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When Schools Criminalize Disability
Education Law Strategies for Legal Advocates

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CONTENTS

INTRODUCTION AND OVERVIEW

Background

In 1988, the U.S. Supreme Court ruled in *Honig v. Doe*[1] that what is now called the Individuals with Disabilities Education Act, or IDEA,[2] prohibits school systems from unilaterally removing from their educational placements students with disabilities deemed disruptive or dangerous by school officials. In the years since, many school systems have achieved the same result by characterizing in-school, disability-related behavior as criminal and involving the courts or the police. Often the in-school behavior forming the basis for the school's delinquency petition or crime report is related not only to disability, but to the consequences of the school system's own failure to provide appropriate educational and related services. No national data collections require school systems to report on the number of delinquency petitions or crime reports they file against students with disabilities, making it difficult to precisely gauge the depth and breadth of this problem. The experience of civil and defense attorneys and other advocates, however, suggests that it is national in scope.[3]

Court involvement takes an enormous toll on even those students who are ultimately vindicated, or against whom prosecutions are dropped as a result of juvenile court intake, screening, diversion or other procedures. Students who are adjudicated delinquent all too often end up incarcerated in settings in which they do not, or cannot, receive the free appropriate public education to which IDEA entitles them. Even prior to adjudication, students often spend significant amounts of time in pre-trial detention, without appropriate services. And for those who remain in the

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[1] 484 U.S. 305 (1988).

[2] 20 U.S.C. §1400 *et seq.*

[3] For example, the Center for Law and Education has been apprized that school-initiated juvenile justice involvement is a significant problem by advocates working in all regions of the country, including the states of Alabama, Arizona, California, Connecticut, Florida, Georgia, Idaho, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, Oregon, Pennsylvania, Tennessee, and Texas. Published due process hearing decisions and U.S. Department of Education/Office for Civil Rights complaints related to this issue have involved school systems in at least Arkansas, Florida, Georgia, Louisiana, Pennsylvania, South Carolina, Tennessee and Texas.

community, a school's treating behavior as a crime is often accompanied by other actions and omissions that violate legal rights to a quality education as well as protections against improper discipline.

Legal Context

Although the problem of school-initiated court-involvement is longstanding, there is little case law on the issue, and scant legal precedent with which to work in combating school system abuse of the juvenile justice system. Furthermore, the Individuals with Disabilities Education Act Amendments of 1997 complicated the legal analyses developed (but not necessarily tested through litigation) prior to their enactment. And even before the 1997 legislation,[4] there was not a single, overarching legal rule or claim upon which advocates might have relied to argue that it is unlawful for school personnel to file or cooperate in the filing of crime reports or delinquency petitions against children with disabilities, or that juvenile courts cannot or, in the exercise of their discretion, should not, entertain such petitions. Rather, potential legal strategies depended, as they continue to depend, upon multiple factors, among them the point in the process at which advocates intervene;[5] the child's educational history, academic and behavioral; the services the school system has or has not provided to address the child's academic and behavioral needs over time; the nature and severity of the child's disability; the school's overall response to the behavior or incident that triggered the petition or crime report; the identity of the individual filing or seeking the filing of the petition; the school system's policies, practices and procedures regarding the filing of charges; and the details of the state's juvenile code.

These uncertainties pose significant challenges for attorneys representing students targeted by school-filed petitions or crime reports. Nonetheless, promising strategies remain to be further explored and developed.

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[4] The 1997 amendments to IDEA added a provision stating that "[nothing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability." *See* 20 U.S.C. §1415(k)(9)(A).

[5] E.g., filing of the petition, assumption of jurisdiction by the court, adjudication, disposition, post-disposition.

Legal Theories and Issues to be Explored

The materials that follow are intended to assist in developing this emerging area of law. The approaches they explore, while well-grounded in law, have not all been tested in the courts. They are not a comprehensive treatment of all topics related to the education rights of students targeted for prosecution by their schools. Rather, they focus on using education advocacy based on IDEA, Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to

- hold local schools accountable when they criminalize the behavior for which they are legally obligated to provide appropriate educational services
- obtain better outcomes for clients in the juvenile courts
- enforce schools' obligation to address behavioral issues as educational ones, and
- reduce the risk of future school-initiated delinquency petitions or crime reports.

Chapter I, as a prelude to examining IDEA-based challenges to school-initiated juvenile court involvement in Chapters II through IV, discusses in general the relevance of language added to IDEA in 1997 regarding the reporting of crimes alleged to have been committed by a child with a disability. Chapters II through IV then examine, respectively, three potential approaches to challenging as improper under IDEA school-initiated delinquency petitions and crime reports based upon in-school, disability-related behavior. Each approach revolves around school system circumvention of its IDEA-based obligations to students, as follows:

Chapter II -- Viewing the delinquency petition or crime report in the context of the school system's overall response to the student's behavioral manifestations and needs, and challenging the school's treatment of behavior manifestations as a crime in this context as a violation of the substantive obligation to provide a free appropriate public education (FAPE).

Chapter III – Using IDEA as the source of an obligation to make an individualized determination that particular behavior is a "crime" before treating it as such.

Chapter IV – Characterizing the resort to the juvenile court and/or police as

impermissible circumvention of IDEA provisions regarding students schools deem dangerous.

Chapter V looks at potential legal claims based on Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, targeting the manner in which schools exercise their judgment in characterizing particular behavior as a "crime."

Chapters II - V each begin with one or more brief hypotheticals illustrating a circumstance that might warrant the approach under consideration, followed by the supporting legal analysis (including anticipated defenses) and consideration of selected strategy and case development issues. In exploring these theories and the illustrative hypotheticals accompanying them, these materials do not intend to, and in fact do not, set out a comprehensive approach for addressing the hypothetical situation posed. Nor are any of the hypotheticals intended to illustrate all of the complexities of real-life cases. Rather, each of these highly fact-specific theories constitutes one option for advocates to consider, explore, develop, adapt, modify, combine with others, reject, etc. in light of the unique circumstances facing a particular client.[6]

Chapter VI explores how re-directing the proceedings from the delinquency system to the education law system can protect clients and improve legal and educational outcomes, in three common contexts. Chapter VII flags an emerging issue under the Family Educational Rights and Privacy Act, or FERPA, concerning information sharing among schools and other agencies involved with youth deemed "at-risk" of juvenile justice involvement. It then notes other miscellaneous issues that, while beyond the scope of these materials, are critical to enforcing the rights of court-involved students and holding schools accountable.

Finally, a compilation of guiding principles and criteria for school policies regarding the filing of delinquency petitions and crime reports appears in the Appendix.

What is a "crime report"?

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[6] In addition to the specific facts of the case, these unique circumstances may also include considerations and determinations specific to state education or juvenile law, relevant interpretations of federal education law by the courts of the jurisdiction, etc.

In addition to school-filed delinquency petitions, these materials refer to and address school-filed "crime reports" or "police reports," and similar terms. By these terms, we mean reports of incidents made after the fact, as distinguished from calls to the police for immediate assistance in a bona fide safety emergency. Our analyses under IDEA, §504 and the ADA assume that these laws permit school officials to request police or other appropriate intervention where necessary to defuse a dangerous situation in a bona fide emergency, while the child's behavior is presenting an immediate, substantial physical danger to self or others that cannot be abated through the individualized crisis prevention and intervention services required under these laws.[7]

[7] In regard to crisis intervention and prevention, see Chapter II of these materials at note 25.

CHAPTER I
CHALLENGING THE PROPRIETY OF SCHOOL-FILED DELINQUENCY PETITIONS AND CRIME REPORTS UNDER IDEA: THE RELEVANCE OF 20 U.S.C. §1415(K)(9)

In 1997, Congress added to IDEA language concerning the reporting of crimes alleged to have been committed by a student with a disability. The subsequent experience of students and their advocates suggests that many school systems have seized upon that language – codified at 20 U.S.C. §1415(k)(9) – as an affirmative authorization to file delinquency petitions, report student behavior to police and otherwise respond to the behavioral manifestations of disability by propelling students into the criminal justice system. In addition, §1415(k)(9) may be anticipated as a defense to any IDEA-based legal challenge to the propriety of a school-filed delinquency petition or crime report. Thus before turning in Chapters II, III and IV to specific approaches for using IDEA to mount such challenges, we briefly discuss here the relevance of 20 U.S.C. §1415(k)(9)(A). The application of §1415(k)(9)(A) is then discussed in more detail as appropriate in the context of each of the three broad legal approaches examined in Chapters II through IV.

Entitled "Referral to and Action By Law Enforcement and Judicial Authorities," 20 U.S.C. §1415(k)(9)(A) states that

> "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability."

As an initial matter, it is important to note that nothing in the plain language of §1415(k)(9) affirmatively grants a school system actual permission to do anything. Rather, the section simply acts as a construction clause, stating merely that nothing in Part B of IDEA is to be construed to prohibit the "reporting" of a "crime" to "appropriate" authorities. Thus the relevance of §1415(k)(9)(A) is as a potential defense to any IDEA-based challenge to the propriety of a particular school-initiated delinquency petition or crime report. In addition, the legislative history of this provision clarifies that schools may not report crimes to even appropriate authorities

where doing so would circumvent the school's obligations to the child under IDEA.[1]

Whether §1415(k)(9)(A) is a valid defense in a given case, on given facts, turns on how four key questions raised by its language and legislative history are answered:

- what constitutes "reporting" a crime,
- is the school reporting a "crime,"
- what are "appropriate" authorities, and
- when does "reporting" to "appropriate" authorities circumvent a school's obligations under IDEA?

Answers to these questions, which have not yet been addressed by the courts, are discussed in Chapters II through IV of these materials in the context of particular IDEA-based legal claims and fact patterns.

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

CHAPTER II
CHALLENGING THE PROPRIETY OF SCHOOL-FILED DELINQUENCY PETITIONS AND CRIME REPORTS UNDER IDEA: VIEWING THE DELINQUENCY PETITION OR CRIME REPORT IN THE CONTEXT OF THE SCHOOL SYSTEM'S OVERALL RESPONSE TO BEHAVIORAL MANIFESTATIONS AND NEEDS

This Chapter examines the first of three potential IDEA-based approaches to challenging the propriety of school-filed delinquency petitions and crime reports. This approach (1) views the petition or report in the context of the school system's overall response to the student's behavioral manifestations and needs, and (2) challenges the school's treatment of behavior manifestations as a crime in this context as a violation of the substantive obligation to provide FAPE. It should be remembered throughout that the terms "crime report," "police report," etc., refer to after-the-fact reporting of an incident, rather than a call to police for immediate assistance in defusing a dangerous situation in a bona fide emergency, while the child's behavior is presenting an immediate, substantial physical danger to self or others that cannot be abated by the individualized crisis prevention and intervention services required by IDEA.[1]

All too often, examination of the education records of youth with disabilities against whom school officials have filed delinquency petitions or crime reports reveals a history of failure to provide FAPE. This may include failure to provide appropriate services to address the behavioral manifestations of disability as well as failure to respond as IDEA requires to patterns and incidents of challenging behavior. In other cases, examination of the education records of youth not previously identified as having a disability for purposes of IDEA reveals that they should have been. In either case, when a school files a delinquency petition or a crime report based upon disability related behavior, the school system is in effect criminalizing the student for its own violations of his or her rights. Under such circumstances, the petition or crime report should be vulnerable to a fact-specific challenge as a violation of, or impermissible circumvention of, the school's substantive obligation under IDEA to provide FAPE.

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[1] *See* note 25, *infra*.

Illustrative Hypotheticals

1. Carey had a significant history of problem behavior, academic deterioration and disciplinary sanctions prior to the school filing a delinquency petition against her in December her eighth grade year. She was retained in the fifth grade in the wake of academic failure and behavioral difficulties. Carey was evaluated during the sixth grade and found eligible for special education services on the basis of serious emotional disturbance. Carey's IEPs for the sixth, seventh and eighth grades did not provide for psychological services, nor did they contain any guidance to her teachers as to positive behavioral interventions. Rather, the IEPs described classroom rules and the punishments and rewards for breaking or following them. Her behavior continued to deteriorate, and she was repeatedly disciplined for verbal abuse, hitting other students and refusing to follow instructions. Carey was suspended a number of times during the fall term of the eighth grade, as she had been during the previous school years. Staff often attempted to restrain her. During one such attempt, as Carey struggled against being restrained, she kicked the person attempting to restrain her on the shin, and hit her on the jaw. She was immediately suspended from school for five days. During the suspension period, the vice principal filed a juvenile delinquency petition against Carey.

2. Seth recently completed the eighth grade. His academic and behavioral difficulties in school date back to at least the second grade. During his seventh grade year, Seth's father had numerous meetings with the school guidance counselor, principal and Seth's teachers. His father was asked to consent to paddling as discipline. In the spring, the school guidance counselor suggested that the family obtain outside counseling or testing for Seth. She did not, however, suggest that the school system evaluate Seth to determine whether he had a disability and required special education or related services. Later that spring, based on a checklist completed by all of Seth's teachers, the school psychologist told Seth's father that Seth was "an ADHD child" and suggested that he have Seth examined for ADHD. She did not, however, suggest or initiate an evaluation by the school system. The following week, Seth's' physician diagnosed him as having ADHD and prescribed medication. School officials were immediately informed.

Seth's grades and behavior further deteriorated during the eighth grade, and the guidance counselor suggested private counseling. In early February, school officials attempted to expel Seth from school for the remainder of the

year, but ultimately relented because they were aware that he was having difficulty adjusting to medication. He was referred for a special education evaluation later that month. After obtaining parental consent for the evaluation, however, the school took no further action to determine whether Seth was a child with disabilities entitled to services under IDEA. Seth began psychotherapy at private expense. His behavior continued to deteriorate. In May, he was accused of vandalizing (with another student) a school lavatory he was not authorized to be in, and was suspended from school. The following day, a school official reported the incident to the police. A delinquency petition was subsequently filed over the signature of one of the police department's juvenile officers.

Legal Analysis[2]

Three broad points comprise the basic legal analysis when a school breaches its obligation to provide appropriate services to a child with challenging behavior and then files a delinquency petition or a crime report:

- a key impetus for the enactment of IDEA was to end the public schools' refusal to accept and properly educate children whose disabilities involve behavior that challenges schools;
- the duty to provide FAPE includes the duty to identify, evaluate and serve children whose disabilities have behavioral consequences, and to address that behavior with appropriate educational and supportive services; and
- IDEA requires that particular steps be taken when problem behaviors emerge, continue or escalate.

Courts have recognized that the manner in which a school responds, or fails to respond, to a child with a disability may cause, contribute to, or exacerbate

[2] The following section discusses substantive legal standards, and considers the claims they may support. For a discussion of anticipated defenses, see the section entitled "Application to Hypotheticals and Anticipated Defenses," below in this Chapter. For a discussion of practical and strategic concerns involved in raising such claims (including, e.g., where and when they might be raised), see the section entitled "Strategy and Case Development Issues," below, and Chapter VI of these materials.

problematic behavior.[3] When a school system fails to do what IDEA requires, and then punishes the behavior that triggered its obligation to do so by filing a delinquency petition or (in the absence of an immediate safety emergency) reporting it to police as a crime, the school in effect prosecutes the child for its own violations of his or her substantive right to FAPE – as well as its own contributions to the behavior in question. This circumvents the school system's obligation to identify, evaluate and appropriately educate, in violation of IDEA.

1. Ending the public schools' refusal to accept and properly educate children whose disabilities involve behavioral manifestations was a key impetus for the enactment of IDEA.

