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Who Will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities

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WHO WILL EDUCATE ME? USING THE AMERICANS WITH DISABILITIES ACT TO IMPROVE EDUCATIONAL ACCESS FOR INCARCERATED JUVENILES WITH DISABILITIES

Abstract: Youth involved with the juvenile justice system present with a higher rate of disability, including mental illness and learning disabilities, than do non-system-involved youth. These young people are often eligible for special education services as provided by the federal Individuals with Disabilities Education Act ("IDEA"). Eligible youth incarcerated in juvenile detention and correctional facilities, however, often fail to receive these services. Education advocates typically bring suits against school districts and correctional institutions alike under the IDEA's mandate to provide a free appropriate public education to students with disabilities. Unfortunately, this approach is failing because the IDEA is not able to tackle other conditions within facilities that stand as barriers to educational access. The IDEA, however, is not the sole remedy available. The Americans with Disabilities Act ("ADA"), which reaches beyond the educational context and applies to more governmental entities than the IDEA, offers a more robust litigation avenue for enforcing the education rights of incarcerated youth with disabilities. Bringing suit under the ADA, therefore, either alone or in conjunction with the IDEA, could result in more consistent enforcement of incarcerated youths' right to an education than bringing suit solely under the IDEA.

INTRODUCTION

For juveniles involved with the juvenile justice system, the school-to-prison pipeline is more than a public policy problem—it is a very real, lived experience.[1] Upwards of ninety percent of incarcerated juveniles exhibit emo-

[1] *See* Sabina E. Vaught, *Juvenile Prison Schooling and Reentry: Disciplining Young Men of Color*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 310, 310, 311 (Francine T. Sherman & Francine H. Jacobs eds., 2011) (highlighting how school exclusion policies, like zero tolerance, and special education diagnoses contribute to the racial disparities seen in juvenile incarceration, a trend known as the "school-to-prison pipeline"); *Youth Involved with the Juvenile Justice System*, YOUTH.GOV, https://youth.gov/youth-topics/juvenile-justice/youth-involved-juvenile-justice-system [https://perma.cc/62N5-DEZ5] (connecting school exclusionary practices, like suspension or expulsion, to increases in juvenile system involvement within a year). A juvenile who is found guilty of a crime or pleads guilty within the juvenile system is considered adjudicated delinquent and not labeled "convicted" as happens in the adult criminal justice system. *Juvenile Court Terminology*, NAT'L JUVENILE DEF. CTR., http://njdc.info/juvenile-court-terminology [https://perma.cc/R2NA-KC9L] (providing definitions to key terms related to juvenile justice). Juveniles adjudicated delinquent may spend their sentence, also known as a disposition, in detention, which is a catch-all term for

tional impairment, and at least half may have a diagnosable emotional disability.[2] These problems often are exacerbated by the harsh conditions and lack of adequate support in facilities.[3] Frequently, incarcerated juveniles have a history of failing to achieve academic progress in and exclusion from mainstream school settings before their incarceration.[4] A correctional facility that favors employing "restrictive security programs," while restricting access to educational programs, fails to consider its legal mandates to provide an education with the appropriate accommodations for those with disabilities.[5] In the school setting, litigators typically approach problems of special education access by bringing suit under the Individuals with Disabilities Education Act ("IDEA"), which guarantees a "free appropriate public education," or a "FAPE," for students with disabilities.[6] In the juvenile justice setting, however, the IDEA may

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various levels of confinement both before and after adjudication for delinquency. *Id.* They may also be committed to state agency custody in a residential or correctional facility. *Id.* For the purposes of this Note, the term "juvenile justice facility" or "juvenile facility" will be used to discuss all confinement settings for youth while "incarcerated juvenile" or "incarcerated youth" will be used to refer to those adjudicated. *See* LOIS M. DAVIS ET AL., RAND CORP., HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE? 21 (2014) (defining the term "incarcerated youth"); *Juvenile Court Terminology*, *supra* (defining terms used in the juvenile justice system).

[2] DAVIS ET AL., *supra* note 1 at 22 (citing two 2003 studies discussing the emotional challenges facing incarcerated youth).

[3] *See id.* at 22–23 (discussing the lack of satisfactory services endemic in juvenile justice facilities). Throughout the 1990s, journalists and researchers exposed physical abuse, a lack of certified education programs, insufficient food rations, sewage problems, and overcrowding at several juvenile facilities. NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 186–87 (Joan McCord et al. eds., 2001) [hereinafter JUVENILE CRIME, JUVENILE JUSTICE] (depicting historical mistreatment within the juvenile justice system). In 2014, 50,821 juveniles were held in juvenile justice facilities. Charles Puzzanchera & Sarah Hockenberry, *Data Reflect Changing Nature of Facility Populations, Characteristics, and Practices*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION (Aug. 2016), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_JRFC2014.pdf [https://perma.cc/XV3N-EVSF] (providing statistical trends on the operation of juvenile justice facilities). Though the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") reported a fifty-percent decrease in overcrowding between 2000 and 2014, cases like *G.F. v. Contra Costa County* in 2014 highlight ongoing mismanagement of juvenile facilities. *See* Statement of Interest of the United States of America at 5–6, G.F. v. Contra Costa Cty., No. 3:13-cv-03667-MEJ (2014) [hereinafter Statement of Interest in G.F. v. Contra Costa Cty.] (describing an overuse of security measures with juveniles with disabilities); *see also* Puzzanchera & Hockenberry, *supra* (presenting data comparison on overcrowding for the years 2000 and 2014).

[4] *See Youth Involved with the Juvenile Justice System*, *supra* note 1 (describing the history of poor academic outcomes and exclusions for system-involved youth). Statistically, life outcomes remain poor for incarcerated juveniles after release, with one study finding that "juvenile incarceration reduced offenders' high school completion rates by thirteen percentage points and increased their adult incarceration rates by twenty-two percentage points." DAVIS ET AL., *supra* note 1, at 23.

[5] *See* Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 6–7 (supporting that the allegations of incarcerated youth against a correctional facility, if true, are violations of the Individuals with Disabilities Education Act ("IDEA") and the Americans with Disabilities Act ("ADA")).

[6] *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2012) (requiring access to a "free appropriate public education," or "FAPE," for all children with disabilities in the purposes of the act); *see, e.g.*, Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993, 998–99

be less effective when used to challenge educational access in correctional facilities because other conditions of confinement that are not under the purview of the IDEA influence educational access.[7] Instead, the Americans with Disabilities Act ("ADA") could be a more effective advocacy tool than the IDEA when challenging education, or the lack thereof, as a condition of confinement because the ADA applies to the entire facility and not just its educational entity.[8] This broader reach allows advocates to attack policies that keep incarcerated juveniles with disabilities from exercising their educational rights and may even result in the closure of facilities egregiously ignoring the civil rights of their young inmates.[9]

This Note explores the potential efficacy of the ADA to protect the educational rights of incarcerated juveniles with disabilities while they are serving their commitments.[10] Part I of this Note will discuss the history of the right to a public education for students with disabilities in the United States.[11] Part II

(2017) (bringing suit under the IDEA based on an alleged violation of a FAPE); Bd. of Educ. v. Rowley, 458 U.S. 176, 185 (1982) (bringing suit under the IDEA based on an alleged violation of FAPE).

[7] *See, e.g.*, JESSICA FEIERMAN ET AL., UNLOCKING YOUTH: LEGAL STRATEGIES TO END SOLITARY CONFINEMENT IN JUVENILE FACILITIES 22 (2017), https://jlc.org/sites/default/files/attachments/2018-03/JLC_Solitary_ReportFINAL.pdf [https://perma.cc/SK7T-QBNB] (recommending that IDEA claims be used to challenge education throughout the facility and not as a way to provide some minimum level of educational services to youth in solitary confinement).

[8] *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2012) (defining the reach of Title II of the ADA to all public entities).

[9] *See, e.g.*, Class Action Complaint at 40–42, G.R. v. Foxhoven, 2018 WL 4701869 (S.D. Iowa June 28, 2018) (No. 4:17-cv-00417) (challenging the widespread use of solitary confinement, including the lack of educational materials available to boys so confined, and the unsanitary conditions of the facility's cells as violations under the ADA); Statement of Interest in G.F. v. Contra Costa Cty, *supra* note 3, at 6–7 (challenging the facility's use of restrictive security policies as violating educational rights for incarcerated students with disabilities under the IDEA and the ADA); FEIERMAN ET AL., *supra* note 7, at 4 (encouraging litigation to improve conditions under disability protections). Policies like solitary confinement keep incarcerated juveniles from accessing educational programs and disproportionately impact incarcerated juveniles with disabilities. FEIERMAN ET AL., *supra* note 7, at 4. In the last year, juvenile facilities employing solitary confinement have faced challenges on civil rights grounds in numerous states. Jessica Feierman, Karen U. Lindell & Natane Eaddy, *Unlocking Youth: Legal Strategies to End Solitary Confinement in Juvenile Facilities* (Aug. 2, 2017), https://jlc.org/resources/unlocking-youth-legal-strategies-end-solitary-confinement-juvenile-facilities [https://perma.cc/AD87-NJAX] (discussing key developments in juvenile justice advocacy). Two facilities in Wisconsin are closing after constitutional challenges to their use of solitary confinement. Press Release, Juvenile Law Ctr. & ACLU of Wis., *Following Class Action Civil Rights Lawsuit, Wisconsin Legislature to Close Lincoln Hills and Copper Lake* (Mar. 22, 2018), https://jlc.org/sites/default/files/attachments/2018-03/2018_3_22LHS%20Ready%20to%20release_FINAL.pdf [https://perma.cc/DQ76-7KEH] (revealing the outcome of lengthy investigations and litigation). Five states and the District of Columbia have undergone major campaigns to close several juvenile facilities. *See generally* SHEILA BEDI, YOUTH FIRST, BREAKING DOWN THE WALLS: LESSONS LEARNED FROM SUCCESSFUL STATE CAMPAIGNS TO CLOSE YOUTH PRISONS 5–11 (2017) (highlighting successful grassroots and legal campaigns in California, New York, Louisiana, Texas, the District of Columbia, and Mississippi).

[10] *See infra* notes 15–205 and accompanying text.

[11] *See infra* notes 15–68 and accompanying text.

will examine the intersection of disabilities and education in the juvenile justice context by charting the origins of juvenile justice to the current problems plaguing the system.[12] Part III will describe the barriers that exist for incarcerated juveniles with disabilities seeking to realize their right to an education while examining a new approach to facilities litigation made possible by the ADA.[13] Part IV will argue that using the ADA as an advocacy tool can more expansively serve the educational needs of students with disabilities who are incarcerated and potentially revolutionize the juvenile justice landscape.[14]

I. A Historical Overview of the Right to a Public Education for Children with Disabilities in the United States

Providing American youth with an education is an important public function entrusted to the states.[15] Presently, each state constitution provides for the establishment of a public education system.[16] State constitutional mandates have provided the legal basis for challenging certain state public education practices, namely school finance equity and more recently, teacher tenure.[17] Although twenty states have declared the right to an education to be fundamental, only nine state constitutions explicitly provide protections for students

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[12] *See infra* notes 69–114 and accompanying text.

[13] *See infra* notes 115–181 and accompanying text.

[14] *See infra* notes 182–205 and accompanying text.

[15] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (debating whether public education is a fundamental right as opposed to an important function); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (describing education as "the most important function of state and local governments").

[16] Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 582 (1996) (discussing the reliance on state constitutions for education-related civil rights litigation). By 1918, all states had compulsory attendance laws. *Brown*, 347 U.S. at 490 n.4. At different times throughout history, states have defined the contours of the right to a public education within their states, creating a patchwork of inconsistent rights for American youth. Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES (Mar. 2016), https://www.ecs.org/constitutional-obligations-for-public-education [https://perma.cc/5EFK-Q36Y] (reviewing the varied constitutional provisions for education of all fifty states); *see also* Francine T. Sherman & Hon. Jay Blitzman, *Children's Rights and Relationships: A Legal Framework*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 68, 72–73 (describing children's law and rights as uniquely driven by local values distinct among the individual states).

[17] *See* Reed, *supra* note 16, at 593–94 (finding that state education clauses are most often invoked when challenging a states' school finance practices). *Compare, e.g.*, Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L. J. 1, 15, 18 (discussing the use of education clauses in state constitutions to raise claims of school finance inequities), *with* Note, *Education Policy Litigation as Devolution*, 128 HARV. L. REV. 929, 929 (2015) (highlighting new trends in the education advocacy arena in regards to using state constitutional provisions about public education).

with disabilities.[18] These provisions are not necessarily expansive, and some reflect outdated understandings of disabilities.[19]

Conversely, the United States Constitution does not explicitly guarantee any right to a public education through the federal government.[20] Instead, a confluence of federal legislation and case law has forged a broad regulatory scheme influencing state public education systems.[21] Since the middle of the twentieth century, Congress and the federal courts have recognized historically disenfranchised students' right to an equal opportunity to access a public education.[22] Empowered by the Spending Clause of the Constitution, Congress has tied federal grants for education to specific programmatic purposes for decades.[23] In addition to these legislative prerogatives, the Supreme Court has in-

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[18] *See* Kathleen B. Boundy & Joanne Karger, *The Right to a Quality Education for Children and Youth in the Juvenile Justice System*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 286, 286 (characterizing state-based declarations of education as a fundamental right); Sherman & Blitzman, *supra* note 16, at 72–73 (characterizing state constitutions' acknowledgement of education as a fundamental right); Parker, *supra* note 16, at 1 (identifying that some state constitutions provide for the education of students with disabilities). The nine states with protections for students with disabilities are: Arizona, Delaware, Indiana, Michigan, Mississippi, Nebraska, Ohio, Oklahoma, and West Virginia. Parker, *supra* note 16, at 1, 5, 8, 10, 12–14, 17, 21.

[19] Parker, *supra* note 16, at 5, 8, 10, 12–14, 17, 21. For example, Indiana, Ohio, and West Virginia provide an education for the "insane and dumb." *Id.* at 10, 17, 21. Arizona only explicitly mandates support for one category of disability—the "hearing and vision impaired." *Id.* at 5.

[20] *Rodriguez*, 411 U.S. at 35. The Supreme Court reasoned in *Rodriguez* that the right to an education is not fundamental because it does not appear explicitly in the Constitution. *Id.* at 99 (Marshall, J., dissenting).

