# **How Children with Learning Disabilities Fare in** the Juvenile Justice System

by Joseph B. Tulman, J.D.



The "school-to-prison" pipeline pushes children with disabilities, particularly minority children, out of school and into delinquency and criminal incarceration.

the educational records of children in juvenile incarceration facilities rarely show evidence of academic success. In addition, juvenile delinquency probation officers point out that children in the caseloads are functioning below grade level. The majority of children in the juvenile delinquency system have learning disabilities and have not received the benefit of appropriate and effective special education services.<sup>1</sup>

Children with learning disabilities are at a double disadvantage. Not only are they more likely than kids without learning disabilities to engage in delinquent conduct, but also the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent.

# **Failure to Deliver Appropriate Services**

Poor educational outcomes among children in the delinquency system provide compelling evidence that both the school system and delinquency system personnel are failing to deliver appropriate educational services and failing to accommodate children with disabilities. The outcomes also, however, often reflect failure by school system and delinquency system personnel even to recognize education-related disabilities. These outcomes also suggest that decision-makers guarding the gates to the delinquency system and to incarceration facilities treat children with educationrelated disabilities differently than children who do not have disabilities.

system are poor and members of racial and ethnic minority groups.<sup>2</sup> These numbers reflect the harsh reality that society imposes unequal and discriminatory treatment upon poor children of color. Researchers and journalists have documented the uneven representation and unequal, discriminatory treatment of children based upon race and socio-economic status. In contrast, uneven representation and unequal, ple with disabilities—including those with education-

discriminatory treatment within the delinquency system of children with disabilities has not been sufficiently studied and documented. Estimates of the correlation between delinquency and disabilities vary

Commentators and analysts have suggested various theories to explain why and how children with education-related disabilities are over-represented in the delinquency system and, particularly, in incarceration facilities. <sup>5</sup> "Examples include the school failure theory, the susceptibility theory, the differential treatment theory and the metacognitive deficits hypothesis. [T]he school failure, susceptibility and metacognitive explanations suggest that learning and behavioral characteristics of certain youths directly or indirectly lead to delinquent behavior..."6 In contrast, the differential treatment thesis rests upon the premise that—in processing and adjudicating children through the delinquency system—people with official or legal authority make decisions that result in a unequal and morepunitive treatment of children who have disabilities.<sup>7</sup>

# **Unawareness of Learning Disabilities**

Work by people at the Harvard Civil Rights Project and by others describing the "school-to-prison" pipeline is helping to clarify the magnitude of problems across the nation related to pushing children with disabilities, particularly minority children, out of school and into delinquency and criminal incarceration. Indeed, although there are statutory<sup>8</sup> and case-based<sup>9</sup> protections against excluding children with disabilities from school, the child who is most likely to be suspended or expelled is an adolescent, male, minority student who is eligible for special education ser-

People in positions of authority who make decisions that affect the categorization and treatment of children in the delinquency system are typically not sufficiently aware of the existence and nature of education-related disabilities. Compounding the problem, these same officials in many instances are not aware of their legal obligations to identify and accommodate The majority of children in the juvenile justice children with disabilities. Therefore, government officials in the school system uniformly fail to develop policies and programs aimed at identifying and serving children with disabilities.

### Learning Disabilities and Federal Law

Even though federal law prohibits all state and local government bodies from discriminating against peo-

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related disabilities—individuals who work within the delinquency system (such as probation officers) are largely unaware that a majority of the children with whom they work have education-related disabilities. These delinquency system workers are, moreover, unaware of the practical and legal consequences of those disabilities in the context of delinquency prosecutions and dispositional placements. Essentially, adults who run the delinquency system have not yet begun to comply with the federal law that prohibits disability discrimination.

Much of the decision-making relating to children in the delinquency system has a discriminatory impact and violates federal laws. One can state as a matter of law that school system personnel must know and follow the dictates of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504). By the same token, delinquency system personnel performing educational duties (for example, running schools for incarcerated children) must follow IDEA and Section 504. In other duties, as well, delinquency system personnel must comply with Title II of the Americans with Disabilities Act (ADA). Likewise, school system personnel must comply with ADA. Yet, due to ignorance of



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disabilities and of the governing law, neglect of specific duties, and failure to establish policies and practices (including training), many school system and delinquency system personnel and officials routinely violate these laws.