Congress enacted what is now called IDEA (and was formerly known as both the Education for All Handicapped Children Act and the Education of the Handicapped Act) in 1975, in response to evidence of mistreatment and abuse, including that "for years [disabled] children of this country have been kept in the dark, deprived of a full, free public education."[4] At regional hearings held in 1973 and 1974, the Senate Subcommittee on the Handicapped (of the Committee on Labor and Public Welfare) heard numerous witnesses, including lawmakers, parents, teachers, special educators, and other professionals testify that substantial numbers of children with

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[3] *E.g., Morgan v. Chris L.,* 1997 U.S. App. Lexis 1041, 25 IDELR 227, 230 (6th Cir. 1997), *affirming* 927 F. Supp. 267 ("[w]hen school systems fail to accommodate a disabled student's behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA"); *Oberti v. Bd. of Ed. of Borough of Clementon School District*, 995 F.2d 1204, 1222-1223 (3rd Cir. 1993) (failure to provide appropriate behavior support services in regular education classroom contributed to disruptive behavior there); *Howard S. v. Friendswood School District*, 454 F. Supp. 634, 640 (S.D. Tex. 1978)(finding that plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was...a contributing and proximate cause of his emotional difficulties and emotional disturbance"); *Stuart v. Nappi*, 443 F. Supp. 1235, 1241 (D. Conn. 1978) (school's "handling of the plaintiff may have contributed to her disruptive behavior"); *Frederick L. v. Thomas*, 408 F. Supp. 832, 835 (E.D. Penn. 1976) (recognizing that an inappropriate educational placement can cause antisocial behavior).

[4] 121 Cong. Rec. H 37027 (daily ed., Nov. 18, 1975) (remarks of Rep. Gude).

disabilities were excluded from school, denied necessary services, and subjected to educational neglect.[5] For example, one state legislator testified that "[c]hildren have been denied an education because of their adjudged incorrigibility or maladaptive behavior...."[6] Parents and educators discussed the widespread failure of states to provide the breadth of supportive services that would assist students whose disabilities had behavioral manifestations to benefit from and participate in special education programs, such as specialized diagnostic evaluations, individualized tutoring, behavior-modification programs and psychological counseling.[7]

Throughout the hearings, legislators specifically referred to the twin problems of exclusion from school and, where children with disabilities *were* nominally served, lack of appropriate services.[8] Statistics compiled for Congress by the Office of Education estimated that of eight million children with disabilities in the United States, nearly two million were excluded from public schools, and more than four million

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[5]Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcommittee on The Handicapped of the Senate Committee on Labor and Public Welfare , 93d Cong., 1st Sess. (1973-74) (hereinafter "Senate Hearings"); H.R. Rep. No. 332, 94th Cong., 1st Sess. 5-6 (hereinafter "House Report").

[6] Senate Hearings, *supra*, at 346 (testimony of David Bartley, Speaker of the Massachusetts House of Representatives).

[7]Senate Hearings, *supra*, at 45, 87, 797, 809, 813, 790, 833.

[8] Senator Williams, chair of the subcommittee, summarized his observations as follows:

> "Exclusion from school, institutionalization, the lack of appropriate services to provide attention to the individual child's need - indeed, the denial of equal rights by a society which proclaims liberty and justice for all of its people - are echoes which the subcommittee has found throughout all of its hearings..."

Senate Hearings, *supra*, at 1155-56.

Senator Mondale made similar observations:

> "For many years handicapped children have been placed in institutions, or segregated in schools and classes, or left to sit at home, where they have not received the educational opportunity which is their right under the law." Senate Hearings, *supra*, at 1153.

were receiving an inappropriate education.[9] As the Supreme Court noted years later in *Honig v. Doe*,[10]

> "[a]mong the most poorly served of disabled students were emotionally disturbed students: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82% of all children with emotional disabilities went unmet."

Of those children who were not excluded from school altogether, the Court also noted, "many...were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out."[11]

In addition to testimony and statistics, Congress also was aware of the recent decision in *Mills v. District of Columbia Board of Education*,[12] brought on behalf of children with disabilities who had been "labeled as behavioral problems,...emotionally disturbed or hyperactive,"[13] and excluded from school or relegated to woefully inadequate education on that basis. *Mills* held that their treatment by the local school system violated equal protection.[14] The Supreme Court has repeatedly recognized that in enacting IDEA, Congress was motivated in part by a wish to assist in remedying the wrongs illuminated by the *Mills* litigation.[15]

In sum, in enacting what has become IDEA Congress intended to ensure that public schools admit and properly educate children with disabilities, stop treating the behavioral consequences of their disabilities as discipline problems, and to address

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[9] *See* S. Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), reprinted in 1976 U.S.C.C.A.N. 1425, 1429; House Report, *supra*, at n.12: Pub. L. No. 94-142, §3(a), 89 Stat. 774 (1975).

[10] 484 U.S. 305, 309 (1988).

[11] *Id.* (citing legislative history).

[12] 348 F. Supp. 866 (D.D.C. 1972).

[13] *Id.*. at 368.

[14] *Id.* at 375.

[15] *See Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 192 (1982); *Honig*, *supra*, 484 U.S. at 324.

their behavioral difficulties as part and parcel of their educational needs. Nothing has changed since. To the contrary, subsequent amendments to IDEA continued to recognize behavior as an educational issue.[16]

2. The duty to provide FAPE includes the duty to identify, evaluate and serve children whose disabilities have behavioral consequences, and to address that behavior with appropriate educational and supportive services.

In seeking to end the rampant educational neglect of children whose disabilities have behavioral consequences, Congress through IDEA conferred upon all children with disabilities an enforceable right to a free appropriate public education meeting statutory requirements in states accepting funds under the Act.[17] The Act contains a corresponding, unequivocal directive to local school districts to identify, locate and evaluate all children with disabilities residing within their jurisdiction, and to provide each child a "free appropriate public education," to be delivered pursuant to an Individualized Educational Program (IEP), in the least restrictive environment consistent with each child's individual needs, regardless of the severity of the disability.[18]

As the above-discussed legislative history illustrates, Congress recognized from the start that for children with behavioral manifestations, access to school must be accompanied by a right to programming that takes into account behavioral needs. Accordingly, the concept of education under IDEA is broad, encompassing, among other things, a child's unique social and emotional needs as well as his or her

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[16] For instance, the statute was amended on 1997 to expressly require the use of positive behavioral strategies and interventions and functional behavior assessments. *See* 20 U.S.C. §§1414(d)(3)(B)(i) and 1415(k)(1)(B). The 1997 amendments also recognized the importance of research-based practices for addressing behavior, and their dissemination to teachers. See 20 U.S.C. §§1412(a)(14) and1413(a)(3)(A), each incorporating by reference 20 U.S.C. §1453(c)(3)(D)(vii). *See also* 34 C.F.R. §300.382(g).

[17] *Honig*, *supra*, 484 U.S. at 310.

[18] *See* 20 U.S.C. §1413(a)(1), incorporating by reference 20 U.S.C. §1412; 20 U.S.C. §§1412(a)(1) - (5).

academic ones.[19] This aspect of IDEA is reflected in, *inter alia*, explicit provisions regarding evaluations, which must assess the child in all areas related to the suspected disability, including social and emotional status, and use technically sound instruments capable of assessing the relative contribution of behavioral factors;[20] the related services required to be made available, which include psychological, counseling and social work services; [21] and the components of IEPs, which must include positive behavioral interventions, strategies and supports to address behavior that impedes learning (by the child in question or by classmates).[22] It also underlies numerous

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[19] *County of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458, 1467 (9th Cir. 1996) ("educational benefit is not limited to academic needs, but includes the social and emotional needs that affect academic progress, school behavior, and socialization"); *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) ("[e]veryone agrees that A.S. is exceptionally bright and thus able to test appropriately on standardized tests. This is not the sine qua non of `educational benefit,' however. The term 'unique educational needs' [shall] be broadly construed to include...academic, social, health, emotional, communicative, physical and vocational needs"). *See also, e.g., Babb v. Knox County School System*, 965 F.2d 104, 109 (6th Cir.), *cert. denied*, 506 U.S. 941, 113 S.Ct. 380 (1992) (education under IDEA encompasses "both academic instruction and a broad range of associated services traditionally grouped under the general rubric of `treatment'"); *Mohawk Trail Regional School District v. Shaun D.*, 35 F. Supp. 2d 34, 42-44 (D. Mass. 1999) (discussing and rejecting school system's contention that it need not provide services to address sexually inappropriate behavior of a student diagnosed with post traumatic stress disorder, mental retardation, pedophilia and other intertwined emotional, social and behavioral conditions).

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

[21] 20 U.S.C. §1401(22); 34 C.F.R. §300.24(b)(2), (9), (13).

[22] 20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. §300.346(b)(2)(i). *See also* 20 U.S.C. §1415(k)(1)(B) (requiring functional behavior assessment and implementation/revision of behavioral intervention plan after disciplinary actions); 20 U.S.C. §1415(k)(3) (requiring that the "interim alternative educational setting" into which children may be placed following certain incidents involving dangerous weapons or drugs, or upon a finding by a hearing officer that maintaining a child in his or her current placement is substantially likely to result in injury to the child or others, include services to address the behavior that triggered the placement change).

judicial decisions holding, recognizing or illustrating the principle that for children whose disabilities entail behavioral consequences, a free appropriate public education requires "special education"[23] aimed at behavioral issues, as well as any necessary behaviorally-related related services.[24] For children with explosive or aggressive behavior, the latter include crisis prevention and intervention strategies and services.[25]

The obligation to provide FAPE, including addressing behavior issues, also includes the duty to monitor educational performance, and to review and revise a child's educational program as necessary.[26] Deterioration in a child's behavior or repeated behavior problems should trigger a reevaluation of the child and/or a review of whether the educational services being provided are in fact appropriate.[27] Schools

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[23] Meaning specially designed instruction, as per the definitions found at 20 U.S.C. §1401(25) and 34 C.F.R. §300.26.

[24] *See, e.g., County of San* Diego, *supra*; *Seattle School District No. 1, supra; Babb, supra*; *Morgan v. Chris L.,* 25 IDELR 227, 230 (6th Cir. 1997), *affirming* 927 F. Supp. 267 (E.D. Tenn. 1994), *cert. denied*, 520 U.S. 1271, 117 S.Ct. 2448 (1997) ("[w]hen school systems fail to accommodate a disabled student's behavioral problems, these problems may be attributed to the school system's failure to comply with the requirements of the IDEA"); *Oberti, supra,* 995 F.2d at 1216 (prior to removing child from regular education environment, "the school must consider the whole range of supplementary aids and services, including...special education training for the regular teacher, behavior modification programs, or any other available aids or services appropriate to the child's particular disabilities"); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 423 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140, 106 S.Ct. 1790 (1986); *Clevenger v. Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984); *Chris D. v. Montgomery County Board of Education*, 753 F. Supp. 922 (M.D. Ala. 1990). See also cases cited *supra* note 2, regarding schools' exacerbating behavioral problems.

[25] *See, e.g., Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994)

[26] 20 U.S.C. §§1414(d)(1)(A)(viii), 1414(d)(4); 34 C.F.R. §300.343(c); 34 C.F.R. part 300, App. A, question 20.

[27] 20 U.S.C. §1414(a)(2)(A). *See also Response to Inquiry of Fields*, Educ. Handicapped. Law Rep. 211:437 (U.S. Department of Education/Office of Special Education Programs 1987) (OSEP "would encourage States and localities to be alert to the possibility that repeated discipline problems may indicate that the services being provided to a particular child with a handicap should be reviewed or changed...."). *Cf.*

should also be aware of the connection between poor or deteriorating academic performance and behavior – and a resulting need to reevaluate a student and/or modify the IEP – as, for example, where a child falling further and further behind academically lashes out in response.

3. IDEA requires that particular steps be taken when problem behaviors emerge, continue or escalate.

IDEA requirements concerning the content of IEPs, the duty to review and revise them as necessary and the obligation to evaluate and re-evaluate children who have (or may have) disabilities establish a framework within which school systems - no longer permitted to simply label and treat children with behavioral manifestations as discipline problems - must work when challenging behavior emerges, continues or escalates. For example:

- The IEP itself must include "a statement of the present levels of educational performance"[28] of the child, which draws upon evaluation results and describes the effect of his or her disability on both academic and non-academic performance.
  - Consistent with the above-described inclusion of social/emotional/behavioral development within the broad meaning of "education" under IDEA, the statement of present levels of educational performance must address behavior when behavior is an issue for the child.
  - Corresponding, measurable annual goals, with either benchmarks or short-term objectives, addressing all areas of educational need resulting from the child's disability – including needs related to behavior – must be developed for each noted problem.[29]

- The IEP also must describe all of the specific educational services - "special

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Honig, supra, 484 U.S. at 326 (noting that where a student poses an immediate threat to the safety of others, school officials may remove a child from school for up to ten days while initiating an IEP review).

[28] 20 U.S.C. §1414(d)(1)(A)(i).

[29] 20 U.S.C. §1414(d)(1)(A)(ii).

education," or specialized instruction, and "related services" - to be provided in order to address the problem areas and work towards the annual goals,[30] along with an explanation of how the child's progress towards the annual goals will be measured, and of how his or her parents will be regularly informed of the child's progress (including being informed of whether that progress is sufficient to achieve the goals by the end of the year).[31]

IDEA sets forth detailed requirements regarding the manner in which programmatic reviews and decisions regarding the provision of a free appropriate public education to any given child are to be made, including decisions regarding behavioral problems and strategies to address them:[32]

- Mandated procedures include convening of an IEP team meeting, with full consideration of the child's needs, evaluation data, current program and placement, and placement options, consistent with 34 C.F.R. §§300.343, 300.344,300.535 and 300.552, and meaningful opportunity for, and efforts by school officials to ensure, parental participation in the meeting, as per 34 C.F.R. §§300.344-300.345 and 300.552(a)(1).

- Furthermore, whenever a school system takes certain disciplinary action against a child, including suspending him or her for 10 school days or less, the statute requires that the IEP team convene to arrange for a functional behavior assessment and develop a behavioral intervention plan (or, if such an assessment has already been performed and a plan implemented, to review the

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[30] 20 U.S.C. §1414(d)(1)(A)(iii). For children with dangerous behavior, these educational services must also include measures to mitigate potential harm to the child or others. *See Light, supra*. *See also* 20 U.S.C. §1415(k)(2)(C).

[31] 20 U.S.C. §1414(d)(1)(viii).

[32] In the words of the Supreme Court, "[t]he importance Congress attached to these safeguards cannot be gainsaid...Congress placed every bit as much emphasis upon compliance with procedures...as it did upon the measurement of the resulting IEP against a substantive standard...[T]he congressional emphasis...demonstrates the legislative conviction that adequate compliance with the procedures proscribed would in most cases assure much if not all of what Congress wished in the way of substantive content of an IEP." *Bd. of Ed. of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982).

existing plan and modify it as necessary).[33]

While IDEA does not require the convening of the IEP team to review a child's educational status and programming each time an incident of problem behavior occurs, surely a situation significant enough in the eyes of school personnel to warrant the filing of a juvenile court petition would in and of itself trigger the above-described IEP review and meeting requirements, in order to ensure that the child is in fact provided a free appropriate public education. Indeed, as noted above, courts have recognized that the manner in which a school responds, or fails to respond, to a child with a disability may cause, contribute to, or exacerbate problematic behavior.[34]

Application to Hypotheticals and Anticipated Defenses

1. Carey

    a. Substantive and procedural violations

Here, it appears that the school system did little, if any, of what IDEA requires, substantively or procedurally, to appropriately address the behavioral consequences of Carey's disability. While in a real case further factual investigation would, of course, be required, the following is a list of apparent substantive and procedural violations, resulting in what an appropriate expert(s) would likely conclude was a substantive denial of FAPE.

