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Jillian Morrison
University of Mississippi

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Juvenile (In) Justice: Reaffirming IDEA's Application in the Juvenile Correctional Context

*Jillian Morrison**

INTRODUCTION

There is little debate that students deprived of the ability to access education suffer irreparable harm. Almost seventy years ago, in *Brown v. Board of Education*,¹ the United States Supreme Court observed that, “it is doubtful that any child may reasonably be expected to succeed in life if [he] is denied the opportunity of an education.”² The necessity of education becomes even more acute when examined in the context of juvenile corrections, or what is commonly referred to as the “juvenile justice system.”³ When juveniles, or incarcerated youth under the age of eighteen, have access to educational opportunities, their chances of recidivism drop dramatically.⁴ This decrease

* Jillian Morrison earned her J.D. in 2021 from Loyola University New Orleans College of Law, with a certificate in Social Justice and International Law, as well as the Spirit of Ignatius award. She is currently the Delta Legal Fellow housed at the Center for Population Studies at the University of Mississippi where her role is to inform and catalyze community change through capacity building and policy advocacy between community partners and academic institutions. She would like to thank Prof. Hector Linares, for sparking her interest in the intersection between juvenile justice and disability justice; as well as Prof. Robert Garda for allowing her to explore an earlier iteration of this topic in his seminar course. She also thanks the educators in her family, for the tireless work they do every day, including her sister Michaela Morrison, her mother Debra Freid, and her husband Matthew Robak, and Prof. Mitchell Crusto for encouraging her academic writing. She dedicates this article to the many children who have been, and continue to be, subject to harmful disciplinary policies and denied educational opportunities in the juvenile system. A system that repeatedly harms any of us, harms all of us.

¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

² *Id.*

³ See generally *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice> (last visited Apr. 15, 2022). Youth under the age of 18 who are accused of committing delinquent or criminal acts are processed through a different criminal justice system than their adult counterparts. *Id.* However, states do have the right to set lower age thresholds which allow youth to be processed in the adult justice system. *Id.* The juvenile justice is supposed to operate on the tenet that “youth are fundamentally different than adults, both in terms of responsibility and potential for rehabilitation. The primary goals of the juvenile justice system are (maintaining public safety), skill development, habilitation, rehabilitation, addressing treatment needs, and successful integration of youth into the community.” *Id.*

⁴ Numerous studies assert that the importance of educational opportunity as a tool for rehabilitation. See FOLLOW-UP STUDY OF A SAMPLE OF OFFENDERS WHO EARNED HIGH SCHOOL EQUIVALENCY DEGREES (GEDS) WHILE INCARCERATED IN DOCS, PRISON POL'Y INITIATIVE (2001), https://static.prisonpolicy.org/scans/nv_ged.shtml#:~:text=Overall%2C%20the%20attainment%20of%20a,earn%20their%20GED%20at%20DOCS (showing that offenders under the age of 21, who earned a GED while incarcerated had a 13.6% lower chance of returning to custody, than those who did not earn a GED); see also John Nuttall, *The Effect of Earning a GED on Recidivism Rates*, 54 J. CORR. EDUC. 90, 92-93 (2003) (showing that those who earned a GED while incarcerated returned to custody after a three year exposure period at a significantly lower rate than those who did not).

also extends to their chances of adult incarceration.⁵ Education is one of the most powerful rehabilitation tools available to the juvenile justice system. Yet, for youth in need of special education services, obtaining access to education while incarcerated can prove extremely challenging.

Children with learning, developmental, and behavioral disabilities are at an increased risk for both educational failure and incarceration, as “they are more likely than their non-disabled peers to experience school failure and subsequent poor adult outcomes.”⁶ Education access and delinquency are intimately related. An alarming 2013 case study showed that 75% of students with disabilities who “dropped out” of school were arrested within five years of exiting the educational system.⁷ More recent studies show that even if a student is enrolled in school when they enter the juvenile system, two out of three students will drop out of school after exiting the system.⁸

Within the juvenile justice system, children who require special education services are significantly overrepresented.⁹ At least one in three youth in the juvenile justice system has a disability qualifying them for special education services under the Individuals with Disabilities Education Act (hereinafter “IDEA”), nearly four times the rate of youth in public schools.¹⁰ One potential cause for this overrepresentation arises out of the link between disruptive behavior and subsequent disciplinary actions, including arrests. Arrests are commonly associated with lower school achievement scores and disability, especially for youth with specific learning disabilities and emotional disturbances.¹¹

⁵ Studies also support that education for adults who are incarcerated decreases recidivism among the adult population as well. For additional information on how educational opportunities impact adults *See* Press Release, U.S. Dep’t of Just., Justice and Education Departments Announce New Research Showing Prison Education Reduces Recidivism, Saves Money, Improves Employment (Aug. 22, 2013), <https://www.justice.gov/opa/pr/justice-and-education-departments-announce-new-research-showing-prison-education-reduces>; *Benefits of Prison Education*, NW. UNIV. PRISON EDUC. PROGRAM, <https://sites.northwestern.edu/npep/benefits-of-prison-education/> (last visited Apr. 15, 2022) (providing evidence from 2013 that inmates who participated in correctional educational programs had 43% lower odds of returning to prison than inmates who did not).

⁶ Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 228 (2013).

⁷ *Id.* at 229.