[21] *See, e.g.*, Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, 79 Stat. 27, 27 (1965) (providing funds to states that provide a public education to low-income children); *Brown*, 347 U.S. at 493, 495 (requiring states to desegregate public schools to remedy violations of the Fourteenth Amendment's Equal Protection Clause); Sarah G. Boyce, Note, *The Obsolescence of* San Antonio v. Rodriguez *in the Wake of the Federal Government's Quest to Leave No Child Behind*, 61 DUKE L.J. 1025, 1047 (2012) (juxtaposing the role of Congress and the Supreme Court in shifting state policies on public education).

[22] *See, e.g.*, Education for All Handicapped Children Act of 1975, Pub. L. No. 101-476, § 3, 89 Stat. 773, 775 (1975) (codified as amended at 20 U.S.C. § 1401(c) (2012)) (providing federal funding for educational programs for children with disabilities for the first time); *Brown*, 347 U.S. at 495 (holding that the "separate but equal" violates students' rights under the Equal Protection Clause of the Fourteenth Amendment because the "educational facilities are inherently unequal"); Pa. Ass'n for Retarded Children v. Pennsylvania (*PARC*), 343 F. Supp. 279, 302 (E.D. Pa. 1972) (approving a settlement giving children with disabilities access to a public education where they had previously been denied such access). In *Brown*, in 1954, when abolishing "separate but equal" education facilities, the Supreme Court characterized the Fourteenth Amendment's historical purpose alongside the slow development of formalized public education systems in southern states after the Civil War as working together to forbid education to black children. 347 U.S. at 489–90. Then, in *PARC*, in 1972, when recognizing the educational rights of children with disabilities, the United States District Court for the Eastern District of Pennsylvania discussed the exclusion of children with intellectual disabilities from public schools prior to the twentieth century and the eugenics movement's furtherance of stigma against those with intellectual disabilities. 343 F. Supp. at 294.

[23] *See* U.S. CONST. art. I, § 8, cl. 1 (establishing Congress's power to tax and spend); 20 U.S.C.A. § 1411(a)(1) (West 2017) (providing grants to states for the education of students with disabilities); Bilingual Education Act, Pub. L. No. 90-247, § 702, 81 Stat. 783, 816 (1968) (providing federal fund-

terpreted the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964 as requiring equitable access to educational opportunities for students on the margins of society.[24]

Federal educational statutes range from specific protections for certain classes of students to sweeping attempts to regulate educational equity among the states.[25] The first federal legislation to address public K-12 education in the United States was the Elementary and Secondary Education Act of 1965 ("ESEA").[26] Passed in the wake of continuing *de facto* school segregation in the post-*Brown* landscape, the ESEA aimed to promote school equity by appropriating federal money to support schools that served high-percentages of low-income students.[27]

Section A of this Part examines the evolution of federal statutes with an emphasis on advancing the rights of children with disabilities.[28] Section B considers the federal judiciary's role in advancing educational access, particularly through its interpretation of federal statutes to further define the right to an education for students with disabilities.[29]

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ing for states and school districts that enact effective bilingual education programs for students from non-native English-speaking backgrounds); Elementary and Secondary Education Act § 2 (offering financial incentives to states and school districts serving high percentages of low-income students); Boyce, *supra* note 21, at 1047 (describing the scope of Congress's power under the Spending Clause of the Constitution). By offering federal funds in exchange for compliance with federal statutory mandates or administrative programs, the federal government shapes education in public schools. Education for All Handicapped Children Act of 1975 § 3; Bilingual Education Act § 702; Elementary and Secondary Education Act § 2; Boyce, *supra* note 21, at 1047. Furthermore, Congress established the Department of Education in 1867 to monitor the states' public schools and provide input for improving them. An Act Establishing a Department of Education, Pub. L. No. 39-73, § 1, 14 Stat. 434, 434 (1867) (establishing the first federal-level agency to oversee education throughout the country); *An Overview of the U.S. Department of Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/focus/what.html [https://perma.cc/7KVF-ZW2B] (outlining the modern goals and responsibilities of the U.S. Department of Education).

[24] *See* Lau v. Nichols, 414 U.S. 563, 566 (1974) (acknowledging inequality of English-only education for non-English-speaking students against the mandates of the Civil Rights Act of 1964); *Brown*, 347 U.S. at 493 (forbidding segregation by race in public schools under the Equal Protection Clause of the Fourteenth Amendment).

[25] *Compare* 20 U.S.C. § 1400(c)–(d) (reaffirming a right to an education for students with disabilities), *with* Every Student Succeeds Act, 20 U.S.C.A. § 6601 (West 2017) (promoting teacher quality and accountability with funding-based incentives for states).

[26] *See generally Federal Programs for Education and Related Activities*, *in* DIGEST OF EDUC. STATISTICS (2002), https://nces.ed.gov/pubs2003/2003060d.pdf [https://perma.cc/MV5W-VDCX] (listing federal statutes addressing education).

[27] Derek Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1317–18 (2017) (detailing the history of major federal education legislation).

[28] *See infra* notes 30–46 and accompanying text.

[29] *See infra* notes 47–68 and accompanying text.

A. Federal Statutes on Disability and Education

The federal government provides specific legal supports for protected classes, such as racial groups or persons with disabilities, in the context of public education.[30] Under the authority of the Equal Protection Clause of the Fourteenth Amendment, Congress passed the IDEA to provide students with disabilities a constitutionally protected right to a public education that meets their needs.[31] The IDEA outlines two major standards to ensure children with disabilities access an education.[32] First, states are required to provide students with a "free appropriate public education," known as a "FAPE."[33] Second, students with disabilities must receive their education in the "least restrictive environment," or "LRE."[34] How a school district meets these two requirements for a student with a disability is detailed in that child's IDEA-required individualized education program ("IEP").[35] The IDEA provides a blueprint for what the IEP must include, such as the student's abilities, goals, and required services or accommodations to make progress, and how the IEP is created.[36] The IDEA also mandates transition services for students with disabilities—services that support the child in transitioning from the secondary school setting to the appropriate post-secondary option.[37]

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[30] *See, e.g.*, 20 U.S.C. § 1400(c) (discussing the importance of supporting the education of students with disabilities); Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 242, 252 (1964) (prohibiting federally-funded entities from discriminating because of race); 34 C.F.R. § 100.1 (2017) (applying Title VI of the Civil Rights Act of 1964 explicitly to the public education context).

[31] *See* 20 U.S.C. § 1400(d)(1)(A) (providing a "free appropriate public education" to all children with disabilities); Steven N. Robinson, Note, Rowley, *The Court's First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U. L. REV. 941, 941–42, 942 n.8 (1983) (describing the Education for All Handicapped Children Act of 1975 as Congress's reaction to equal protection cases on the educational rights of students with disabilities). The Education for All Handicapped Children Act of 1975 was later renamed the IDEA. *See* 20 U.S.C. § 1400(a) (naming the chapter of the legislation). Part B of the IDEA provides for services for students ages three through twenty-one. *About IDEA*, U.S. DEP'T OF EDUC., https://sites.ed.gov/idea/about-idea [https://perma.cc/SGE2-MZMQ] (differentiating the services provided to specific populations).

[32] 20 U.S.C.A. § 1412(a)(1)(A), (5)(A) (West 2017) (outlining the IDEA requirements for states that seek funding eligibility).

[33] *Id.* § 1412(a)(1)(A). A "free appropriate public education" ("FAPE") encompasses all services for special education that are free to the family and paid for by the public. *Id.* § 1401(9). These services must meet the child's needs as outlined in the child's individualized education program ("IEP"). *Id.*

[34] *Id.* § 1412(a)(5)(A). In recent years, one of the primary goals of the IDEA is keeping students with disabilities in general education classrooms with non-special education peers as often and as much as possible. *See About IDEA*, *supra* note 31 (highlighting the rate of inclusion of students with disabilities in general education classrooms for the overwhelming majority of the school day).

[35] 20 U.S.C.A. § 1414(d) (West 2017). States empower public school districts as the "local educational agency" to deliver the specialized education as mandated by the IDEA. *Id.* § 1401(19)(A).

[36] *Id.* § 1414(d).

[37] *Id.* § 1401(34). For some students, college or a vocational program is the next step, whereas other students require programs that allow them to continue learning how to live as independently as possible. *See id.* (outlining examples of post-secondary options and how to determine what is appro-

Students with disabilities are also protected by two civil rights statutes, Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act of 1990 ("ADA").[38] Section 504 forbids discrimination against those with disabilities by any entity receiving federal funds, which includes but is not limited to public schools.[39] Title II of the ADA reaches beyond Section 504 by protecting individuals with disabilities from discrimination by any state or local governmental entity, regardless of whether they receive federal monies.[40]

The definition of disability in these two civil rights statutes is similar.[41] Under the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities."[42] In contrast, the definition of disability in the Rehabilitation Act varies based on its application within the statute.[43] When defining disability for entities receiving federal grants, which includes the public education systems of the states, the Rehabilitation Act relies on the ADA's definition.[44] The IDEA, however, has a narrow, categorical

priate for the child based on interests and abilities). Transition planning must be documented in the IEP beginning with the IEP that covers the child's sixteenth birthday, though schools are welcome to begin planning earlier. *Id.* § 1414(d)(1)(A)(i)(VIII).

[38] *About IDEA*, *supra* note 31. The U.S. Department of Education's Office of Civil Rights enforces the rights of students with disabilities under these two federal legislative provisions, but not under the IDEA. *Id.*

[39] The Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C.A. § 794 (West 2017)) (providing disability discrimination protections); *see also Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP'T OF EDUC. (Oct. 16, 2014), https://www2.ed.gov/about/offices/list/ocr/504faq.html [https://perma.cc/W2Z5-7BDJ] [hereinafter *Protecting Students with Disabilities*] (discussing the applicability of the Rehabilitation Act of 1973 (Section 504) in the public education context). Section 504 prevents discrimination against any student with a physical or mental disability by a school that receives federal funding. *Protecting Students with Disabilities*, *supra*.

[40] *State and Local Governments (Title II)*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., https://www.ada.gov/ada_title_II.htm [https://perma.cc/8QJ5-T4S8] (offering guidance on implementing Title II); *see also* 42 U.S.C. § 12132 (banning discrimination on the basis of disability by any "public entity"). The ADA protects individuals with disabilities in much the same way as the Civil Rights Act of 1964 protects individuals of other protected classes, like race and religion. *Introduction to the ADA*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., https://www.ada.gov/ada_intro.htm [https://perma.cc/T6BM-2WXF] (explaining the history of the ADA).

[41] *Compare* 42 U.S.C. § 12102(1) (2012) (defining disability and its limitations on daily living in the ADA), *with* Rehabilitation Act, 29 U.S.C.A. § 705(9) (West 2017) (defining disability and its limitations on employment opportunities in the Rehabilitation Act).

[42] 42 U.S.C. § 12102(1). What constitutes a major life activity is also defined in the ADA with several non-limiting examples. *Id.* § 12102(2).

[43] *See* 29 U.S.C.A. § 705(9) (offering one definition for disability in the employment context and another for other applications).

[44] *See id.* § 705(9)(B) (outlining the specific subchapters that assume the ADA's definition); 42 U.S.C. § 12102(1) (defining disability). The ADA's definition applies to the Rehabilitation Act's subchapter containing the regulation known as Section 504. *See* 29 U.S.C.A. § 705(9)(B) (applying

definition that applies only to children in the education setting.[45] A student with a disability may bring a claim of disability-based discrimination, demonstrated by a lack of access to educational services to which he or she is entitled, under the ADA, Section 504, the IDEA, or any combination of the three statutes.[46]

B. Major Federal Cases on Educational Access

During the second half of the twentieth century, the Supreme Court advanced access to public primary and secondary education for marginalized populations using constitutional and statutory precedents.[47] First, in 1954, in *Brown v. Board of Education*, the Supreme Court unanimously held that "separate but equal" educational provisions violated the Equal Protection Clause of the Fourteenth Amendment.[48] Two decades later, but preceding the enactment

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the grant to subchapter V, including section 794, which is known by its session law name, Section 504).

[45] 20 U.S.C.A. § 1401(3)(A). The only disabilities or impairments that qualify a child for consideration of special education services under the IDEA are: "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." *Id.* § 1401(3)(A)(i). Additionally, the child must be found to require "special education and related services." *Id.* § 1401(3)(A)(ii).

[46] *See, e.g.*, Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 993 (2017) (bringing IDEA claims as parents of a child with autism); Fry v. Napoleon Cmty. Sch. Dist., 137 S. Ct. 743, 754, 758 (2017) (bringing ADA and Section 504 claims against a school district while discussing the impact of the IDEA on the disability claims); *Protecting Students with Disabilities*, *supra* note 39 (discussing Section 504 enforcement). Congress has long recognized the overlap between federal disability and special education law. *See* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1418 (2015) (discussing changes made to the IDEA over thirty years ago to create symmetry with Section 504).

[47] *See, e.g.*, *Lau*, 414 U.S. at 566 (relying on the Civil Rights Act of 1964 as statutory precedent); *Brown*, 347 U.S. at 495 (relying on the Equal Protection Clause of the Fourteenth Amendment). The Court in *Brown* discussed its six prior "separate but equal" education cases. 347 U.S. at 483–84. The two involving primary and secondary schools did not address the constitutionality of the "separate but equal" doctrine while the other four dealt with issues in post-secondary education. *Id.* Therefore, *Brown* became the first successful case at the Supreme Court to strike down the "separate but equal" doctrine in the field of public primary and secondary education. *Id.* at 495.