- Carey's IEPs have included neither special education geared to her behavioral manifestations (i.e., specially designed instruction to meet the unique needs related to the behavior), nor related services to address behavior. The "positive behavioral interventions, strategies, and supports" that the statute requires to

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[33] *See* 20 U.S.C. §1415(k)(1)(B). *But see also* 34 C.F.R. §300.520(b), purporting to limit right to functional behavior assessment to students who will be excluded for a total of 11 or more school days during the school year. For a discussion of the general principles that apply when agency regulations are challenged as inconsistent with the statute they implement, see *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[34] See cases cited *supra* note 2.

address behavior that impedes learning are missing as well.[35]

- To the extent that for three years Carey's annual IEPs have included a list of rules, rewards and punishment -- and that her challenging behavior and ineffectual punishment have continued without significant change -- the school system has also violated the statutory review and revision requirement. While Carey's IEP may have been *reviewed* at least annually, it does not appear to have been *revised* "as appropriate."[36]

- Given the context of apparent continuous difficulty, if the school system conducted only *annual* reviews, it likely violated the IDEA obligation to review a child's IEP "*periodically*, but not less than annually...."[37]

- Similarly, there is no indication that Carey was re-evaluated during this time, despite continuing deterioration and exclusionary discipline. This may be a violation of the duty to conduct a re-evaluation "if conditions warrant," rather than simply adhering automatically to a once-every-three-years schedule.[38]

- There is no indication that the school system ever conducted a functional behavior assessment, either as part of Carey's initial evaluation (which should have included appropriate assessment(s) relevant to behavior) or as required by the statute when she was suspended.[39]

- These facts suggest consistent failures to convene the IEP team, arrange for a functional behavior assessment, and develop (or review and modify an existing) behavior intervention plan following instances of suspension that appear to have spanned three school years.[40]

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[35] 20 U.S.C. §1414(d)(3)(B)(i).

[36] 20 U.S.C. §1414(d)(4)(A).

[37] *Id.* (Emphasis added).

[38] 20 U.S.C. §1414(a)(2).

[39] 20 U.S.C. §20 U.S.C. §§1414(b)(2)(C), (3)(C), 1415(k)(1)(B); 34 C.F.R. §§300.520(b), 300.532(g).

[40] 20 U.S.C. §1415(k)(1)(B).

- Although school officials apparently deemed the last incident serious enough to warrant criminal charges, there is no indication that the IEP team was convened to discuss Carey's behavior and plan educational responses (e.g., new evaluations, change in services, placement, etc.).

- It is unclear whether the school's repeated physical restraint of Carey (whether done pursuant to the rules and punishments outlined in her IEP or otherwise) was consistent with state law, if any, regarding the use of restraint.[41] To the extent that they protect students, such state standards are deemed incorporated into IDEA by virtue of the statutory definition of FAPE,[42] and are enforceable as IDEA rights.[43]

Given these facts and violations of statutory rights (and assuming that further factual investigation does not suggest a different interpretation), a strong argument can be made that under the circumstances, (1) the school system is in effect punishing through the delinquency petition its own failure to provide Carey with FAPE, and/or (2) the school system is unlawfully seeking to substitute punitive measures for the

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[41] For examples of state laws and regulations limiting schools' use of restraint and seclusion, see 105 ILCS 5/2-3.126, 105 ILCS 5/10-20.31, and 105 ILCS 5/34-18.18 (Illinois), all as added by Public Act 91-600; Tex. Educ. Code §37.0021 (as added by S.B. No. 1196); 603 C.M.R. 46.01 *et seq.* (2001) (Massachusetts Department of Education regulation).

[42] By definition, a "free appropriate public education" must meet the standards of the state education agency. 20 U.S.C. §1401(8).

[43] *See, e.g., Town of Burlington v. Department of Education*, 736 F.2d 773, 789 (1st Cir. 1984), *aff'd.*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Seattle School District No. 1, supra*, 82 F.3d at 1499 n.2; *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990), *cert. denied*, 500 U.S. 905, 111 S. Ct. 1685 (1991); *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 620 (6th Cir. 1990); *Geis v. Board of Education of Persippany-Troy Hills*, 774 F.2d 575, 581 (3rd Cir. 1985); *Students of California School for the Blind v. Honig*, 736 F.2d 538, 544-545 (9th Cir. 1984), *vacated as moot*, 471 U.S. 148, 105 S.Ct. 1928; *LIH v. New York City Board of Education,* 103 F. Supp. 2d 658, 668-9 (E.D.N.Y. 2000); *Pink v. Mt. Diablo Unified School District*, 738 F. Supp. 345, 346-347 (N.D. Cal. 1990); *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296, 1303-1304 (W.D. Mich. 1987).

provision of FAPE.[44] These facts may also support an argument that the delinquency petition is really an unlawful attempt by the school to change Carey's placement without following IDEA procedures, by triggering the change in placement that often accompanies court involvement.[45] The school system's glaring failures to provide

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[44] *Cf. Murphy v. Timberlane Regional School District*, 22 F.3d 1186, 1196 n. 13 (1st Cir. 1994) ("Timberlane's misconceptions about the IDEA are betrayed...by the contention that its institution of truancy proceedings should be considered the rough equivalent of the administrative adjudication required under [special education regulations]...[A] coercive adversarial proceeding against a parent is no substitute for a substantive review of the special educational needs of a handicapped child"); *Lamont X. v. Quisenberry*, 606 F. Supp. 809, 813 n.2 (S.D. Ohio 1984) ("....we cannot help but be troubled by the decision to prosecute the minor plaintiffs for the August disturbances....Plaintiffs' handicap by definition includes a likelihood for behavioral disturbances, and the fact that defendants chose criminal prosecution as an appropriate response to such behavior leads us to question whether the school may have simply decided that it was time to take harsh action in such instances as a policy matter, a result which we do not perceive as wholly in keeping with the spirit and purpose of the EAHCA [now IDEA]").

[45] *See Morgan v. Chris L., supra*, 1997 U.S. App. Lexis 1041 at 14-17, 25 IDELR at 230 (by filing delinquency petition, school system had unlawfully attempted to secure a program from the juvenile court instead of providing services itself, and improperly sought to change student's educational placement without following IDEA change-in-placement procedures); *In the Matter of Beau II*, 95 N.Y.2d 234, 738 N.E.2d 1167, 1171 (2000) (allowing that a Person in Need of Supervision petition might constitute a change in placement requiring IDEA procedures to be followed, but rejecting "blanket rule" of *Morgan* in favor of a "case-specific" approach). *But see also Joseph M. v. Southeast Delco School District*, 2001 U.S. Dist. Lexis 2994 at 16-17 (E.D. Pa. 2001) (*Morgan* holding treating petition as change of placement requiring manifestation determination overruled by 1997 enactment of §1415(k)(9)(A)).

Note also that if the filing of the delinquency petition can be characterized under the facts as a significant change in placement, the regulations implementing §504 should require the school system to conduct an evaluation of the student prior to making the decision to file it. *See* 34 C.F.R. §104.35(a); *Hickman County (TN) School District*, 34 IDELR 294 (OCR 10/2/2000) (complaint resolution agreement requiring manifestation determinations before filing of delinquency petitions under certain circumstances); *Chester County (TN) School District*, 17 EHLR 301 (OCR 10/26/90) ("In the case of students who have no prior or ongoing involvement with juvenile

required services, or to even invoke the processes that the statute has established for designing those services when challenging behavior deteriorates or fails to improve, would be key to this argument.

b. Defenses

In any given case advocates will face a number of legal and strategy issues regarding how to frame and where best to raise and use such claims. The particular resolution of these issues, along with the case's particular facts, will determine in large part the defenses that may be anticipated. Section 1415(k)(9)(A) may be expected regardless, with defendant school officials/systems arguing that this provision allows for the delinquency petition filed against Carey. A response, on the facts of this hypothetical, would consist of the following points:

- Section 1415(k)(9)(A) provides that part B of IDEA not be interpreted as prohibiting schools from "reporting a crime" to "appropriate authorities."

- The phrase "reporting a crime" is not defined in the statute. In common usage,[46] this phrase refers to notifying the law enforcement entities to which crimes ordinarily are reported, i.e., the police, sheriff, etc. – not to notifying the judiciary, which tries crimes. Section 1415(k)(9)(A) thus does not encompass the filing of juvenile delinquency petitions, and so is irrelevant on these facts.

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authorities or the courts, the District should not by-pass its discipline procedures prior to contacting juvenile authorities. If referral to juvenile authorities for a disciplinary matter may result in the student's placement being significantly changed, the District has an obligation, prior to the referral, of determining whether the misbehavior is related to his/her handicapping condition."). But see also the following less helpful OCR complaint decisions, both of which involved students who did not miss any school as a result of their school-initiated arrests: *New Caney (TX) Independent School District*, 30 IDELR 903 (OCR 11/13/99); *Richland (SC) School District #2*, 29 IDELR 980 (OCR 7/7/98).

[46] It is a basic canon of statutory construction that unless otherwise defined, phrases are interpreted as taking on their ordinary contemporary common meaning. Sutherland Stat. Const. §47:28 (6th Ed.). *See also, e.g., American Rivers v. F.E.R.C.* , 201 F.3d 1186 (9th Cir. 2000) (when common terms are used, they should be given their common meaning).

- The use of the phrase "*appropriate* authorities" (emphasis added) reinforces this limitation, as law enforcement entities (e.g., police, sheriff), rather than the courts, ordinarily are the appropriate authorities to receive crime reports.

- Even if "reporting a crime" to "appropriate authorities" could be properly construed to include the filing of a juvenile delinquency petition, §1415(k)(9)(A) would not excuse the school system's filing in this case. The use of the word "appropriate" also indicates that reports may only be made to such authorities as are appropriate in light of the purposes of IDEA.[47] Depending upon the particular factual situation, using certain behavior as a basis for a delinquency petition is not appropriate in light of the purposes of IDEA, and so does not constitute the reporting to "appropriate" authorities.

    - Examples of such factual situations include those where (as above) schools respond to behavioral manifestations by "reporting," rather than by providing appropriate special education and related services consistent with IDEA substantive and procedural requirements -- particularly (but not exclusively) where a school fails to provide appropriate services and treats the resulting behavior as a discipline problem and a crime.[48]
    - Another example would be schools' using broad definitions of crimes to characterize as criminal behavior that is typically associated with a particular disability -- and for which a school system is legally responsible for providing special education and related services.[49]

- Even where §1415(k)(9) applies, crimes may not be reported to even "appropriate" authorities if doing so would circumvent the schools'

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[47] *Cf. Town of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985) (where IDEA, then known as the Education of the Handicapped Act, grants courts authority to "grant such relief as the court determines is appropriate," "appropriate" relief is relief that is appropriate in light of the purposes of the Act).

[48] Such were the facts in *Morgan v. Chris L.*, *supra*.

[49] In regard to school decisions to characterize certain behavior as a crime, see also Chapter V of these materials, discussing §504 and the ADA.

responsibilities towards the student under IDEA.[50] Viewed in context, the delinquency petition filed against Carey does just that. The examples noted immediately above of reports that would be inappropriate in light of the purposes of IDEA, and so not reports to "appropriate" authorities within the meaning of §1415(k)(9)(A), are good examples of this kind of prohibited circumvention as well.

2. Seth

a. Substantive and procedural violations

Assuming that Seth's ADHD manifests in such a way as to render him IDEA-eligible,[51] and subject of course to further factual investigation, it would appear that Seth was denied at least all of the IDEA rights denied to Carey (see above): the school system did not even acknowledge him as a child with a disability with FAPE and associated rights under the statute and regulations. On these facts – which include ample evidence of various school officials having reason to believe that Seth had ADHD, and actual knowledge once he was diagnosed at their suggestion – it would seem that the school system also violated its legal obligations under the related childfind and evaluation provisions of IDEA.[52] As in the case of Carey, Seth's treatment

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

[51] *See* 34 C.F.R. §300.7(c)(9) (defining the IDEA eligibility category of "other health impairment" as including "limited...alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that...[i]s die to chronic or acute health problems such as...attention deficit disorder or attention deficit hyperactivity disorder...and...adversely affects a child's educational performance"). In order to be eligible for services under IDEA, a child must have one of the listed conditions, such as an "other health impairment," and need special education and related services "by reason thereof." 20 U.S.C. §1401(3)(A).

[52] *See* 20 U.S.C. §§1412(a)(3)(A), 1412(a)(7), 1413(a)(1); 34 C.F.R. §§300.125(a), 300.300(a)(2). For examples of individual cases in other contexts in which a violation of childfind has been claimed, see *Doe v. Metropolitan Nashville Public Schools*, 133

appears to give rise to strong arguments that the school system impermissibly substituted punitive measures for appropriate (or any) services, and is punishing him through the criminal process for the consequences of its own violations of the law. Further, to the extent that it can be proven that in this community, crime reports filed with the police by school officials against students generally result in the filing and prosecution of delinquency petitions, it may also be possible to characterize the crime report as an attempt by this particular school to avoid serving Seth by having his placement changed by the court.

b. Defenses

Because the vice principal called the police and did not himself file the resulting delinquency petition, Seth's response to the school system's expected invoking of §1415(k)(9) may differ somewhat from Carey's. If it can be established factually, as suggested above, that in this school/school system/community, a school official filing a crime report with the police is tantamount to the school official filing a delinquency petition, and that the relevant school officials are aware of this, then all of the responses to §1415(k)(9)(A) set forth above in connection with Carey, against whom the delinquency petition was filed by a school official acting as such, should be available to Seth.[53] If not, the response to this defense might make the following points:

- Section 1415(k)(9)(A) provides that part B of IDEA not be interpreted as prohibiting schools from reporting a crime to "appropriate" authorities.

- The use of the word "appropriate"means that reports may only be made to such

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F.3d 384 (6th Cir.), *cert. denied*, 525 U.S. 813 (1998) (denying defendant's motion for summary judgment); *Dept. of Ed., State of Hawaii v. Cari Rae S.*, 2001 U.S. Dist. Lexis 11376 (D. Hawaii 8/3/2001) (violation found, plaintiff should have been evaluated sooner); *Hoffman v. East Troy Community School District*, 38 F. Supp. 2d 750 (E.D. Wis. 1999) (no violation found).

[53] *Cf. State of Wisconsin v. Trent N.*, 212 Wisc.2d 728, 741, 569 N.W.2d 719, 725 (1997) (rejecting argument that school essentially initiated juvenile proceedings when it reported student to police, in view of various levels of review under state law before and after filing of a delinquency petition).

authorities as are appropriate in light of the purposes of IDEA.[54] Depending upon the particular situation, reporting behavior to police as a crime may not be appropriate in light of the purposes of IDEA, and so would not constitute the reporting to "appropriate" authorities.

