These two laws contribute to a political environment in which education for incarcerated juveniles with disabilities can be denied or ignored with little opposition. Laws like these allow access to education to be revoked as a punishment for bad behavior. And they create large numbers of undereducated, formerly-incarcerated individuals, who are faced with at least two obstacles to employment after release: discrimination on the basis of criminal records and lack of qualifications due to poor education.<sup>153</sup> Limited access to education sets in motion a cycle: without higher education, access to high-wage legitimate employment is impossible.<sup>154</sup>

Juvenile justice, the state-sanctioned punishment of minors, was founded on the principle of rehabilitation,<sup>155</sup> which includes the provision of an appropriate education. Sentences for juveniles should be an opportunity for the state to evaluate and address their educational needs. The idea that time spent in prison should be used for education and training is not a new one; federal law provides for vocational and transitional training for incarcerated youth, revealing an awareness of the power and potential of correctional youth education.<sup>156</sup> This goal of rehabilitation for incarcerated youth has not been met in many states.

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150. HEALTH, EDUC. & HUMAN SERVS. DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-94-224R: PELL GRANTS FOR PRISON INMATES 5 (1994), *available at* <http://archive.gao.gov/t2pbat2/152342.pdf>.

151. *Id.*

152. *Id.* at 6. The report notes that the Pell grant program is funded by “borrow[ing] from future appropriations”; therefore, had incarcerated students not been able to receive any money, the result would have been to borrow less money from future years’ appropriations, rather than to increase the amount of funding per student or the number of students benefited.

153. Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, SENT’G & CORRECTIONS: ISSUES FOR 21ST CENTURY (Nat’l Inst. of Justice, U.S. Dep’t of Justice, Washington, D.C.), Nov. 2000, at 1, 3 (“One year after release, as many as 60 percent of former inmates are not employed in the legitimate labor market.”), *available at* <http://www.ncjrs.gov/pdffiles1/nij/184253.pdf>.

154. See Charles F. Willson, *But Daddy, Why Can’t I Go to College? The Frightening De-Kline of Support for Children’s Post-secondary Education*, 37 B.C. L. Rev. 1099, 1124 (1996) (“A direct correlation between education and earnings exists . . .”).

155. *Cf.* Bishop, *supra* note 19, at 83 (noting that one foundational assumption of juvenile justice—that youth were more malleable and therefore more able to reform—“ma[de] rehabilitative strategies particularly attractive”).

156. 20 U.S.C. § 1151(a)(7) (2006).

Despite public awareness of the importance of education for reducing crime rates and maximizing the potential of all individuals, the state of special education in adult prisons remains bleak.

#### IV. CURRENT STATE OF PRISON EDUCATION

Deficiencies in special education for juvenile inmates in adult prisons persist in the face of clearly-established legal obligations. In this section, I will examine special education programs in various state adult prisons to illustrate representative failures and possibilities for change. In particular, I will focus on Florida and New York. As the states with the second- and third-largest populations of juvenile inmates in adult prisons,<sup>157</sup> these states illustrate the challenges that states face in educating juvenile inmates.

##### A. *Correctional Education Standards*

Some, but not all, states have developed agency guidelines to govern correctional education. According to the New York State Education Department, any individual in a state correctional facility who is sixteen years of age or older and is not performing at or above a ninth-grade level is required to participate in an educational program offered by the Department of Correctional Services.<sup>158</sup> As of 2005, it was an express goal of the Division of Education of the Department of Correctional Services to “insure that every inmate who leaves the system . . . possesses a high school diploma or equivalency.”<sup>159</sup> All incarcerated individuals twenty-one years of age or younger must be informed of the availability of educational services and must be given access to at least three hours of individually-paced instruction time per day from a licensed or certified teacher, amounting to no less than fifteen hours per week.<sup>160</sup> While these standards provide structure for New York’s correctional educational programs, they entitle juvenile inmates in adult prisons to only half of what

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157. SABOL, MINTON & HARRISON, *supra* note 32, at 17 app. tbl.5. Connecticut has the largest population of juvenile inmates in adult prisons, *id.*, but lacks comprehensive public information and analysis of correctional education.

158. STATE EDUC. DEP’T, UNIV. OF THE STATE OF N.Y., NEW YORK, THE STATE OF LEARNING: STATEWIDE PROFILE OF THE EDUCATIONAL SYSTEM 253 (2006), *available at* <http://www.emsc.nysed.gov/irts/chapter655/2006/volume1.pdf>.

159. N.Y. EDUCATION ANNUAL REPORT, *supra* note 46, at 1. Under New York law, children over the age of sixteen cannot be compelled to attend school. *See* N.Y. EDUC. LAW § 2(11) (McKinney 2009) (defining compulsory age of education as between six and sixteen years of age). However, the state is still required to provide education to children above the age of sixteen if they are willing to attend school. N.Y. EDUC. LAW § 3202(1), (1-a) (McKinney 2009).

160. *See* § 3202(7)(a); N.Y. COMP. CODES R. & REGS. tit. 8, § 118.4(b), (c)(1), (3) (2009); N.Y. COMP. CODES R. & REGS. tit. 9, § 7070.4(b)–(g) (2009).

nonincarcerated students are entitled to receive.<sup>161</sup>

In Florida, every inmate lacking “basic and functional literacy skills” and with two or more years remaining on her sentence at the time of admission to a correctional facility must be provided with at least 150 hours of adult basic education.<sup>162</sup> Youthful offenders are given priority in educational programs,<sup>163</sup> though this minimum requirement essentially guarantees them less than five hours a week over the course of the school year.<sup>164</sup> Florida is excused from its requirement to provide education to inmates if there exist “insufficient facilities, staff, or classroom capacity.”<sup>165</sup> Though these standards fall far below what is required for nonincarcerated youth, they provide some structure for correctional general education and a means by which the state’s obligations to its incarcerated youth can be measured.

New York has tightened its correctional special education standards in the past few years.<sup>166</sup> In 2002, the New York Departments of Correctional Services and Education signed a Memorandum of Agreement ensuring FAPE to all incarcerated students under twenty-one years of age with a disability.<sup>167</sup> The order requires that all inmates under twenty-one who have been identified as having a disability must be provided with special education services.<sup>168</sup> Inmates with disabilities must be provided with at least 5.5 hours of programming a day.<sup>169</sup> Special education services include both individualized and group instruction.<sup>170</sup> These guidelines would seem to imply that incarcerated special education students should leave prison with a GED, IEP diploma, or high school diploma. However, New York has not yet realized even these basic standards, and facilities do not have sufficient resources to adequately serve a large proportion of incarcerated youth with disabilities.

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161. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 8, § 175.5(a)(3) (2009) (providing that all students enrolled in public schools grades seven through twelve must receive at least 5.5 instructional periods per day for the school to be eligible for funding from the state for that day).

162. FLA. STAT. ANN. § 944.801(3)(i) (West 2001 & Supp. 2009).

163. § 944.801(3)(i)(2) (granting “highest priority” for “youthful offenders” and “inmates nearing release from the correctional system”).

164. This estimate is based on Florida’s required school-year length of 180 days. FLA. STAT. ANN. § 1001.42(12)(a) (West 2009 & Supp. 2010).

165. § 944.801(3)(i)(3)(e).

166. Comparable standards in Florida were unavailable.

167. *See* Directive No. 4805, *supra* note 35, at 1.

168. *Id.* at 2.

169. *Id.* at 3.

170. *Id.* at 3–4

*B. The Reality of Correctional Education Programs*

Despite established standards, approximately half of all inmates under the age of twenty-one incarcerated in adult prisons in New York in 2004 were not enrolled in any educational program.<sup>171</sup> The following year, New York officially reported that all juvenile inmates identified as needing special education—sixteen percent of the total population of juvenile inmates in adult facilities—were enrolled in special education programs.<sup>172</sup> However, this figure does not specify what kinds of services these children were receiving, nor does it account for the many inmates who have unidentified disabilities or who were not receiving special education in their last educational placement.<sup>173</sup>

Although general education programs are available in sixty-three of the seventy New York Department of Corrections facilities, only fifteen facilities offer special education programs.<sup>174</sup> Many of these programs do not have sufficient resources (including staffing), resulting in long waitlists and overcrowded classes.<sup>175</sup> Of the fourteen facilities offering special education programs in New York, ten are staffed with two or fewer special education teachers, creating high teacher-to-student ratios.<sup>176</sup> New York's correctional education still falls far short of requirements laid out by its regulations.