[48] U.S. CONST. amend. XIV, § 1 (establishing equal protection under the law for all persons); *Brown*, 343 U.S. at 495. This decision struck down "separate but equal" practices in public education as previously authorized by the Court's precedent in *Plessy v. Ferguson*. *Brown*, 343 U.S. at 494–95; *see* Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (recognizing the constitutionality of schools segregated along racial lines). *Brown* was an amalgamation of four cases first brought in federal district courts challenging state-based statutes and constitutional provisions that allowed or required segregated schools. 343 U.S. at 486, 486 n.1. In all but one of the four cases, the district courts found that, though segregation may be harmful to children of color, so long as the educational facilities and resources were made equal, the states' legal provisions were valid. *Id.* at 488, 486 n.1. The Supreme Court viewed educational opportunity as inherent to the success of individuals and society. *Id.* at 483. The Court further considered segregation as potentially permanently damaging to the children of color who were separated from their white peers solely on the basis of race and that such separation could negatively affect their educational outcomes. *Id.* at 494.

of federal disabilities laws, federal courts ushered in an era of expanding education rights beyond race to other disenfranchised groups.[49]

In 1972, two federal district courts recognized the educational rights of students with disabilities.[50] The United States District Court for the Eastern District of Pennsylvania first heard *Pennsylvania Association for Retarded Children ("PARC") v. Pennsylvania*, a case brought by parents of children with intellectual disabilities and PARC, a state-based advocacy group.[51] PARC and the parents sought to stop the Commonwealth of Pennsylvania from continuing to exclude children with intellectual disabilities from the public school system.[52] Because the parties settled during the proceedings, the district court affirmed the settlements and ordered an injunction.[53] During the process of es-

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[49] *See, e.g.*, *Lau*, 414 U.S. at 566, 568 (recognizing the rights of students whose primary language was Chinese); Mills v. Bd. of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972) (holding that the Board of Education of the District of Columbia violated the due process rights of students with disabilities); *PARC*, 343 F. Supp. at 302 (celebrating the settlement that guaranteed access to public education for all children with an intellectual disability in the Commonwealth of Pennsylvania).

[50] *Mills*, 348 F. Supp. at 875; *PARC*, 343 F. Supp. at 302. At the time, students with intellectual disabilities were dubbed "mentally retarded," though the latter term is no longer politically correct. *See* Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 148, 46499 (Aug. 1, 2013) (to be codified at 20 CFR pts. 404, 416) (adopting the term "intellectual disability" in order to promote acceptance of those so affected). When discussing these cases, this Note uses the term "intellectual disability" where possible. *See id.* (replacing "mental retardation" with "intellectual disability" throughout the rules of the Social Security Administration).

[51] *PARC*, 343 F. Supp. at 281–82, 281 n.1. PARC and the parents of children with intellectual disabilities challenged four Pennsylvania statutes that operated in concert to exclude such children from public school systems. *Id.* at 282. Children with intellectual disabilities were excluded on the grounds that they were "uneducable and untrainable," "had not attained a mental age of five years," or would not benefit from education. *Id.* When children with intellectual disabilities were allowed to attend public schools, schools excluded the children who fell outside of the state's compulsory education range of ages "eight to seventeen." *Id.* PARC and the parents of children with disabilities raised constitutional questions of due process and equal protection. *Id.* at 283. They contended that the lack of any hearing before the children's deprivation of their right to an education—a right bestowed upon them by the Pennsylvania Constitution—denied the children due process as no "rational basis" existed for their exclusion under any of the four statutes. *Id.*

[52] *Id.* at 283. Based on a 1965 state-issued report, roughly 60.3 to 63.5% of school-age children with intellectual disabilities were denied their right to a public education as guaranteed by the Pennsylvania Constitution. *Id.* at 296.

[53] *Id.* at 293. During the initial proceedings, the parties settled on the issues of due process and equal protection. *Id.* at 284–88. The first agreement, which addressed due process, provided for a formal hearing with witnesses and evidence before any child could have their educational assignment changed or any child with an intellectual disability could be excluded from public education. *Id.* at 284–85. The state offered four educational assignments for children with intellectual disabilities: "regular, retarded-educable, retarded-trainable, and uneducable-untrainable." *Id.* at 283 n.7. The second agreement, which addressed equal protection, ensured that all Pennsylvanian children with intellectual disabilities between the ages of four and twenty-one would receive a public education. *Id.* at 288. Subsequently, the court issued an injunction to enforce the settlement agreement. *Id.* at 288, & n.19. This injunction ensured that the Commonwealth of Pennsylvania and its school districts would not apply or interpret the four statutes in a manner discriminatory against children with intellectual disabilities. *See id.* at 288. (detailing how the defendants could no longer apply or interpret the statutes to exclude children with intellectual disabilities from attending public schools). Even so, because the

tablishing its jurisdiction to affirm the settlements and order the injunction, the court held that the lack of a hearing before depriving a child with an intellectual disability of a public education presented a valid claim under the Due Process Clause of the Fourteenth Amendment.[54] The court also held that the plaintiffs brought a valid claim under the Equal Protection Clause of the Fourteenth Amendment based on the sheer number of children with intellectual disabilities throughout the Commonwealth who were not receiving a proper public education, despite a constitutional mandate that a proper education is provided to all school-age children.[55]

The United States District Court of the District of Columbia decided *Mills v. Board of Education* less than three months after *PARC*.[56] In *Mills*, a group of students with intellectual and emotional disabilities alleged that the District of Columbia Public Schools were not providing children with disabilities with a public education in violation of the Due Process Clause of the Fifth Amendment, statutes of the District of Columbia, and the regulations of the school board.[57] The court held that the Due Process Clause of the Fifth Amendment required District of Columbia Public Schools to provide all students, regardless of disability, with an equal opportunity to a public education and conduct full

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district court had jurisdiction over the subject matter of the case, it also evaluated the claims and issued its own holding. *Id.* at 293.

[54] *Id.* at 293, 295.

[55] *See id.* at 296–97 (enumerating the tens of thousands of students who were excluded from public education in Pennsylvania because of their intellectual disability, including those institutionalized or improperly housed in correctional facilities without access to proper educational programing).

[56] *See Mills*, 348 F. Supp. at 866 (issuing decision on Aug. 1, 1972); *PARC*, 343 F. Supp. at 279 (issuing decision on May 5, 1972).

[57] *See Mills*, 348 F. Supp. at 868, 871 (describing the plaintiffs' prayer for relief and the defendants' acknowledgement of their failure to provide what the law required of them). Although some of minor-plaintiffs were deemed to have intellectual disabilities, others were regarded as "emotionally disturbed or hyperactive." *Id.* In D.C., children requiring additional educational services because of a disability had been labeled "exceptional." *Id.* Each party offered data that supported to varying degrees the claim that children with disabilities were not being educated in the D.C. school system. *Id.* at 868–69. The plaintiffs estimated that 18,000 of 22,000 children with intellectual, emotional, and learning disabilities failed to receive the proper educational supports. *Id.* at 868. The Board of Education of the District of Columbia estimated that 12,340 children with disabilities were denied services during the previous school year while fewer than 4,000 children received those services. *Id.* at 868–69. The seven named plaintiffs had all been excluded from the D.C. Public Schools without hearings or any process for reviewing whether they could return. *Id.* at 869–70. Two students had never been allowed to attend the D.C. public school system because of their intellectual disabilities, an outcome reminiscent of the exclusions based on statutory application and interpretation discussed in the *PARC* case. *See id.* at 869–70 (relating the enrollment denials for George Liddell, Jr., who was eight at the time of the lawsuit, and Janice King, who was thirteen); *PARC*, 343 F. Supp. at 282 (detailing the Pennsylvania statutes used to exclude children with intellectual disabilities from attending public schools). Once excluded from their public schools without any opportunity to return, nearly all the students were unable to access any educational services, as their families could not afford private schools and children remained on waiting lists for funding programs. *Mills*, 348 F. Supp. at 869–70. The school district stipulated to failing to fulfill its obligation to educate school-aged children with disabilities according to their needs as well as failing to provide them with due process. *Id.* at 871.

due process hearings before students with disabilities were deprived of educational opportunities.[58] Three years later, *PARC* and *Mills* led to the passage of the Education for Handicapped Children Act of 1975, now known as the IDEA.[59]

After the passage of the IDEA, the Supreme Court examined the contours of the right to an education for students with disabilities in regards to the statute's "free appropriate public education," or "FAPE" standard.[60] In 1982, in *Board of Education v. Rowley*, the parents of Amy Rowley, a student with a hearing impairment, alleged that she was denied a FAPE because the school district would not provide Amy with a sign-language interpreter.[61] The Supreme Court held that a FAPE is an education "reasonably calculated to enable the child to receive educational benefits" and that Amy had been provided at least that level of education, if not more.[62]

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[58] *Mills*, 348 F. Supp. at 875. The Fifth, and not the Fourteenth, Amendment's Due Process Clause applies to the District of Columbia. U.S. CONST. amend. V (guaranteeing due process before deprivation of a right); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (recognizing the applicability of the Fifth Amendment to the District of Columbia). The United States District Court for the District of Columbia relied on its precedent in *Hobson v. Hansen* from 1967 to envelope the claim on equal protection within the due process claim. *Mills*, 348 F. Supp. at 875 (citing Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967)). The court in *Hobson* held that the Due Process Clause of the Fifth Amendment required equal educational opportunities for children regardless of their socioeconomic status. *Id.*; *Hobson*, 269 F. Supp. at 493. Applying that same logic, the court found in *Mills* that the Due Process Clause of the Fifth Amendment required equal protection and procedural due process for students with disabilities. *Mills*, 348 F. Supp. at 875, 876. The court also found that the District of Columbia Public Schools were violating their own rules and applicable statutes by failing to educate school-aged children with disabilities. *Id.* at 874.

[59] SPECIAL EDUCATION PUBLIC POLICY, PROJECT IDEAL, TEX. COUNCIL FOR DEV. DISABILITIES, http://www.projectidealonline.org/v/special-education-public-policy [https://perma.cc/N3YQ-P3EU] (elucidating the judiciary's impact on passing a legislative enactment to protect students with disabilities); *see also Rowley*, 458 U.S. at 194 (emphasizing the role of the *PARC* and *Mills* cases when drafting the original version of the IDEA). Although federal district courts and later Congress expanded educational access for students with disabilities, the Supreme Court recognized the rights of non-English-speaking students in accessing education in 1974, in *Lau v. Nichols*. 414 U.S. at 566. Though neither Congress nor the Court recognize the existence of a federal right to education for all students, both institutions have developed legal protections for specific student populations. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (citing *Rodriguez*, 411 U.S. at 35, to reinforce that public education is a not a right recognized by the United States Constitution); *Lau*, 414 U.S. at 566 (advancing educational rights for non-English-speaking students); *Brown*, 347 U.S. at 493 (advancing educational rights for racial minorities).

[60] *See Endrew*, 137 S. Ct. at 993 (addressing what adequately constitutes a "free appropriate public education" under the IDEA for students with disabilities); *Rowley*, 458 U.S. at 201 (setting the minimum standard for a "free appropriate public education" under the IDEA).

[61] *Rowley*, 458 U.S. at 185. The district provided Amy with other supports, however, and she was excelling in school, even surpassing some of her peers without disabilities. *Id.* at 184, 185.

[62] *Id.* at 202, 207, 209–10. The United States District Court for the Southern District of New York and the Second Circuit found that Amy had been denied a FAPE because a FAPE required "an opportunity to achieve [one's] full potential commensurate with the opportunity provided to other children." *Id.* at 185–86.

The Supreme Court did not extend its definition a FAPE beyond the facts of *Rowley*, however.[63] Thus, in 2017, in *Endrew F. v. Douglas County School District RE-1* ("*Endrew*"), the Court grappled with the question of how much educational benefit constitutes a FAPE for a child with a disability.[64] The parents of Endrew F., a child with autism, alleged that the Douglas County School District had failed to deliver upon their son's right to a FAPE as required by the IDEA.[65] Writing for a unanimous court, Chief Justice Roberts held that a FAPE's "educational benefits" adequacy threshold had to be more than "*any* educational benefit."[66] The Court rephrased the FAPE standard from *Rowley* as "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[67] Thus, providing the opportunity to make

[63] *Id.* at 202. The Court found that testing whether the FAPE standard is met is very fact-specific because implementation of this standard must vary based on the individual child's needs according to other provisions in the IDEA. *Id.* at 201–02. Because Amy was performing significantly better than "passing," the Court found that her IEP was "reasonably calculated" to allow her to receive a FAPE. *Id.* at 209–10.

[64] *Endrew*, 137 S. Ct. at 993, 998. This question was less about the definition of a FAPE under the IDEA and more about how to measure a FAPE's adequacy. *Id.* at 998. For instance, for a student like Amy Rowley, who was receiving personalized instruction in her general education classroom, determining whether she had received the benefits of a FAPE was measured by whether she passed and moved to the next grade. *Rowley*, 458 U.S. at 204.

[65] *Endrew*, 137 S. Ct. at 997. Because Endrew had a diagnosis of a qualifying disability under the IDEA and lived in a state that accepted the IDEA funding, he was owed a FAPE as provided by his school district under the IDEA. *Id.* at 996. Endrew's parents believed their son was denied a FAPE when his IEPs failed to result in his academic or behavioral growth and the goals and approaches outlined in the IEPs remained largely unchanged from kindergarten through fifth grade. *Id.* at 996–97. An Administrative Law Judge ("ALJ") with the Colorado Department of Education, ruled in favor of the school district, finding that a FAPE had been provided. *Id.* at 997. Judges in both the United States District Court for the District of Colorado and the Tenth Circuit affirmed the ALJ's judgment. *Id.*

[66] *Id.* at 998. The district court used the "reasonably calculated" standard from *Rowley*, applying it to Endrew's case to mean that his IEP had to be "reasonably calculated" to provide for some progress, albeit a minimal amount. *Id.* at 997. The Tenth Circuit construed the "reasonably calculated" standard as providing for more than a trivial amount of progress. *See id.* at 997 (applying its application of the *Rowley* standard as "more than *de minimis*"); *De Minimis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining the standard used by the court as "trifling" or "negligible"). Endrew's parents sought an even higher standard than that promulgated by the Supreme Court in *Rowley*—a standard the Court ultimately refined in *Endrew*. *Endrew*, 137 S. Ct. at 1001. Endrew's parents wanted a FAPE to mean an education that was "substantially equal to the opportunities afforded children without disabilities." *Id.* The Supreme Court had denied the application of that standard in *Rowley*, however, and refused to reconsider. *Id.*

[67] *Endrew*, 137 S. Ct. at 999. This phrasing highlighted the individualized, fact-specific nature of reasonableness and adequacy inquiries. *See id.* (discussing the purpose of the IEP as tailored to each student to ensure progress). The Court did not determine whether Endrew's IEP was designed for him to make effective progress or even whether he was making effective progress in his public school but instead vacated and remanded the Tenth Circuit's decision so that these questions could be revisited. *See id.* at 1001–02 (discussing the role of the courts as opposed to relying upon the expertise of school officials and providing the disposition).

adequate progress meant setting "appropriately ambitious" goals for each child.[68]

II. EDUCATION & DISABILITY IN JUVENILE JUSTICE FACILITIES

Education plays an especially important role in the juvenile justice system—not only is an incarcerated juvenile still entitled to receive an education, but providing that education promotes the system's core goal of rehabilitation.[69] Education services, however, are not uniform across states or even among juvenile justice facilities in the same state.[70] Not only is the education inconsistent, but it is also often insufficient or non-existent for this vulnerable, incarcerated population.[71]

Section A explores the history of the juvenile justice system and its original goal of rehabilitation.[72] Section B discusses the operation of juvenile justice facilities and how education and disability intersect within that context.[73] Section C highlights the disproportionate occurrence of disabilities in juveniles in the justice system, magnifying the need for proper support for incarcerated juveniles with disabilities.[74]

A. A Brief History of the Juvenile Justice System

Today's juvenile justice system encompasses facilities that house juveniles in prison-like settings, facilities that house juveniles in residential settings like group homes and care facilities, and courts and state agencies that serve the

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[68] *Id.* at 1000. The Court seemingly focused on bridging the divide between students, like Amy Rowley, who were successful in a general education classroom with the proper supports, and students who would be unable to remain in the general education classroom. *See id.* at 1000–01 (comparing the facts of *Rowley* with the Tenth Circuit's use of the *de minimis* standard to measure adequate progress). The Court also repeated a caveat it delivered in *Rowley*—not all students with disabilities who were advanced to the next grade level were *de facto* receiving a FAPE. *Id.* at 1000 n.2.