- One example of such a factual situation would be where, as here, schools respond to behavioral manifestations by "reporting," rather than by providing appropriate special education and related services consistent with IDEA substantive and procedural requirements -- particularly (but not exclusively) where a school fails to provide appropriate services and treats the resulting behavior as a discipline problem and a crime.[55]

- Even where §1415(k)(9) applies, crimes may not be reported to even "appropriate" authorities if doing so would circumvent the schools' responsibilities towards the student under IDEA.[56] Viewed in context, the police report involving Seth arguably does just that, as it follows an ongoing failure to address his known disability, is based upon behavior exacerbated by the school's failure to provide IDEA services, and may result in Seth's long-term removal from this school – and of this particular school's obligation to provide him with FAPE.

Strategy and Case Development Issues

The most significant strategy issue raised by this approach, and the claims it suggests, is where and how a student's attorney ought to try to halt the delinquency proceedings, and prevent an adjudication. Even before the 1997 addition of

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[54] *Cf. Town of Burlington, supra*.

[55] Another example, not necessarily implicated here, is when schools use broad definitions of crimes to characterize as criminal behavior that is typically associated with a particular disability, and for which a school system is legally responsible for providing special education and related services

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

§1415(k)(9) to the statute, no reported judicial decisions had held that IDEA limits the jurisdiction of state courts over delinquency matters. The express language in §1415(k)(9)(A) that "[n]othing in this part shall be construed...to prevent State...judicial authorities from exercising their responsibilities with regard to the application of Federal and State laws to crimes committed by a child with a disability" makes such jurisdictional arguments even more difficult, at least in the absence of helpful state law.[57]

If the goal is to halt the delinquency proceedings,[58] a better approach might be to ask the court to exercise its discretion (under the applicable state-law standard) to dismiss the petition in light of the poor school system conduct[59] underlying it.[60]

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[57] *See, e.g., Trent N.*, *supra*. For an example of a pre-1997 case involving helpful state law, see *In re McCann*, 17 EHLR 551 (Tenn. Crt. Apps. 1990).

[58] Where delinquency defense and education advocacy are to be handled by separate counsel, close collaboration between the student's civil and defense attorneys will be critical if any of the strategies discussed herein are to succeed.

[59] I.e., the cumulative violations of explicit statutory provisions regarding the obligation to provide FAPE and the impropriety under IDEA of the school-filed delinquency petition or crime report under the circumstances.

[60] Recognizing the potential for inappropriate school system reliance upon juvenile courts, a number of courts have held (albeit in juvenile proceedings other than delinquency cases), without necessarily finding limits on juvenile court jurisdiction, that what is presented through a juvenile petition may in reality be an educational matter within the purview of IDEA and other disability laws, and therefore inappropriate for resolution through the juvenile system. *See, e.g.*, *North v. District of Columbia Bd. of Ed.*, 471 F. Supp. 136, 140 (D.D.C. 1979) (it would be inappropriate to proceed with neglect proceedings where real issue concerned school district's failure to provide special education and related services to which child was entitled); *In the Matter of Ruffel P.*, 582 N.Y.S.2d 631 (Family Court Orange Co. 1992) (dismissing "in the interests of justice" Person In Need of Services petition brought by school principal alleging violent behavior by student, where school had refused to certify child as eligible for special education, failed to try different teaching approaches, and responded solely with disciplinary actions); *In the Interest of J.D.*, 510 So.2d 623 (Fla. App. 1 Dist. 1987) (court did not have dependency jurisdiction over child allegedly in need of placement in a segregated classroom for students with cognitive disabilities; educational needs of child did not form statutory basis of dependency); *In the Matter*

Convincing the juvenile court that the crux of the matter is educational, not criminal, will be critical. Advocates will likely be in a stronger position to do so if they can represent to the court that these education-law violations are being litigated, and will be resolved, via the procedures provided by IDEA and state special education law. Furthermore, insofar as juvenile courts generally are courts of limited jurisdiction, not competent under state or federal law to resolve disputes over the provision of FAPE under IDEA,[61] advocacy before the juvenile court should probably focus on convincing the court that serious issues concerning school system violations of IDEA exist (including the propriety of the petition itself under the circumstances), and that the student has initiated the proper proceedings under education law to address them – rather than on attempting to litigate the IDEA issues on the merits in juvenile court.

If the juvenile court will not dismiss the petition based on the foregoing (or is thought unlikely to do so), an alternative strategy might be to (1) seek a stay of the adjudication pending completion of the parallel IDEA proceedings and, (2) as relief in the latter seek, *inter alia*, an order requiring the offending school system to seek dismissal of the juvenile charges or, depending upon how the juvenile court case has proceeded, otherwise cooperate in obtaining a favorable resolution.[62] An order by a due process hearing officer or a court in a civil action/appeal under IDEA requiring the school system to take certain actions vis a vis the delinquency petition would fall well within the statute as the "appropriate relief" authorized and required by 20 U.S.C.

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of Shelly Maynard, 453 N.Y.S.2d 352 (Family Court Monroe Co. 1982) (where child was found to have a disability after being adjudicated a Person in Need of Services on the basis of truancy at the behest of school officials, school would be required to fulfill its obligation to provide appropriate special education and related services; court would renew involvement only if child failed to attend an appropriate placement made pursuant to special education law); *Flint Bd. of Ed. v. Williams*, 276 N.W.2d 499 (Mich. App. 1979) (school system may not ask probate court to take jurisdiction over children with disabilities pursuant to state statute regarding students who repeatedly violate school rules or are truant until proceedings under special education law have terminated and a final decision made that no program within the school system can serve the child's needs). *Cf. Murphy, supra*; *Lamont X., supra*.

[61] *See, e.g., In Re: Roger S.*, 338 Md. 385, 658 A.2d 696 (1995); *A.C.B. v. Denver Department of Social Services*, 725 P.2d 94 (1986) (Colorado); *Oscar F. v. Worcester*, 412 Mass. 38, 587 N.E.2d 208 (1992).

[62] This strategy is discussed further in Chapter VI of these materials.

§1415(i)(2)(B).[63] In contrast, unless somehow authorized by state law and brought in state court, an action asking a court to enjoin the juvenile proceeding based upon IDEA violations would likely raise thorny issues under federal abstention doctrine and the Anti-Injunction Act.[64]

In regard to case development, this highly fact-specific approach will require detailed factual investigation and development, as well as the assistance and testimony of appropriate experts. It will be important to re-construct in detail the student's academic and behavioral history, and the school system's response or lack thereof, including evaluations, meetings, parental requests, formal and informal interactions between the family and school personnel, the context of specific disciplinary incidents and the school's response thereto, etc. Competent expert testimony regarding the connection between the student's disability and the incident underlying the delinquency petition or crime report, what the school system should have done in order to provide FAPE as it concerns behavior in this student's case, why what the school system did was substantively insufficient and the consequences for the student, including the relationship between the school's mishandling of his or her behavioral needs and continuing or escalating behavioral difficulties, will be critical. Where, as in Seth's case, failure to evaluate/childfind violations are also a factor, expert testimony on when, and why, the student should have been identified and evaluated for IDEA eligibility will also be necessary.

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[63] See the discussion of appropriate relief in Chapter VI of these materials. Where the delinquency petition was filed by school officials, an order might require the school system to seek dismissal of the petition, as was the case in *Morgan*, *supra*. Where the petition was filed by police or prosecutors following a school-filed crime report, or by any other third party, the school system might be ordered to cooperate with the student in bringing the juvenile proceedings to a favorable conclusion in other ways (e.g., submitting to the court appropriate evidence of its ability, desire and intent to provide appropriate education and related services, interceding with the prosecutor, providing needed supports for the staff member who may have filed the petition, etc.).

[64] *See* 28 U.S.C. §2283.

CHAPTER III
CHALLENGING THE PROPRIETY OF SCHOOL-FILED DELINQUENCY PETITIONS AND CRIME REPORTS UNDER IDEA: USING IDEA AS THE SOURCE OF AN OBLIGATION TO MAKE AN INDIVIDUALIZED DETERMINATION THAT PARTICULAR BEHAVIOR IS A "CRIME"

This Chapter examines the second of three potential IDEA-based approaches to challenging the propriety of school-filed delinquency petitions and crime reports. This approach uses IDEA as the source of an obligation to make an individualized determination that particular behavior is a "crime" before treating it as such. It blends affirmative IDEA requirements regarding services and processes for addressing behavioral manifestations with an analysis of 20 U.S.C. §1415(k)(9)(A) to conclude that schools are not free to treat any incident as a crime but, rather, must at a minimum convene the IEP team to consider whether the characterization of the incident as a particular crime is accurate in light of the child's disability and the attendant circumstances. This should include consideration of whether the child had the requisite intent, which may require supplementing the IEP team with other qualified professionals with appropriate expertise.[1]

Illustrative Hypothetical

> *David is 10 years old and diagnosed with autism. This semester, the behavioral manifestations of his disability appear to have intensified, and tantrums in school have become more frequent. Recently, after becoming frustrated during an interaction with his teacher, he swept the books, supplies and papers off of his desk and onto the floor, and went into a tantrum. During the course of the tantrum, he pulled his teacher's hair and kicked him. Although David was calm and the incident over when she became aware of it, the principal reported it to the police and requested that charges of assault and disorderly conduct be filed.*

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[1] Again, it should be remembered throughout that as used herein, the terms "crime report," "police report," etc. refer to after-the-fact reporting of an incident, rather than a call to police for immediate assistance in defusing a dangerous situation in a bona fide emergency, while the child's behavior is presenting an immediate, substantial physical danger to self or others that cannot be abated through the individualized crisis prevention and intervention strategies IDEA requires.

Legal Analysis

As discussed in Chapter II, schools have an obligation under IDEA to address the behavioral manifestations of disability with educational services and supports. As also discussed, towards this end schools must take particular steps when problem behaviors emerge, continue or escalate, and may not substitute punitive discipline instead. It logically follows that schools must also have a related obligation to make a principled, individualized determination of whether behavior is a crime under the circumstances before treating it as such. This determination must be made by a group of people with knowledge and expertise necessary to interpret events in context, in light of the child's disability and its consequences, including whether the child had, or was capable of forming, the requisite intent.[2]

IDEA provides a mechanism for making this determination – a mechanism schools are required to activate whenever challenging behavior reaches a critical point, regardless of whether anyone is contemplating characterizing it as a crime. As discussed in Chapter II, the statute and regulations call for convening an IEP team meeting to consider these developments and plan for meeting the child's needs. This necessarily entails bringing some insight to bear on the behavior, including utilizing evaluation data, functional behavior assessments and other pertinent information to come to an understanding of the behavior in relation to the child's disability and the impact of that disability on the child.

Anticipated Defenses

Determining whether behavior is a crime under the circumstances will require a basic understanding of how the "crime" in question is defined, including such elements as intent. Schools may claim that this places an undue burden on them, and that it is for the legal process to decide whether a student is guilty or innocent. However, this is tantamount to arguing that it is acceptable for a school official to accuse a student of a crime, bringing the force of the criminal justice system to bear against him or her, without knowing what the crime is. It also ignores the enormous

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[2] *C.f. S-1 v. Turlington*, 635 F.2d 342, 350 (5th Cir. 1981) (pre-expulsion determinations of whether misconduct is related to disability must be made by a trained and knowledgeable group of persons).

toll that going through the juvenile justice system takes on student and family, even if the student is vindicated in the end. Indeed, the tort of malicious prosecution – a part of the common law in virtually all states – recognizes that being subjected to an unwarranted prosecution is itself an injury, and thus imposes a general legal duty to refrain from initiating or procuring the initiation of criminal proceedings against another without probable cause.[3]

Section 1415(k)(9)(A) may be anticipated as a defense as well. A response might be as follows:

- §1415(k)(9)(A) provides in pertinent part that the provisions of part B of IDEA are not to be construed to prohibit schools from reporting "crimes" to appropriate authorities, etc.

- §1415(k)(9)(A) therefore applies only when what is being reported is a "crime." Put another way, §1415(k)(9)(A) does not defeat or otherwise limit IDEA-based claims when the behavior or incident reported is not a "crime."

- Therefore, (1) schools must determine whether what they are reporting is a "crime" before they may invoke §1415(k)(9)(A) as a defense, and (2) that determination must be competent and accurate, and made in good faith.

- As a matter of statutory construction, whether something is a crime within the meaning of §1415(k)(9)(A) -- which was added to the statute in 1997 -- must be determined with reference to pre-existing law regarding the duty to address the behavioral manifestations of disability as part and parcel of the duty to provide FAPE – of which Congress is presumed to have been aware when it enacted

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[3] More specifically, "[a] private person who initiates or procures the institution of criminal charges against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and (b) the proceedings have terminated in favor of the accused." Restatement (second) of Torts §653 (1977). One who initiates or continues criminal proceedings against another has probable cause "if he correctly or reasonably believes (a) that the person whom he accuses has acted or failed to act in a particular manner, and (b) that those acts or omissions constitute the offense that he charges against the accused, and (c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution." *Id.* §662.

§1415(k)(9).[4] Whether something is a "crime" within meaning of 1415(k)(9)(A) also must be determined in light of the fact that Congress contemporaneously added explicit provisions to the statute regarding schools' duty to address behavior with appropriate educational interventions and supports (i.e. 20 U.S.C. §§1414(d)(3)(B)(i) and 1415(k)(1)(B)), as each section of a statute must be construed in connection with every other part, so as to produce a harmonious whole.[5] Thus §1415(k)(9)(A) cannot be interpreted to permit schools to criminalize *any* challenging, disability-related behavior that might look to a school official, at first blush, like an element of a crime. Rather, to be consistent with then-existing law and contemporaneous enactments, and to render IDEA a harmonious whole, §1415(k)(9) must be interpreted to require an individualized determination by knowledgeable persons with appropriate expertise of whether the incident in question was a crime in light of the child's disability and the attendant circumstances.

Application to Hypothetical

Depending upon facts not stated or implied in the hypothetical, David may have claims along the lines of those discussed in Chapter II in regard to Carey and Seth. Regardless, however, of whether he could establish a past failure to provide FAPE, the fact remains that the school system appears to have responded to this particular incident in a manner inconsistent with its obligations under IDEA. There is no indication that the IEP team (supplemented, if necessary, by other qualified professionals) convened to discuss the incident in the context of David's disability prior to the principal's non-emergency involving of the police, and so no indication that

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[4] *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (it is assumed that Congress is aware of existing law when it passes legislation); *Goodyear Atomie Corporation v. Miller*, 486 U.S. 174, 185 (1988). For a discussion of pre-existing law regarding the duty to address behavioral manifestations, see Chapter II of these materials.

[5] Sutherland Stat. Const. §46:05 (6th Ed.). *See also Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995); *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439 (1993); *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) (court will not only consider particular statute in question, but also entire legislative scheme of which it is a part); *Lindsey v. Tacoma-Pierce Co. Health Department*, 203 F.3d 1150 (9th Cir. 2000).

an individualized determination by a knowledgeable group of persons was made that his behavior on that occasion was criminal. Furthermore, subject to examination of David's education records and evaluation results and with appropriate expert assistance, it is likely that the principal's determination that David's tantrum constituted the crimes of assault and disorderly conduct, both of which commonly include an element of intent, was substantively erroneous as well as procedurally flawed.

Strategy and Case Development Issues

As is the case with the approach discussed in Chapter II, the most significant strategy issue raised by this approach, and the claims it suggests, is where and how it can be used to halt the delinquency proceedings, and prevent an adjudication – and for the same reasons. Options for using these claims to prevent an adjudication in juvenile court, or to stay the juvenile proceedings pending completion of IDEA proceedings in which they will be litigated, are similar. However, whereas a claim that the school system's filing a delinquency petition or crime report was improper under IDEA based upon a cumulative past denial of FAPE may remain viable even if, and after, a child is adjudicated delinquent (as further discussed in Chapter VI of these materials), a claim based on an erroneous determination that certain behavior was a crime – or upon no meaningful determination at all – may lose power if the juvenile court adjudicates the student delinquent on the basis of that behavior before the claim can be fully litigated, especially if the adjudication is not appealed.