IDEA is a civil rights statute that emanated and evolved from the history and precedents of racial desegregation of public schools. 11 Under IDEA, each state must provide a "free appropriate public education" to all children between the ages of three and 21, inclusive, who have disabilities and who reside within the state. Children with disabilities who are not necessarily eligible under IDEA (because the disability does not substantially affect the child's academic functioning or because the disability is not listed under IDEA) may qualify for protection in the school setting under Section 504.<sup>12</sup> Section 504 prohibits discrimination on the basis of disability within any program that receives federal funding. 13 In 1990, Congress passed ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities... [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."14

## **Procedures and Standards**

The delinquency system, as embodied within the law, may be described as a complex network of procedures and substantive standards. The primary purpose of the procedures is to control and regulate decision-making so that police officers, prosecutors, probation officers, judges and others make decisions that are accurate. The substantive standards establish what is fair and just as a matter of fact and law. Both procedural and substantive decision-making in the delinquency system that discriminates against or fails to accommodate children with disabilities violates ADA. Yet virtually no one seems to be litigating—or even actively thinking about—how ADA applies in the context of the delinquency system.

A judge would know to appoint a sign-language interpreter for a criminal defendant or a delinquency respondent who is deaf and who uses sign language to communicate. Without special training, however, regarding the nature of expressive and receptive language disorders, a judge is unlikely to be aware of the need to accommodate children with language-based disabilities. One can speculate that the percentage of children in the delinquency court who are affected by such disorders is high and, correspondingly, that the current awareness of this problem by judges is low.



This unmet need to accommodate children with language-processing problems could require, by itself, a wholesale change to the juvenile court. Indeed, the problem—if it can be demonstrated—must exist at every stage of a delinquency proceeding, from intake and detention through probation and parole (aftercare) revocation. Imagine, for example, restructuring the hearings at which children accept plea bargains so that, instead of simply answering "yes" and "no" to questions from the judge, the child would have to explain the rights being waived. Anyone familiar with delinquency courts must acknowledge that the conveyor belt of plea hearings would grind to a halt: the children are programmed to answer the "yes/no" questions dutifully; they rarely understand in actuality what rights they are waiving.

Consider a probation officer who asks the delinquency judge to revoke probation of a child who is truant from school and has missed appointments with the probation officer. A tremendous number of children across the country are incarcerated for violating these kinds of probation conditions. What if, however, the child is missing school as a consequence of the failure of school personnel to identify and respond appropriately to the child's special education needs? What if the child is missing meetings because the probation officer does not understand that the child has a language-processing problem and is not able to follow instructions? By revoking and incarcerating a child in these circumstances—typically without understanding and responding to the underlying disability issues—probation officers, judges and prosecutors are arguably violating ADA. Furthermore, in failing to understand the circumstances and the possible defenses to the revocation motion, the defense attorney is an accomplice in the ADA violations.

# **Inadequately Trained Defense Attorneys**

Defense attorneys are unaware that many of their clients have education-related disabilities and that those disabilities (or the lawyer's ignorance of the disabilities) may influence their decision-making and, indeed, influence the very essence of the lawyer-client relationship. Most lawyers do not communicate effectively with child clients. They are called upon to translate for their young clients layered legalisms and jumbled jargon. The lawyers, moreover, are not trained to listen empathetically and non-judgmentally. In addition to barriers of class, race, age and cultural differences that impede communication, the lawyers are often dealing with children who have disabilities that directly affect the ability to communicate orally. By failing to understand—literally—the child's story about events that led to the delinquency charge, a defense attorney may pressure the child not to testify (even though the decision about whether to testify should be the child's decision) and, indeed, may pressure the child to plead guilty. Imagine a child with a language-based disability attempting to sound credible in responding to cross-examination by a prosecutor. Perhaps defense attorneys should be asking for accommodations under ADA for clients in that circumstance. Minimally, in response to a request from a defense attorney or even perhaps on the court's own initiative, the judge should allow an expert to screen questions from the prosecutor to determine if the child understood them.

#### **Decision-making by Police Officers**

Consider decision-making by police officers. For many categories of delinquent conduct, police officers have the discretion simply to take the child home rather than to arrest the child. Police officers often are not aware that some of the children whom they interview

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have disabilities and that the children's disabilities may be relevant to gauging credibility and to determining who should be a suspect. If police officers arrest the child and decide to pursue a charge, they then (in most jurisdictions) are required to refer the child to intake probation officers. These intake probation officers determine, among other things, whether to recommend that the case go forward and, if so, whether the court should detain the child until the trial.

Exercising largely unrestrained discretion, prosecutors make decisions about which children to prosecute, what charges to bring and, increasingly, whether to charge a child as an adult (in the criminal system). These decisions self-evidently alter the child's life, often fundamentally. Prosecutors are typically not aware of the possibility that a child confessed falsely due to heightened vulnerability—as a function of an emotional or language-based disability—to pressure and verbal manipulation by police. By using a false confession to establish guilt and to impeach the child's testimony at trial, a prosecutor may be violating ADA and compromising the procedural and substantive stan-

dards at the heart of the delinquency system.