[69] *See* Boundy & Karger, *supra* note 18, at 287, 300 (categorizing fulfilling the right to an education as critical to rehabilitation); Katherine Twomey, Note, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 799 (2008) (positing that education is a rehabilitative tool.

[70] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 155, 178. Because creating a public education system lies with the individual states, each state's right to an education is unique. Boundy & Karger, *supra* note 18, at 286. For the twenty states that recognize education as a fundamental right, education can only be taken away in the face of a "compelling state interest." *Id.* Because of these state-by-state variations, terminology may not be used consistently. *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 155, 156 (explaining the localized individuality of juvenile justice systems alongside various terminology used to describe it).

[71] PETER LEONE & LOIS WEINBERG, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 21 (2010) (discussing the inadequacies of education in the juvenile justice system, including at times, a lack of services).

[72] *See infra* notes 75–88 and accompanying text.

[73] *See infra* notes 89–101 and accompanying text.

[74] *See infra* notes 102–114 and accompanying text.

needs of juveniles.[75] The early juvenile justice system evolved around pre-existing reform schools, also known as training schools, and institutions.[76] Among the first institutions were the New York House of Refuge and the Chicago Reform School, established, respectively, in 1825 and 1855.[77] Shortly thereafter, the first juvenile court in the United States was established in Chicago in 1899.[78] The purpose of the specialized court was to provide youth with rehabilitative rather than punitive services.[79] Prior to these systems, juveniles moved through the adult criminal justice system and were subjected to incredibly inhumane conditions.[80] Children could even be executed for certain crimes.[81]

Though the development of the nascent juvenile justice system was focused on rehabilitation, the implementation of the system was rife with

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[75] *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 156 (defining "juvenile justice system" narrowly and broadly); Pam Clark, *Types of Facilities*, *in* DESKTOP GUIDE TO QUALITY PRACTICE FOR WORKING WITH YOUTH IN CONFINEMENT 1, 2 (2014), https://info.nicic.gov/dtg/print/4 [https://perma.cc/G59F-RACX] (using traditional delineations of security settings in juvenile facilities, such as maximum and minimum security). For the purposes of this Note, the term "juvenile justice system" encompasses the juvenile courts and facilities in which juveniles are housed exclusively. *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 156 (providing narrow and expansive definitions of the term "juvenile justice"); Clark, *supra*, at 1, 4. This Note refers to modern-day juvenile detention centers and correctional facilities collectively as juvenile justice facilities and specifically as detention centers or correctional facilities when a distinction must be made. *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 156 (including juvenile facilities in an expansive definition of "juvenile justice"). Detention centers generally refer to short-term stay facilities that tend to house juveniles before they go through their juvenile court proceedings. Clark, *supra*, at 4. Correctional facilities may house juveniles for longer periods of time and tend to be used post-adjudication. *Id.* Both detention and correctional facilities provide education services. *Id.* Juvenile offenders in juvenile facilities are not labeled convicted of crimes but rather are "adjudicated delinquent." JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 154. Unlike adults, juveniles may be adjudicated for "status offenses," which are acts that are considered unlawful because of the offender's age. *Id.* at 162. A common example of a status offense is "running away from home." *Id.*

[76] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 154; ABA DIV. FOR PUB. EDUC., DIALOGUE ON YOUTH AND JUSTICE 5 (2007) (depicting the roots and evolution of the juvenile justice system).

[77] ABA DIV. FOR PUB. EDUC., *supra* note 76, at 5.

[78] Kristi Holsinger, *Youth in the Juvenile Justice System: Characteristics and Patterns of Involvement*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 24 (providing the underpinnings of the juvenile justice system as a means of analyzing key statistical figures reflecting the current state of juvenile justice). Chicago was the site of the first juvenile court in 1899, and by 1925, all but two states had a juvenile court. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 157. An estimated 3,000 juvenile courts are in operation in the United States today. Holsinger, *supra*, at 25.

[79] *See* JUVENILE CRIME, JUVENILE JUSTICE *supra* note 3, at 157–58 (describing early juvenile justice systems); Holsinger, *supra* note 78, at 24 (describing the history of juvenile delinquency and its treatment during this reform period. The shift toward non-criminal juvenile courts also coincided with an expansion of social reforms and welfare-related services. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 157.

[80] *See* Vincent Schiraldi, Marc Schindler & Sean J. Goliday, *The End of the Reform School?*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 409, 410 (illustrating strict punishments undifferentiated between adults and youth).

[81] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 157.

abuse, as evidenced by the harsh conditions within juvenile justice facilities.[82] Juvenile justice reformers of the 1960s and 1970s sought to eradicate abuses of power and remedy deplorable conditions in facilities.[83] One of their reforms removed youth who were in the custody of the state due to child abuse or neglect from the juvenile justice system.[84] As a result of the reformers' efforts, Congress passed the Juvenile Justice Delinquency Prevention Act of 1974 ("JJDPA"), the first federal legislative oversight of state juvenile justice facilities.[85] JJDPA sought to improve the conditions in juvenile facilities throughout the country and iron out inconsistencies among the various local and state juvenile systems.[86] The JJDPA also established the Office of Juvenile Justice and Delinquency Prevention ("OJJDP") within the Department of Justice to over-

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[82] *See* Patrick McCarthy et al., *The Future of Youth Justice: A Community-Based Alternative to the Youth Prison Model*, 2 NEW THINKING IN COMMUNITY CORRECTIONS BULL. 1, 2 (2016), https://chronicleofsocialchange.org/wp-content/uploads/2016/10/The-Future-of-Youth-Justice.pdf [https://perma.cc/4Y8Q-TUAA] (portraying conditions of living at a reform school).

[83] *See, e.g.*, *Juvenile Corrections Reform in Massachusetts*, CTR. ON JUVENILE & CRIMINAL JUSTICE, http://www.cjcj.org/Education1/Massachusetts-Training-Schools.html [https://perma.cc/3MMU-XSKQ] (describing the shuttering of the Massachusetts reform schools in favor of a community-based, decentralized system that remains in place to this day).

[84] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 160; Holsinger, *supra* note 78, at 24–25.

[85] *What Is the JJDPA?*, ACT 4 JUVENILE JUSTICE, http://www.act4jj.org/what-jjdpa [https://perma.cc/C2ED-T4ST] (outlining the purpose of the Juvenile Justice and Delinquency Prevention Act ("JJDPA")); *see* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 101, 88 Stat. 1109, 1109–10 (1974) (addressing the needs of the youth demographics who are frequently entangled with the juvenile justice system). Congress reauthorized the JJDPA on December 13, 2018. Press Release, Campaign for Youth Justice, Congress Unanimously Passes Bipartisan Bill to Strengthen Federal Juvenile Justice Law (Dec. 13, 2018), http://cfyj.org/news/cfyj-news-press-releases/item/congress-unanimously-passes-bipartisan-bill-to-strengthen-federal-juvenile-justice-law [https://perma.cc/J4VL-4L7S]. The JJDPA works through the same mechanism of block grant incentives as the IDEA and Section 504 of the Rehabilitation Act. *See* Marsha Weissman et al., *The Right to an Education in the Juvenile and Criminal Justice Systems in the United States* 1 (Dec. 31, 2008) (submission to Vernor Muñoz, Special Rapporteur on the Right to Educ., Human Rights Council, United Nations) (explaining federal requirements imposed on states accepting federal monies). The JJDPA currently requires facilities receiving federal dollars to meet four criteria. *State Compliance with JJDP Act Core Requirements*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, https://www.ojjdp.gov/compliance/compliancedata.html [https://perma.cc/33HW-N73H] (outlining the federal requirements set for states in order to receive JJDPA funding). The four criteria are: the "deinstitutionalization of status offenders," "adult jail and lock-up removal," "'sight and sound' separation," and "disproportionate minority contact." *Id.* These criteria aim to keep incarcerated juveniles separated from adult offenders, divert juveniles adjudicated for offenses like truancy away from juvenile facilities, and diminish the racial disparity in juvenile facilities. *Id.*

[86] *What Is the JJDPA?*, *supra* note 85; *see* Juvenile Justice and Delinquency Prevention Act § 101 (presenting Congress's findings that led to enacting federal oversight). The 2018 reauthorization of JJDPA, titled the Juvenile Justice Reform Act of 2018, addresses education explicitly in the JJDPA for the first time, though special education services are not mentioned. *See* Pub. L. No. 115-385, § 205(1)(R) (providing for three new requirements related to educational attainment for incarcerated juveniles).

see these reforms.[87] With the advent of the "tough on crime" years of the 1980s and 1990s, several states redefined their juvenile justice systems with an emphasis on crime eradication and public safety instead of juvenile rehabilitation.[88]

B. Education as a Condition of Confinement in Juvenile Justice Facilities

Education is consistently recognized as a productive component of any juvenile justice facility.[89] Though non-binding, a set of standards known by the acronym "CHAPTERS" serves as a rubric for juvenile justice facilities to evaluate the quality of the conditions of confinement under seven key categories.[90] Education plays a major role in evaluating "P," which stands for "pro-

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[87] Juvenile Justice and Delinquency Prevention Act § 201 (providing for the creation of an office within the Department of Justice to manage programs under JJDPA); *Legislation/JJDP Act*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROT., https://www.ojjdp.gov/about/legislation.html [https://perma.cc/YG5W-AXV4] (highlighting major changes to the JJDPA and its implementation).

[88] *See* JUVENILE CRIME, JUVENILE JUSTICE *supra* note 3, at 155 (discussing a general change in society's outlook toward juvenile crime while seventeen states explicitly changed the focus of the juvenile justice systems to be more punitive). The original passage of JJDPA in 1974 focused on removing status offenders from juvenile justice institutions and separating juvenile and adult offenders in lock-up. *Id.* at 161. By the 1990s, states had reversed these reforms, making it easier to try juveniles and adults and renewing a focus on stopping youth-committed violent crimes. *Id.* Meanwhile, Congress passed the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), which applies to all incarcerated persons, including juveniles. Civil Rights for Institutionalized Persons Act of 1980, Pub. L. No. 96-247, § 2(1)(B)(iv), 94 Stat. 349, 349 (1980) (codified as amended at 42 U.S.C. § 1997(1)(B)(iv) (2012)) (implementing federal legislation to protect the rights of persons in a wide array of institutional settings, including the juvenile justice system). Under CRIPA, the U.S. Department of Justice's Civil Rights Division can monitor state and local juvenile justice facilities for civil rights abuses and remedy systemic issues. *See Rights of Persons Confined to Jails and Prisons*, DEP'T OF JUSTICE, https://www.justice.gov/crt/rights-persons-confined-jails-and-prisons [https://perma.cc/2WCM-WH4C] (discussing scope of oversight). When investigating juvenile facilities, the Department of Justice may also rely on the Violent Crime Control and Law Enforcement Act of 1994. 34 U.S.C. § 12601 (2012) (formerly codified at 42 U.S.C. § 14141) (defining causes of action that may be brought under the act); *Rights of Persons Confined to Jails and Prisons*, *supra*. This act explicitly forbids the systemic deprivation of rights of incarcerated juveniles by any government employee or entity. 34 U.S.C. § 12601.

[89] *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 189 (highlighting the nearly 100% compliance of all juvenile facilities with offering educational services); JUVENILE DET. ALTERNATIVES INITIATIVE, JUVENILE DETENTION FACILITY ASSESSMENT 5 (2014) (discussing educational services under programming).