CHAPTER IV
CHALLENGING THE PROPRIETY OF SCHOOL-FILED DELINQUENCY PETITIONS AND CRIME REPORTS UNDER IDEA: CHARACTERIZING THE RESORT TO THE JUVENILE COURT OR POLICE AS IMPERMISSIBLE CIRCUMVENTION OF IDEA PROVISIONS REGARDING STUDENTS SCHOOLS DEEM DANGEROUS

The hypothetical scenarios described in Chapters II and III suggest yet another circumvention of IDEA that arguably renders a school-filed delinquency petition or crime report improper, and a third IDEA-based approach. This approach to defending against a school-initiated prosecution is based upon the Supreme Court's decision in *Honig v. Doe*[1] and a subsequently-enacted statutory provision regarding school system options for seeking outside intervention to address dangerous behavior.[2]

Legal Analysis

IDEA, as interpreted in *Honig* and amended in 1997, provides schools with two procedural avenues for seeking outside intervention as a part of their response to a student who exhibits behavior dangerous to him- or herself or others.[3] As discussed

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[1] 484 U.S. 305 (1988).

[2] In this context, "outside intervention" means either the filing of a delinquency petition or the after-the-fact reporting of an incident to law enforcement authorities, as opposed to a call to police for immediate assistance in defusing a dangerous situation in a bona fide emergency, while a student's behavior is presenting an immediate, substantial physical danger to self or others that cannot be abated by the individualized crisis prevention and intervention strategies the law requires.

[3] As discussed in Chapter II, the response first and foremost must include providing substantively appropriate educational and related services, including positive strategies and supports to address emotional and behavioral needs, consistent with IDEA-mandated procedures for developing, reviewing and revising IEPs (including crisis prevention and intervention plans) and placements. Outside intervention should only be an issue where the parent and school system cannot agree on an appropriate

below, school officials may go to an appropriate court, under appropriate circumstances, to obtain an order allowing them to exclude a student from his or her usual educational placement, or they may use IDEA's administrative due process hearing system to obtain similar relief. Filing a delinquency petition instead, or involving the police in the absence of a bona fide safety emergency requiring immediate police assistance to resolve (and otherwise meeting the criteria included in note 2, *supra*), should be deemed an impermissible circumvention of IDEA's carefully-crafted system for simultaneously protecting the educational rights of students whose disabilities have challenging behavioral consequences with the right of children with disabilities, their non-disabled peers and school staff to a safe educational environment.

1. Outside intervention from a court – Honig v. Doe

In addition to holding that (subject to the narrow exceptions later added to the statute), there is no exception to IDEA's "stay-put" provision for students deemed dangerous or disruptive by schools, *Honig* also set forth the conditions under which a school system may invoke the aid of the courts to address student behavior. At the outset, the Court noted Congress' intent, apparent from the legislative history of the Act, to safeguard the education rights of all students with disabilities, particularly those with serious emotional disturbance.[4] In order to safeguard those rights and to strike a balance between emotionally disturbed students' "interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA [IDEA]...[and] the interests of state and local school officials in maintaining a safe learning environment for all their students," the Court allowed that in exigent circumstances involving truly dangerous students, school officials may petition courts to order that a student be temporarily excluded from his or her current educational placement, notwithstanding a parent's objecting and invoking the stay-put provision.[5] The Court reasoned that the latter (formerly codified at 20 U.S.C. §1415(e)(3), now found at 20 U.S.C. §1415(j)) does not "limit the equitable powers of district courts such that they cannot, in appropriate cases temporarily enjoin a dangerous disabled child from attending school," because "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by §1415(e)(2) [now 20 U.S.C.

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educational response (i.e., changes in IEP or placement).

[4] *Honig, supra,* 484 U.S. at 309.

[5] *Id.*, 484 U.S. at 328.

§1415(i)(2)]."[6] As does current §1415(i)(2), then-§1415(e)(2) provided, *inter alia*, that a party aggrieved by the decision in an administrative due process hearing could bring an action in "any State court of competent jurisdiction or in a district court of the United States," and that the court "shall grant such relief as the court determines is appropriate."

Honig thus set three conditions as prerequisites to a school system's resort to the courts in response to the behavioral problems of children with disabilities: (1) that the court to which the school system turns is a federal district court or a state court of competent jurisdiction exercising jurisdictional and remedial powers pursuant to what is now §1415(i)(2); (2) that the court will issue temporary relief, pending completion of any administrative proceedings and subsequent civil action pursuant to §1415, in which a final determination will be made regarding the school system's provision of appropriate educational services for the child consistent with IDEA requirements; and (3) that the child is dangerous.[7]

These conditions are unlikely to be present in juvenile courts. Most juvenile courts are not courts of competent jurisdiction empowered under state law to entertain civil actions such as those authorized by 20 U.S.C. §1415(i)(2), but, rather, are courts of limited statutory jurisdiction. Furthermore, even if the juvenile court *were* the kind of court specified in *Honig*, a delinquency petition would be a circumvention of *Honig* requirements nonetheless because such petitions do not seek a temporary order regarding the provision of a free appropriate public education pursuant to §1415(i)(2), pending resolution of a disagreement between school and parents through IDEA procedures, but, rather, a student's adjudication, punishment and disposition as a delinquent. A school-initiated delinquency prosecution thus ordinarily will fall far outside the limited circumstances under which school systems may resort to the courts.

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[6] *Id.,* 484 U.S. at 327. To obtain such an order, the school system must demonstrate that "maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others," 484 U.S. at 328, and that it has made reasonable efforts to minimize any risk of harm through the use of supplementary aids and services. *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994). The burden on school districts seeking such an injunction is "substantial." *Honig*, 484 U.S. at 328.

[7] *Id.*

2. Outside intervention from a due process hearing officer – 20 U.S.C. §1415(k)(2)

Amendments to IDEA made in 1997 allow a school system to request a due process hearing and seek an order from an IDEA due process hearing officer placing a child with dangerous behavior into an "interim alternative educational setting" for up to 45 calendar days.[8] Before ordering a child placed in an interim alternative educational setting, the hearing officer must (1) determine that the school system has proven by more than a preponderance of the evidence that keeping the child in his or her current placement is substantially likely to result in injury to the child or others; (2) consider the appropriateness of the child's placement; (3) consider whether the school system has made reasonable efforts to minimize the risk of harm in the current placement, including the use of supplementary aids and services; and (4) determine that the interim alternative educational setting meets IDEA requirements regarding educational content and quality.[9]

The child must be returned to the prior placement at the end of this period, or to a placement to which his or her parents agree. If the school system wishes to place the child in another placement *not* acceptable to the parents, the parents may object, file a complaint and request a due process hearing, thereby triggering the child's right to return to, and remain in, his or her prior placement until the dispute is resolved.[10] Should the school system believe that returning the child to that placement would be dangerous, it may request an expedited due process hearing and seek permission to keep him or her in the interim alternative educational setting pending resolution of the dispute.[11]

Anticipated Defenses

A school system confronted with the argument that its delinquency petition or crime report impermissibly circumvents IDEA provisions concerning students who

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[8] 20 U.S.C. §1415(k)(2); 34 C.F.R. §300.521. It is unclear whether, in light of this addition to the statute, schools may still proceed directly to court, as per *Honig*, or must first exhaust this administrative remedy.

[9] 20 U.S.C. §§1415(k)(2), 1415(k)(10)(C); 34 C.F.R. §300.521.

[10] 20 U.S.C. §1415(k)(7)(B); 34 C.F.R. §300.526(b).

[11] 20 U.S.C. §1415(k)(7)(C); 34 C.F.R. §300.526(b).

behave dangerously is likely to raise 20 U.S.C. §1415(k)(9)(A)as a defense. Two points are critical in response. First, as discussed in Chapter II, juvenile courts are not "appropriate" authorities for the purposes of that section. Second, as also discussed in Chapter II, "appropriate" authorities are those that are appropriate in light of the purposes of IDEA. In this regard, it is important to remember that *Honig* and §1415(k)(2) do more than simply provide school systems with some options to assist in addressing dangerous behavior. Rather, they provide critical protections for students by controlling the extent to which school systems may seek outside intervention in responding to student behavior, thereby taking education issues outside of the education system. When school systems sidestep these limits, the juvenile courts with which they file delinquency petitions or the police to whom they report student behavior as a crime are not "appropriate" authorities.

Strategy and Case Development Issues

As is true of the approaches discussed in Chapters II and III, the most significant strategy issue raised by this approach is where and how it can be used to halt the delinquency proceedings and prevent an adjudication. Options for using this claim to accomplish this end, or to stay the juvenile proceedings pending the IDEA proceeding in which it is to be litigated, are similar. In addition, because this claim raises what courts and hearing officers may see and perhaps minimize as procedural circumvention, it may be more likely to succeed where the facts demonstrate that the school system has violated substantive rights as well. When added to the circumvention of *Honig* and §1415(k)(2) limits on outside intervention, the presence of facts showing substantive violations of the kind illustrated by the hypotheticals in prior chapters may also make it easier to refute the §1415(k)(9) defense by convincing a court or hearing officer that the juvenile court or police were not "appropriate" authorities for a crime report in light of the purposes of IDEA.

CHAPTER V
CHALLENGING THE PROPRIETY OF SCHOOL-FILED DELINQUENCY PETITIONS AND CRIME REPORTS: APPROACHES UNDER SECTION 504 AND THE ADA

Whether IDEA rights are implicated or not, developing effective strategies for challenging a school disciplinarian's initial decision to characterize a particular incident of disability-related behavior as a crime -- and to treat it accordingly -- is critical to stemming the tide of inappropriate school-filed delinquency petitions and crime reports. Although relatively unexplored in this regard, §504 and the ADA are the source of promising approaches. The duty to modify policies and practices so as to avoid discrimination, as well as the prohibition on employing criteria and methods of administration that have the effect of discriminating on the basis of disability, should give rise to viable claims when school officials fail to interpret behavior in light of the particulars of a student's disability.

Illustrative Hypotheticals

1. Jon has Tourette Syndrome, a neurological condition characterized by tics -- involuntary, rapid, sudden movements or vocalizations that occur repeatedly in the same way. One of Jon's verbal tics is the phrase "I'll kill you." This tic is especially likely to emerge when Jon feels pressured or threatened. Jon's neurologist has provided the school with information about Tourette Syndrome in general, and its impact on Jon in particular. Among other things, she has explained to the school that Jon's saying "I'll kill you" is not purposeful, that Jon does not actually intend to threaten or kill anyone when he utters it, that Jon may sometimes be able to delay, but cannot suppress or control, these neurologically-based outbursts, or their content; and that feeling pressured may exacerbate this verbal tic. The school maintains that uttering "I'll kill you" is a terroristic threat, and has reported Jon to the police and charged him with terroristic threatening on more than one occasion. Jon has been prosecuted in juvenile court as a result, and is now on probation. Although Jon has not been expelled from school, school officials have informed his parents that they will call the police again if he says "I'll kill you" to anyone. When the family balked at this condition, the school system offered to provide five hours per week of home tutoring as an alternative. The family, fearing the legal consequences if Jon is charged with terroristic threatening again, accepted the homebound

placement.

2. The XYZ Board of Education has an agreement with the XYZ Police Department under which a police officer is stationed at XYZ High School. Pursuant to Board of Education policy, when school staff witness or are told of student behavior that raises discipline concerns – including all incidents involving threats or hitting – they are to report it to the police officer. The police officer then investigates by interviewing the staff member, the alleged victim (if any), any other witnesses and the accused student. If the officer concludes that a student committed a crime, he or she may file a delinquency petition with the juvenile court or a report with the prosecutor. These policies and procedures are applied uniformly to all students. A study conducted by an advocacy group indicates that (1) a disproportionate number of the delinquency petitions filed against students with disabilities as a result of this process are ultimately dismissed or otherwise resolved short of an adjudication of delinquency, but that (2) this occurs only after significant involvement with the court, including, e.g., going through the juvenile court intake/screening process, hearings, evaluations, and, in some instances, placement in a detention facility.

Legal Analysis and Anticipated Defenses

Section 504 provides that 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...."[1] Title II of the ADA similarly provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[2] These two laws prohibit unintentional as well as intentional discrimination.[3]

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[1] 29 U.S.C. §794(a).

[2] 42 U.S.C. §12132.

[3] *See Alexander v. Choate*, 469 U.S. 287, 292-297 (regarding §504); 42 U.S.C. §12201(a) ("...nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title") (regarding the

Quite significantly in the context of inappropriate school-filed delinquency petitions and crime reports, both §504 and the ADA also require reasonable accommodations and modifications to rules, policies and practices when necessary to avoid discrimination.[4] "Reasonable" accommodations and modifications are those that do not fundamentally alter the nature of the program or impose an undue burden.[5] Whether a particular accommodation or modification constitutes a "fundamental alteration" must be determined on a case-by-case basis, through an individualized inquiry.[6] Finally, the regulations implementing §504 and Title II each prohibit the use of "criteria and methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability," or have "the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the...program with respect to individuals with disabilities."[7]

Depending upon the circumstances, these provisions may support at least four kinds of claims when schools file delinquency petitions or crime reports based on disability-related conduct: (1) different treatment on the basis of disability; (2) adverse treatment based solely on the status of having a disability; (3) failure to provide reasonable accommodation by modifying discipline policies, practices and/or procedures; and (4) impermissible use of criteria and methods of administration that have the effect of discriminating or substantially impairing accomplishment of program objectives.

1. Different treatment.

If a student with a disability (or students with disabilities) is singled out for the filing of a delinquency petition or police report for behavior that is not treated as a crime when exhibited by other students – for example, if in the above hypothetical, the

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ADA).

[4] *Alexander, supra,* 469 U.S. at 300 and n. 20; 42 U.S.C. §12131(2); 28 C.F.R. §35.130(b)(7).

[5] *Alexander, supra*, 469 U.S. at 300-301; *Southeastern Community College v. Davis*, 442 U.S. 397, 413; 28 C.F.R. §35.130(b)(7).

[6] *PGA Tour, Inc. v. Martin*, ___ U.S. ___, 121 S.Ct. 1879 (2001).

[7] 28 C.F.R. §35.130(b)(3); 34 C.F.R. §104.4(b)(4).

school system has not charged other students who mutter "I'll kill you" with terroristic threatening – there may be a straightforward claim for different, discriminatory treatment based solely on disability.[8] Such a claim would need to be predicated upon careful factual investigation to ascertain that the students were, in fact, similarly situated, and that there is no other relevant, non-discriminatory reason for the different treatment.[9]

2. Adverse treatment based upon status.

Where the behavior underlying a school-initiated delinquency petition or police report is an aspect of the student's disability and, understood as such, does not match the elements of the crime alleged, there may be an argument that the school system is subjecting him or her to the criminal process simply for his or her status as a person with that particular disability. In the above hypothetical, for example, medical evidence has established that Jon's saying "I'll kill you" is an uncontrollable tic that is an inherent aspect of his disability, and that when he utters these words he does not mean to threaten, let alone terrorize,[10] anyone – and so does not engage in terroristic threatening. Thus when the school treats his outbursts as criminal terroristic threatening nonetheless, it is not punishing a crime. It is not even singling him out based upon some relevant consequence of his disability. Rather, it is in effect punishing Jon solely for the status of having Tourette Syndrome -- a result inconsistent with the language and intent of §504 and the ADA. This should be deemed unlawful

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[8] *See, e.g., McCracken Co. (KY) School District*, 18 IDELR 482 (OCR 10/31/91) (students without disabilities who misbehaved were not put in closet as a discipline measure); *Sumter Co. (SC) School District #17*, 17 EHLR 193 (OCR 9/28/90) (non-disabled students involved in confrontation with student with AIDS, who was then suspended, were not). Such a claim may be grounded directly on the statutes, and/or on the §504 and Title II regulations prohibiting different treatment. *See* 34 C.F.R. §104.4(b)(ii), (iv); 28 C.F.R. §35.130(b)(ii), (iv).