In Florida, juvenile inmates in adult prisons similarly suffer from inadequate education. Forty-six of seventy correctional facilities in Florida offer general educational programs,<sup>177</sup> but only twenty-four facilities, much

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171. JAMES A. KADAMUS & REBECCA CORT, STATE EDUC. DEP'T, UNIV. OF THE STATE OF N.Y., EDUCATIONAL PROGRAMMING FOR STUDENTS WHO ARE INCARCERATED AND/OR INSTITUTIONALIZED THROUGH THE JUDICIAL SYSTEM, at tbl.3 (2005), available at <http://www.regents.nysed.gov/2005Meetings/February2005/0205emscvesidd2.htm>.

172. N.Y. EDUCATION ANNUAL REPORT, *supra* note 46, at 13 (identifying 451 inmates under the age of twenty-one who were assessed as needing special education services, accounting for 15.8% of the total number of under-twenty-one inmates in adult prisons, and reporting that all of these individuals were enrolled in special education services).

173. There are no readily available statistics on numbers of juvenile inmates with learning disabilities in New York's adult prisons, aside from those reported by the State Department of Correctional Services. However, due to the prevalence of underidentification of inmates with learning disabilities, there are likely large populations of unidentified learning-disabled juvenile inmates receiving insufficient special education in violation of federal law. See Quinn, Rutherford, Leone, Osher & Poirier, *supra* note 42.

174. Additionally, two alcohol and substance abuse correctional treatment facilities offer special education services. Out of all of these facilities, four are facilities for women inmates. Directive No. 4805, *supra* note 35, at 5.

175. See PRISON VISITING COMM., CORR. ASS'N OF N.Y., STATE OF THE PRISONS 2002-2003: CONDITIONS OF CONFINEMENT IN 14 NEW YORK STATE CORRECTIONAL FACILITIES 8 (2005) [hereinafter STATE OF THE PRISONS], available at [http://www.correctionalassociation.org/publications/download/pvp/State\\_of\\_prisons\\_02-03.pdf](http://www.correctionalassociation.org/publications/download/pvp/State_of_prisons_02-03.pdf).

176. N.Y. EDUCATION ANNUAL REPORT, *supra* note 46, at 13.

177. FLA. ANNUAL REPORT, *supra* note 47, at 35-36.

less than half of the total number of facilities, offer special education programs.<sup>178</sup> In 2007, eighty-one percent of inmates eligible for an educational program in Florida's adult correctional facilities were not enrolled in any program.<sup>179</sup> That year, Florida employed only fifty correctional special education teachers, despite enrolling over 17,000 inmates in some form of educational programming.<sup>180</sup> In Florida facilities offering special education programs, the information reported on IEPs as to services provided was inconsistent with the practices that the facilities reported.<sup>181</sup> At least one correctional facility in Florida employs only one special education teacher, and he is responsible for educating both special education and general education students.<sup>182</sup> In another facility, IEPs were not based on students' individual needs and provided for only fifteen minutes of consultation per month.<sup>183</sup> In New York and Florida, two of the states with the most juveniles in adult prisons, inmates are receiving much less than what their legal right to education demands.

Independent of state and federal mandates requiring education in correctional facilities, both inmates and prison administrators are deeply concerned about improving correctional educational programs. Education is among the most pressing issues identified by prison officials and prisoners.<sup>184</sup> In many New York prisons, superintendents, correction officers, and inmates cite cuts in educational programming and the resultant prisoner idleness as the leading problems in their facilities.<sup>185</sup> Twenty-two percent of inmates in these facilities ranked educational improvements as their priority for change in the facilities.<sup>186</sup> A review of student records in several of Florida's correctional facilities revealed a "lack of evidence that [a] student's concerns for enhancing his education had been considered."<sup>187</sup>

Correctional educational programs have been hit hard by economic

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178. *Id.*

179. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, FLA. LEGISLATURE, REP. NO. 08-16: ALTERNATIVE PLACEMENTS FOR THE CORRECTIONAL EDUCATION PROGRAM WOULD BE MORE COSTLY 2 exh. 1 (2008), *available at* <http://www.oppaga.state.fl.us/reports/pdf/0816rpt.pdf>.

180. *Id.* at 2 & n.2.

181. BUREAU OF INSTRUCTIONAL SUPPORT & CMTY. SERVS., FLA. DEP'T OF EDUC., FINAL REPORT OF FINDINGS OF EXCEPTIONAL STUDENT EDUCATION PROGRAMS IN DEPARTMENT OF CORRECTIONS 1 (2003) [hereinafter FLA. EXCEPTIONAL STUDENT FINAL REPORT], *available at* <http://www.fldoe.org/ese/pdf/m3corr.pdf>.

182. *Id.* at 9.

183. *Id.* In the same facility, only one teacher develops all IEPs for inmates and only one teacher tests the inmates.

184. *See* STATE OF THE PRISONS, *supra* note 175, at 4.

185. *Id.* at 7.

186. *Id.* at 4.

187. FLA. EXCEPTIONAL STUDENT FINAL REPORT, *supra* note 181, at 12.

downturns and subsequent budget cuts. The New York Department of Correctional Services announced a hiring freeze in 2001, ordering all “non-essential” staff positions to remain unfilled when employees retired or transferred to another facility.<sup>188</sup> Usually, any position unrelated to security is considered “non-essential” and will remain unfilled.<sup>189</sup> In Florida, the Department of Corrections’ educational budget decreased twenty-four percent while the inmate population grew by the same percentage.<sup>190</sup> These cuts led to a reduction in the numbers of teachers, while class size grew.<sup>191</sup> State legislatures are increasingly willing to increase the size of prison populations while decreasing the number of educational programs offered in prisons, a tradeoff which leads to higher rates of recidivism, cyclically contributing to the increase in prison population.<sup>192</sup>

In New York, this refusal to fill vacated teaching positions has created waiting lists of approximately six months to get into a class.<sup>193</sup> At Green Haven Correctional Facility, for example, twenty-five percent of the prison population (amounting to 500 inmates) was waiting to get into an academic class, vocational program, or substance abuse treatment program.<sup>194</sup> As one instructor at Green Haven noted to the Correctional Association inspectors, the waiting lists were created by the hiring freeze: “We have classroom space, materials and students waiting to come to school—but no teachers . . . .”<sup>195</sup> In Florida, nearly four times as many inmates are on waitlists for classes in prisons as are actually enrolled in such programs.<sup>196</sup> These numbers indicate violations of federal requirements to provide adequate special education to incarcerated juveniles occurring in at least two states—a violation that has stark consequences for public safety and economic efficiency. Better educated ex-prisoners means lower crime

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188. See STATE OF THE PRISONS, *supra* note 175, at 7. The Division of Budget, an agency unrelated to the Department of Corrections, defines “non-essential,” removing discretion over prison educational staffing from the facility superintendent or the Commissioner of Corrections.

189. *Id.* at 8.

190. OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, FLA. LEGISLATURE, REP. NO. 07-14: CORRECTIONS REHABILITATIVE PROGRAMS EFFECTIVE, BUT SERVE ONLY A PORTION OF THE ELIGIBLE POPULATION 3 (2007), *available at* <http://www.oppaga.state.fl.us/reports/pdf/0714rpt.pdf>.

191. *Id.*

192. See *id.* at 5 & n.5.

193. See STATE OF THE PRISONS, *supra* note 175, at 8.

194. *Id.*

195. *Id.*

196. STEVEN KLEIN & MICHELLE TOLBERT, MPR ASSOCIATES, INC., CORRECTIONAL EDUCATION, COMMON MEASURES OF PERFORMANCE: USING STATE DATA TO ASSESS THE STATUS OF CORRECTIONAL EDUCATIONAL PROGRAMS IN THE UNITED STATES 15 tbl.9 (2004), *available at* [http://www.cedatanetwork.org/pdf/common\\_measures\\_of\\_perf.pdf](http://www.cedatanetwork.org/pdf/common_measures_of_perf.pdf).

rates and less need for future reincarceration, saving states taxpayer dollars and creating more economically productive, and hence taxpaying, citizens.<sup>197</sup>

Fortunately, over the past five years, there has been a noticeable improvement in some state facilities. Great Meadow, a maximum-security prison for men in upstate New York with approximately 1700 inmates,<sup>198</sup> significantly increased its teacher capacity over a five year period, from a forty-one percent vacancy rate to twenty percent.<sup>199</sup> With the increase in staffing came an increase in access. By 2006, all of the facility's inmates under the age of twenty-one were enrolled in some type of educational, vocational, or treatment program.<sup>200</sup> Inmates enrolled in an education program had access to the facility's computer lab on a biweekly basis.<sup>201</sup> Additionally, Great Meadow has a special education class for inmates under the age of twenty-one.<sup>202</sup> Even these notable measures fall short of state guidelines, however. Only 278 inmates at Great Meadow, or seventeen percent of the inmate population, are enrolled in educational programs and approximately 1000 inmates are on the waiting list.<sup>203</sup> The institutional inadequacies that create this waiting list are violations of inmates' rights to special education. Even improvements in infrastructure and teacher hiring will not satisfy legal requirements for inmate special education. Structural reform is needed.