[90] *See* Michael J. Dale et al., *Legal Rights of Children in Institutions*, *in* 1 REPRESENTING THE CHILD CLIENT § 2.01[1] (3d ed., 2017) (explaining the use of the CHAPTERS standards); JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 5–7 (outlining changes to the CHAPTERS rubric). CHAPTERS stands for "classification and intake," "health and mental health," "access," "programming," "training and supervision of staff," "environment," "restraints, room confinement, due process, and grievances," and "safety." JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 5–7. The Juvenile Detention Alternatives Initiative ("JDAI") contracts with juvenile facilities to help them meet the "CHAPTERS" standards. *Id.* at 3, 5–7. The JDAI currently works with "more than 250 counties . . . across 39 states and District of Columbia" to reform juvenile justice facilities. RICHARD A. MENDEL, JUVENILE DETENTION ALTERNATIVES INITIATIVE PROGRESS REPORT 2 (2014) (highlighting the investigative findings of the JDAI).

gramming."[91] The Juvenile Detention Alternatives Initiative ("JDAI") has a set of questions that it recommends evaluators use to probe the adequacy of education services, including specific questions on special education.[92] Some of the questions correspond to the use of disciplinary policies with those who have disabilities.[93] One of the challenges with providing education to incarcerated juveniles, regardless of disability status, is the structure of the education system within facilities.[94] Whereas the state corrections agency oversees the management of the facility—notably the facility's disciplinary systems—the state's education agency may be tasked with either providing education to all incarcerated juveniles or only to those requiring special education services under the IDEA.[95]

Incarcerated juveniles with disabilities are entitled to exercise their federal statutory rights to a public education.[96] As safeguards against discrimination on the basis of disability by public entities, the ADA and Section 504 still apply to students in local and state juvenile justice facilities.[97] Even so, whether the IDEA still applies may depend upon the age of the incarcerated youth and if intersecting state laws limit the application of the IDEA.[98] In 2014, the U.S. Department of Education and the U.S. Department of Justice partnered to promulgate a report on best practices for juvenile justice systems throughout the country.[99] These agencies recommended providing students in juvenile fa-

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[91] *See* Dale et al., *supra* note 90, § 2.01[5][a] (discussing the role of education in juvenile programming); JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 5 (providing an update on the standard related to special education). Education programming must be provided in some fashion, whether by the facility itself or through the state's system of public education. ARNE DUNCAN & ERIC HOLDER, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 2 (Dec. 2014), https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf [https://perma.cc/2X4N-TTEB] (describing the status of education in juvenile justice facilities).

[92] JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 56–61.

[93] *Id.* at 60–61. The JDAI uses the term "room confinement" as a pseudonym for solitary confinement and defines it as "the involuntary restriction of a youth alone in a cell, room, or other area." *Id.* at 92.

[94] Boundy & Karger, *supra* note 18, at 302–03.

[95] *Id.*

[96] *See* DAVIS ET AL., *supra* note 1, at xvi (distinguishing correctional education programs for incarcerated juveniles from those for incarcerated adults with the advancement of the right to education). When juveniles are sent to adult prison facilities, this right remains. *Id.* This Note focuses on juveniles incarcerated in juvenile facilities and the educational services provided therein. *See, e.g.*, JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 189 (indicating nearly all juvenile facilities have educational programming).

[97] DUNCAN & HOLDER, *supra* note 91, at 3.

[98] Individuals with Disabilities Education Act, 20 U.S.C.A. § 1412(a)(1)(B) (West 2017). For example, states may not need to provide special education services in adult facilities to persons aged eighteen through twenty-one who were not first found eligible for services under the IDEA while at the school they last attended. *Id.*

[99] *See, e.g.*, DUNCAN & HOLDER, *supra* note 91, at iv (setting forth recommendations centered on educational attainment through a variety of means for youth while in detention or correctional facili-

cilities with the same educational attainment opportunities as their non-detained counterparts.[100] The Department of Justice has also filed statements of interest in class action suits in support of sanctions against local educational agencies and correctional facilities that are not providing adequate educational opportunities to their juvenile inmates, especially those with disabilities.[101]

C. The Prevalence of Disabilities Within the Juvenile Justice System

Learning disabilities and mental illnesses are much more prevalent among youth involved in juvenile justice.[102] Recent studies find seventeen to fifty-three percent of system-involved youth have a learning disability.[103] By contrast, children aged zero to eighteen exhibit learning disabilities at roughly two to ten percent of the general population of the United States.[104] Emotional disabilities appear in forty-seven percent of incarcerated youth as compared to eight percent of the nation's school system population.[105] The statistics for mental illness are just as staggering.[106] An estimated sixty-five percent of girls in juvenile residential detention facilities have two or more mental illnesses while the rate for boys is seventy percent.[107] Overall, between sixty-five and

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ties). This report provides recommendations for reform but does not appear to be binding. *See id.* at iv, 2, 23 (framing the content of the report as "suggestions" to better support juvenile justice facilities, which tend to be managed by states).

[100] *Id.* at iv.

[101] *See, e.g.*, Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 13 (affirming that the behavior and policies alleged by the incarcerated juveniles' complaint would violate the IDEA and ADA if their allegations were taken as true).

[102] Marty Beyer, *A Developmental View of Youth in the Juvenile Justice System*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 3, 11 (analyzing the impact of learning disabilities on the involvement of youth with the juvenile justice system); Holsinger, *supra* note 78, at 39.

[103] Beyer, *supra* note 102, at 11.

[104] *Id.*

[105] Holsinger, *supra* note 78, at 39.

[106] *See, e.g.*, ROBERT L. LISTENBEE & JOE TORRE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 174 (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf [https://perma.cc/XQJ9-7QEC] (highlighting the prevalence of mental illness in incarcerated youth).

[107] *Id.* A 2006 study mirrors these gender-based distinctions, finding seventy-nine percent of incarcerated juveniles had at least two mental illnesses while sixty percent had at least three. *See* Paula Braverman & Robert Morris, *The Health of Youth in the Juvenile Justice System*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE, *supra* note 1, at 44, 52 (discussing the mental health and substance abuse needs of incarcerated youth). One estimate places the rate of mental illness for incarcerated juveniles between fifty and one hundred percent, especially when including "disruptive behavior disorders," though these disorders could represent behaviors that an adolescent will age out of. *Id.* at 50. By comparison, the rates of mental illness for non-incarcerated youth range from about six to forty-one percent with an average rate of sixteen-and-a-half percent. *Id.*

seventy percent of juvenile justice system-involved youth could be eligible for protection against discrimination under the ADA.[108]

For youth involved in the juvenile justice system, the manifestation of their disabilities is easily criminalized within the walls of the juvenile justice facility.[109] The criminalization of disabilities does not begin within the juvenile justice system, however.[110] These juveniles may have presented in school with an undiagnosed mental illness, causing behaviors that ultimately resulted in out-of-school suspension or expulsion.[111] School exclusion increases the likelihood of a student's introduction to the juvenile justice system.[112] Ultimately,

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[108] *See* NAT'L DISABILITY RIGHTS NETWORK, ORPHANAGES, TRAINING SCHOOLS, REFORM SCHOOLS AND NOW THIS? 7 (2005), http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_-_Juvenile_Justice_Report.pdf [https://perma.cc/QN7T-Q2B8] (estimating the rate of those who would "meet the criteria for a disability"). The rate of disability in the general population is three times less than that for youth involved in the juvenile justice population. *Id.*

[109] *See, e.g.*, FEIERMAN ET AL., *supra* note 7, at 15 (considering the effect of solitary confinement policies on incarcerated juveniles with disabilities). Incarcerated youth with disabilities are more likely to be placed in solitary confinement because of behaviors stemming from their disabilities or through a justification of safety for themselves or others in lieu of proper treatment. *Id.* A class action lawsuit in California brought by incarcerated youth with disabilities centered on the use of solitary confinement in a discriminatory manner. *Lawsuit Details Solitary Confinement and Failure to Educate Young People with Disabilities in Contra Costa County Juvenile Hall*, DISABILITY RIGHTS ADVOCATES (Aug. 8, 2013), http://dralegal.org/press/lawsuit-details-solitary-confinement-and-failure-to-educate-young-people-with-disabilities-in-Contra-Costa-County-juvenile-hall [https://perma.cc/754E-4CZX] (promoting the causes of action for impact litigation related to education in a juvenile justice facility); *see also* Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 6–7 (outlining plaintiffs' claims that they were "disproportionately burdened" by the use of solitary confinement policies because they had disabilities). For a discussion of *G.F. v. Contra Costa County*, see Part III.C of this Note. *See infra* notes 160–181 and accompanying text.

[110] *See* JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 85–86 (correlating suspension with learning disabilities); Vaught, *supra* note 1, at 310–11 (discussing school-based practices that lead to greater risk of involvement with the juvenile justice system).

[111] Boundy & Karger, *supra* note 18, at 299–300; JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 85–86 (correlating suspension with learning disabilities). Students with disabilities are entitled to procedural safeguards that protect against their removal from school because of the manifestation of their disability. 20 U.S.C. § 1415(k)(E) (2012) (ensuring procedural safeguards for students who seek protection under the IDEA). These safeguards are known as manifestation hearings. *Id.* A student may not be removed for more than ten school days total for behavior related to the disability unless certain procedures are followed to better support the child and prevent the behavior in the future. *Id.* § 1415(k)(B). An exception to this ten-day limit is if the student engages in behavior involving a weapon or illegal drugs or causes "serious bodily injury" to someone while at school, at which point the student may be given an alternative education placement for up to forty-five days. *Id.* § 1415(k)(G).

[112] JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 85–87. Incarcerated youth, especially youth of color and youth from low-income backgrounds, often fall victim to several pitfalls within the public education system, including an overreliance on "zero tolerance policies" and low-quality schooling. *See* Boundy & Karger, *supra* note 18, at 298–99 (discussing the creation of the school-to-prison pipeline at the school level). Beyond suspensions and expulsions, incarcerated youth also tend to have poor grades and poor attendance records and are more likely to drop out. *Id.* at 298. School exclusion and dropping out both increase rates of adult incarceration. *Id.*; JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 3, at 87.

students' behaviors that are a direct byproduct of a disability have resulted in incarceration.[113] Once confined to a juvenile facility, system-involved youth may not find the treatment or educational support they require to address their mental health needs or disability.[114]

III. The Current Challenges to Advancing Educational Rights of Incarcerated Juveniles with Disabilities

For advocates seeking to improve education conditions in juvenile facilities, several obstacles stand in the way.[115] First, a federal statute on incarceration—the Prison Litigation Reform Act of 1995 ("PLRA")—heavily restricts inmates' ability to challenge prison conditions in the courts.[116] The IDEA and the judiciary's interpretation of its administrative remedies provision have created confusion as to what avenues of relief must be pursued under the IDEA before filing a civil rights lawsuit, even if the rights asserted in that lawsuit do not stem from the IDEA.[117] Meanwhile, litigation using the ADA to challenge educational access as a condition of confinement for incarcerated juveniles with disabilities is a relatively new strategy.[118]

Section A of this Part discusses the statutory construction challenges facing advocates trying to improve conditions in juvenile facilities.[119] Section B examines the practical barriers of the IDEA to improving educational access in juvenile facilities for incarcerated youth with disabilities.[120] Section C reviews current approaches relying on the ADA to improve educational access for stu-

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[113] *See* Juvenile Crime, Juvenile Justice, *supra* note 3, at 85–87 (receiving special education services increases the students risk for expulsion); Boundy & Karger, *supra* note 18, at 299 (describing the use of "inappropriate school-based referrals to law enforcement").

[114] Davis et al., *supra* note 1, at 22. Students receiving IDEA protections cost nearly two times more than students without disabilities. *Id.* The defendants in *Mills v. Board of Education* tried unsuccessfully to excuse their lack of educational programming for students with disabilities on the financial strains of the school district. 348 F. Supp. 866, 869 (D.D.C. 1972).

[115] *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. § 1415(l) (requiring exhaustion of administrative remedies under the IDEA); Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the United States 1–2 (2009), https://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf [https://perma.cc/9JNB-7MZG] (highlighting litigation challenges rendered by the Prison Litigation Reform Act).

[116] Prison Litigation Reform Act of 1995 ("PLRA") § 803(d), 42 U.S.C.A. § 1997e(a) (West 2012 & Supp. 2018) (codified in scattered sections of the U.S.C.); Human Rights Watch, *supra* note 115, at 1–2.

[117] *See* 20 U.S.C. § 1415(l) (detailing exhaustion requirement of administrative remedies under the IDEA); Fry v. Napoleon Cmty. Sch. Dist., 137 S. Ct. 743, 752 n.4 (2017) (refusing to answer a key question as to how far the exhaustion requirement extends).

[118] *See, e.g.*, First Amended Class Action Complaint at 1, G.F. v. Contra Costa Cty., No. C 13-3667-SBA (2013) [hereinafter First Amended Class Action Compl. in G.F. v. Contra Costa Cty.] (using the ADA to challenge practices in a juvenile justice facility).

[119] *See infra* notes 122–142 and accompanying text.

[120] *See infra* notes 143–159 and accompanying text.

dents with disabilities in the school setting and incarcerated youth with disabilities in juvenile justice facilities.[121]

A. Statutory Exhaustion as an Obstacle to Litigation

During the "tough on crime" era, Congress passed the PLRA, which applies to all incarcerated persons, including juveniles.[122] PLRA makes it more difficult for all inmates to sustain litigation challenging facility conditions by outlining five requirements, including some prerequisites, for litigation.[123] For example, an incarcerated juvenile must first pursue all facilities-based administrative procedures for remedying his or her cause of action before filing a lawsuit under federal law.[124] An incarcerated juvenile with a disability may especially struggle to understand how to pursue an administrative grievance and yet still be prevented from pursuing a federal lawsuit.[125] Furthermore, harnessing the expertise of counsel or the guidance of a parent when filing a grievance could jeopardize a juvenile's ability to fulfill the exhaustion requirement and file a federal lawsuit if the juvenile did not personally submit the grievance.[126]

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[121] *See infra* notes 160–181 and accompanying text.

[122] Prison Litigation Reform Act § 802, 18 U.S.C. § 3636(g)(5) (2012) (defining prison within the context of the legislation).

[123] HUMAN RIGHTS WATCH, *supra* note 115, at 1–2. As defined by Human Rights Watch, the five requirements are (1) exhaustion of remedies; (2) physical injury; (3) application to children; (4) restrictions on court oversight of prison conditions; and (5) limitations on attorney fees. *Id.* at 2.

[124] *See* 42 U.S.C.A. § 1997e(a) (creating an administrative exhaustion requirement that applies to all incarcerated individuals); HUMAN RIGHTS WATCH, *supra* note 115, at 2 (discussing application of the PLRA to juveniles).