[9] *See Castro Valley (CA) Unified School District*, 29 IDELR 615 (OCR 3/4/98); *Richland (SC) School District #2*, 29 IDELR 980 (OCR 7/7/98).

[10] The statutory crime of terroristic threatening commonly requires a purpose or intent to terrorize the target of the threat. *See, e.g.,* Ark. Code Ann. §§ 5-13-301(a)(1)(B); Minn. Stat. §§ 609.713; R.R.S. Neb. §§ 28-311.01; O.C.G.A §16-11-37 (Georgia); N.D. Cent. Code, §§ 12.1-17-04 ; Tex. Penal Code §§ 22.07.

discrimination under the plain language of both statutes.[11]

3. Reasonable accommodation and modification of policies, practices and procedures.

Although there has been little litigation applying reasonable accommodation/modification obligations to school discipline policies, practices and procedures, they clearly apply.[12] Failure to take disability into account in interpreting student behavior creates the risk that innocent disability-related behavior will be deemed a crime, and the student inappropriately subjected to the criminal justice system. Therefore, school policies/procedures/practices that deem an incident a crime or lead to the filing of a delinquency petition or crime report without taking into account the role of disability under the circumstances must be modified as a reasonable accommodation/modification.[13] In Jon's case, above, for example, this would mean that the school's insistence upon continuing to report him to the police violates his rights under §504 and Title II to reasonable accommodation/modifications, and constitutes illegal discrimination under both laws.[14]

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[11] *Cf. School Board of Nassau Co. v. Arline*, 480 U.S. 273, 284-285 (§504 "is carefully structured to replace...reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (singling out group home for individuals with developmental disabilities by requiring a special use permit where no such restrictions were imposed on many other uses permitted in the neighborhood found to "rest on an irrational prejudice against the mentally retarded,"and so violated equal protection).

[12] *See Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994).

[13] Furthermore, as discussed in the next section, failure to take disability into account in this context leads to criteria and methods of administration that discriminate, the use of which is expressly prohibited by the §504 and Title II regulations.

[14] While in other contexts (e.g., employment) reasonable accommodations and modifications to policies, etc., may have to be requested before the failure to provide them becomes a violation, *see Gaston v. Bellingrath Gardens & Home*, 167 F.3d 1361 (11th Cir. 1999), accommodations/modifications regarding a school's filing of delinquency petitions or crime reports should be viewed differently. First, public elementary and secondary schools already have an affirmative obligation under the §504 regulations (and under IDEA) to learn about, take into account and address in

In response to schools' anticipated defense that taking disability into account prior to deeming behavior criminal for discipline purposes constitutes an "undue burden" or a "fundamental alteration," it may be noted that schools already have an obligation under the §504 regulations to collect, review, update and use in educational decision-making comprehensive information about a student's disability and its consequences.[15] They are also already required as a §504 matter to assess the relationship between disability and alleged misconduct when they wish to suspend for more than ten days or expel a student from school.[16] Given this context, modifying procedures in order to take disability into account in interpreting behavior before making a decision to treat it as a crime cannot plausibly be characterized as an undue burden or a fundamental alteration.

Where students with disabilities are being directed into the juvenile and criminal justice systems without consideration of disability as part of so-called zero tolerance policies, a school might argue that treating a student with a disability differently would constitute a "fundamental alteration" of its program by jeopardizing school discipline and safety. As noted above, whether a particular accommodation or modification would constitute a fundamental alteration must be determined with reference to the particular individual involved. In a case like Jon's, where it is clear that he is not engaging in terroristic threatening, recognizing this reality and refraining from reporting his behavior to the police clearly would not jeopardize school safety or undermine the notion of "zero tolerance" for behavior that is, in fact, terroristic

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various ways the consequences of a student's disability. *See* 34 C.F.R. §104.31-104.37. Second, it is unreasonable to expect parents and students to anticipate that school officials will file criminal charges against a student for disability-related behavior (let alone that this will be done without taking disability into account), and request reasonable accommodation (in the form of consideration of the impact of disability prior to deeming the behavior a crime, or anything else) "just-in-case." In any event, where school officials have been made aware of the relevant disability implications and persist in erroneously treating certain behavior as a crime, as in Jon's case, the unlawful failure to make reasonable accommodations/modifications to policies, etc. is clear.

[15] *See* 34 C.F.R. §§104.33(b), 104.35.

[16] *See S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981); Memorandum of Oct. 28, 1988 to OCR Senior Staff from L.S. Daniels, Assistant Secretary for Civil Rights, reprinted at EHLR 307:05.

threatening. The requested modification of school policies/practices/procedures thus would not constitute a "fundamental alteration."

4. Criteria or methods of administration that discriminate.

As noted above, both the §504 regulations and the Title II regulations prohibit the use of "criteria and methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability," or have "the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the...program with respect to individuals with disabilities."[17] "Criteria" are written or formal policies; "methods of administration" are actual practices and procedures.[18] Policies/practices/procedures that fail to take disability into account in interpreting behavior before deeming it a crime implicate these regulations as well as the reasonable accommodation obligation discussed above.

In both of the above hypotheticals, school systems' "criteria and methods of administration" make no provision for interpreting behavior in light of disability. This has the "effect of subjecting" some students with disabilities to "discrimination on the basis of disability" by channeling them into the criminal justice system for innocent behavior that is (in the case of Jon) or appears to be (in the case of XYZ High School) an aspect of disability. It also has at least "the effect of," if not the "purpose" of, "substantially impairing accomplishment of the objectives of the...program with respect to" those individuals with disabilities. Jon, in order to avoid further adverse legal consequences of his school's discrimination, is now receiving minimal, less than lawful, tutoring at home instead of a full education. And as to the XYZ students, the time away from school, emotional impact, and mistrust created by their school's having inappropriately subjected them to criminal treatment likely substantially impairs for them accomplishment of the educational objectives of XYZ High School.

In order to prevail on a claim based upon a discriminatory effect under these regulations, a plaintiff must first show that a facially neutral practice has a disproportionate effect based upon disability. The burden then shifts to the school system to provide a substantial, legitimate educational justification for the practice. The plaintiff may then prevail by proffering an equally effective alternative practice which results in less disproportionality, or by proof that the justification offered is really

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[17] 28 C.F.R. §35.130(b)(3); 34 C.F.R. §104.4(b)(4).

[18] *Illinois State Bd. of Ed.*, 20 IDELR 687 (OCR 12/3/93).

a pretext for discrimination.[19] In the XYZ case, for example, the facially neutral practice would be the two levels of referral – by staff to the police officer, and by the police officer to the courts or the prosecutor – that omit consideration of disability. Assuming that XYZ were to offer a legitimate educational justification, the "equally effective alternative practice" would be integrating into the system an effective mechanism for ensuring that the implications of disability are fully considered before an incident is treated as a crime.

The Board of Education of XYZ might contend that it is the XYZ police officer who is filing the petitions and reporting students to the prosecutor, not the school system, and that, therefore, the Board of Education cannot be held responsible for any discrimination that may be occurring. However, both the §504 regulation and its Title II counterpart provide that a covered entity may not, "*directly or through contractual or other arrangements*, utilize criteria or methods of administration that...."[20] The Board has an agreement with the XYZ Police Department, and policies requiring school staff to report discipline incidents to the officer the Department stations in the high school. It remains responsible.

Finally, a school system facing a lawsuit claiming that it is in violation of either the §504 or Title II criteria and methods of administration/effects regulation might argue that there is no private right of action to enforce these regulations, relying upon the Supreme Court's recent decision in *Alexander v. Sandoval*.[21] *Sandoval* held that there is no private right of action to enforce a similarly-worded regulation promulgated under Title VI of the Civil Rights Act. While an analysis of this issue is beyond the scope of these materials, it should be noted that at least two post-*Sandoval* decisions from the federal courts have distinguished §504, the ADA and their respective regulations from Title VI and the Title VI criteria and methods of administration/effects regulation on this point, allowing §504 and ADA claims to proceed.[22] In addition, the Supreme Court has counseled hesitation before reading Title VI and §504 "*in pari*

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[19] *See Georgia Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (interpreting parallel regulation under Title VI of the Civil Rights Act).

[20] 34 C.F.R. §104.4(b)(4); 28 C.F.R. §35.130(b)(3).

[21] ___ U.S. ___, 121 S.Ct. 1511 (2001).

[22] *See Frederick L. v. Department of Public Welfare*, 2001 U.S. Dist. Lexis 102225 (E.D. Penn. 7/23/01); *Access Living Chicago v. Chicago Transit Authority*, 2001 U.S. Dist. Lexis 6041 (N.D. Ill. 5/9/01).

materia" with respect to issues regarding intentional discrimination versus discriminatory effect.[23]

Strategy and Case Development Issues

The potential use of §504 and Title II raises two sets of strategy and case development issues: those related to an individual's case, such as Jon's, and those where a broader attack on school policies/procedures is contemplated.

1. Individual cases.

In an individual case, the first question of course is where, legally speaking, is the student, and what does he or she want the advocate to do about it. In the case of Jon – who does not currently have charges pending in the juvenile court, but is facing a real threat of a new prosecution if he returns to school – the most important immediate goal might be to obtain a temporary restraining order prohibiting the school system from reporting his tic to police or the juvenile court as a crime, based upon one or more of the above-discussed §504/Title II theories. Preparing to seek one will require an immediate decision as to how to deal with IDEA's exhaustion of administrative remedies requirement in this §504/ADA context.[24] The particular facts of the case, the extent to which the client does or does not have IDEA claims to raise as well, the law of the Circuit in question on exhaustion and exceptions to the requirement, and the ability of the state's IDEA due process hearing system to issue emergency orders comparable to the TRO needed to protect Jon (and the ability to demonstrate to the court that the due process system cannot/will not do this) will all be relevant considerations. Exhaustion will also be an issue, and perhaps a more difficult one, in less urgent cases, for example, where a student not currently at risk

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[23] *Alexander v. Choate*, *supra*, 469 U.S. at 294-97 and n. 11.

[24] Although ordinarily individuals suing under §504 or Title II of the ADA do not have to exhaust administrative remedies, if the relief sought is also available under IDEA, IDEA exhaustion requirements must be met even if the plaintiff does not intend to raise IDEA claims. *See* 20 U.S.C. §1415(l). Exhaustion under IDEA may be excused if it would be futile or inadequate. *Honig v. Doe*, 484 U.S. 305 (1988). *Cf. Komninos v. Upper Saddle River Board of Education*, 13 F.3d 775 (3rd Cir. 1994) (in an emergency, court may order school district to provide an interim placement before administrative proceedings run their course).

seeks compensatory education or damages for similar past violations of §504/ADA rights.

Yet another permutation of exhaustion issues will arise for clients who are currently facing charges in juvenile court. Similar to the strategy discussed in Chapters II -IV in connection with IDEA-based claims, an advocate might try to use the school's §504/ADA violations to convince the juvenile court that it should either dismiss the delinquency petition or stay the juvenile proceedings pending resolution of the education-law claims. For reasons also discussed in prior Chapters, the latter option might be more attractive to the juvenile court. However, staying juvenile proceedindgs pending a §504/ADA *lawsuit* might seem less reasonable to a juvenile court than staying those proceedings pending the outcome of an IDEA administrative due process hearing, decisions in which, at least in theory, are due within 45 days. Thus it might be to a client's advantage to initiate appropriate administrative proceedings as part of an overall litigation strategy.

Regardless of an individual client's situation, the §504/ADA approaches discussed above, like the IDEA approaches discussed in Chapters II, III and IV, are very fact-specific and will require expert assistance and nuanced testimony on, among other possible issues,

- the nature of the disability in question,
- how the disability affects this student (in general, and in school in particular),
- the role of disability in the incident that school officials have treated as a crime, and
- the proper interpretation of that incident in light of the preceding.

It will also be important to understand school policies, procedures and practices – both in theory and in actual operation – regarding the filing of delinquency petitions and the reporting of incidents to police, including,

- how such decisions are made,
- by whom, and
- based upon what kind of factors/considerations.

2. Broader challenges.

The second hypothetical suggests one set of circumstances that might warrant consideration of a broader challenge to a school's criminal referral practices as

including "criteria or methods of administration that have the effect of" discriminating or "the purpose or effect of defeating or substantially impairing accomplishment of the objectives of"[25] the school's program with respect to students with disabilities (or some subset thereof). In evaluating the potential of, and shaping, such litigation, three strategy concerns are particularly critical:

- identifying the offending "criteria or methods of administration," including the level of detail at which to define it
    - In the XYZ hypothetical, for example, the difference between challenging the practice of failing to take disability into account and challenging the fact that students with disabilities are "referred" to juvenile court or the police at all. Another option to consider might be identifying a failure to appropriately train staff as an offending "criterion or method of administration."

- identifying the relevant discriminatory effect
    - Is it that a disproportionate number of students with disabilities are "referred"? That a disproportionate number of referred students with disabilities are ultimately found not to have committed a crime? Some other effect?

- identifying the remedy to be sought, including desired changes in criteria or methods of administration

The possibilities for the first two of these strategy concerns will depend heavily upon local facts. The issue of shaping a remedy may be viewed more globally, at least insofar as concerns the principles that should shape any school system policies regarding delinquency petitions and crime reports. Towards that end, a list of *Guiding Principles and Criteria for School Policies on Crime Reports* is included as an Appendix to these materials.

Finally, whether pursuing individual claims or broader issues, advocates considering a complaint to the U.S. Department of Education/Office for Civil Rights (OCR) as part of their strategy will want to obtain comprehensive, up-to-date information revealing how OCR analyzes cases involving school-filed delinquency petitions and crime reports, and how it perceives the relevant law. Published

[25] 34 C.F.R. §104.4(b)(4); 28 C.F.R. §35.130(b)(3).

complaint decisions to date by and large do not employ the analyses set forth above, focusing instead on issues such as whether the school followed its usual procedures, whether students without disabilities are treated similarly and whether a significant change in placement that should have been proceeded by an evaluation and manifestation determination occurred.[26]

[26] *See, e.g., Citrus County (FL) School District*, 34 IDELR 67 (OCR 9/15/2000); *Warren County (PA) School District*, 28 IDELR 485 (OCR 11/5/97); *New Caney (TX) Independent School District,* 30 IDELR 903 (OCR 11/13/99); *Richland School District #2*, *supra*; *Chester County(TN) School District,* 17 EHLR 301 (OCR 10/26/90).