⁸ THE STATE OF AMERICA’S CHILDREN 2021, CHILD.’S DEF. FUND 27 (2021), <https://www.childrensdefense.org/wp-content/uploads/2021/04/The-State-of-Americas-Children-2021.pdf>.

⁹ *See generally* Keidra McGriff, *The Overrepresentation of Youth with Disabilities in the Juvenile Justice System*, 11 CONTEMP. ISSUES IN JUV. JUST. 105, 117 (2021).

¹⁰ THE STATE OF AMERICA’S CHILDREN 2021, *supra* note 8.

¹¹ Bonnie Doren et al., *Predicting the Arrest Status of Adolescents with Disabilities in Transition*, 29 J. SPECIAL EDUC. 363, 363 (1996). Behavior may be misinterpreted or misunderstood and potentially viewed as “combative”, leading to arrest, and as such disabled people are often policed at disproportionate rates. *see* Jamelia Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1405 (2021) Morgan also details how disabled people are overrepresented in police killings and are involved in a significant proportion of police use of force killings, in cities like Baltimore and Ferguson, and the subsequent reasons for this. *Id.* at 1404.

Courts have made it clear that IDEA's protections apply to minors in detention facilities. At the onset, these protections include a requirement to identify¹² potential children with disabilities. Courts have also explained that juvenile justice facilities need to provide a "free appropriate public education" or "FAPE" as required under IDEA.¹³ Despite this, incarcerated youth with disabilities are regularly subjected to disciplinary proceedings and actions that impede their ability to access their "free appropriate public education," in violation of the protections guaranteed by IDEA.¹⁴

These violations continue, despite both case law and statutory language supporting the contrary. One of the major challenges for students who are incarcerated arises out of their inability to access educational services due to disciplinary actions that result in them being placed in isolation and/or excluded from the classroom setting. For example, a student may be penalized for a behavioral issue that takes place at dinner. As discipline, they are placed in administrative segregation, or solitary confinement.¹⁵ If the next day they are still in administrative segregation or isolation, they are unable to attend the educational option at the facility. However, IDEA protections would not apply as the disciplinary issue did not take place in the educational setting.

Theoretically, this may make sense. IDEA protections do not apply to parents who discipline their child at home, outside of the educational context. However, when facilities are responsible both for the physical care and custody and education of incarcerated minor students, this becomes problematic. Even discipline that may not occur in the traditional "school" setting can still limit or deny a student their educational access. How can a student in isolation possibly get the special education services they need, and are guaranteed, under IDEA?

The COVID-19 pandemic has further exacerbated the difficulty that arises when juvenile correctional facilities are responsible for acting both as a residence and school. Due to COVID-19 students were not meeting in physical classrooms. With this absence of students from the traditional classroom setting, both the "where" and "when" of educational hours is often in flux.¹⁶ However, even pre-COVID, teacher shortages within juvenile correctional facilities blurred the lines of when and where education truly took

¹² 34 C.F.R. § 300.111 (2021). Referred to statutorily as "child find." *Id.*

¹³ See JOSEPH C. GAGNON ET AL., NAT'L TECH. ASSISTANCE CTR. FOR THE EDUC. OF NEGLECTED OR DELINQ. CHILD. & YOUTH, ISSUE BRIEF: KEY CONSIDERATION IN PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION FOR YOUTH WITH DISABILITIES IN JUVENILE JUSTICE SECURE CARE FACILITIES (2015), <https://files.eric.ed.gov/fulltext/ED571826.pdf>.

¹⁵ ALISON SHAMES ET AL., VERA INST. FOR JUST., SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 4 (2015), https://www.vera.org/downloads/publications/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf (stating that the practice of solitary confinement goes by many names, including isolation, restricted housing, administrative segregation, protective custody, special housing, disciplinary segregation, etc.).

¹⁶ See, e.g., *State Orders Chicago to Fix Special Education in Detention*, NBC CHI. (Apr. 24, 2021), <https://www.nbcchicago.com/news/local/state-orders-chicago-to-fix-special-education-in-detention/2494434/> (stating that Chicago Public Schools "essentially halted" special education services during the COVID-19 pandemic for students at Nancy B. Jefferson Alternative School inside the detention center, resulting in many students lacking the ability to receive any educational hours, or being forced to do independent packet type work within their residential incarcerated placement).

place.¹⁷ Simply put, in many cases it is hard to tell where educational hours begin and end in the case of residential correctional placement.

The nebulous confines of when and where a student is in “school” vs. in “residence” is especially troublesome as it pertains to discipline protections under IDEA. One of the guarantees of IDEA discipline protection is a “manifestation determination review” or “MDR”.¹⁸ MDR’s are designed to protect children from being disciplined for behavior that is caused by their disability. The MDR process asserts that if a student’s behavior is a manifestation of their disability, that student cannot be subjected to disciplinary removal from the classroom.¹⁹ The rationale behind the MDR process is sound; punishing a child for behavior resulting from their disability is essentially punishing them for being disabled. Yet many incarcerated children are routinely denied this protection guaranteed to them under IDEA. In carceral settings, where youths may not be given access to the traditional classroom setting on a day to day basis, IDEA protections must apply when behavioral discipline arising from a child’s disability results in their inability to access their education. Without IDEA disciplinary protections, incarcerated children with disabilities are routinely disciplined through exclusion and isolation, which ultimately denies them total or partial educational access.