[125] *See* HUMAN RIGHTS WATCH, *supra* note 115, at 16, 31 (highlighting conditions, such as dyslexia, mental illness, and blindness, that have prevented inmates from exhausting the administrative grievance system, which in turn, barred them from the federal court system, and how difficult these processes are for juvenile inmates with disabilities especially). A young woman incarcerated in Texas had her grievance application rejected because of her poor handwriting. *Id.* at 30. She struggled because of her lack of education. *Id.*

[126] *Id.* at 32 & n.128 (citing El'Shabazz v. Philadelphia, 2007 WL 2155676, at *3 (E.D. Pa. 2007) (denying a father of an inmate the ability to advocate for his incarcerated son); Harris v. Baca, 2003 WL 21384306, at *3 (C.D. Cal. 2003) (denying a lawyer the ability to advocate for his incarcerated client)). In *Harris v. Baca*, an inmate brought a civil rights complaint against corrections officials and a local sheriff's office after he was allegedly beaten by the officials. 2003 WL 21384306, at *1. The inmate's lawyer filed a grievance on his client's behalf. *Id.* at *3. Reviewing a corresponding civil rights complaint filed in the United States District Court for the Central District of California, Judge Ronald S. W. Lew dismissed the complaint, given that the inmate had not exhausted the grievance process under the PLRA because the lawyer and not the inmate filed the complaint. *Id.* In *El'Shabazz v. Philadelphia*, an inmate claimed that his father filed grievances for him after he was beaten by prison guards. 2007 WL 2155676, at *1, 3. The United States District Court for the Eastern District of Pennsylvania dismissed the complaint on the grounds that the inmate did not exhaust the administrative procedures available to him. *Id.* at *1. The court explained that the father's complaints, if they were lodged, would also not count toward the exhaustion requirement. *Id.* at *3. Cases like *Harris* and *El'Shabazz* abound throughout several jurisdictions. HUMAN RIGHTS WATCH, *supra* note 115, at 31–33.

To further complicate the litigation strategy, when evaluating the rights of incarcerated juveniles with disabilities, the PLRA is not the only relevant federal statute that contains an administrative remedy exhaustion requirement.[127] Despite 2004 amendments to the IDEA meant to clarify the issue, the statute remains unclear as to whether the availability of its administrative remedies preempts bringing IDEA claims alongside other statutes that protect civil rights, including the ADA and Section 504.[128] Prior to the amendments, a split amongst federal circuit courts arose as to whether a plaintiff must first exhaust *all* the administrative remedies available under the IDEA before bringing claims under alternative civil rights statutes.[129] Additionally, some circuits ap-

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[127] *See* 20 U.S.C. § 1415(l) (establishing exhaustion of administrative procedures outlined in IDEA); 42 U.S.C.A. § 1997e(a) (establishing exhaustion of grievance procedures in PLRA). The exhaustion requirement of the PLRA is much broader than that of the IDEA. Brief for the United States as Amicus Curiae at 13, *Fry*, 137 S. Ct. 743 (No. 15-497) (explaining the United States' position on the exhaustion doctrine).

[128] *See* 20 U.S.C. § 1415(l) (codifying the relationship between the IDEA and legislation protecting against disability discrimination). The provision names the ADA and Title V of the Rehabilitation Act of 1973 as not affected by this chapter of the IDEA. *Id.* Nevertheless, this provision also dictated that if the relief sought under either of those statutes was available under the IDEA, then the party filing the lawsuit needed to first exhaust the procedures in sections 1415(f) and (g) as though the lawsuit was being filed under the IDEA. *Id.* Section 1415(f) provides for an "impartial due process hearing" led by an impartial hearing officer. *Id.* § 1415(f)(1)(A)–(3)(A) (outlining the components of a fair hearing under the IDEA). Section 1415(g) provides for an appeal process after the hearing from section 1415(f), if that hearing was conducted by the local, and not state, educational agency. *Id.* § 1415(g)(1). In that situation, the state educational agency appoints an impartial hearing officer to make an assessment. *Id.* § 1415(g)(2). Typically, the relief available under the IDEA is injunctive in nature and relates to remedying the lack of a "free, appropriate public education," or a "FAPE." Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214, 219 (2013) (condensing the typical paths of IDEA litigation). Although the IDEA does not provide for monetary damages, such relief is available under other civil rights statutes. *See* JOHN PARRY, AM. BAR ASS'N, DISABILITY DISCRIMINATION LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES AND DISABILITY PROFESSIONALS 365 (2008) (discussing forms of damages under 42 U.S.C. § 1983 and Section 504 of the Rehabilitation Act); Zirkel, *supra*, at 220 (explaining lack of monetary relief available under the IDEA).

[129] *See* PARRY, *supra* note 128, at 364–65 (discussing the diverse treatment of the IDEA's exhaustion and futility doctrines in the federal courts). Under varying circumstances and to varying degrees, the First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits have required exhaustion of the IDEA's administrative remedies before bringing a claim for damages under other statutes. *See* Payne v. Peninsula Sch. Dist., 653 F.3d 863, 871 (9th Cir. 2011) (holding that the exhaustion doctrine of the IDEA applies only to claims that seek relief available in the IDEA, regardless of whether the claim requests relief under that statute); Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478 (2d Cir. 2002) (rejecting the claims of a visually impaired high school student, brought under the ADA and Section 504, because the plaintiff did not pursue, much less exhaust, all of the IDEA's administrative remedies first); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 56–57 (1st Cir. 2002) (requiring plaintiffs—a high school graduate with a disability and her parents—to exhaust all administrative remedies under the IDEA because they alleged a denial of a FAPE, even though they brought their claim under a civil rights statute, 42 U.S.C. § 1983, and not the IDEA so they could pursue monetary damages against the school district); Padilla v. Sch. Dist., 233 F.3d 1268, 1274 (10th Cir. 2000) (recognizing that exhaustion of IDEA's administrative remedies is required where the "source and nature of the alleged injuries" could be remedied under the IDEA and favoring exhaustion

plied a futility exception to the exhaustion doctrine, but the definition of futility varies by circuit.[130] Some circuits base futility on whether the specific remedy sought by the plaintiffs, such as monetary damages, is available under the IDEA while other circuits recognize that, though the IDEA's administrative procedures could be applied, the procedures would not likely fix the alleged injuries.[131]

In 2017, in *Fry v. Napoleon Community Schools*, the Supreme Court sought to cure the circuit split, holding that the exhaustion doctrine only applies when the plaintiff is alleging that he or she was denied a "free, appropriate public education," or a "FAPE."[132] Here, the parents of a child with cerebral palsy filed a complaint under Title II of the ADA and Section 504 when their child's school barred her from bringing her service dog to school.[133] No-

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under the IDEA in unclear situations); Charlie F. v. Bd. of Educ., 68, 98 F.3d 989, 992 (7th Cir. 1996) (holding that, the exhaustion doctrine applies when relief is available under the IDEA that would potentially address the plaintiff's complaints, but whether it is the relief that the plaintiff desires is irrelevant); N.B. v. Alachua Cty. Sch. Bd., 84 F.3d 1376, 1378, 1379 (11th Cir. 1996) (upholding dismissal of the suit on failure to exhaust grounds and explaining that moving out of the school district does not render the relief under the IDEA futile). The Ninth Circuit's holding in *Payne* is particularly instructive because it happened after the 2004 amendments to the IDEA. *See Payne*, 653 F.3d at 871 (finding an exhaustion requirement in 2011).

[130] *See* PARRY, *supra* note 128, at 364–65 (discussing various applications of the exhaustion doctrine and the futility exception).

[131] *See id.* (providing examples of different circuits' definitions of futility when applied to IDEA-based cases). The Second and Ninth Circuits have recognized some form of a futility exception to the exhaustion doctrine whereas the First Circuit has stated that futility in regards to the type of remedy sought makes no difference. *Compare Payne*, 653 F.3d at 889 n.3 (recognizing, in the Ninth Circuit, the futility exception exists but was not appropriately raised in this case), *and* J.S. *ex rel.* N.S. v. Attica Cent. Schs., 386 F.3d 107, 112 (2d Cir. 2004) (recognizing the futility exception where the IDEA would "not provide an adequate remedy"), *with Frazier*, 276 F.3d at 63 (refusing to find utility for a claim for monetary damages when the IDEA does not provide monetary damages, the kind of relief sought). The Sixth Circuit has recognized that a futility exception to the IDEA does not provide the most suitable remedy when compared to a different civil rights statute, such as 42 U.S.C. § 1983. Covington v. Knox Cty. Sch. Sys., 205 F.3d 912, 913 (6th Cir. 2000) (holding that the plaintiff's rights could be remedied successfully with damages alone).

[132] *See Fry*, 137 S. Ct. at 748, 752 (qualifying the meaning of the IDEA's exhaustion doctrine and acknowledging the circuit split). In describing the administrative procedures available under the IDEA, the Court noted that these procedures often revolve around parents of a student with a disability and the student's school coming to an agreement as to what services and goals should be included in the student's IEP. *Id.* at 749. The Court characterized a FAPE as "the IDEA's core guarantee." *Id.* at 748.

[133] *Id.* at 750, 752. Title II of the ADA, which applies to all public entities, and Section 504, which applies to programs that receive federal funds, both applied to a public school that received money from the federal government under the IDEA. *See id.* at 749 (explaining how the IDEA imposes the right to an education through the states and the scope of other civil rights and disability-related federal statutes). The service dog, Wonder, helped the child, E.F., manage physical tasks with greater independence. *Id.* at 751. When E.F. went to kindergarten, the school provided a paraprofessional to assist with her needs, and so Wonder was banned. *Id.* Though the school eventually acquiesced to a trial period with the dog in tow, Wonder was not allowed to interact with E.F. and the school then reaffirmed Wonder's banishment. *Id.* An investigation by the U.S. Department of Education's Office

tably, the parents did not file suit under the IDEA, and subsequently, they did not argue that she was being denied her right to a FAPE.[134] This decision was likely strategic, because unlike the IDEA, both the ADA and Section 504 could provide for monetary damages.[135] The defendant-school district, however, challenged this strategy by arguing that the plaintiffs were required, but had failed, to seek the necessary remedies under the IDEA before they could seek relief under the civil rights statutes.[136]

The Supreme Court's holding was two-fold.[137] First, the "suit must seek relief for the denial of a FAPE, because that is the only 'relief'" offered under the IDEA.[138] Second, whether the denial of FAPE is at issue can be determined by a careful examination of the complaint.[139] Therefore, the IDEA's exhaustion doctrine of the IDEA only applies when the plaintiff alleges that he or she was not receiving a FAPE.[140] Pertinent to potential claims in the context of correctional education for incarcerated juveniles with disabilities, the Court considered a hypothetical lawsuit that used the ADA and not the IDEA to assert a lack of educational access and found that the exhaustion doctrine could still

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of Civil Rights resulted in a finding that banning the service dog was discriminatory under the ADA and Section 504, even if the school was providing services that allowed E.F. to access a FAPE. *Id.* Subsequently, E.F.'s school approved Wonder's presence at the school but, due to E.F.'s parents' lingering concerns about the school's unwelcoming climate for their child and her needs, they transferred her to a different public school. *Id.*

[134] *See id.* at 752 (detailing the complaint for discrimination under the ADA and Section 504).

[135] *See id.* at 750, 752 n.4 (discussing remedies available under the ADA, Section 504, and the IDEA). E.F.'s parents sought monetary and declaratory relief for the infliction of "emotional distress and pain, embarrassment, and mental anguish." *Id.* at 752 (internal quotations omitted).

[136] Fry v. Napoleon Community Schools, No. 12-15507, 2014 WL 106624, at *2 (E.D. Mich. Jan. 10, 2014). The United States District Court for the Eastern District of Michigan dismissed the suit under the IDEA's exhaustion doctrine. *Fry*, 137 S. Ct. at 752. The United States Court of Appeals for the Sixth Circuit affirmed, citing the 1996 *Charlie F.* decision from the Seventh Circuit. *Id.* The Sixth Circuit saw E.F.'s parents' claims as rooted in the IDEA because they "were educational in nature." *Id.* (internal quotations omitted).

[137] *Fry*, 137 S. Ct. at 752.

[138] *Id.* Under the IDEA's procedures, which are at the center of the exhaustion doctrine, the hearing officer can only provide relief that remedies a denial of FAPE. *Id.* at 754. Such relief would likely materialize through changes in the child's IEP. *See id.* at 753 (describing how the FAPE mandate of the IDEA is upheld through the use of the IEP and delivered through the services proscribed in the IEP).

[139] *Id.* at 752. The Court recognized various approaches to determining whether a plaintiff alleged a denial of a FAPE. *Id.* at 755. It rejected, for example, a bright-line rule stating that the use of terms of art from the IDEA, such as "FAPE" or "IEP," indicate that the claimant implicitly seeks relief that the IDEA could provide. *Id.* The Court used hypotheticals to illustrate its point. *Id.* at 756. For instance, if the complaint alleged injuries that would be considered discriminatory if carried out by public places other than a school or if committed against an adult instead of child, then the lawsuit was probably not about a FAPE. *Id.*

[140] *Id.* at 754. The Supreme Court remanded the case to the Sixth Circuit to address whether the lawsuit was about the denial of a FAPE according to the Court's new two-part framework. *Id.* at 758.

come into play.[141] Furthermore, the Court left open a question that plagued the circuit courts: whether, when alleging a denial of FAPE, a plaintiff seeking relief not available under the IDEA, such as monetary damages, must still exhaust all the relief that is available under the IDEA.[142]

B. Practical Implications of Using the IDEA to Advance Educational Rights for Incarcerated Juveniles with Disabilities

The IDEA requires all students diagnosed with one of the IDEA's qualifying disabilities to have an "individualized education program," or an "IEP," if the local educational agency, usually the student's school district, finds that the student requires personalized instruction.[143] If an incarcerated student has an IEP, then he or she is entitled to the fulfillment of those needs and accommodations under the IDEA.[144] In practice, however, the IDEA's mandates may create additional barriers to accessing education for incarcerated juveniles with disabilities.[145] First, the student must be diagnosed with one of the disabilities outlined in the IDEA.[146] Second, the student must have been found by an evaluation to need "special education and related services."[147] Third, the student must have a current IEP or the juvenile justice facility must be willing to craft one for the student in question.[148] Rather than protecting incarcerated juveniles with disabilities, these three mandates are rarely fulfilled while they are incarcerated.[149]

The IEP also dictates how the school district must accommodate the student's disability so that he or she may access his or her education in the "least

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[141] *See id.* at 757 (discussing a hypothetical ADA lawsuit that dealt with potential discrimination but also the lack of a FAPE, even if FAPE was not mentioned by name). The Supreme Court's example leaves open the possibility that a reviewing court could find that the educational access claim was geared toward a public entity that was not a school, such as the correctional facility itself. *See id.* (debating whether the claim regarding a lack of tutoring could be produced against "a public theater or a library").