In other facilities, there has been little change over the past five years. In Green Haven Correctional Facility, the same proportion of teaching positions was unfilled in 2006 as had been in 2003.<sup>204</sup> Among the teachers at Green Haven, there were no bilingual instructors and no educational material in any language but English,<sup>205</sup> even though a sizable portion of Green Haven's population is fluent solely in Spanish.<sup>206</sup> Despite the high

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197. STEURER & SMITH, *supra* note 50, at 17.

198. STATE OF THE PRISONS, *supra* note 175, at 71.

199. *Compare id.* at 76, with CORR. ASS'N OF N.Y., GREAT MEADOW CORRECTIONAL FACILITY 8 (2006) [hereinafter GREAT MEADOW REPORT], available at [http://www.correctionalassociation.org/publications/download/pvp/facility\\_reports/Great\\_Meadow\\_6-20-06.pdf](http://www.correctionalassociation.org/publications/download/pvp/facility_reports/Great_Meadow_6-20-06.pdf).

200. GREAT MEADOW REPORT, *supra* note 199, at 8.

201. *Id.* at 9.

202. *Id.* at 8.

203. *Id.* at 8-9.

204. *Compare* STATE OF THE PRISONS, *supra* note 175, at 83 (reporting three out of thirteen teaching positions vacant), with CORR. ASS'N OF N.Y., GREEN HAVEN CORRECTIONAL FACILITY 7 (2006) [hereinafter GREEN HAVEN REPORT] (reporting two of twelve teaching positions vacant), available at [http://www.correctionalassociation.org/publications/download/pvp/facility\\_reports/Green\\_Haven\\_5-24-06.pdf](http://www.correctionalassociation.org/publications/download/pvp/facility_reports/Green_Haven_5-24-06.pdf).

205. GREEN HAVEN REPORT, *supra* note 204, at 8.

206. *See* STATE OF THE PRISONS, *supra* note 175, at 83 (noting that more than ten percent of those incarcerated at Green Haven were Spanish-dominant).

number of inmates who do not hold high school diplomas or GEDs,<sup>207</sup> less than twenty percent of all inmates in the facility are enrolled in classes.<sup>208</sup>

These states purport to educate all eligible inmates, but, in practice, many inmates never get the chance to attend a class in prison. Unless these shortcomings are challenged and remedied, inmates, particularly juveniles, will continue to receive substandard education and leave prison unprepared to deal with the challenges of life on the outside.

*C. A Model for Juvenile Correctional Education: Coxsackie Correctional Facility*

Coxsackie Correctional Facility illustrates the potential of juvenile correctional education. Coxsackie was founded as a reform school for youth before it became a correctional institution for felony offenders under the age of twenty-one. It now houses approximately 1000 inmates of all ages.<sup>209</sup> Thirty percent of Coxsackie's inmate population is between the ages of sixteen and twenty-one, a high percentage of juveniles for an adult state prison.<sup>210</sup> Its sizable youth population allows Coxsackie to maintain its status as a school district and to receive federal funding for educational services.<sup>211</sup> Coxsackie's demographics make the facility a prime site for the development of innovative approaches to fulfilling its obligation to provide adequate educational services.

As of 2004, their educational program was fully staffed.<sup>212</sup> There is a relatively short waiting list for educational classes at Coxsackie, although this may be due in part to underidentification of inmates who would benefit from special education programs.<sup>213</sup> This failure to adequately identify eligible inmates is significant given Coxsackie's otherwise-successful programming, as many of the inmates are young and many of them sit idle most of the day.<sup>214</sup> Coxsackie represents the success that a correctional facility can achieve in the creation and implementation of quality educational programming. It also highlights the potential pitfalls

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207. Nine hundred and seventy inmates in Green Haven did not have a high school diploma or GED in 2006, compared with 1160 inmates who did. GREEN HAVEN REPORT, *supra* note 204, at 7.

208. *Id.* (reporting that 360 inmates were enrolled in educational classes in 2006).

209. STATE OF THE PRISONS, *supra* note 175, at 65.

210. *Id.*

211. *See id.* at 66.

212. CORR. ASS'N OF N.Y., COXSACKIE CORRECTIONAL FACILITY 3 (2004), available at [http://www.correctionalassociation.org/publications/download/pvp/facility\\_reports/Coxsackie\\_9-30-04.pdf](http://www.correctionalassociation.org/publications/download/pvp/facility_reports/Coxsackie_9-30-04.pdf).

213. *See id.* (stating concerns that youth who would benefit from educational programs were not being adequately identified based on complaints of idleness in the prison).

214. *Id.* at 4.

that an otherwise-successful education program must still overcome.

## V.

### CHALLENGES TO INADEQUACIES OF INMATE SPECIAL EDUCATION

All advocates—public defenders, reentry service providers, criminal justice policy reformers, and other civil legal service providers—who are concerned about legally adequate special education for juvenile inmates in adult prisons can challenge systemic failures. Raising public awareness—through lobbying for stricter legislative oversight, launching media campaigns, and litigating in the courts—can be effective methods of change, either independently or in concert. In this section, I will explore each of these strategies in turn, beginning with legislation.

#### A. *Legislative Advocacy*

Legislative advocacy is a useful tool to change systems whose obligations are primarily rooted in statutes, as with correctional special education. In an area already governed by federal legislation, such as special education (where enforcement of standards is the problem), remedial legislation is duplicative. Advocates may instead want to strive for clarification and for stricter enforcement of existing federal and state laws. Advocates interested in challenging correctional special education conditions should take a lesson from a highly successful comparison: prison rape. The Prison Rape Elimination Act of 2003 (PREA) was the result of a legislative campaign, headed by Stop Prison Rape (SPR), a nonprofit organization run by survivors of prison rape.<sup>215</sup> PREA is the first federal law to address rape in prison. The statute created a national commission, the National Prison Rape Elimination Commission, to study the prevalence and extent of sexual abuse in detention.<sup>216</sup> Recently, the Commission released a final report aimed at decreasing the prevalence of sexual abuse in these facilities and recommending standards for conditions in lockup, community corrections, and juvenile facilities.<sup>217</sup> SPR's success—the passage of legislation to assist a politically marginalized population in an area where no legislation had existed—can serve as a model for advocates for better correctional special education.

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215. See STOP PRISON RAPE, PREA UPDATE REPORT ON THE PRISON RAPE ELIMINATION ACT 1–2 (2005), available at <http://www.spr.org/pdf/preaupdate0505.pdf>.

216. *Id.*

217. NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf>.

### 1. *Strengthen IDEA's Oversight Commission*

IDEA authorizes the creation of an oversight commission,<sup>218</sup> but no committee is currently in existence. In 2002, President George W. Bush established a President's Commission on Excellence in Special Education, charged with studying special education programs and making recommendations for improvements.<sup>219</sup> The Commission released its report, entitled "A New Era: Revitalizing Special Education for Children and Their Families," on July 1, 2002.<sup>220</sup> Other than a brief mention of the failings of special education in juvenile correctional facilities,<sup>221</sup> the report does not address correctional special education and does not address special education for juveniles in adult prisons at all. The Commission was terminated pursuant to the order that created it, thirty days after submitting its report.<sup>222</sup> Another federal commission should be formed to monitor, specifically, the provision of special education to politically marginalized populations, including institutional populations. The commission should review special education programs in adult prisons by conducting inspections and holding hearings to receive testimony from experts, advocates, inmates, and teachers. Clear guidelines must be developed to guide inspections. These guidelines should check compliance with every aspect of IDEA and should focus on: inmate interviews, teacher qualifications, classroom observation, IEP review, and special education procedures.

***Inmate Interviews.*** Inspectors should interview a representative sample of inmates, which includes inmates enrolled in general education classes, inmates who are enrolled in special education classes, and inmates who are on waiting lists for any kind of education program. Interviews should explore whether inmates' records were gathered from their last school; whether they were offered special education and related services at least equivalent to what they were receiving before they were admitted, if applicable; whether an IEP was developed in the prison or whether their previous IEP was used; IEP review; the range of special education and related services available in the facility; student-teacher ratios in both special education and general education classes; the amount of time

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218. See 20 U.S.C. § 1412(a)(21) (2006).

219. See Exec. Order No. 13,227, 3 C.F.R. 793 (2002).

220. PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES (2002), available at [http://www2.ed.gov/inits/commissionsboards/whspecaleducation/reports/images/Pres\\_Rep.pdf](http://www2.ed.gov/inits/commissionsboards/whspecaleducation/reports/images/Pres_Rep.pdf).