This article argues that the disciplinary protections of IDEA must apply broadly any time a juvenile correctional facility impedes a child’s ability to access the free appropriate public education (FAPE) guaranteed to all children under IDEA. Part I will provide relevant background information including information on children with disabilities and existing disability protections. Part II will examine the existing relationship between IDEA protections and juvenile correctional facilities. Finally, Part III will propose why applying IDEA broadly to discipline is the best practice in the juvenile corrections system and also will address potential counterarguments.

I. UNDERSTANDING THE PROBLEM: CHILDREN WITH DISABILITIES AND INCARCERATION

This section will address (1) the overrepresentation of children with disabilities in the juvenile justice system; (2) disciplinary procedures within the juvenile justice system; and (3) the fundamental relevant principles of IDEA.

¹⁷ Molly McCluskey, *What If This Were Your Kid?*, ATLANTIC (Dec. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/12/juvenile-solitary-confinement/548933/>.

¹⁸ 34 C.F.R. § 300.530(e) (2021).

¹⁹ *Id.* at § 300.530(f).

A. Children with disabilities are overrepresented in the juvenile correctional system.

While the number of children incarcerated has steadily decreased over the last twenty years,²⁰ on any given day, approximately 48,000 children in the United States are still incarcerated in juvenile correctional facilities.²¹ Of those children, ct with disabilities are overrepresented.²² While 8.6% of public school students have been identified as having disabilities that qualify them for special educational services, minors within the juvenile justice system have significantly higher rates of both identified and unidentified disabilities.²³ Nearly 33% of youth in “correctional facilities across the United States have an identified disability that impacts their ability to learn, making them eligible for special education services.”²⁴ However, 33% is a conservative figure and only accounts for those who have identified disabilities and are already qualified for special education services at the time of their incarceration. As indicated, many incarcerated youth with disabilities go undiagnosed and as a result, lack access to special education services. Some studies indicate that as many as 70% of youth who are incarcerated suffer from “disabling conditions that impact their daily lives.”²⁵ The large discrepancies in these figures reveal that the disabilities of many incarcerated youths may go unidentified.²⁶

²⁰ John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/>.

²¹ WENDY SAWYER, PRISON POL'Y INITIATIVE, YOUTH CONFINEMENT: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/youth2019.html>. Actual results vary from approximately 48K-70K depending on the study cited. In addition, certain states report higher arrests than others. *See America's Addiction to Juvenile Incarceration: State by State*, ACLU, <https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state#:~:text=On%20any%20given%20day%2C%20nearly,prisons%20in%20the%20United%20States> (last visited Apr. 15, 2022),; *see also* Lindsay McAleer, *Litigation Strategies for Demanding High Quality Education for Incarcerated Youth: Lessons from State School Finance Litigation*, 22 GEO. J. ON POVERTY L. & POL'Y, 545, 547 (2015). The author states that as of publication “approximately 70,000 children nationwide are confined in juvenile detention centers in the United States.” *Id.* The author also notes that children of color are disproportionately represented in this group, specifically Black and Latinx. *Id.* Children of color are also disproportionately transferred to the adult criminal justice system, where they are tried and prosecuted as adults. *See also* THE STATE OF AMERICA'S CHILDREN 2020, CHILD.'S DEF. FUND 28 (2020), <https://www.childrensdefense.org/wp-content/uploads/2020/02/The-State-Of-Americas-Children-2020.pdf>.

²² Lisa M. Geis, *Courtroom, Classroom, Commitment: Using Special Education and Disability Rights to Keep Youth Out of Secure Facilities*, 8 J. MARSHALL L.J. 521, 523-24 (2015).

²³ SUE BURRELL & LOREN WARBOYS, U.S. DEP'T OF JUST., NCJ 179359, OJJDP JUVENILE JUSTICE BULLETIN: SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM I (2000), <https://www.ojp.gov/pdffiles1/ojdp/179359.pdf>.

²⁴ Geis, *supra* note 22, at 523.

²⁵ BURRELL & WARBOYS, *supra* note 23.

²⁶ Of note, this is a violation of the child find mandate as required by IDEA of all public agencies involved in education, including correctional facilities. 34 C.F.R. § 300.111. There is also an equally harmful phenomenon in which children, particularly children of color, are over identified for special education

Data shows that some disability classifications are more prevalent among incarcerated children. Emotional disturbance, specific learning disability, intellectual disability, other health impairment, and speech or language impairment are all IDEA disability classifications that are overrepresented in the juvenile system.²⁷ The two most common disabilities of youths in the juvenile justice system are emotional disturbance and specific learning disability.²⁸ Many studies have found a disproportionately high rate of emotional or behavioral disorders and learning disabilities among incarcerated youth.²⁹ A startling case study report from a licensed therapist in Denver revealed that out of the 250 incarcerated youth that the therapist was working with, she reported 97% were diagnosed with a mental health disorder.³⁰ Up to 50% of incarcerated youth are estimated to have attention-deficit/hyperactivity disorder and one in eight are labeled as having an intellectual disability.³¹ While the actual percentages may vary collectively there appears to be an overrepresentation of children with disabilities in the system.