[142] *See id.* at 752 n.4 (refusing to answer the question in this case); *see, e.g.*, *Frazier*, 276 F.3d at 56–57 (enforcing the exhaustion doctrine despite a claim for monetary damages).

[143] 20 U.S.C.A. § 1414(d) (West 2017).

[144] Boundy & Karger, *supra* note 18, at 295.

[145] *See, e.g.*, 20 U.S.C.A. § 1401(3)(A)(i)–(ii) (limiting the IDEA's protections to certain disabilities and requiring a determination of the need for services), § 1414(a)(1)(A) (requiring evaluations to determine eligibility).

[146] *Id.* § 1401(3)(A)(i).

[147] *See id.* § 1401(3)(A)(ii) (determining eligibility for services if child has a qualifying disability), § 1414(a)(1)(A) (requiring evaluation before services are provided).

[148] *See* Boundy & Karger, *supra* note 18, at 295 (discussing the rights of juveniles, including those incarcerated, who fall within the IDEA's eligibility framework); JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 136 (asking about conformity with IEP development that is in compliance with the IDEA).

[149] *See* Boundy & Karger, *supra* note 18, at 301–02 (discussing incarcerated juveniles' lack of access to special education that meets IDEA requirements and how facilities fail to meet the requirements of the IDEA).

restrictive environment," or "LRE."[150] This individualized, least restrictive setting requirement may not be properly implemented by the correctional facility if it defines "least restrictive" based on the kinds of security settings available rather than the juvenile's learning needs.[151] Transition planning, which documents the student's plans after high school and sets measurable goals for the student to be prepared to pursue those plans, must be incorporated into the IEP that is in place when the student turns sixteen.[152] For incarcerated juveniles, however, these transition plans often never happen because facility staff lacks the proper skills to craft them, resulting both in lack of family engagement and in incomplete school records from which to work.[153]

The IDEA has been used successfully by advocates attempting to advance the educational rights of incarcerated juveniles.[154] For example, in 1993, ten juveniles aged eleven to sixteen brought a class action lawsuit against several public officials of the State of Connecticut challenging confinement conditions, including educational access, in juvenile detention facilities in Connecticut's three urban centers, Bridgeport, Hartford, and New Haven.[155] Because some plaintiffs qualified for special education services by their public school districts, the lawsuit included a claim under the IDEA.[156] The parties were able to reach a settlement that provided for more services.[157] Changes in facilities

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[150] 20 U.S.C.A. § 1412(a)(5)(A).

[151] *See id.* (defining "least restrictive" settings for all facilities); JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 137 (describing what does not constitute a least restrictive environment); LEONE & WEINBERG, *supra* note 71, at 21 (identifying the tension between security and education).

[152] 20 U.S.C.A. § 1401(34) (defining transition planning), § 1414(d)(1)(A)(i)(VIII) (explaining when and how transition planning is incorporated into the IEP). Incarcerated juveniles with IEPs are entitled to transition plans that account for postsecondary goals. JUVENILE DET. ALTERNATIVES INITIATIVE, *supra* note 89, at 136 (inquiring about conformity with IEP-centered transition planning).

[153] LEONE & WEINBERG, *supra* note 71, at 22.

[154] *See, e.g.*, *Emily J. v. Weicker*, CTR. FOR CHILDREN'S ADVOCACY, https://cca-ct.org/pleadingsbank/pleadingsbank_federal/emily-j-v-weicker-complaint-conditions-of-confinement-medical-mental-health-care [https://perma.cc/BD66-PAXM] [hereinafter CTR. FOR CHILDREN'S ADVOCACY] (reproducing the pleading of a class action lawsuit in Connecticut brought under the IDEA and Section 504 of the Rehabilitation Act of 1973).

[155] *Id.*

[156] *Id.* The lawsuit characterizes the plaintiffs as "handicapped children." *Id.* In this Note, the plaintiffs will be described as children with disabilities. *See* NAT'L YOUTH LEADERSHIP NETWORK & KIDS AS SELF-ADVOCATES, RESPECTFUL DISABILITY LANGUAGE: HERE'S WHAT'S UP! 2 (2012), http://www.aucd.org/docs/add/sa_summits/Language%20Doc.pdf [https://perma.cc/L98P-XQ26] (offering respectful terminology when discussing disabilities). Emily J. was a thirteen-year-old girl who was placed in special education services in Bridgeport Public Schools until she was removed from the program due to truancy. CTR. FOR CHILDREN'S ADVOCACY, *supra* note 154. Bridgeport Juvenile Detention Center staff kept her locked in a cell for days on end throughout her confinement period without access to toilet facilities, much less educational services. *Id.* Her mental health and medication needs were also mismanaged. *See id.* (describing forgotten dosages and lack of therapeutic services).

[157] Settlement Agreement at 9, Emily J. v. Rell, No. 3:93-cv-01944-RNC (2005) (dictating the ultimate settlement agreement between the parties).

brought by lawsuits under the IDEA will not necessarily reach incarcerated students who do not fall within the protections of the IDEA but who are still living with a disability.[158] IDEA litigation is also limited in scope as the court can only remedy the denial of a FAPE.[159]

C. Current Approaches to Using the ADA as an Educational Advocacy Tool

The ADA has been used to address disability discrimination by school officials against *individual* students, as well as to challenge placement in restrictive environments on behalf of *classes* of students.[160] Recent class action cases serve as examples for ADA-based, class action facilities litigation, which would also challenge restrictive environments that impede educational access.[161] In one such class action, in 2015 in the United States District Court for the District of Massachusetts, the Parent/Professional Advocacy League, and the Disability Law Center, on behalf of a class of students with mental health disabilities, filed a complaint against the City of Springfield seeking remedy under the ADA.[162] The plaintiffs alleged that the City violated the ADA by keeping students segregated in a placement that used improper behavior management techniques rather than providing appropriate therapeutic services to students with mental health disabilities in Springfield Public Schools' neighborhood schools.[163] The United States filed a statement of interest that chal-

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[158] *See* 20 U.S.C.A. § 1401(3)(A) (West 2017) (defining eligibility under the IDEA); LEONE & WEINBERG, *supra* note 71, at 25 (highlighting the retention of IDEA rights while in juvenile facilities but also explaining the broader disability definition under the ADA and Section 504 when compared to IDEA); Zirkel, *supra* note 128, at 215 (proscribing litigation under the IDEA as limited to pursuit of a FAPE through the identified student's IDEA-mandated IEP). Although anywhere from fifty to eighty percent of incarcerated youth could be eligible under the IDEA, in 2011, an estimated thirty-three percent were actually identified as qualifying for IDEA-related services. Dale et al., *supra* note 90, § 2.01[5][a]; Adam Segal, *IDEA and the Juvenile Justice System: A Factsheet*, THE NAT'L TECH. ASSISTANCE CTR. FOR THE EDUC. OF NEGLECTED OR DELINQUENT CHILDREN AND YOUTH, https://neglected-delinquent.ed.gov/idea-and-juvenile-justice-system-factsheet [https://perma.cc/D6UF-CBGM] (offering statistics on special education eligibility within the juvenile justice system).

[159] *Fry*, 137 S. Ct. at 754 n.7.

[160] *See, e.g.*, *id.* at 752 (bringing suit under the ADA for damages stemming from disability-based discrimination against a student with a service animal); Class Action Complaint at 1, Doe v. Pasadena Unified Sch. Dist., No. 2:16-CV-00984-BRO-DGS (2016) [hereinafter Class Action Compl. in Doe v. Pasadena Unified Sch. Dist.] (arguing against the use of restraints and a highly restrictive physical environment); First Amended Class Action Complaint at 1, 2, S.S. v. City of Springfield, Civil No. 3:14-30116, ECF No. 53 (2015) [hereinafter First Amended Class Action Compl. in S.S. v. City of Springfield] (arguing against use of restraints and highly restrictive physical environment).

[161] *See, e.g.*, First Amended Class Action Compl. in S.S. v. City of Springfield, *supra* note 160, at 2 (challenging the school's use of isolation as a behavior policy); Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 6 (detailing use of isolation to address behavior).

[162] First Amended Class Action Compl. in S.S. v. City of Springfield, *supra* note 160, at 1, 2.

[163] *Id.* at 2. The complaint details the use of "physical restraints" and "inappropriate forced isolation." *Id.* Springfield Public Schools operates the Public Day School for elementary through high

lenged the defendants' motion to dismiss for lack of administrative exhaustion under the IDEA and instead supported the non-application of the IDEA's exhaustion doctrine for a lawsuit bringing the ADA claim.[164] Unfortunately, the court held that the plaintiffs were required to meet the IDEA's exhaustion doctrine and failed to do so.[165]

In 2016, in the United States District Court for the Central Division of California, advocacy groups brought a similar class-action lawsuit on behalf of students with mental health disabilities against the Pasadena Unified School District.[166] The complaint alleged that the district's use of its Focus Point Academy as a separate placement for students with mental disabilities and the use of behavioral policies like physical restraints and isolation violated the ADA.[167] Attorneys for the students with disabilities argued that, to meet the

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school students on separate campuses. *Id.* at 14. The Public Day School program educates 233 students with emotional disabilities, keeping them completely separate from students without disabilities. *Id.* at 14, 16. The complaint alleges that the school provides impermissibly low-level academics, focuses on punitive measures to control behavior, and results in students dropping out or being arrested at school and sent to juvenile justice facilities. *Id.* at 15–16. The Public Day School also fails to provide supplemental opportunities to its students, like extracurricular activities and sports. *Id.* at 16. The Public Day School also counsels families out to equally restrictive private schools. *Id.* For a student with a disability, like plaintiff S.S., who wants to be integrated into a mainstream school setting, the Public Day School allegedly does not provide integration as an option. *See id.* at 18–19 (discussing S.S.'s desire to attend one of the specialized high school programs coupled with his ability to be educated in the high school setting but how he was barred from applying).

[164] Statement of Interest of the United States of America at 2, S.S. v. City of Springfield, No.14-cv-30116-MGM (Mar. 12, 2018) [hereinafter Statement of Interest in S.S. v. City of Springfield] (supporting the claims and litigation strategy of the plaintiffs). The United States disagreed with the defendants' interpretation of the IDEA's exhaustion doctrine and noted that an ADA claim could be brought in lieu of or alongside an IDEA claim because the statutes protect and advance different rights. *Id.* The United States expressed an interest in the accurate interpretation of the ADA and the proper enforcement of its mandates. *Id.* at 3. The plaintiffs filed the First Amended Class Action Complaint after the United States filed its Statement of Interest. *See* First Amended Class Action Compl. in S.S. v. City of Springfield, *supra* note 160, at 1 (filed Feb. 11, 2015); Statement of Interest in S.S. v. City of Springfield, *supra*, at 16 (filed Aug. 27, 2014). The administrative hearing officer dismissed all the ADA claims brought by one of the students with a mental health disability, S.S., and found that the school environment and the IEP of S.S. fulfilled the mandates of the IDEA. First Amended Class Action Compl. in S.S. v. City of Springfield, *supra* note 160, at 5.

[165] S.S. by S.Y. v. City of Springfield, 332 F. Supp. 3d 367, 378 (D. Mass. 2019). The plaintiffs have filed an appeal in the United States Court of Appeals for the First Circuit and defendants have cross-appealed. Notice of Appeal of Court's Order from 09/05/2018, S.S. v. City of Springfield, Civil No. 3:14-30116-MGM, ECF No. 286 (D. Mass. Oct. 5, 2018); Notice of Appeal, S.S. v. City of Springfield, Civil No. 3:14-30116-MGM, ECF No. 281 (D. Mass. Sept. 10, 2018) (filing by intervenors); Notice of Appeal, S.S. v. City of Springfield, Civil No. 3:14-30116-MGM, ECF No. 267 (D. Mass. Aug. 9, 2018) (filing by original plaintiff).

[166] Class Action Compl. in Doe v. Pasadena Unified Sch. Dist., *supra* note 160, at 1 (challenging certain behavior management techniques and separate campuses).

[167] *Id.*

mandates of the ADA, these students could be educated with the proper supports, such as behavior services, in the district's neighborhood schools.[168]

Advocates have also begun to use the ADA as an educational advocacy tool by challenging conditions of confinement as barriers to educational access.[169] The recent leading case using this approach settled, however, which poses difficulties in determining how courts may treat this approach in the future.[170] In that case, in 2014, in *G.F. v. Contra Costa County*, advocates brought suit under the ADA, Section 504, and the IDEA on behalf of a group of juveniles with disabilities incarcerated at the Contra Costa County's Juvenile Hall.[171] They alleged that the facility relied on restrictive tactics like solitary confinement to address concerning behaviors rather than providing youth with the services they needed.[172] Furthermore, when the juveniles were placed in solitary, they were denied access to education.[173] The United States Department of Justice filed a statement of interest to affirm its role in enforcing the ADA, provide its interpretation of the ADA's mandates, and express concerns about the use of solitary confinement in juvenile facilities.[174]

At the time of the actions alleged in the complaint, nearly thirty-three percent of youth enrolled at the detention center's school qualified for IEPs.[175]

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[168] *Id.* at 1–2. This case is ongoing pending the school district's final approval of a settlement. Ex. A, Statement of Consent to Proceed Before a United States Magistrate Judge, Doe v. Pasadena Unified Sch. Dist., No. 2:16-CV-00984 BRO-DGS (C.D. Cal. Dec. 4, 2018), ECF No. 141 (providing a recent update on the status of the case).

[169] *See* FEIERMAN ET AL., *supra* note 7, at 15, 24 (advocating for use of the ADA to challenge use of solitary confinement and advocate for "reasonable modifications" to programming and highlighting the *G.F. v. Contra Costa County* case as an approach to challenging conditions' impediment to education).

[170] *See id.* at 24 (discussing the settlement agreement).

[171] Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 2; First Amended Class Action Compl. in G.F. v. Contra Costa Cty., *supra* note 118, at 3–4; *see also* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A)–(B) (2012) (protecting the educational interests of students with disabilities); Rehabilitation Act, 29 U.S.C.A. § 794 (West 2017) (guarding against disability-based discrimination); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012) (protecting persons with disabilities from disability-based discrimination). The maximum-security John A. Davis Juvenile Hall can house up to 290 juveniles and has on-site educational facilities and mental health services. *John A. Davis Juvenile Hall*, CONTRA COSTA CTY., http://www.co.contra-costa.ca.us/680/John-A-Davis-Juvenile-Hall [https://perma.cc/RR4P-WRD3] (describing the features of the John A. Davis Juvenile Hall).