As to IDEA, its primary application in the delinquency context is to provide a way for children to get services so that they do not need to be in the delinquency system; for a child who has already been adjudicated or incarcerated, IDEA services can be a ticket out of the delinquency system. Indeed, a child who is getting appropriate, individualized special education services—in other words specialized instruction, related services and transition services—should not require the kind of care and rehabilitation that, at least on paper, the delinquency system is supposed to provide. A failure by intake probation officers (who recommend whether to pursue a delinquency case), diagnostic probation officers (who recommend what disposition—or sentence—to impose), or supervising probation officers (who supervise children sentenced to periods of probation) to understand the applicability of IDEA can lead to unnecessary prosecution and incarceration. These failures may also constitute wholesale violations of ADA.

### Conclusion

Unmasking the discriminatory impact against children with disabilities in the school system and in the delinquency system holds the potential for significant changes in both systems. By meeting with greater regularity the objective of educating children appropriately, in accordance with the law, school system and delinquency system personnel can reduce the flow of children with disabilities into the delinquency system. Ultimately, those changes should lead, in turn, to obtaining a broader goal: a society that nurtures and promotes productive young adults.

Ultimately, one hopes that, as a result of heightened awareness of the impact of education-related disabilities and of the mandates of anti-discrimination laws, school-system and delinquency-system officials will uniformly shift the perspectives and alter the assumptions underlying their daily decisions. If so, one would expect a decline in the disproportionate representation in the delinquency system of children with disabilities and a coincident decline in overall rates of incarceration for children.

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#### References

- 1 For examples, see Puritz, P. & Scali, M.A. (1998) Beyond the Walls: Improving Conditions of Confinement for Youth in Custody (Office of Juvenile Justice and Deliquency Prevention Report, January 1998). pp. 16–17; Leone, P., et al. (1995). Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention, 3 D.C.L. Rev. 389 n.2; and Gemignani, R.J. (1994) Juvenile Correctional Education: A Time for Change, Office of Juvenile Justice and Delinquency Prevention 2., available at http://www.ncjrs.org/pdffiles/juved.pdf (accessed 12/20/04).
- 2 Miller, J.G. (1998). Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools, 2<sup>nd</sup> Edition. Columbus, Ohio: Ohio State University Press. pp. 3-5. For a presentation of over-representation of minorities in the criminal system, see Miller, J.G. (1996). Search and Destroy: African-American Males in the Criminal Justice System. Cambridge: Cambridge University Press. pp. 4–9, 149–50.
- 3 National Council on Disability. (2003). Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research, § 5.3 Prevalence of Youth with Disabilities in the Juvenile Justice System, available at http://www.ncd.gov/newsroom/publications/2003/juvenile.htm (accessed 12/20/04) and Rutherford, R.B. Jr., et al. (2002). Youth with Disabilities in the Corrections System: Prevalence Rates and Identification Issues. College Park, Md.: National Center on Education, Disabilities and Juvenile Justice, available from http://www.edjj.org/Publications/monographs/ (accessed 12/20/04).
- 4 People with disabilities suffer discrimination in incredibly high proportions and in a pervasive range of ways, including exceedingly high rates of institutionalization. Burgdorf, R.L. Jr. (1991). The Americans with Disabilities Act: Analysis and implications of a second generation civil rights statute. Harvard Civil Rights/Civil Liberties Law Review, 26(2): 415–17.

- 5 Leone, P.E., Zaremba, B.A., Chapin, M.S. & Isili, C. (1995). Understanding the overrepresentation of youths with disabilities in juvenile detention. *The District of Columbia Law Review*,
- 6 Leone, P.E. (1995). p. 390.
- 7 Leone, P.E. (1995). p. 390.
- 8 For example, see *Honig v. Doe*, 484 U.S. 305 (1988).
- 9 Leone, P.E. (1995). p. 323 (Interpreting the "stay-put" provision (codified at the time of the decision at 20 U.S.C. § 1415(e)(3); now at 20 U.S.C. § 1415(j)), the Supreme Court noted that "Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students from school")
- 10 Wald, J. & Losen, D.J. (Fall 2003). Defining and redirecting a school-to-prison pipeline in *New Directions for Youth Development: Deconstructing the School-to-Prison Pipeline, No. 99.* (Johanna Wald & Daniel J. Losen eds.) Canada: John Wiley & Sons
- 11 See, e.g., Honig v. Doe, 484 U.S. 305, 309 (1988).
- 12 Colker, R., Milani, A.A. & Tucker, B.P. (2003). The Law of Disability Discrimination (4th ed.). Cincinnati, Ohio: Anderson Publishing. (providing specific examples of students covered by Section 504 but not IDEA; also providing an overview of the overlap of the two laws).
- 13 The Rehabilitation Act of 1973, § 504, is codified at 29 U.S.C. § 794. Section 794(a) reads, in relevant part, as follows: No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any executive agency or by the United States Postal Service.
- 14 42 U.S.C. § 12101(b)(1)&(2).