The reason why children with these particular types of disabilities are so overly represented in the juvenile justice system is complex. However, one of the rationales proposed is that disabilities, like emotional disturbance, may cause children to exhibit behavior that appears disruptive or confrontational to those that are unaware of the child's disability.³² This can result in confrontational interactions with authority figures, including police officers or probation officers.³³ Officers may interpret behavior as hostile, impulsive, unconcerned, or otherwise inappropriate – unaware that this behavior is may be reflection of the youth's disability.³⁴

Despite attempts to reframe them as something different, juvenile detention facilities operate as jails for children.³⁵ Any time a child spends incarcerated or detained

services. See Claire Raj, *The Misidentification of Children with Disabilities: A Harm With No Foul*, 48 ARIZ. L.J. 373, 402-03 (2016).

²⁷ BURRELL & WARBOYS, *supra* note 23, at 2.

²⁸ *Id.* Of note, both emotional disturbance and specific learning disability may manifest behaviors that routinely subject a child to disciplinary procedures. See U.S. DEP'T OF EDUC., STATE PERFORMANCE PLANS (SPP) LETTERS AND ANNUAL PERFORMANCE REPORT (APR) LETTERS, <https://sites.ed.gov/idea/spp-apr-letters> (last visited Apr. 15, 2022).

²⁹ McAleer, *supra* note 21, at 548.

³⁰ See Lindsey Nichols et al., *Nearly Three-Quarters of Youth Behind Bars Suffer From Mental Health Issues*, CRONKITE NEWS (Sept. 4, 2020), <https://cronkitenews.azpbs.org/2020/09/04/mental-health-kids-incarcerated/>; See also OFF. OF JUV. JUST. & DELINQ. PREVENTION, INTERSECTION BETWEEN MENTAL HEALTH AND THE JUVENILE JUSTICE SYSTEM, <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/intsection-between-mental-health-and-the-juvenile-justice-system.pdf> (last updated July 2017) (providing research from the OJJDP showing that a meta-analysis from 2017 suggests that as many as 70% of youths have a diagnosable mental health problem).

³¹ Howard N. Snyder, *An Empirical Portrait of the Youth Reentry Population*, 2 YOUTH VIOLENCE & JUV. JUST. 39, 50 (2004).

³² BURRELL & WARBOYS, *supra* note 23, at 8.

³³ *Id.*

³⁴ *Id.*

³⁵ Pam Clark, NAT'L INST. OF CORR., *Types of Facilities*, in PRINCIPLES AND CONCEPTS, <https://info.nicic.gov/dtg/node/4> (last visited Mar. 10, 2022).

will likely result in poorer mental health outcomes.³⁶ For children with disabilities who enter a correctional facility due to their behavior, the chance for that behavior to grow more disruptive and problematic over time, as their disability symptoms are exacerbated, also increases.³⁷ This results in situations where a juvenile may enter the juvenile justice system for a relatively minimal offense but their stay then compounds into long term incarceration due to their inability to follow programmatic rules around behavior and demands.³⁸ Sadly, this is often because the incarcerated youth's behavior is misinterpreted as "showing a poor attitude, lack of remorse or disrespect for authority,"³⁹ rather than a manifestation of behavior surrounding their disability.

B. Disciplinary Procedures in juvenile facilities focus on exclusion and solitude.

Punishment for children in the juvenile justice setting often mirrors what is traditionally referred to as "solitary confinement",⁴⁰ even if the terminology used bears a different moniker.⁴¹ Solitary confinement for juveniles is considered taboo in many jurisdictions and is even banned at the federal level.⁴² More than half of states still use solitary confinement as a disciplinary procedure, while 23 states and the District of

³⁶ See generally Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS 1, 2 (2017).

³⁷ See *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, ACLU, <https://www.aclu.org/report/growing-locked-down-youth-solitary-confinement-jails-and-prisons-across-united-states> (last visited Apr. 15, 2022). (Asserting that while solitary confinement as a form of discipline is damaging to all children, it is especially problematic for those with disabilities. "Solitary confinement can cause extreme psychological, physical and developmental harm. For children, who are still developing and more vulnerable to irreparable harm, the risks are magnified- particularly for kids with disabilities or histories of trauma and abuse.")

³⁸ BURRELL & WARBOYS, *supra* note 23, at 7.

³⁹ *Id.*

⁴⁰ Layne Dowdall, Jos Fox & Chloe Johnson, *Use of solitary confinement often arbitrary and 'all too common'*, KIDS IMPRISONED (Aug. 21, 2020), <https://kidsimprisoned.news21.com/solitary-confinement-kids/> (quoting Karen Lindell, senior attorney at the Juvenile Law Center "Solitary confinement and other forms of isolation remain all too common in juvenile facilities... As described in our 2017 report on the use of solitary confinement, almost half of juvenile facilities report using isolation to control behavior, and more than two-thirds of juvenile defenders we polled say they have clients who spent time in solitary."). The usage of solitary as a disciplinary tool is especially problematic for children with disabilities. Discipline does not necessarily have to take the version of solitary isolation of exclusion. However, this specific disciplinary practice and how it impedes a child's ability to access educational services, is the highlight of this article.

⁴¹ SHAMES ET AL., *supra* note 15 (stating that the practice of solitary confinement goes by many names, including isolation, restricted housing, administrative segregation, protective custody, special housing, disciplinary segregation, etc.).