CHAPTER VI
RE-DIRECTING THE PROCEEDINGS FROM THE DELINQUENCY SYSTEM TO THE EDUCATION LAW SYSTEM: THREE CONTEXTS

The strategy of re-directing proceedings from the delinquency system to the education law system can take many different forms. Obtaining and presenting to the juvenile court, as an alternative to supervision or rehabilitation in the juvenile justice system, appropriate education services from the responsible local school system is a critical component of delinquency defense for any youth with a disability. Successfully re-directing the judicial proceedings in this manner is no small matter even when the alleged delinquent act was committed out in the community.[1]

The challenges only mount when it is the school system that has accused the student of a crime. Among other things, the relationship with the school system more likely than not already is adversarial. Further, counsel will pursue multiple, and more complex goals, for the outcome of the education advocacy. In addition to using IDEA, §504 and the ADA to obtain better outcomes in the juvenile court, counsel may be attempting to protect the student the student against future inappropriate delinquency petitions and crime reports, and to hold the school system accountable for its improper conduct. Understood in this way, "re-directing" the proceedings from the delinquency system to the education law system may be a key strategy in a variety of contexts. This Chapter look at three of these contexts, considering the aims and contours of such a strategy,

- as part of an overall delinquency defense/education advocacy strategy challenging the propriety of the delinquency petition (based, perhaps, on one of the legal theories discussed in previous Chapters);

- when there does not appear to be a viable claim that the school unlawfully initiated the delinquency petition, or the crime report that prompted it; and

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[1] For an excellent manual on how to go about doing this, see Joseph B. Tulman and Joyce A. McGee, eds., *Special Education Advocacy Under the Individuals with Disabilities Education Act for Children in the Juvenile Delinquency System* (University of the District of Columbia School of Law Juvenile Law Clinic 1998).

- when education advocacy begins only after critical points in the delinquency proceeding have already passed.

In each of these contexts, the utility and success of a strategy of "re-directing" will turn to a great extent upon the nature of the relief that may be obtained on the education law side.[2] Thus this Chapter begins with a brief discussion of general remedial principles, including the remedial powers of courts and hearing officers under IDEA.

"Appropriate" Relief

In regard to the relief that may be available for violation of IDEA rights, the statute simply states that in a civil action brought by a party aggrieved by the results of an IDEA due process hearing (or impartial review) the court "shall grant such relief as the court determines is appropriate."[3] The Supreme Court interpreted this language in *School Committee of Town of Burlington v. Department of Education* as follows:

> "The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act."[4]

Subsequent Supreme Court decisions have reiterated that IDEA affords courts of competent jurisdiction acting in IDEA matters broad discretion to fashion equitable relief.[5]

Few courts have directly addressed questions regarding the scope of an IDEA

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[2] For example, counsel may be pursuing as relief an order requiring the school system to seek dismissal or otherwise assist in the delinquency defense, or an order requiring prophylactic measures to reduce the risk of future court involvement, in addition to more common remedies such as compensatory education or particular prospective services.

[3] 20 U.S.C. §1415(i)(2)(B)(iii), formerly 20 U.S.C. §1415(e)(2).

[4] 471 U.S. 359, 369 (1985).

[5] *See Florence Co. School District No. 4 v. Carter*, 510 U.S. 7, 15-16 (1993); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988).

due process hearing officer's remedial powers. Those that have, however, have recognized that the scope of a hearing officer's remedial authority in an IDEA matter must be commensurate with the equitable powers that courts may exercise in such matters. As one court explained,

> "[i]t seems incongruous that Congress intended the reviewing court to maintain greater authority to order relief than the hearing officer....Given the importance the IDEA places on protections afforded by the administrative process...the hearing officer's ability to award relief must be coextensive with that of the court. To find otherwise would make the heart of the Act's administrative machinery, its impartial due process hearing, less than complete."[6]

In another case, the court further reasoned that the broad statutory mandate that hearing officers permit parents to present complaints with respect to "any matter relating to" the identification, evaluation or educational placement of a child, or to the provision of a free appropriate public education to him or her, requires comparably broad authority to order appropriate relief.[7]

In a similar vein, the U.S. Department of Education/Office of Special Education Programs has opined that because IDEA "intends an impartial hearing officer to exercise his/her authority in a manner which ensures that the right to a due process hearing is a meaningful mechanism for resolving disputes between parents and responsible public agencies[,]...based upon the facts and circumstances in each individual case, an impartial hearing officer has the authority to grant any relief he/she deems necessary...to ensure that a child receives the FAPE to which he/she is entitled."[8]

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[6] *Cocores v. Portsmouth School District*, 779 F. Supp. 203, 205-6 (D. N.H. 1991) (internal quotations and citations omitted). *See also Harris v. District of Columbia*, 19 IDELR 105 (D.D.C. 1992).

[7] *See S-1 v. Spangler*, 650 F. Supp 1427 (M.D.N.C. 1986), *vacated as moot and remanded*, 832 F.2d 294 (4th Cir. 1987).

[8] *Letter to Kohn*, 17 EHLR 522 (OSEP 2/13/91). *See also Letter to Armstrong*, 28 IDELR 303 (6/11/97).

Redirecting as Part of a Combined Delinquency Defense/Education Advocacy Strategy Challenging the Propriety of the School-initiated Delinquency Petition or Crime Report

In a very real sense, all of the approaches discussed in Chapters II through V of these materials for challenging the propriety of school-filed petitions and crime reports involve "redirecting" from the criminal to the civil framework, regardless of whether independent IDEA proceedings are initiated. The legal arguments discussed for dismissing the delinquency petitions are premised upon independent violations by school officials of either education law or the right to be free from discrimination in school. Critical to all of those approaches is "redirecting" the juvenile court's way of thinking about the matter, by getting the judge to see the issues, problems and solutions first and foremost as education matters. If a court is willing to do this at the outset, and exercises its discretion to dismiss an improper petition, any subsequent education law advocacy can focus on matters such as securing appropriate services and obtaining compensatory relief for past denials of FAPE.[9]

If, on the other hand, the juvenile court will not exercise its discretion to dismiss at the outset, or if strategic considerations (such as those discussed in Chapters II through V) counsel initiating administrative proceedings under IDEA to challenge the propriety of the school's having filed the delinquency petition or underlying crime report, the education advocacy takes on another dimension. In addition to seeking, as necessary, changes in the services being provided the student and/or compensatory relief for past violations of his or her rights, the student's attorney may use the due process hearing to seek two additional outcomes to assist in the delinquency defense:

- a finding that the school system's filing of the petition or crime report was improper under education law, and

- depending upon the attendant circumstances, an order that the school system seek dismissal of the petition and/or take other specific actions to assist the student in obtaining a favorable outcome in the juvenile court.

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[9] However, even where the petition is dismissed, depending upon the facts counsel might think it wise to seek through IDEA avenues a ruling that the petition was improper, as a premise for both compensatory relief (including damages, to the extent permitted in the jurisdiction involved) and protection against future improper delinquency petitions or crime reports.

Possible legal bases for obtaining the former, along with related case development considerations, are discussed in Chapters II through V of these materials.[10] And once the former is obtained, the latter should be available as a matter of "appropriate" relief within the meaning of IDEA.

As discussed above, in providing that reviewing courts (and so, for reasons also discussed above, due process hearing officers) "shall" provide "appropriate" relief, IDEA calls for relief that is "'appropriate' in light of the purpose of the Act."[11] IDEA's purposes include, *inter alia*,

- ensuring "that all children with disabilities have available to them a free appropriate public education...,"[12]
- ensuring "that the rights of children with disabilities and parents of such children are protected,"[13]
- ensuring "the effectiveness of...efforts to educate children with disabilities,"[14] and

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[10] While IDEA due process hearing decisions finding a school-filed delinquency petition improper may be less than common at this juncture, they are not unprecedented. See, e.g., *Cabot School District*, 29 IDELR 300 (SEA AR 9/21/98) ("call to the police by agents of the school was not...placed for the purpose of preserving the legitimate safety of the students or the faculty, but was made for..purposes of avoiding compliance with the child's behavior management plan...and of causing a change in placement...."); *Fort Smith Public Schools*. 29 IDELR 398 (SEA AR 8/26/98) ("the filing of charges...was wholly inappropriate, even based on the District's position that the Student's behaviors were not a manifestation of...disability, but especially based on the finding that the behavioral difficulties are a manifestation.... "); *In re Child with Disabilities, No. 93-19* (SEA TN 7/30/93). The latter is the administrative decision unsuccessfully appealed by the defendant school system into federal district court, and then to the Sixth Circuit, in *Morgan v. Chris L.,* discussed *infra* at notes 17 through 20.

[11] *Burlington, supra,* 471 U.S. at 369.

[12] 20 U.S.C. §1400(d)(1)(A).

[13] 20 U.S.C. §1400(d)(1)(B).

[14] 20 U.S.C. §1400(d)(4).

- ending the mistreatment of children with challenging behavioral manifestations and ensuring that schools properly educate them.[15]

Given these purposes, an order requiring a school system to seek dismissal of a delinquency petition should be available as "appropriate" relief in due process hearings and civil actions under IDEA in at least the following two situations:

- where the school system has responded to disability-related behavior with a delinquency petition (or a crime report leading to a delinquency petition) instead of by providing appropriate services

- any case in which the school system is found to have used, or attempted to use, the juvenile justice or law enforcement systems to circumvent its IDEA-based obligations to the student.

For example, in the hypothetical case of Carey, discussed in Chapter II, the school system did little, if any, of what IDEA requires, substantively or procedurally, to address the consequences of her disability. Over three years, her IEPs included neither special education geared towards her behavioral needs, nor related services to address behavior; no positive behavioral strategies were implemented; IDEA requirements concerning IEP review and revision, reevaluation and functional behavior assessment appear to have been violated; and, to the extent that school officials believed that Carey's behavior posed a danger to herself or others in her current placement, rather than seeking permission to place her in an interim alternative educational setting from a hearing officer, pursuant to 20 U.S.C. §1415(k)(2), or from a court of competent jurisdiction under *Honig v. Doe*, they enlisted the juvenile court. Under these circumstances, an order requiring the school system to seek dismissal of the petition would be "appropriate" in light of the above-described purposes of IDEA. The same would be true in the hypothetical case of Seth, also discussed in Chapter II, where, in addition to the kinds of violations committed by Carey's school system, the school system did not even acknowledge Seth as a student with a disability, in apparent violation of the child find and evaluation provisions of IDEA. Insofar as the school system in the latter case filed a crime report rather than a delinquency petition (the delinquency petition having been filed over the signature of a police officer), the wording of any order would necessarily differ in the kinds of steps to be taken in supporting and cooperating with an attempt to have the delinquency

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[15] *Honig v. Doe,* 484 U.S. 305, 309 (1988). See also the discussion in Chapter II, *supra,* at notes 3 through 15.

petition dismissed.[16]

A due process hearing order requiring the defendant school system to seek termination of the delinquency proceedings it had initiated was the relief sought and obtained in *Morgan v. Chris L.*.[17] The school system appealed the order without success, first to Federal District Court, which rejected the contention that the order improperly interfered with the jurisdiction of the juvenile court,[18] and then to the U.S. Court of Appeals for the Sixth Circuit. While *Morgan* is perhaps best known for its holding that the school's filing of a delinquency petition was an unlawful attempt to change the student's placement without following IDEA's usual change in placement procedures, the case also involved egregious violations of the student's substantive rights to FAPE. The Sixth Circuit emphasized this aspect of the case,[19] and it was against this background that the appellate court held that "[b]y ordering the Knox County School System to take all actions necessary to seek the dismissal of the juvenile court petition filed against Chris, the ALJ and the district court properly exercised their discretion by fashioning specific relief to redress the school system's failure to provide Chris with the education to which he is entitled under the IDEA."[20]

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[16] The singling out of the Carey and Seth hypotheticals as examples for purposes of the foregoing discussion is not intended to imply that an order requiring a school district to seek dismissal would not be appropriate in the kinds of circumstances illustrated by the other hypotheticals in Chapters II through V.

[17] *Morgan v. Chris L.*, 1997 U.S. App. Lexis 1041, 25 IDELR 227, 230 (6th Cir. 1997), *affirming* 927 F. Supp. 267.

[18] The lower court noted that the administrative law judge, "did not order the juvenile court to do anything; instead, it ordered the plaintiff, a litigant in the proceeding before the ALJ, to seek dismissal of the proceeding..." 927 F. Supp. at 270. For an example of a federal court ordering a litigant to seek dismissal of state court proceedings in another context, see *Parents of Child, Code No. 870901W v. Coker*, 676 F. Supp. 1072 (E.D. Okla.1987).

[19] For example, the Sixth Circuit found that the school system had breached its duty under IDEA to identify, evaluate and provide the student with a free appropriate public education; that his deteriorating behavior was attributable to this breach; and that the school system had unlawfully attempted to secure a program for the student from the juvenile court instead of providing services itself. *See* 25 IDELR at 230.

[20] *Id.*

Redirecting When There Does Not Appear to Be a Viable Claim That the School Unlawfully Initiated the Delinquency Petition or the Crime Report That Prompted It

Even where the facts are such that there does not appear to be a viable claim that the school unlawfully initiated the delinquency petition or underlying crime report – for example, because the school had apparently legitimate reasons for calling police to the school to assist in an emergency, and the police then filed a crime report or petition – it may still be possible to redirect the proceedings to the civil/education law side, and avoid detention, adjudication and/or incarceration. Again, the primary goal is to convince the court that

- this is primarily (or at least to a significant degree) an education matter, in light of the facts that
  - the alleged delinquent act occurred in school,
  - the incident was or may be related to disability,
  - services and supports to address the behavior underlying the incident are required to be made available to the student under state and federal education law, and
  - there is a specialized legal mechanism for dealing with disability-related education issues,

  and that therefore,

- the court should stay the juvenile proceedings so that the student may attempt to resolve these education issues through the IDEA system.

Counsel can then

- pursue the educational services necessary to address the emotional, behavioral or other needs underlying the incident,

- work with the school (to the degree possible) to consider and implement any other appropriate changes in the student's IEP or placement,[21] and,

- once obtained, present the package of educational services to the court

[21] For students not previously identified as having a disability, these efforts will of course need to include obtaining an evaluation and eligibility determination.

as an alternative to proceeding with the delinquency charges.

This approach may be used even if the juvenile court won't grant a stay, albeit with more difficult issues concerning the timing of the juvenile court and IDEA proceedings.

With no claim being made that the school system acted unlawfully in regard to the filing of the petition, it may be possible in some such cases to obtain what the student needs (for purposes of both his or her education and the pending juvenile court proceeding) without resort to a due process hearing. Or it may not be. In addition, depending of course upon the facts and the client's goals and interests, any due process hearing may need to address past failures to provide FAPE, including, e.g., failure to treat behavior as an education issue, as well as the refusal/failure to make the requested prospective changes in services.

Finally, while this context assumes a legally "innocent" school system *as far as the initiation of the juvenile proceedings is concerned*, advocates should still consider in individual cases whether on the facts, "appropriate" relief from the due process hearing officer ought not include an order requiring the school to take particular steps to assist the student in seeking a favorable termination of the juvenile court proceedings. Such relief might be appropriate, for example,

- where a connection can be demonstrated between shortcomings in services provided to the student in the past and behavior that required police intervention, or

- where the manner in which the school system has dealt with the student in general has contributed to his or her emotional or behavioral difficulties.[22]

Redirecting When Education Advocacy Begins Only after Critical Points in the Delinquency Proceeding Have Already Passed

Education advocacy has the potential to improve juvenile court outcomes for students, protect them from further school-related court involvement and assist in

[22] For cases recognizing that a school's treatment of a student may contribute to or exacerbate challenging behavior, see those cited in Chapter II, note 2, of these materials.

holding schools accountable even after critical phases of the delinquency proceedings have passed – for example, where a youth has already been adjudicated delinquent, or the proceeding has been continued without a finding and the student placed on probation.