221. *Id.* at 37 ("We are concerned about . . . youth with disabilities in the juvenile justice system.").

222. Exec. Order No. 13,316, 3 C.F.R. 261 (2004), reprinted in 5 U.S.C. § 14 app. at 264 (Supp. III 2003).

inmates had to wait, due to capacity constraints, before attending special education or general education classes; the amount of time spent in class daily; the subjects and skills taught; teaching methods; and whether transition or reentry planning is provided. Inmates should be assured that they will remain anonymous in any communication with the prison regarding education.

**Teacher Qualification.** Inspectors should monitor teachers' qualifications to ensure that special education teachers are legally qualified and trained to teach special education classes.

**Classroom Observation.** Inspectors should observe special education classes, paying attention to class length and structure (including breaks); student-teacher ratios (including aides present); student-teacher interaction; the teacher's presentation techniques and class reactions; the subjects and skills taught; the classroom materials used (including textbooks); teaching methodologies; assistive technologies in use; the teacher's proficiency in the subjects taught; individual attention of students; classroom discipline methods; methods of assessment (quizzes, tests, questions); and nonverbal teacher communication.

**IEP Review.** Inspectors should review IEPs in each facility to see if they comply with all the requirements of IDEA and IEP regulations.<sup>223</sup> Inspectors should observe or read transcripts of IEP conferences and annual reviews.

**Special Education Procedures.** Inspectors should review the special education procedures in place at each facility, paying special attention to disciplinary procedures, particularly IDEA's requirement that manifestation determination reviews be held within ten days of a disciplinary change of placement to determine the relationship between the student's disability and her behavioral infraction.<sup>224</sup>

After inspections, the committee should release a series of reports on each facility that summarize their findings, assess the facility's compliance with federal and state law, and suggest areas for improvements. Similar inspections are conducted by the Prison Monitoring Project of the Correctional Association in New York,<sup>225</sup> but these inspections should be done by a government agency in every state to provide an incentive for facilities to comply with special education law. If violations are found, there must be a system of graduated sanctions in place to remedy and deter future violations, including loss of federal IDEA funding.

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223. See *supra* Part II.A.1.

224. 20 U.S.C. § 1415(k)(1)(E) (2006); 34 C.F.R. § 300.530(e) (2009).

225. The Correctional Association of New York is authorized by the state legislature to conduct regular inspections of correctional facilities. Corr. Ass'n of N.Y., History, <http://www.correctionalassociation.org/about/history.htm> (last visited Apr. 22, 2010).

In addition to conducting inspections, this committee should provide technical assistance and training to prison superintendents and education coordinators to ensure that they are well-educated about the laws and regulations defining their responsibilities.

## 2. *Eliminate Zero-Tolerance Policies*

Improving the nuts and bolts of correctional educational programs is not the only way to attack the problem. Reducing the overrepresentation of learning-disabled students in correctional facilities addresses the problem preventatively. One way this can be accomplished is by eliminating zero-tolerance policies in public schools. There could be a few plausible strategies for accomplishing this goal, but the most effective may be through legislation at the state and local level. This idea is not new, nor is it unsupported. A measure proposing elimination was introduced in Georgia<sup>226</sup> after a ten-year-old student was suspended for ten days for bringing a Tweety Bird keychain to school in 2000, prompting public uproar.<sup>227</sup> Ten years later, measures proposing elimination of these policies are still being introduced in Georgia.<sup>228</sup> The American Bar Association voted to oppose zero-tolerance public school expulsions in February 2001.<sup>229</sup> This popular and legal support for elimination of zero-tolerance could be harnessed into a legislative campaign at the state and local levels, the jurisdictions in which education is regulated.

Zero-tolerance for school infractions is an unwise social policy, but it also may be legally problematic. Federal law and some state laws require an assessment of whether a disabled student's misbehavior is related to her disability if she is suspended for more than ten consecutive school days.<sup>230</sup> If her infraction is a manifestation of her disability, her IEP team must develop a behavior plan without removing her from school.<sup>231</sup> The only

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226. Senate Bill 335, which would give discretion to local school boards regarding zero-tolerance policies for weapons at school (a change from the federal policy requiring such policies for weapons, *see* Blumenson & Nilsen, *One Strike*, *supra* note 133, at 69–70) was introduced to the Georgia Senate's Education Committee in 2002 but ultimately did not pass. Ga. Senate Info. Office, Highlights of Major Senate Action for the Week of February 4, 2002, [http://www.broc.state.ga.us/legis/2001\\_02/senate/sinfo/wrap\\_3b.htm](http://www.broc.state.ga.us/legis/2001_02/senate/sinfo/wrap_3b.htm) (last visited Apr. 22, 2010).

227. Jon Shirek, 11Alive.com, State Senator: End School "Zero-Tolerance" Weapons Policy (Dec. 30, 2009), <http://www.11alive.com/news/local/story.aspx?storyid=139173&catid=3>.

228. In 2009, a state senator "introduced legislation to remove the 'zero' from the Zero Tolerance policy," after a family friend's son was arrested for accidentally bringing a fishing knife to school and voluntarily turning it in to the school principal. *Id.*

229. *See* ABA, Criminal Justice Section, Policy Recommendations on Zero Tolerance (Feb. 2001), <http://www.abanet.org/crimjust/just/policy.html#zero>.

230. 20 U.S.C. § 1415(k)(1)(E)(i) (2006); 34 C.F.R. § 300.530(e) (2009).

231. *See* 34 C.F.R. § 300.530(f) (excepting, however, that the parent may consent to

exception to this requirement is if the student was found carrying a weapon, inflicting serious bodily injury, or possessing or selling drugs on school premises. Even then, the child cannot be removed to an alternative educational setting for more than forty-five days, and special education services must continue to be provided.<sup>232</sup> The requirement of an alternative educational setting even in these extreme cases shows that the right to special education is so closely guarded by law that it cannot be eliminated even by dangerous activities.

These laws provide a starting point to remedy state evasion of IDEA. Several factors demand that schools take a closer look at misbehaving students: the demonstrated relationship between disabilities and expulsions<sup>233</sup> and schools' underidentification of children with disabilities,<sup>234</sup> to name two. As an alternative to expulsion or suspension, advocates should more often suggest behavioral assessments for students whom school officials are considering expelling or suspending as a consequence for a disciplinary infraction.<sup>235</sup> In other words, schools could treat disciplinary infractions in some cases as constructive knowledge of a child's potential disability. Under the current regime, if a school district does not have constructive knowledge of a student's disabilities, the school district can expel the student without an evaluation. A revised system could count some disciplinary infractions as "constructive notice," thus triggering the evaluation requirement under federal law.<sup>236</sup> Expulsion without an evaluation would then be open to challenge in the courts. In addition, broadening the definition of "constructive knowledge" to include disciplinary infractions might correct the problem of persistent underevaluation of children with special needs.

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have the child removed from her placement). If the infraction is not a manifestation of the disability, schools can proceed as they would with a non-disabled child, with certain qualifications. § 300.530(c)–(d).

232. See § 300.530(g).

233. See Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 WEST'S EDUC. L. REP. 759, 771 (2000).

234. See Tulman, *supra* note 5, at 28, 31.

235. 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e).

236. See 34 C.F.R. § 300.534(a) (2009) (providing procedural protections for children with disabilities who are not eligible for special education if the entity had knowledge "that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred"). Currently, schools are deemed to have knowledge of a child's disability if the child's teacher or other school personnel have "expressed specific concerns about a pattern of behavior demonstrated by the child directly" to someone with supervisory authority. § 300.534(b)(3). Under my proposal, any discipline procedure initiated as a result of a child's behavioral infraction would also satisfy the knowledge requirement, whether or not the infraction was part of a pattern of behavior and regardless of which school personnel were involved in disciplining the child.

This proposal is not likely to pass uncontested by public school administrators, as they have several interests in the maintenance of zero-tolerance policies. For one, getting rid of problematic students by expulsion is easier and cheaper than addressing the underlying causes of the conduct.<sup>237</sup> Additionally, because students with multiple behavioral infractions tend to be underachieving academically, removing offending students also tends to raise the school's overall scores on standardized tests, an important factor in determining state and federal funding.<sup>238</sup>

Preventative and remedial efforts such as increased behavioral assessments are likely to pay for themselves if utilized correctly, however. The cost of increasing behavioral interventions is likely to be cheaper than the alternative cost of future criminal justice involvement: by one estimate, a delinquency prevention program costs approximately \$10,000 per student per year.<sup>239</sup> The benefits of prevention programs are estimated at approximately seventy-two serious crimes prevented each year per one million dollars spent on programming.<sup>240</sup> In addition, \$10,000 per year, an estimate at the high end of prevention costs, is far less than the cost of incarcerating a juvenile for a year, which estimates place between \$35,000 and \$64,000.<sup>241</sup> Prevention, which includes assessments of students who offend in school by in-school counselors and psychologists, is more cost effective than the long-term costs of removal.