⁴² Layne Dowdall et al., *Feds Ban Solitary Confinement for Kids in Prison, but State Juvenile Facilities Still Use Isolation*, OREGONIAN (Sept. 8, 2020), <https://www.oregonlive.com/crime/2020/09/feds-ban-solitary-confinement-for-kids-in-prison-but-state-juvenile-facilities-still-use-isolation.html> (stating that while solitary confinement has been banned federally, states still have discretion on whether or not to use it for punitive purposes).

Columbia have enacted statutes which limit or prohibit the use of solitary confinement.⁴³ The use of solitary confinement, by any nomenclature, is harmful to youth as it results in an array of harmful consequences, including an increased risk of suicide, depression, agitation, and an exacerbation of pre-existing mental health conditions.⁴⁴ Depression, agitation, and potential mental health conditions can also be viewed as disruptive behavior used to justify the practice of isolation discipline.

Children accused of disciplinary infractions are sent to isolation where they are confined and separated from their peers. Punishable infractions are often vaguely defined, such as causing a “disruption.”⁴⁵ While isolation is commonly used following a physical altercation through a practice called “administrative segregation,” it can also be used for more ephemeral behavioral or rule-breaking incidents.⁴⁶ In particular, when it pertains to behavioral infractions, the usage of solitary confinement is extremely problematic as solitary confinement continues to aggravate potential behavioral stressors that likely caused the confinement in the first place.

Solitary confinement is the most extreme form of isolation in detention where a student can spend 22 to 24 hours of the day alone in their cell.⁴⁷ Some states have recognized the immense harm that solitary confinement causes children and have recently passed limits and/or prohibitions on the usage of solitary, including Alaska, Connecticut, Maine, Nevada, New Jersey, Oklahoma, West Virginia and Texas.⁴⁸

⁴³ Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 30, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx>. (Providing a map that shows what states currently limit or prohibit either solitary confinement or the use of shackles on juveniles.)

⁴⁴ See Deborah Paruch, *The Solitary Confinement of Juveniles: It is Cruel and Unusual Punishment*, 57 IDAHO L. REV. 689, 694-696 (2022) (discussing the outward manifestations and neurobiological effects of isolation, and detailing the tragic death of Kalief Browder after years spent in juvenile solitary confinement), See Statement of Interest of the United States of America at 2, *G.F. v. Contra Costa County*, No. 3:13-cv-03667-MEJ (N.D. Cal. 2014 filed Feb. 13, 2014). “A 2002 investigation by the U.S. Department of Justice showed that juveniles experience symptoms of paranoia, anxiety and depression even after very short periods of isolation. Confined youth who spend extended periods of time isolated are more likely to actually commit suicide.”

⁴⁵ See LA. OFF. OF JUV. JUST., YOUTH CODE OF CONDUCT - SECURE CARE B.5.1, ch. IX, §§ B(1), (4), (7) (2019), <https://ojj.la.gov/wp-content/uploads/2019/03/B.5.1.pdf>. (For example, in Louisiana, punishable infractions include causing a disruption, unauthorized area access, possession of any type of contraband, assault, and destruction of property).

⁴⁶ *Why are People Sent to Solitary Confinement? The Reasons Might Surprise You*, VERA INST. OF JUST. (Mar. 2021), <https://www.vera.org/publications/why-are-people-sent-to-solitary-confinement> (highlighting that many people with mental illnesses are placed in restrictive housing, often from behaviors relating to mental illness, and that the majority of individuals placed there are sent for nonviolent infractions).

⁴⁷ Teigen, *supra* note 43. However, the definition of solitary including time spent isolated, bed checks, and length of use does vary from state to state. For example, Louisiana defines administrative segregation as the “restriction of a youth to a designated sleeping room or dorm for reasons other than current acting-out behavior, discipline, medical reasons, or threats to the youth.” LA. ADMIN. CODE tit. 67, § 7505 (2019).

⁴⁸ Teigen, *supra* note 43.

Other states still allow solitary confinement, with or without limitations.⁴⁹ In Alabama, for example, solitary confinement for punitive purposes is allowed with the only restriction being that administrative authorization is required for confinements that exceed 8 hours.⁵⁰ Yet, in 2020, at the height of the first wave of the COVID pandemic, Alabama was putting children into solitary confinement as an answer to “social distancing.”⁵¹ In 2017, a federal judge in Wisconsin issued a broad injunction calling for the “drastic reduction of solitary confinement... at Wisconsin’s juvenile prison complex.”⁵² Prior to the injunction in 2017, incarcerated minors could be sentenced to up to 60 days in solitary confinement.⁵³ Currently, incarcerated children can only receive a maximum of 7 days in solitary confinement,⁵⁴ but even a “mere” 7 days of solitary confinement can still cause irreparable harm to children.