As discussed above, for example, putting before the court evidence that there is now a plan in place for providing a youth who has been adjudicated delinquent with appropriate services through the school system may result in more favorable disposition than would otherwise be the case. Another kind of situation might be where the student has been placed on probation and returned to school – perhaps following an adjudication of delinquency, or where the delinquency case has been continued without a finding – and risks revocation of probation and/or further delinquency charges should the school again file a petition or crime report. Here, the related goals of the education advocacy will include not only obtaining appropriate services prospectively along with relief for past violations of IDEA and/or §504 and ADA rights, but protecting the student against future inappropriate school-filed delinquency petitions or crime reports.[23]

While having in place appropriate educational services is critical to protecting students from future abuses, it affords no guarantee that a recalcitrant school system will not again attempt to criminalize behavior in violation of IDEA and/or §504 and ADA rights. In many cases, it therefore may remain important to use legal remedies under these laws to obtain a finding that the school's original delinquency petition or crime report was improper, and an order that in effect prohibits the school system from filing (or supporting) such improper petitions or reports against the student in the future.[24] Assume, for example, that in the hypothetical case of Seth, discussed above, the juvenile court has already found Seth delinquent and placed him on probation subject, among other things, to the condition that he attend school and have no further

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[23] Where the student had not been previously been identified by the school system as a child with a disability, the goals of the representation will also include getting an evaluation and eligibility determination (as well as prospective services). To the extent that the law, facts and expert testimony can support the argument that the school system should have evaluated and begun serving the student sooner, some or all of the other goals regarding retrospective relief can be pursued as well.

[24] The details and wording of such an order would necessarily depend upon the particular facts, and likely would need to allow for calls to the police for bona fide emergency assistance.

disciplinary infractions. Especially if the adjudication has not been appealed, an order requiring the school system to assist in seeking dismissal of the petition would likely be beside the point now in most jurisdictions.[25] However, Seth remains at-risk of further school-initiated court involvement, given the school system's track record in responding to behavioral issues and apparent inability or unwillingness to properly implement IDEA. Further, even assuming that the school system now provides appropriate services meeting IDEA standards, it is not reasonable to expect that years of educational neglect, with all of its attendant emotional and behavioral consequences, will be cured overnight. A finding that the school system's prior crime report was improper under the circumstances, along with an order that will preclude it from again circumventing IDEA to treat Seth's disability-related behavior as either a disciplinary offense or a crime may thus be critical to reducing the risk that his probation will be revoked and/or that new delinquency proceedings will be initiated.

Finally, the hypothetical case of Jon, discussed in Chapter V, presents a very urgent example of a student needing protection against future, improper crime reports. It may be recalled that Jon, whose Tourette Syndrome manifests itself in part through a verbal tic of "I'll kill you," is on probation, following accusations by school officials of terroristic threatening. He is also on limited homebound tutoring, as school officials insist that they will call the police if he utters "I'll kill you" while at school again. Chapter V of these materials discuss §504 and ADA claims that might be brought on his behalf, along with strategic concerns that include obtaining an order prohibiting the school system from reporting Jon's tic as a crime.[26]

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[25] Advocates should, however, consult their state law and defense counsel regarding post-adjudication remedies in the juvenile system.

[26] To the extent that Jon or a similarly situated student is also IDEA-eligible, the above-discussed approaches to obtaining appropriate relief would be relevant as well.

CHAPTER VII
FINAL NOTES

The topics of school system abuse of the juvenile justice system and the education rights of court-involved youth encompass many issues beyond the scope of these materials. Briefly noted below are a few of those most critical to enforcing the right of all students with disabilities to a high quality education and holding schools accountable.

Emerging Issues Under the Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act,[1] or FERPA, generally prohibits public school systems (or any other educational institutions that receive funds from the U.S. Department of Education) from disclosing education records or the personally identifiable information contained therein without the prior written consent of a parent or eligible student. While there are some exceptions to this consent requirement, there is no blanket exception for delinquency petitions or crime reports.[2] The IDEA requirement that school systems reporting crimes to "appropriate authorities" also transmit the student's special education and discipline records[3] applies only to the extent that the transmission is consistent with FERPA.[4]

An exception to FERPA's consent requirements added to the statute in 1994,

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[1] 20 U.S.C. §1232g

[2] The exceptional circumstances under which FERPA allows protected education records to be disclosed *without* prior written consent include disclosure to comply with a court order or lawfully issued subpoena – provided that parents and students are notified in advance -- and disclosure "to appropriate parties" in connection with a health or safety emergency, "if knowledge of the information is necessary to protect the health or safety of the student or other individuals." 20 U.S.C. §1232g(b)(2)(B); 34 C.F.R. §99.31(9). The latter exception is to be strictly construed. 20 U.S.C. §1232g(b)(2)(B); 34 C.F.R. §99.31(9). For additional exceptions, see 34 C.F.R. §99.31.

[3] *See* 20 U.S.C. §1415(k)(9)(B).

[4] 34 C.F.R. §300.529(b)(2).

however, increasingly is emerging as a concern for students with and without disabilities. This provision allows disclosure of otherwise protected information without consent to "State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted...after November 19, 1974 [the date of FERPA's enactment], if...the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released...."[5] The U.S. Department of Education appears to be interpreting this language broadly, opining, for example, that (assuming a compliant state statute is in place) it allows schools to participate in information-sharing initiatives among agencies (including the juvenile courts and the police) involved in the juvenile justice system, and permits disclosure of information from the records of youth "at risk" of involvement with the juvenile justice system, even if they have not been charged with a delinquent act.[6] The extent to which schools are using this provision to forward otherwise protected information about students to the juvenile courts or the police is unclear at this time. Also unclear is the extent to which any such school action is resulting in the prosecution of students for in-school, disability-related behavior. Advocates should be aware of these issues, however, including staying apprized of any relevant state statutes, their local implementation, and the implications under FERPA.

School System Responsibility When Employees File as Individuals

In each of the hypothetical cases considered in these materials, the school-initiated delinquency petition or police report was filed by a school administrator acting in that capacity on behalf of the school system. When the petition or police report is filed instead by a staff member purporting to have been injured by the student (e.g., a teacher struck by flailing arms during a tantrum, a classroom assistant kicked or scratched by a student resisting restraint), the school system may defend against the student's legal claims by arguing that it is therefore not responsible. The myriad legal and factual contexts in which such a defense might be raised and the possibilities for defeating it in those contexts are beyond the scope of these materials.

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[5] 20 U.S.C. §1232(b)(1)(E)(ii).

[6] *See, e.g,* U.S. Department of Justice/Office of Juvenile Justice and Delinquency Prevention and U.S. Department of Education/Family Policy Compliance Office, *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs* (June 1997). This document is available on the internet at <http://www.ed.gov/offices/OM/fpco/fpcopubs.html>.

On a related note, however, the *Guiding Principles and Criteria for School Policies on Crime Reports* included herein (see Appendix) reach some of the issues related to staff reaction to challenging student behavior.[7]

The Ongoing Right to FAPE

These materials focus on keeping accused students with disabilities in the community by holding local school systems accountable for their education, and a discussion of the issues facing incarcerated youth is beyond their scope. Nonetheless, given the disproportionate number of youth with disabilities among those in correctional facilities,[8] it is important to note that the right under IDEA to FAPE extends to all eligible youth with disabilities, whether they are enrolled in local schools, involved with the courts, or placed in a detention or other juvenile or adult facility.[9] The corresponding governmental responsibility to provide FAPE, and to do all that this entails under IDEA, applies not only to local school districts and state departments of education, but to all "public agencies" – a term that includes, for purposes of IDEA, all political subdivisions of the state that are involved in the education of children with disabilities, including departments of mental health and welfare, and state and local juvenile and adult correctional facilities.[10] The public entity that is directly responsible

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[7] On another related note, advocates should be aware that the No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (January 8, 2002), includes provisions limiting the liability of teachers, administrators and other school staff for actions taken in the context of school discipline under certain conditions. *See* 115 Stat. at 1667 *et seq.*, to be codified at 20 U.S.C. §§2361 *et seq.*

[8] *See, e.g.,* U.S. Department of Education, To Assure the Free Appropriate Public Education of All Children with Disabilities: Twenty-first Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act at II-1 (1999) (citing research finding that more than one in three youths entering correctional facilities have previously received special education services).

[9] 20 U.S.C. §1412(a)(2). *See also, e.g., Smith v. Wheaton*, 29 IDELR 200 (D. Conn. 1998); *Alexander S. v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995); *Donnell C. v. Illinois State Board of Education*, 829 F. Supp. 1016 (N.D. Ill. 1993); *Green v. Johnson*, 513 F. Supp. 965 (D. Mass. 1981). The IDEA rights of some youth incarcerated in adult correctional facilities may be circumscribed in certain respects. *See* 20 U.S.C. §§1412(a)(1)(B)(ii), 1414(d)(6).

[10] *See* 34 C.F.R. §§300.2(b), 300.22.

for providing FAPE to a particular court-involved, adjudicated or incarcerated youth will vary depending upon state law, subject to the state educational agency's having ultimate responsibility for seeing that FAPE is actually provided.[11] In any event, however, the local school system remains obligated to provide FAPE meeting all meeting relevant legal standards, despite having filed a delinquency petition or crime report, unless and until educational responsibility for the student passes to some other entity, under state law. Further, the local school system for the community into which an incarcerated youth is to be released must cooperate in the transition by having appropriate educational services in place.[12]

The Ongoing Right to an Education That Meets Legal Standards for Quality

Regardless of whether a youth targeted by a delinquency petition or crime report remains in the community, and regardless of which public entity has educational responsibility, he or she remains entitled to an education that meets legal standards for quality under IDEA, §504 and the ADA. This includes, *inter alia*, appropriate services and supports to address emotional and behavioral issues,[13] as well as a full substantive curriculum.[14] The latter must include meaningful opportunities to learn in the general curriculum and attain the standards expected of all students in the state.[15]

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[11] *See* 20 U.S.C. §1412(a)(11)(A). Note however, that, at a state's discretion, responsibility for ensuring that IDEA requirements are met with respect to youth convicted as adults under state law and incarcerated in adult prisons may be assigned to any public agency in the state. 20 U.S.C. §1412(a)(11)(C).

[12] *See Smith v. Wheaton*, *supra*.

[13] *See* discussion in Chapter II, *supra*.

[14] 20 U.S.C. §1401(8)(C).

[15] 20 U.S.C. §§1401(8)(B), (C), 1414(b)(2)(A), (c)(1)(iv), 1414(d)(1)(A), (d)(4); 34 C.F.R. §104.4(b)(1)(ii - iv), (2).

APPENDIX

Guiding Principles and Criteria for School Policies on Crime Reports

Guiding Principles for School Policies/Procedures/Practice

1. The responsibilities of public school systems include addressing the behavioral ramifications of disabilities, through appropriate special education and related services. This is part and parcel of education. Criminalizing the very behavior for which schools are obliged to provide special education and related services is not acceptable, and violates IDEA, §504 and Title II of the ADA.

2. Absent an immediate, genuine emergency requiring police intervention to protect the physical safety of the school community, no police reports, crime reports, delinquency petitions, etc. for behavior that the school, as a matter of IDEA/504/ADA, should be addressing through special education, related services or accommodations, or for behavior that is associated with a disability that the school is supposed to be addressing through special ed., related services, or accommodations.

3. Using police/crime reports, delinquency petitions, etc. to punish behavior that is part of a disability (as opposed to contacting police for assistance in an emergency) is illegal discrimination even if the school's policy or practice is to file police reports, etc. for outwardly similar behavior by students without disabilities. Failure to modify such a policy as an accommodation constitutes illegal discrimination under §504 and Title II of the ADA.[1]

4. Behavior that might otherwise prompt school officials or individual staff to involve law enforcement or judicial authorities should be brought to the attention of the child's IEP or §504 team.

Minimum Criteria for School Policy/Procedures (and consistent with above principles)

1. Policies/procedures should address and protect students who have not yet been identified as having a disability under IDEA and/or §504, as well of those already receiving special

[1] *See Thomas v. Davidson Academy*, 846 F. Supp 611 (M.D. Tenn. 1994).

education, related services, or accommodations.

2. Policies/procedures should, at a minimum, incorporate IDEA and §504 rights/processes re: review and revision of IEPs, evaluation/reevaluation, manifestation reviews (to discover the relationship between behavior of concern and the child's disability), proposed changes in placement, functional behavior assessment, parent participation and qualified educational decision makers *prior to any resort to law enforcement, judicial or juvenile authorities*, absent a genuine, immediate safety emergency.

3. Schools should ensure that all staff who come into contact with students are versed in the above principles, policies and procedures, and in their rationale. Policies/procedures should provide that staff having concerns/complaints about student behavior – including behavior that might prompt them, as individuals, to consider contacting law enforcement or judicial authorities – must relay them to the student's IEP or §504 team. If the concerned staff member is one of the child's teachers, he or she may participate in the IEP team's discussion/decision making re: appropriate positive strategies/supports/services for addressing the behavior in question.[2]

4. Policies/procedures should provide that schools/school officials may not assist or support in any way staff who, as individuals, file police reports, criminal complaints, delinquency petitions, etc. contrary to the above principles and consistent policies/procedures. Same re: parents or other third parties who attempt to involve law enforcement/judicial authorities (absent emergency).

5. Policies/procedures should stress that information from education records may not be provided to *any* individual, entity, institution, etc. – including police, courts, prosecutors, etc. – without prior written consent, unless otherwise permitted by FERPA. This includes drawing upon education records in any way in the course of dealing with law enforcement or judicial authorities.

6. Under IDEA, school systems have an affirmative obligation to keep abreast of promising new methods and strategies for meeting the educational needs of children with disabilities, including behavioral needs, and to employ them as appropriate in designing and implementing IEPs.[3] Policies/procedures should ensure that this obligation is met.

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[2] *See* 20 U.S.C. §1414(d)(3)(C), (4)(B).

[3] *See Timothy W. v. Rochester School District*, 875 F.2d 954, 973 (1st. Cir. 1989), *cert. denied*, 110 S. Ct. 519 ("...educational methods...are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in

7. Hiring policies (including qualifications and pre-service training required) and in service training policies should ensure to the maximum extent possible that those working with students with behavioral manifestations (whether they are regular educators, special educators, aides, or other school staff) have the understanding and skills to respond to difficult disability-related behavior as an educational concern, rather than through punishment and criminalizing of their students.

8. Policies should provide for supports for regular and special education teachers and other staff in addressing/responding to difficult behavior.

9. Policies should provide that inappropriate attempts by individual staff to involve law enforcement or judicial authorities in responding to in-school, disability-related behavior will be taken into account in teacher/staff evaluations and other personnel decisions.

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providing an education program geared to each child's individual needs"); *see also* 20 U.S.C. §§1412(a)(14), 1453(c)(3)(D)(vii) (state must have in effect system to acquire and disseminate to teachers, administrators, school board members and related services personnel significant knowledge derived from education research and other sources, and for adopting, where appropriate, promising practices, materials and technology); 20 U.S.C. §1413(a)(3) (local school systems shall ensure that personnel are appropriately prepared to carry out IDEA, consistent with §1453(c)(3)(D); 34 C.F.R. §300.382(g).