### *B. Media Campaigns*

One of the biggest barriers to change in correctional special education is the issue's marginalization. If special education as an issue does not grab collective public attention, special education for young inmates in prisons after committing crimes, sometimes violent ones, barely merits a second glance. To bring this issue to the public eye, advocates must engage the media. The issue of correctional special education can be played to multiple angles across demographic spectrums. The criminal justice

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237. See PRESIDENT'S COMM'N ON MODEL STATE DRUG LAWS, TRUANCY, EXPULSION, AND CHILDREN OUT OF SCHOOL, at L-188 (acknowledging that treatment and intervention costs require higher expenditures than suspension or expulsion), available at <http://www.eprevco.com/policydocuments/Model%20Truancy%20Policy.pdf>.

238. See Melba Newsome, *Is a Top School Forcing Out Low-Performing Students?*, TIME.COM, Mar. 14, 2007, <http://www.time.com/time/nation/article/0,8599,1599099,00.html> (discussing allegations that a prestigious high school was "pushing out" problematic or underperforming students, and analyzing the financial and social incentives for such policies).

239. JEFFREY POIRIER & MARY MAGEE QUINN, AM. INSTS. FOR RESEARCH, PREVENTION AND EARLY INTERVENTION: LINKING LONG-TERM VISION WITH SHORT-TERM COSTS (2002), available at [www.edjj.org/presentations/EDJJNew%20OrleansMay2002.ppt](http://www.edjj.org/presentations/EDJJNew%20OrleansMay2002.ppt).

240. *Id.*

241. ACLU Juvenile Justice Fact Sheet, *supra* note 51.

system, once largely the province of the tabloid media,<sup>242</sup> has become an increasing fascination of mainstream news sources such as *The New York Times*, *The Washington Post*, and CNN.<sup>243</sup> The media's hunger for crime stories and courtroom drama is fed by (and feeds) the public's willingness to consume these news stories.<sup>244</sup> Since the early 1970s, when Attica prisoners used media coverage of their uprising to spark institutional reform, the media has been central in exposing criminal justice scandals.<sup>245</sup> The groundbreaking coverage by *60 Minutes* of the Abu Ghraib scandal in 2004<sup>246</sup> and the *Washington Post*'s discovery of unsanitary conditions at the Walter Reed Medical Center<sup>247</sup> are recent examples of the power of the media to assist in large-scale governmental reform and action. Even more recently, results of reports released by the Department of Justice and the Vera Institute of Justice condemning conditions of confinement in New York's juvenile detention facilities were closely covered by national newspapers such as *The New York Times*.<sup>248</sup> The *Times* has also been closely covering the class-action lawsuit brought by detained youths against the state agency in charge of these facilities.<sup>249</sup> In addition to factual reporting, the *Times* also ran a series of editorials and op-eds,<sup>250</sup> and many readers wrote letters to the editor highlighting innovative alternatives to detention currently in force and suggesting ideas for

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242. RICHARD L. FOX & ROBERT W. VAN SICKEL, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* 53–56 (2001).

243. *Id.*

244. *See id.* at 130–31 (noting that “the public has received heavy doses of tabloid justice information” and hypothesizing that either Americans are uninterested in news and politics, or the media reports more extensively on “tabloid justice” than on news and politics, and that “[a]t a minimum . . . the increasing media focus on criminal justice entertainment is directed at a receptive audience”).

245. Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 66–68 (1987).

246. *See* Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed: 60 Minutes II Has Exclusive Report on Alleged Mistreatment*, CBSNEWS.COM, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

247. Dana Priest & Anne Hull, *Soldiers Face Neglect, Frustration at Army's Top Medical Facility*, WASH. POST, Feb. 18, 2007, at A1.

248. *See, e.g.*, Julie Bosman, *For 800 Youths Jailed by State, Not One Full-Time Psychiatrist*, N.Y. TIMES, Feb. 11, 2010, at A1; Nicholas Confessore, *A Glimpse Inside a Troubled Youth Prison*, N.Y. TIMES, Feb. 14, 2010, Metro Section, at 1; Nicholas Confessore, *New York Finds Extreme Crisis in Youth Prisons*, N.Y. TIMES, Dec. 14, 2009, at A1; Susan Dominus, *Girls in Trouble, Humiliated and Injured at the Hands of the State*, N.Y. TIMES, Aug. 29, 2009, at A15.

249. *See* Nicholas Confessore, *Treatment of Youths in Prisons Spurs Suit*, N.Y. TIMES, Dec. 31, 2009, at A23.

250. *See, e.g.*, Editorial, *Juvenile Injustice*, N.Y. TIMES, Jan. 6, 2010, at A22; Editorial, *Sentenced to Abuse*, N.Y. TIMES, Jan. 15, 2010, at A26; Jonathan Lippman, Op-Ed, *Judging Our Children*, N.Y. TIMES, Dec. 15, 2009, at A41.

reform.<sup>251</sup> On the heels of this media furor, New York City Mayor Michael Bloomberg announced that the agencies in charge of managing pre-trial youth detention and child welfare would merge and more money would be spent on home-based treatment for juvenile offenders as opposed to on incarceration.<sup>252</sup>

In the wake of these exposés, decreased confidence in the institutions of criminal justice has created an environment in which further failings can be revealed.<sup>253</sup> However, a media campaign must be structured carefully, even in this sympathetic atmosphere. Advocates must clarify the goals of the campaign, prepare its message, and weigh their resources.<sup>254</sup> These steps may involve using publications that reach a politically powerful contingent, enlisting visible politicians to speak on television and radio outlets, and recruiting public figures to give interviews with the media. Television channels that used to focus exclusively on pop culture and celebrity culture have broadened their coverage to include news and politics, often presented in a youth-friendly format—these could be appropriate targets for youth-focused stories. For example, MTV recently announced the launch of a social activism network, Think.MTV.com, which will allow users to trade information and learn about political and social issues.<sup>255</sup> MTV hopes the site will help “close the gap” between high levels of interest in social activism and lower levels of action among youth.<sup>256</sup> Education for juvenile inmates may be one such issue that could appeal to a young and potentially enthusiastic audience.

Advocates must be familiar with the strengths and weaknesses of their issues if they are to successfully use the media to their advantage. Criminal justice advocates have long been aware that their clients, convicted criminals, are not a politically powerful contingency. Juvenile inmates, especially those incarcerated in adult prisons, may be a demographic that engenders some sympathy among the greater public. Emphasizing the social and economic advantages of crime prevention over incarceration—such as reduced recidivism rates, decreasing prison

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251. See, e.g., Tracy Velazquez, Letter to the Editor, *Reforming Juvenile Justice*, N.Y. TIMES, Jan. 30, 2010.

252. Julie Bosman, *Seeking to Send Fewer Youths to Jail, City Shifts Strategy on Delinquency*, N.Y. TIMES, Jan. 21, 2010, at A31.

253. See FOX & VAN SICKEL, *supra* note 242, at 132–43 (noting that extensive, sensationalistic coverage of several high-profile cases could cause decreased confidence in both the overall criminal justice system and in individual institutions within the system).

254. CHARLOTTE RYAN, *PRIME TIME ACTIVISM: MEDIA STRATEGIES FOR GRASSROOTS ORGANIZING* 220 (1991).

255. Kenneth Li, *MTV To Launch Activism Social Network*, REUTERS.COM, Sept. 20, 2007, <http://www.reuters.com/article/internetNews/idUSN1946445220070920?feedType=RSS&feedName=internetNews&pageNumber=1>.

256. *Id.*

administration and policing costs, and increased earning potential after release (leading to increased tax contributions for the state)—is another strategy for success.<sup>257</sup>

### C. Litigation

In situations where immediate injunctive relief is necessary, advocates can bring a lawsuit to correct educational conditions in adult prisons. Litigation can be a powerful tool for prospective relief, particularly to obtain individual damages. The downsides of litigation are high costs, in both time and money, and results of limited reach: by the time a lawsuit is resolved, it may be too late to provide actual relief to the named plaintiffs; alternatively, a specific lawsuit's victory may be too narrow to actually provide prospective relief for non-plaintiff inmates. Litigation is most effective when combined with other strategies, such as those described, *supra*, to address systemic issues at their roots.

Lawsuits to challenge the adequacy of special education services in prisons for inmates between the ages of thirteen and twenty-one must take into account several factors in order to be successful, including venue, choice of plaintiffs, administrative exhaustion, and the appropriateness of prospective relief.