Further, even limitations or protections that exist on paper can mean little to nothing when it pertains to actual practice around juvenile isolation. Until recently, on paper, Louisiana only permitted the practice of solitary isolation when it pertained to room confinement for disciplinary infractions for up to 72 hours.⁵⁵ Yet, last year, Louisiana opened the Acadiana Center for Youth at St. Martinville where children were held in solitary confinement around the clock in violation of the existing law in the Louisiana Children’s Code.⁵⁶ During a hearing appearance in October 2021, the social worker for a 15 year old detained at the Acadiana Center testified that the child in question was being kept in continuous solitary confinement and receiving no educational services whatsoever.⁵⁷ Despite Louisiana statutory law to the contrary, teens in this facility were locked up and left alone in their cells for 23 hours a day, for weeks at a time.⁵⁸ Even more horrific, some of these teens already suffered from severe mental illness before their experiences in extended solitary.⁵⁹ All while, on paper, this practice should have been illegal. Recognizing how reprehensible this practice is Louisiana has

⁴⁹ *Id.*

⁵⁰ *Alabama: Juvenile Justice Services*, JUV. JUST., GEOGRAPHY, POL’Y, PRAC. & STAT., <http://www.jjgps.org/juvenile-justice-services/alabama> (last visited Apr. 15, 2022).

⁵¹ Melissa Brown, *Coalition Petitions Alabama Supreme Court to Release Detained Youths Amid Coronavirus*, MONTGOMERY ADVERTISER (May 4, 2020), <https://www.montgomeryadvertiser.com/story/news/2020/05/04/cyan-coalition-alabama-supreme-court-should-release-detained-kids/3064260001/>.

⁵² Patrick Marley, *Judge Orders Reduction in use of Solitary Confinement at Wisconsin’s Teen Prison*, MILWAUKEE J. SENTINEL (July 10, 2017), <https://www.jsonline.com/story/news/2017/07/10/judge-orders-reduction-use-solitary-confinement-wisconsins-teen-prison/465938001/>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ LA. ADMIN. CODE tit. 67, § 751(E) (4) (2022).

⁵⁶ Annie Waldman et al., *Shackles and Solitary: Inside Louisiana’s Harshest Juvenile Lockup*, PROPUBLICA (Mar. 10, 2022), <https://www.propublica.org/article/shackles-and-solitary-inside-louisianas-harshest-juvenile-lockup>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

recently proposed HB 746 in the 2022 Regular Session that states “under no circumstances shall any period of solitary confinement last longer than eight hours.”⁶⁰

Isolation practices frequently intensifies emotional disturbances in youth.⁶¹ Given the high number of youths with instances of emotional disturbance in juvenile facilities, it is exceedingly questionable how effective isolation is as a punishment.⁶² Isolation may aggravate, rather than alleviate, behavioral outbursts.⁶³ The findings at the Acadiana Center for Youth reinforce this claim,⁶⁴ with documentation showing that multiple teens in facility engaged in self-harm so severe that it required medical intervention.⁶⁵ Disciplinary practices that rely on solitary confinement and exclusion as a remedy to problematic behavior only serve to reinforce negative behaviors, creating a dangerous cycle, with long lasting effects for children that are penalized.

C. The Individuals with Disabilities in Education Act ensures educational access for children with disabilities.

On November 29, 1975, President Ford signed into law the Education for All Handicapped Children Act, now known as the Individuals with Disabilities in Education Act (IDEA).⁶⁶ By adopting this landmark civil rights measure, Congress opened public school doors for millions of children with disabilities and laid the foundation of the country's commitment to ensuring that *all* children with disabilities have the opportunity to develop their talents, share their gifts, and contribute to their communities by receiving an education.⁶⁷

⁶⁰ LA. Legis. Assemb. HB-786. Reg. Sess. 2022 (2022). <https://trackbill.com/bill/louisiana-house-bill-746-juveniles-detention-fac-provides-relative-to-solitary-confinement-in-juvenile-facilities/2242942/>. (As of publication this bill has passed the House and been received in the Senate where it was referred to the Committee on Judiciary B).

⁶¹ Waldman *supra* note 56 (stating that the use of isolation and “treating kids like hardened criminals is ... counterproductive, often leading to more bad behavior.”)

⁶² *Id.*

⁶³ Tamar R. Birkhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 13 (2015) (stating that common reactions to isolation include emotional breakdowns, suicidal ideation, hypersensitivity to stimuli, psychosis, hallucinations, and paranoia. “In addition, rather than engendering an atmosphere of calm and passivity within a facility, the solitary confinement of prisoners has instead exacerbated displays of aggression and rage.”).

⁶⁴ Waldman *supra* note 56 (Per a former staffer speaking on the conditions juveniles in isolation were kept in, “These kids were in their cells with no bed on a concrete floor with a state-issued green mattress-flame retardant- a blanket and a sheet and nothing else. No light. No nothing... Feces were being thrown every single day, multiple times a day. Not a surface in those pods has not had feces on it.”).

⁶⁵ *Id.*

⁶⁶ *About IDEA*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/idea/about-idea/#IDEA-History> (last visited Apr. 15, 2022). Of course, there are other protections for minors with disabilities that would also apply to those children who are incarcerated, including Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. *Id.*

⁶⁷ *Id.*

IDEA is a funding statute that requires all states to comply with its conditions in exchange for receiving federal funding support for education.⁶⁸ IDEA contains not only procedural requirements for agencies but also rights and procedural protections for students and parents. IDEA applies to both public schools and state-operated programs, ensuring that each provides eligible children with adequate special education and related services.⁶⁹

Both schools and any agencies involved in the delivery of education have an affirmative duty to locate all children with disabilities who may be eligible to receive special education services.⁷⁰ Colloquially, this is referred to as “child find.”⁷¹ A child can be identified either at the referral or request of the school, or parents may affirmatively request to have their child evaluated.⁷² This “child find” requirement applies both when the school or agency knows that a child may have a disability, or suspects that a child may have a disability.⁷³

In order to qualify for special education services under IDEA, children must meet the statutory definition for “disability.”⁷⁴ A qualifying disability under IDEA is one that adversely affects the child’s educational performance or ability to learn, and requires special education.⁷⁵ IDEA mandates that all covered students with disabilities receive a “free and appropriate public education” (FAPE) in the form of special education and related services in the least restrictive environment (LRE).⁷⁶ The least restrictive environment requires both that “students with disabilities receive their education with peers without disabilities to the maximum extent [possible], [and that students with disabilities] should not be removed from the general education setting unless learning cannot be [provided], even with the use of supplementary aids or services.”⁷⁷ The LRE is

⁶⁸ See generally 20 U.S.C. § 1400.