[172] First Amended Class Action Compl. in G.F. v. Contra Costa Cty., *supra* note 118, at 1.

[173] *Id.* At Contra Costa County's Juvenile Hall, youth were confined to their cells for upwards of twenty-two hours per day and denied accessed to all group programming. Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 1 n.1. Given these conditions, the plaintiffs in the case referred to such restrictive methods as solitary confinement. *Id.* At the Juvenile Hall, the most restrictive levels of security—maximum and security risk—barred plaintiffs from attending any educational programming, including special education. *Id.* at 5. For "special program" youth, a third level within the most restrictive levels of security, tutors were provided for upwards of thirty minutes of instruction in a day but not every day. *Id.*

[174] Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 2.

[175] *Id.* at 4.

By bringing an IDEA claim, plaintiffs argued that relegating them to these restrictive security programs violated their right to education in the least restrictive environment with appropriate accommodations that would meet the "individualized" characterization of the IEP.[176] The three plaintiffs in the case also had disabilities recognized under the ADA.[177] They argued that, because of their disabilities, they were disproportionately affected by these removal policies and thus were suffering from discrimination.[178] The Department of Justice's Statement of Interest highlighted that the county's correctional and education agencies shared responsibility for following the IDEA and the ADA.[179] Taking as true plaintiff's allegations, the Department believed that the plaintiffs had asserted violations of these federal statutes and thus the county's practices could be found discriminatory.[180] Ultimately the parties settled in 2015.[181]

IV. How the ADA Holds Promise for Enforcing the Educational Rights of Incarcerated Juveniles

Juvenile justice facilities' frequent use of security policies, like solitary confinement, are used to justify denying educational access to preserve inmate and staff safety.[182] Using the ADA to promote educational access for incarcerated juveniles with disabilities is newly charted territory, but the few cases that have attempted this strategy show early signs of its efficacy.[183] Section A of

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[176] *Id.* at 7. Restrictive security programs necessitated removal from school in violation of the manifestation hearing requirement under the IDEA. *See* 20 U.S.C. § 1415(k) (discussing procedures required before removing a student with a disability from school due to behaviors potentially stemming from the disability).

[177] Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 5. W.B. was "diagnosed with psychosis and schizophrenia," G.F. with "bipolar affective disorder, attention deficit and hyperactivity disorder, and intermittent explosive disorder," and Q.G. with "oppositional defiant disorder and attention deficit and hyperactivity disorder." *Id.* at 5–6. W.B. was placed in restrictive security programs for sixty days over the course of four months, G.F. for one hundred days in twelve months, and Q.G. for more than two hundred days in upwards of three years. *Id.*

[178] *Id.* at 6.

[179] *Id.* at 9–10. The agencies were seemingly trying to off-load responsibility to one another, thereby creating a dearth of protection for the plaintiff's rights. *Id.*

[180] *Id.* at 18.

[181] Feierman et al., *supra* note 7, at 24. The settlement reduced the use and length of solitary confinement and required the facility to meet the needs of students with disabilities. G.F. et al. v. Contra Costa County et al., Disability Rights Advocates, http://dralegal.org/case/g-f-et-al-v-contra-costa-county-et-al [https://perma.cc/M843-ACTX] [hereinafter Disability Rights Advocates] (outlining the ultimate settlement reached by the parties).

[182] *See* Feierman et al., *supra* note 7, at 6 (citing use of prolonged solitary confinement in "almost half of juvenile detention facilities and training schools").

[183] *See, e.g.*, Class Action Compl. in Doe v. Pasadena Unified Sch. Dist., *supra* note 160, at 1–2 (continuing to pursue ADA claims against a school district to challenge restrictive practices); Electronic Notice of ADR Conference, *supra* note 165, ("filed under seal," referring the matter to alternative dispute resolution in an ADA case against a school district that challenged the use of restrictive practices); Disability Rights Advocates, *supra* note 181.

this Part outlines the benefits of using the ADA in conjunction with or instead of the IDEA to advance public education access for incarcerated juveniles with disabilities.[184] Section B of this Part provides a blueprint for advocates when using the ADA that could result in a complete overhaul of the juvenile justice facilities across the country.[185]

A. Benefits of the ADA as an Educational Advocacy Tool for Incarcerated Juveniles with Disabilities

Claims can be brought in federal court under either the IDEA or ADA or both.[186] As a civil rights statute, the ADA lacks the prescriptiveness of the IDEA when it comes to advancing the educational rights of those with disabilities.[187] Instead, the ADA's breadth allows advocates to focus on the impact a disability may have on the juvenile's life.[188] Further, whereas the IDEA centers on educational agencies, Title II of the ADA focuses on the actions of any public entity.[189] In juvenile facilities that delegate the provision of all educational or special education services from the corrections agency to the educational agency, the ADA would apply to both entities.[190] The IDEA, by contrast, would only apply to an educational agency.[191] Under the ADA, the correctional and educational environments must work together to ensure, for example, that disciplinary action, like solitary confinement, does not impede access to a public service like special education.[192] The expansiveness of the ADA demon-

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[184] *See infra* notes 186–192 and accompanying text.

[185] *See infra* notes 194–203 and accompanying text.

[186] Statement of Interest in S.S. v. City of Springfield, *supra* note 164, at 2.

[187] *Compare* Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2012) (defining disability and its impact under the ADA), *and id.* §12132 (banning discrimination on the basis of disability by any "public entity"), *with* Individuals with Disabilities Education Act, 20 U.S.C.A. § 1412(a)(1)(A), (5)(A) (West 2017) (defining the narrow rights as to educational access available under the IDEA).

[188] *See* 42 U.S.C. § 12102(2) (defining the impact on daily living and framing the scope of the ADA's protections); LEONE & WEINBERG, *supra* note 71, at 25 (discussing expansive coverage of the ADA's protections on individuals with disabilities and their families).

[189] *Compare* 20 U.S.C.A. § 1401(19)(A) (defining "local educational agency" as the deliverer of the IDEA services and protections), *with* 42 U.S.C. § 12132 (defining the scope of the protections to all public entities and their services).

[190] *See* Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 13 (applying the ADA to both the correctional and educational entities of the facility); Boundy & Karger, *supra* note 18, at 302–03.

[191] *See* Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 8 (discussing the application of the IDEA solely to the county's educational board).

[192] *See* 42 U.S.C. § 12132 (scope of the ADA); Statement of Interest in G.F. v. Contra Costa Cty., *supra* note 3, at 13 (applying the ADA to both the correctional and educational entities of the facility).

strates how it will improve conditions for incarcerated juveniles with disabilities.[193]

B. Blueprint for Advocacy: Using the ADA to Secure the Educational Rights of Incarcerated Juveniles with Disabilities

Advocates who wish to use the ADA as a vehicle for securing the rights of incarcerated juveniles with disabilities need not stop at access to educational services.[194] Because the ADA includes all conditions of confinement, not just education, advocates can use the ADA to challenge a range of facility operations that impact education.[195] This Section endeavors to provide advocates with a blueprint for challenging conditions of juvenile justice facilities in order to advance the educational rights of incarcerated youth with disabilities and ultimately, shut down or overhaul facilities that fail to uphold all incarcerated juveniles' civil rights.[196]

`First, advocates for incarcerated juveniles with disabilities must consider the limitations wrought by the PLRA's and the IDEA's separate exhaustion doctrines.[197] When considering the exhaustion doctrine of the PLRA, advocates need to ensure that potential juvenile plaintiffs have pursued grievances first through the facility's formal process.[198] Fulfilling the PLRA mandate requires close attention to its processes and those of the juvenile justice facility.[199] Accounting for the exhaustion doctrine of the IDEA when advocating for

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[193] *See, e.g.*, 42 U.S.C. § 12132 (engulfing all public entities within the ADA's protection for persons with disabilities).

[194] *See* FEIERMAN ET AL., *supra* note 7, at 22 (recommending a variety of challenges to practices in juvenile facilities under the ADA).

[195] *See* First Amended Class Action Compl. in G.F. v. Contra Costa Cty., *supra* note 118, at 1 (connecting facility's use of solitary confinement to deteriorating educational progress and behaviors that result in more solitary confinement); FEIERMAN ET AL., *supra* note 7, at 22 (discussing ADA challenges to lack of integration and mental health services).

[196] *See infra* notes 197–203 and accompanying text. *See generally* BEDI, *supra* note 9.

[197] *See* 20 U.S.C. § 1415(l) (2012) (requiring exhaustion of the IDEA's remedies); Prisoner Litigation Reform Act § 803(d), 42 U.S.C.A. § 1997e(a) (West 2012 & Supp. 2018) (requiring exhaustion of the correctional facility's remedies under the PLRA). Incarcerated juveniles with disabilities face extra obstacles to their lawsuits because they are both inmates and students with disabilities. *See* 20 U.S.C. § 1415(l) (explaining scope of exhaustion under IDEA); 42 U.S.C.A. § 1997e(a) (explaining the scope of exhaustion under PLRA).

[198] *See, e.g.*, El'Shabazz v. Philadelphia, 2007 WL 2155676, at *1 (E.D. Pa. July 25, 2007) (dismissing suit for failure to exhaust); Harris v. Le Roy Baca, 2003 WL 21384306, at *3 (C.D. Cal. June 11, 2003) (same).

[199] *See, e.g.*, *El'Shabazz*, 2007 WL 2155676, at *3 (refusing to recognize grievances filed on the inmate's behalf by the inmate's father); *Harris*, 2003 WL 21384306, at *3 (refusing to recognize grievances filed on the inmate's behalf by the inmate's lawyer); HUMAN RIGHTS WATCH, *supra* note 115, at 30 (denying a grievance claim by an incarcerated juvenile because of poor handwriting).

the educational rights of incarcerated juveniles with disabilities requires greater exploration of potential plaintiffs' unique situations.[200]

Additionally, advocates must distinguish between incarcerated juveniles with IEPs addressing their IDEA-recognized disabilities and those who have not been identified as having a disability under the IDEA.[201] For those who are not identified, advocates should examine the IDEA's definition of disability and determine whether a juvenile needs to be identified as having a disability and also requiring disability-related services through the IDEA's evaluation process.[202] For juveniles who are determined to have both a disability and rights to special education services under the IDEA, however, prudent advocates would be wise first to pursue the IDEA's administrative remedies to avoid dismissal of the suit.[203] Given the prevalence of disabilities in incarcerated juveniles, if the IDEA does not apply, the juvenile may still have a disability recognizable under the ADA's broader definition of disability.[204] If that is the case, then advocates should avoid the murky waters of the IDEA's exhaustion requirement in favor of litigation that challenges facilities conditions and their impact on education.[205]

CONCLUSION

For decades, the United States has recognized the right of students with disabilities to access a public education. Federal statutes, like the IDEA, and recent major federal cases, like *Board of Education v. Rowley* and *Endrew F. v. Douglas County School District RE-1*, have institutionalized the right to a "free, appropriate public education" in the "least restrictive environment" to make "effective progress" for youth with disabilities in public schools across

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[200] *See* PARRY, *supra* note 128, at 364–65 (describing various applications of the IDEA's exhaustion doctrine).

[201] *See* 20 U.S.C.A. § 1401(3)(A) (West 2017) (defining a child with a disability under the IDEA), § 1414(d) (discussing the purpose and application of IEPs).

[202] *See id.* § 1401(3)(A)(i)–(ii) (providing an explicit list of disabilities covered by the statute's protection and requiring the child with a qualifying disability to also need services provided), § 1414(b) (explaining the evaluation process). If the juvenile is eligible for services under the IDEA, then the IDEA's exhaustion doctrine applies to remedies available under the IDEA. *See id.* § 1414(l) (explaining exhaustion procedures under the IDEA).

[203] *See id.* § 1414(l). Advocates could consider arguing a futility exception to the exhaustion doctrine, but the ultimate determination of futility is made by the courts after the lawsuit is filed. *See* PARRY, *supra* note 128, at 364–65 (discussing varying degrees of success in different circuits with the futility exception).

[204] *See* NAT'L DISABILITY RIGHTS NETWORK, *supra* note 108, at 7 (estimating upwards of seventy percent of youth involved in the juvenile justice system could qualify as having a disability under the ADA).

[205] *See* 20 U.S.C.A. § 1414(l) (outlining the exhaustion doctrine of the IDEA); First Amended Class Action Compl. in G.F. v. Contra Costa Cty., *supra* note 118, at 1 (linking conditions to deplorable education standards); FEIERMAN ET AL., *supra* note 7, at 22 (demonstrating how the ADA can be used to challenge various conditions of confinement).

the country. These statutes and cases also guarantee affected students important procedural protections. Unfortunately, the IDEA's mandates have fallen short for incarcerated juveniles with disabilities. Emotional disabilities, learning disabilities, and mental illness are overrepresented in our juvenile justice facilities. Moreover, these facilities, built upon principals of rehabilitation, are not providing incarcerated youth with disabilities with the educational services they deserve. Juvenile justice facilities struggle to provide proper educational services in the appropriate educational environment and clamp down on behavior through the use of damaging practices, like solitary confinement. Facilities managers also fail to consider that untreated mental illness and emotional disabilities create undesired behaviors and that the security policies themselves often exacerbate these clinical root causes.

Traditionally, the educational rights of students with disabilities are examined through the lens of the IDEA. The IDEA can successfully secure education for some incarcerated juveniles with disabilities, but it leaves behind those who are not identified under the IDEA or do not have an IDEA-qualified disability. Legal advocates should consider students' statutory rights to access public services under the ADA instead of or in addition to students' right to access a public education under the IDEA. In the last few years, a flurry of disability rights lawsuits that include the ADA in their claims has resulted in settlements geared toward remedying systemic civil rights injuries by improving conditions of confinement, including providing appropriate education services. Incarcerated youth are a captive audience, both literally and figuratively, for academic instruction. By advocating for specialized educational services, incarcerated youth with disabilities stand a far better chance of successful reentry and reduced recidivism than when their educational needs are ignored.

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