#### 1. Jurisdiction

Broadly, jurisdiction will be determined by the location of the prison whose practices are being challenged. As education and other services for individuals with disabilities are significantly regulated by federal law (IDEA, section 504, and the ADA), a federal court may be the best forum. Sovereign immunity, broadly defined as the prohibition against suing state governments in federal court, poses obstacles to simply suing the state government in federal court on behalf of affected juveniles.<sup>258</sup> The Supreme Court has held that the Eleventh Amendment bars suit against a state government by citizens of that state.<sup>259</sup> However, suits against local governments or subdivisions of the state are permitted,<sup>260</sup> except when there is significant state involvement in the local action such that the relief

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257. See, e.g., John W. Gonzalez, *Education in Prison Helps Curb Repeat Offenses*, HOUSTON CHRON., Aug. 30, 2000, at A27 (basing statistics on a 2000 Texas study); Jamie Stockwell, *Study Finds Value in Inmate Education*, WASH. POST, Nov. 23, 2000, at M21 (reporting results of a three-state recidivism study whose initial results indicated that reducing recidivism through education saves states money—helping inmates rather than keeping them locked up actually benefits the state in the long run).

258. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 393–94 (4th ed. 2003).

259. See *Edelman v. Jordan*, 415 U.S. 651 (1974); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

260. See CHEMERINSKY, *supra* note 258, at 413.

will be fulfilled by the state.<sup>261</sup>

The Eleventh Amendment issue can be avoided by seeking an injunction against the officer responsible for implementing IDEA requirements (as opposed to the district as a whole), to stop her from violating federal law.<sup>262</sup> Injunctive relief is permitted even if compliance will cost the state money in the future.<sup>263</sup> Monetary damages can be sought if the suit names the official in charge of implementing IDEA in correctional facilities in her individual capacity, thus seeking any monetary damages from the official personally rather than from the state.<sup>264</sup>

At least some plaintiffs alleging a violation of IDEA based on inadequate correctional special education can sue under an important federal statute that forms the basis for most suits in federal court against state governments and state officials: 42 U.S.C. § 1983. This statute makes anyone acting “under color” of state law<sup>265</sup> subject to a cause of action if they deprive an individual of federal rights.<sup>266</sup> The statute was passed after the Civil War to address racial discrimination.<sup>267</sup> Section 1983 provides a remedy for individuals deprived of both (or either) federal constitutional and federal statutory rights.<sup>268</sup> The Supreme Court has interpreted § 1983 to extend to government officials acting in their official capacity, even if their actions were not specifically authorized by law.<sup>269</sup> For the purposes of § 1983 litigation, municipalities, but not states, can be held liable.<sup>270</sup> State officials can be sued under § 1983 for injunctive relief, but not for damages.<sup>271</sup>

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261. *See* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123–24 (1979). The extent to which the state has to be involved before suit is barred has yet to be defined; however, it is clear that this partial extension of Eleventh Amendment immunity to local governments applies only if money judgment is sought and only if the money judgment will be paid by the state treasury.

262. *See* CHEMERINSKY, *supra* note 258, at 421–22 (noting that the Eleventh Amendment does not bar suits against a state officer who is acting illegally).

263. *Id.* at 424 (citing *Quern v. Jordan*, 440 U.S. 332 (1979); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Edelman*, 415 U.S. 651).

264. *See id.* at 423 (citing *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)). Chemerinsky also notes that these suits are still allowed even if the state indemnifies the official, thereby not requiring her to pay the damages directly. *Id.* at 424.

265. This phrase has been interpreted to apply to anyone acting in their official position as an employee of the government. *Id.* at 477. The test for whether the individual acted under color of state law is identical to the test for whether there is state action for purposes of the Fourteenth Amendment. *Id.*

266. 42 U.S.C. § 1983 (2006).

267. CHEMERINSKY, *supra* note 258, at 470.

268. *Maine v. Thiboutot*, 448 U.S. 1 (1980).

269. *Monroe v. Pape*, 365 U.S. 167 (1961).

270. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

271. *Will*, 491 U.S. at 71 & n.10.

Before 2004, most circuits held that special education students alleging IDEA violations could not sue under § 1983.<sup>272</sup> In 2004, Congress amended IDEA to explicitly abrogate Eleventh Amendment immunity for states under the statute, allowing all § 1983 claims for IDEA violations.<sup>273</sup>

Injunctive relief is available in a § 1983 suit, particularly in the case of IDEA violations.<sup>274</sup> Courts may alternatively award damages, though only for actual injuries suffered.<sup>275</sup> In cases where the plaintiffs cannot adequately actually prove actual damage suffered, they can receive only nominal damages.<sup>276</sup> Punitive damages could be available in cases where the plaintiffs can show malicious intent or reckless indifference to the protected rights.<sup>277</sup> Additionally, attorneys' fees are available under § 1983.<sup>278</sup>

## 2. *Ideal Plaintiffs*

The suit should be brought as a class action on behalf of inmates in an adult prison between the ages of sixteen and twenty-one who have been identified as having a learning disability, have been denied FAPE, and do not fall into any of the statutory exceptions to the provision of special education to incarcerated youth.<sup>279</sup> The choice of named plaintiffs in a class-action lawsuit can affect its success. If the plaintiffs are deposed, details about their personal history and underlying offenses may be revealed. Any potentially negative details can be used by the opposition to weaken the plaintiffs' case. Consequently, named plaintiffs should be as

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272. See SCH. LEGAL SERV., ORANGE COUNTY DEP'T OF EDUC., LIABILITY UNDER SECTION 1983, at 14 & n.72 (2003), available at [http://www.ocde.k12.ca.us/downloads/legal/LIABILITY\\_SECT\\_1983.pdf](http://www.ocde.k12.ca.us/downloads/legal/LIABILITY_SECT_1983.pdf).

273. Individuals with Disabilities Education Improvement Act of 2004 § 604, 20 U.S.C. § 1403 (2006). Congress does not have the unbridled power to abrogate sovereign immunity. However, courts have read this section of IDEA to require states to waive immunity in exchange for funds and have found this tactic constitutional. See, e.g., *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005).

274. See SCH. LEGAL SERV., *supra* note 272, at 10.

275. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

276. *Id.* at 267.

277. *Smith v. Wade*, 461 U.S. 30 (1983).

278. 42 U.S.C. § 1988(b) (2006).

279. 20 U.S.C. § 1412(a)(1)(B)(ii) (2006) (providing that states do not have an obligation to provide FAPE to disabled children ages eighteen to twenty-one who are incarcerated in adult facilities and were neither identified as a child with a disability nor had an IEP prior to their incarceration); 20 U.S.C. § 1414(d)(7)(A) (2006) (excusing states from conducting general assessments of disabled children incarcerated in adult prisons and from providing transition planning or transition services for such children if they will age out of eligibility for such services by the time they leave prison); § 1414(d)(7)(B) (providing that a state may modify the IEP of a disabled child incarcerated in an adult prison "if the State demonstrate[s] a bona fide security or compelling penological interest" requiring modification).

sympathetic as possible. Advocates should seek out plaintiffs who, while representative of the affected population, are the most likely to generate sympathy—plaintiffs with nonviolent convictions, for instance, and those who have few to no disciplinary infractions in their facility.<sup>280</sup> In some cases, consent of the youth’s parent is required to become a named plaintiff in a class action lawsuit.<sup>281</sup> In these cases, the family history of the youth should be explored in case anything potentially negative could be revealed.<sup>282</sup> While advocates should not encourage the perception that only certain clients are worthy of rights to education, they must understand the temperature of the social climate in order to change it in the long run. Bringing lawsuits with unsympathetic plaintiffs may have the effect of creating “bad” law, whereas lawsuits with more sympathetic plaintiffs are more likely to create “good” law that will benefit all similarly-situated individuals, regardless of personal history or conviction record.

### 3. *Administrative Exhaustion Requirement*

Under many statutes, including IDEA, inmate plaintiffs must first exhaust all available administrative remedies before bringing a lawsuit in federal court.<sup>283</sup> If success appears likely in either an administrative channel or in state court, plaintiffs must pursue these remedies before filing in federal court or else the case risks dismissal.<sup>284</sup> Given that administrative tribunals are often inefficient and unwilling to grant relief for inmates, this requirement of exhaustion may create delays for litigants without any real promise of providing relief at the administrative stage. Advocates must pursue these channels, however, to ensure that a federal court will hear the case.

In an IDEA lawsuit, exhaustion would require challenging the student’s IEP through the available administrative channels: asking for a reevaluation and requesting a hearing to challenge the conclusion of the

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280. Interview with Christine Bella, Staff Attorney, Special Litig. & Law Reform Unit, The Legal Aid Soc’y, in New York, N.Y. (Jan. 21, 2010).