⁶⁹ 34 C.F.R. § 300.149 (2021).

⁷⁰ *Id.* at § 300.111.

⁷¹ *Id.*

⁷² *A Guide to the Individualized Education Program*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/parents/needs/spced/icpguide/index.html#process> (last visited May 18, 2022).

⁷³ 34 C.F.R. § 300.111. (2021)

⁷⁴ 34 C.F.R. §300.306 (a) (1) (2021) (Determination of eligibility occurs “upon completion of the administration of assessment and other evaluation measures when a group of qualified professionals and the parent of the child determines whether the child is a child with a disability, as defined in §300.8, in accordance with paragraph (c) of this section and the educational needs of the child...”). 34 C.F.R. §300.8 (a)(1)(2021) (“Child with disability means a child evaluated in accordance with §§300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as ‘emotional disturbance’, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.”).

⁷⁵ 34 C.F.R. § 300.8 (2021). The qualifying disability must fall into one of thirteen specific categories to be eligible, as listed *supra* in note 75. The disability also must adversely affect educational performance; however, this can include both behavior and academics. *Id.*

⁷⁶ 20 U.S.C. § 1401.

⁷⁷ IRIS CENTER, INFORMATION BRIEF: LEAST RESTRICTIVE ENVIRONMENT (LRE) 1, <https://iris.peabody.vanderbilt.edu/wp->

more than simply a place based requirement⁷⁸ – it is meant to ensure that a student with disabilities has the necessary services and support⁷⁹ to ensure their success.⁸⁰

The necessary services and support a child needs will vary depending on that specific child's needs and strengths. Together this package is delivered through an individualized education program (IEP) that includes educational goals, accommodations, services, and supports.⁸¹ Each IEP should be developed based on collaboration between both the student's teachers, school administrators and parents, and it may also include the child's collaboration depending on age and developmental needs.⁸²

One of the catalysts behind the passage of IDEA was the knowledge that children with disabilities are especially vulnerable to discipline and subsequent exclusion from the classroom. In an effort to protect children with disabilities from discriminatory disciplinary exclusion policies, IDEA includes extensive disciplinary protections.⁸³ These disciplinary protections that pertain to exclusion are referred to as “change of placement.”⁸⁴ A change of placement occurs when there is an exclusion, or disciplinary removal for more than ten consecutive school days, or a series of shorter removals constituting a pattern and totaling more than ten cumulative days.⁸⁵ Short-term disciplinary measures, such as partial day removals and undocumented suspensions can constitute disciplinary removals if implemented repeatedly.⁸⁶ Importantly, these protections apply both to students who have already been identified for special education

content/uploads/pdf_info_briefs/IRIS_Least_Restrictive_Environment_InfoBrief_092519.pdf (last visited Apr. 15, 2022).

⁷⁸ 34 C.F.R. § 300.114 (2021) “Each public agency must ensure that (i) to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

⁷⁹ 34 C.F.R. § 300.42 (2021). “Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent possible.”

⁸⁰ IRIS CENTER, *supra* note 77. For references, on a continuum of LRE, the general education classroom would be the least restrictive setting. *Id.* at 2. By contrast, a hospital or residential facility would be considered one of the most restrictive environments. *Id.*

⁸¹ 34 C.F.R. § 300.320 (2021).

⁸² US Dep't of Education, *Guide to IEP* *Supra* note 72.

⁸³ *See generally* 34 C.F.R. §§ 300.530-37 (2021).

⁸⁴ *Id.* at § 300.530.

⁸⁵ *Id.* at § 300.530(a).

⁸⁶ U.S. Dep't of Education, OSP Letter to Carrie Mason on Partial Day Exclusions, (July 27, 2018) (speaking directly to partial day removals in the form of a shortened school days as forced removal from the classroom “The use of short-term disciplinary measures under the circumstances you described, if implemented repeatedly (emphasis added), could constitute a disciplinary removal from the current placement and thus the discipline procedures set out in 34 CFR §§300.530-300.536 would apply.”).

services and have current IEPs in place, and students suspected of having a disability requiring special education services.⁸⁷

Whenever a removal that constitutes a change of placement is enacted or proposed, a “manifestation determination review” (MDR) must take place.⁸⁸ The purpose of this review is to determine whether the behavior that led to the child’s disciplinary infraction was a result of their disability.⁸⁹ The IEP team must determine whether the behavior was a manifestation by determining if the behavior was caused by, or had a direct and substantial relationship to, the student’s disability, or if the conduct happened because the school failed to implement the IEP.⁹⁰ Examples of disabilities that can manifest what may be perceived as potentially negative behaviors include autism, ADHD, and emotional disturbances.⁹¹ In the event the behavior is found to be a manifestation of the child’s disability, then the child must be returned to their original educational placement and a functional behavioral assessment (FBA), and a subsequent behavior intervention plan (BIP) must be created and/or modified.⁹²