281. While the Federal Rules of Civil Procedure do not require parental consent before a minor can sue as long as the minor is adequately represented by an adult, *see* FED. R. CIV. P. 17(c), some organizations may require parental consent before allowing a minor to become a plaintiff, Interview with Christine Bella, *supra* note 280. For a more detailed discussion of the topic, see Alison M. Brumley, *Parental Control of a Minor’s Right to Sue in Federal Court*, 58 U. CHI. L. REV. 333 (1991).

282. Interview with Christine Bella, *supra* note 280.

283. *See, e.g.,* Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (“It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court . . . .”) (quoting *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 112 (2d Cir. 2004)).

284. For further discussion of federal exhaustion standards, see *id.* at 341–44.

evaluation, among other procedures.<sup>285</sup>

#### 4. *Legal Claims*

Individuals can bring federal claims against state officials under IDEA,<sup>286</sup> section 504 of the Rehabilitation Act of 1973,<sup>287</sup> and the ADA.<sup>288</sup> As discussed previously, IDEA is the only federal statute that creates substantive rights to special education for disabled children, but under section 504 and the ADA, claims may be brought if the individual is not protected under IDEA or if the individual seeks accommodations for her disability aside from the substantive requirements of IDEA.<sup>289</sup> States' full or partial failure to meet any one of IDEA's requirements<sup>290</sup> for incarcerated juveniles with disabilities is an actionable claim. These requirements in the prison context include, but are not limited to: provision of FAPE;<sup>291</sup> Child Find obligation;<sup>292</sup> IEP development, review, and revision;<sup>293</sup> placement in LRE;<sup>294</sup> procedural safeguards;<sup>295</sup> appropriate teacher and other personnel qualifications;<sup>296</sup> and performance goals and indicators.<sup>297</sup> Factors in the last category are particularly relevant in showing that the state has willfully or negligently overlooked its failure to provide adequate special education services to incarcerated youth. Within each of these categories, there are multiple procedural and substantive failures that can be addressed in a lawsuit. Courts usually give substantial deference to the judgment of prison officials, so the suit must allege clear violations of the statutory requirements.<sup>298</sup>

Given the detailed federal regulations, proving a statutory violation may be an easier burden for plaintiffs to carry than proving a

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285. IDEA procedural safeguards are outlined in 20 U.S.C. § 1415 (2006).

286. 20 U.S.C. § 1403 (2006).

287. *See, e.g.,* Bruggeman *ex rel.* Bruggeman v. Blagojevich, 324 F.3d 906 (7th Cir. 2003) (permitting suit by developmentally disabled individuals under the Rehabilitation Act); Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77 (2d Cir. 2000) (permitting suit by disabled employees against state agencies under the Rehabilitation Act).

288. 42 U.S.C. § 12202 (2006).

289. *See supra* Part II.B.

290. *See supra* Part II.A.1 for a thorough discussion of IDEA's requirements.

291. 20 U.S.C. § 1412(a)(1) (2006).

292. § 1412(a)(3)(A).

293. § 1412(a)(4). *See also* 20 U.S.C. § 1414(d) (2006) (describing substantive and procedural requirements of IEPs).

294. § 1412(a)(5)(A).

295. § 1412(a)(6).

296. § 1412(a)(14).

297. § 1412(a)(15).

298. *See* *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (holding that courts "must accord substantial deference to the professional judgment of prison administrators" and that prisoners have the burden of proving the invalidity of prison regulations).

constitutional violation. This is true particularly in light of the fact that the Supreme Court has declared that education is not a fundamental right.<sup>299</sup> However, this does not mean that constitutional claims are completely unavailable in special education reform lawsuits. Rather, Supreme Court precedent leaves room to argue for a heightened status of review of educational deprivations. In *San Antonio v. Rodriguez*, the Court indicated that there may be a right to the “opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”<sup>300</sup> The school-financing scheme at issue in *San Antonio* was found not to violate this right because it did not completely deny basic education to a class of children.<sup>301</sup> Complete denial of education, or even severe deprivation of adequate programming, could violate this limited right.

The Court expanded on this idea nine years later in *Plyler v. Doe*, where it distinguished education from other forms of social welfare.<sup>302</sup> The Court stated that the “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>303</sup> Incarcerated juveniles with disabilities are an isolated group of children; depriving them of special education presents obstacles to their advancement that are arguably unreasonable, as there is no state interest that can justify denying them the education to which these youth are entitled under federal and state law. But for the denial of special education services to these youth, they might be able to succeed academically and socially.

*Plyler* establishes intermediate scrutiny as the standard of review for laws and practices that limit the right to education.<sup>304</sup> However, there are analytic difficulties in applying the heightened standard of *Plyler* to a correctional special education lawsuit. *Plyler* involved a Texas statute that denied public education to children of undocumented immigrants, while a prison special education lawsuit would challenge prison practices, rather than a statute or regulation. In challenging prison practices as opposed to a specific law, the implementation of an established legal standard is in question, not the legal standard itself. Moreover, juvenile inmates with disabilities incarcerated in adult prisons are not precisely analogous to the

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299. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–39 (1973).

300. *Id.* at 37.

301. *Id.*

302. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

303. *Id.* at 221–22.

304. *Id.* at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children . . . that denial must be justified by showing that it furthers some substantial state interest.”).

class of children in *Plyer*, whose status as children of illegal immigrants was not a result of their actions.<sup>305</sup> In fact, subsequent lower court cases have explicitly limited the application of heightened scrutiny to deprivations that the plaintiffs did not play a role in creating.<sup>306</sup> In light of these restrictions, application of heightened scrutiny requires arguing that special education programs in adult prisons deprive a distinct class of youth of a basic education, with high costs to their development and success, and out of proportion to their own illegal conduct.

While the standard of review applied to deprivations of education may be ambiguous after *San Antonio* and *Plyer*, special education for incarcerated youth may nonetheless be protected by the Due Process Clause of the Fourteenth Amendment.<sup>307</sup> Arguments that state constitutional and statutory rights create a property entitlement in public education have been conditionally embraced.<sup>308</sup> In *Handberry v. Thompson*, a suit brought against the New York City Departments of Education and Correction by prisoners ranging in age from sixteen to twenty-one incarcerated at Riker's Island, the Second Circuit held that this property interest is severely limited once the individual is incarcerated.<sup>309</sup> The court cited different statutory language regarding the provision of education to incarcerated youth as opposed to nonincarcerated youth.<sup>310</sup> The court concluded that incarcerated youth do not have the same "legitimate expectation" of education as nonincarcerated youth.<sup>311</sup> The court took a pessimistic view of whether the New York statute created a property interest in education, noting that a similar statute regarding

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305. *See id.* at 238 (Powell, J., concurring) (noting that the statute punished innocent children for the misdeeds of their parents, "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing" (quoting *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972))). One could argue, however, that incarcerated juveniles with disabilities are also less than fully culpable because so many times an individual's disabilities bear a causal relationship to the offenses she has committed.

306. *See* Brian B. *ex rel.* Lois B. v. Pa. Dep't of Educ., 230 F.3d 582, 586 (3d Cir. 2000) (affirming the denial of an Equal Protection claim brought by a class of juvenile inmates claiming inadequate education in adult county correctional facilities as compared to education in state facilities and stating that the heightened scrutiny standard of *Plyer* was limited to the unique circumstances of that case).

307. U.S. CONST. amend. XIV, § 1.

308. *Handberry v. Thompson*, 446 F.3d 335, 353 (2d Cir. 2006) (finding that the provision of New York's state constitution providing for the creation of public schools wherein all children may be educated did not create a property interest in a public education, but that the state's education law did create such an interest).

309. *See id.* at 353–55.

310. *Id.* at 354 (citing N.Y. EDUC. LAW § 3202(7)).

311. *Id.* (noting that section 3202(1), referring to education for nonincarcerated youth, uses the word "entitled," whereas section 3202(7) states that incarcerated youth are "eligible" for educational services).

educational programs for adults had not been interpreted to create an absolute property interest in inmate socialization programs.<sup>312</sup> Comparing the two statutes, the court concluded that the statutes relied on by the plaintiffs did not create an absolute property interest.<sup>313</sup> Concluding that nothing short of a complete denial of education would violate the plaintiffs' right to a free education, the court denied the federal constitutional claims.<sup>314</sup>

Despite this holding, an argument can be made that at least some state education statutes, including New York's,<sup>315</sup> create a property interest protected under the Federal Constitution, when read in conjunction with IDEA.<sup>316</sup> *Handberry* analyzed the state statute in isolation, not addressing its added force when combined with IDEA, which explicitly requires FAPE for incarcerated youth.<sup>317</sup> The mandatory language of IDEA does not leave the provision of special education for incarcerated youth to prison officials' discretion. Because it remains an open question whether special education for incarcerated youth is protected by the Fourteenth Amendment, advocates can argue that state action regarding special education is entitled, at a minimum, to intermediate scrutiny review.

In sum, an argument for recognition of a constitutional right to some degree of education, particularly for inmates with disabilities, may succeed in federal court. If heightened scrutiny applies, plaintiffs are more likely to succeed because of the requirement that the State show a "substantial interest" in not providing necessary special education services. While courts have traditionally been reluctant to disrupt the status quo with regard to state-funded services, bringing cases alleging continued

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312. *See id.* (noting that a previous court had held that N.Y. CORRECT. LAW § 136, which provides for adult correctional education, creates "some property interest," but "only the provision of *no education at all* or education that was *wholly unsuited* to the goals . . . of socialization and rehabilitation" would violate that interest (quoting *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1041 (S.D.N.Y. 1995)).

313. *Id.* at 354–55 (emphasizing the stricter language of section 136, the discretionary nature of prison programs, and the similarities of the regulations promulgated pursuant to section 136 as compared to those implementing section 3202(7)).

314. *Id.* at 355.

315. N.Y. EDUC. LAW § 3202(7)(a) (McKinney 2009) (making persons under age twenty-one who have not received a high school diploma eligible to receive educational services while incarcerated). Other states have similar statutes which could be interpreted as creating a property entitlement, particularly when read in conjunction with IDEA.

316. 20 U.S.C. § 1412(a)(1)(A) (2006) (creating state obligation to provide FAPE).

317. *See id.* (mandating that FAPE must be "available to *all children with disabilities*" (emphasis added)). While IDEA excuses the performance of some of its obligations, such as providing transitional services and general assessments, it also mandates that states provide FAPE to juveniles with disabilities who are incarcerated as adults and who are under eighteen, or who are aged eighteen through twenty-one and either were identified as children with disabilities or had IEPs in their previous placements. *See* discussion *supra* Part II.A.2.

violations may induce courts to recognize the need for heightened scrutiny.

### 5. *No Fundamental Right to Education*

As discussed above, an argument for recognition of a fundamental right to basic education is unlikely to succeed. The Supreme Court has been hesitant to announce a clear right to education, perhaps in part because doing so threatens traditional federalism values. Separation of powers principles support leaving this policy up to the democratic process rather than the judiciary, and the United States' history of libertarianism supports a commitment to providing equality of opportunity rather than equal results.<sup>318</sup>

On the other hand, the Supreme Court has stated that education is distinguishable from other social benefits that the Court has been unwilling to entrust to the judiciary.<sup>319</sup> Ensuring that all incarcerated juveniles with disabilities receive adequate special education means guaranteeing equal opportunities for all disabled youth, rather than mandating equal results across the class.<sup>320</sup> This strikes at the heart of what the Constitution aims to protect. A successful fundamental rights argument might not request recognition of an unlimited right to education, as *San Antonio* did, but rather a limited right to basic special education for youth with disabilities in adult prisons.

The Court's concerns about an unlimited fundamental right to education in *San Antonio* do not apply to recognition of this limited right to special education. Requiring states to provide adequate special education services for incarcerated juveniles is merely requiring them to comply with established federal law. Declaring adequate special education a fundamental right is hardly groundbreaking in this regard—it would simply canonize what has already been recognized by prior case law and federal statutes. Further, special education policy would still be left to the legislature except when there has been a complete denial of basic education services, in which case judicial oversight would be required.<sup>321</sup> Finding a fundamental right to adequate special education does not create as many problematic issues as the Court feared would arise if it recognized

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318. Blumenson & Nilsen, *One Strike*, *supra* note 133, at 93–94.

319. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). *See also* Blumenson & Nilsen, *One Strike*, *supra* note 133, at 93 (“[The Supreme Court] remains at the threshold, unwilling either to embrace or reject a constitutional right to a minimally adequate education.”).

320. *See* Blumenson & Nilsen, *One Strike*, *supra* note 133, at 95–96 (noting that education is unique among government benefits because it “has less to do with equalizing results than equalizing opportunity”).

321. *See id.* at 96 (“[T]he right to a minimally adequate education leaves educational policy to the legislature except when that policy so disserves a student as to deprive her of the most rudimentary, least contestable educational needs.”).

a fundamental right to general education.

Although advocates should pursue this federal constitutional claim, a claim under state constitutions is more likely to succeed since state constitutions generally guarantee educational rights.<sup>322</sup> This argument avoids the difficulties of the Federal Constitutional argument. For this argument to succeed, a state's constitution must include a right to education that is actionable by individuals, but such rights are provided by the constitutions of most states.<sup>323</sup> In states that have declared a fundamental right to education, this argument will be easier to make.<sup>324</sup> However, the argument is not impossible in states that do not use a fundamental right framework,<sup>325</sup> as statutes and policies that severely deprive children of special education may not pass even a rational basis standard of review.<sup>326</sup>

#### 6. *Appropriate Relief*

While appropriate relief must be tailored to individual suits, at a minimum any lawsuit seeking to improve special education services for incarcerated juveniles with disabilities should request an order requiring the state to improve its special education programs for juvenile inmates in adult prisons within a reasonable period of time following the judgment. The order should include a commitment to fill teacher vacancies in special education programs with low student-teacher ratios,<sup>327</sup> increase class

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322. See *supra* note 54 (listing provisions of state constitutions that guarantee educational rights).

323. Blumenson & Nilsen, *One Strike*, *supra* note 133, at 104.

324. *Id.* at 104–05 & n.164. Thirteen states have declared education to be a fundamental right under their constitutions.

325. *Id.* at 105 & n.165. Seven states have declared that education is not a fundamental right under their constitutions.

326. In some cases, courts have upheld statutes and policies of educational expenditures that result in differential spending per pupil under rational basis review, holding that such policies are rationally related to the state interest of local control of public education. See, e.g., *Board of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979) (applying rational basis review to uphold Ohio's system of financing public education despite significant disparity in per pupil expenditures among districts). These challenged policies, however, tend to involve the allocation of tax dollars rather than the substantive right to FAPE created by the IDEA and state constitutions. See *id.* at 819 (“This case is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children.”). A challenge to the way in which a state educates its children may be viewed differently.

327. Cf. EILEEN M. AHEARN, NAT'L ASS'N OF STATE DIRS. OF SPECIAL EDUC., CASELOAD/CLASS SIZE IN SPECIAL EDUCATION: A BRIEF ANALYSIS OF STATE REGULATIONS 3–4 (1995) (describing a study that found that “[l]ower student-teacher ratios were related to an increased amount of time on academic tasks and student academic responses, as well as fewer incidents of inappropriate behavior”); Martha L. Thurlow, James E. Ysseldyke & Joseph W. Wotruba, *Instruction in Special Education Classrooms*

capacities in proportion to teacher hiring, provide for more classroom space, and require detailed review of existing IEP plans in accordance with IDEA requirements, among other appropriate relief based on the facility's failings. Plaintiffs can also seek attorneys' fees under IDEA, which provides that the court can award "reasonable attorneys' fees" to the prevailing party.<sup>328</sup>

In addition to prospective relief addressing the named plaintiffs' situation, systemic reform should be sought. Any remedial efforts must be expanded to apply to other facilities that suffer from the same educational failings as the defendant facility. This can be done by seeking legislation or regulations to apply any corrective plan to all similarly situated facilities.

#### CONCLUSION

Public education is a government service most Americans take for granted. For a substantial but invisible population of youth, it is a luxury just out of reach. Juvenile inmates incarcerated as adults may be legally deprived of their freedom, but they should not also be deprived of an education tailored to their educational disabilities. Despite the passage of federal legislation to protect the rights of individuals with disabilities, ongoing failures to provide adequate special education services to juveniles incarcerated in adult facilities persist in many states today. Incarcerated juveniles with disabilities regularly receive insufficient special education, far below that which their nonincarcerated peers receive, and less than what their peers incarcerated in juvenile facilities receive. Although this paper focuses on the access provided in adult prisons in only two states, other states are similarly failing incarcerated youth.<sup>329</sup> The correctional special education crisis is shaped by many factors, including political apathy, the political and social invisibility of incarcerated youth, and public education policy. This article suggests methods that might be used to challenge these policies through legislative, media, and litigation strategies. These policies must be challenged to ensure equal opportunity of education for all youth with special needs, as the law requires.

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*Under Varying Student-Teacher Ratios*, 93 *ELEMENTARY SCH. J.* 305 (1993).

328. 20 U.S.C. § 1415(i)(3)(B) (2006).

329. *Cf.* BURRELL & WARBOYS, *supra* note 44, at 10 ("Nationally, youth and adults confined in institutions have an astonishingly low level of functioning with respect to basic skills . . .").