Functional behavioral assessments (FBAs) are meant to address disruptive student behavior that may result in disciplinary reprimand.⁹³ The purpose of the FBA is to address “why” certain disruptive behaviors occur.⁹⁴ The FBA looks “beyond the demonstrated behavior and focuses instead upon identifying biological, social, affective and environmental factors that initiate, sustain, or end the target behavior.”⁹⁵ Following the completion of the FBA, a behavior intervention plan (BIP) is created. The BIP is a

⁸⁷ 34 C.F.R. § 300.534(a) (2021). “A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provide for in this part if the public agency had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.” *Id.* at §300.534(b), “A public agency [is deemed to have knowledge] if before the behavior that precipitated the disciplinary action occurred (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services; (2) The parent of the child requested an evaluation of the child pursuant to §300.311, or (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.”

⁸⁸ *Id.* at § 300.530(e).

⁸⁹ *Id.* at § 300.530(f).

⁹⁰ *Id.*

⁹¹ See Michael O. Ogundele, *Behavioral and Emotional Disorders in Childhood: A Brief Overview for Paediatricians*, 7 *WORLD J. CLINICAL PEDIATRICS* 9, 10 (2018).

⁹² 34 C.F.R. § 300.530(f).

⁹³ N.M. PUB. EDUC. DEP’T, CONDUCTING A FUNCTIONAL BEHAVIORAL ASSESSMENT (FBA), https://webnew.ped.state.nm.us/wp-content/uploads/2018/01/SHSB_4.fba_11.28.pdf (last visited Apr. 15, 2022).

⁹⁴ *Id.* (“The logic behind an FBA is that practically all behavior occurs within a particular context and serves a specific purpose... Identifying the purpose of the problem behaviors or more specifically- what the student ‘gains’, ‘controls’, or ‘avoids’ through those behaviors- can provide information that is essential to developing instructional strategies and supports to reduce or eliminate behaviors that interfere with successful classroom performance or participation.”)

⁹⁵ *Id.*

written improvement plan created for the student based on the outcomes of the FBA.⁹⁶ The plan must identify (1) baseline measures for problematic behavior, including frequency, duration, and intensity of the behavior; (2) intervention strategies to be used to alter antecedent events to help prevent the behavior's occurrence, including alternative and adaptive behaviors and consequences for the inappropriate behaviors; and (3) a schedule to measure the effectiveness of the interventions.⁹⁷ Taken together, both the BIP and FBA recognize that "problematic behavior" that is the result of a child's disability is not something the child should be disciplined for, and that discipline would be ineffective.⁹⁸ Instead, the school and parents should work together to find meaningful solutions toward avoiding or mitigating that behavior moving forward.

II. IDEA PROTECTIONS APPLY TO INCARCERATED YOUTHS.

For nearly forty years, courts have ruled on the provision of appropriate services and disability rights as they pertain to youth in correctional facilities.⁹⁹ In each case, courts have held that disability and special education rights, as afforded by IDEA, are available to incarcerated youth. However, juvenile correctional facilities continue to fail to meet their obligation to students with disabilities under IDEA. This article will next examine the complicated existing relationship between IDEA and juvenile correctional facilities by examining (1) IDEA's protections regarding a student's ability to access their free appropriate public education (FAPE); (2) the involvement of multiple agencies towards FAPE; and (3) protections for disciplinary change of placement.

A. *IDEA protections apply to incarcerated children with disabilities access to free appropriate public education.*

While it is evident that Congress's intent when crafting IDEA was to protect the rights of children with disabilities' access to education, there are some questions as to whether those protections were intended to be extended to *all* children. Following its passage, debates existed as to whether IDEA protections extended to incarcerated youth with disabilities. However, following subsequent jurisprudence, it is commonly

⁹⁶ *Behavioral Intervention Plans*, N.Y. STATE DEP'T OF EDUC., <https://www.p12.nysed.gov/specialed/publications/topicalbriefs/BIP.htm> (last updated May 23, 2011).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See, e.g.*, *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 213 (1998) (holding that an inmate denied LRE because of his disability is a violation of the ADA); *Morgan v. Sproat*, 432 F. Supp. 1130, 1151 (S.D. Miss. 1977) (holding that youth with specific learning disabilities needed programs tailored to fit those needs); *Alexander S. v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995) (holding that as a recipient of federal funding, the Department of Juvenile Justice was legally bound to adhere to the requirements of IDEA, including providing special education and related services).

understood that the principles of IDEA should apply equally to all minor students, regardless of whether they are incarcerated.¹⁰⁰

The entitlement to FAPE exists for all eligible children, including those in the juvenile justice system.¹⁰¹ This includes both IDEA, as well as Americans with Disabilities Act¹⁰² and Section 504 protections.¹⁰³ Being in detention does not cause a child to forfeit their right to special education services.¹⁰⁴ With specific limited exceptions for those incarcerated in adult prisons, all age-eligible students with disabilities in detention are entitled to FAPE under IDEA.¹⁰⁵

Despite what appears to be clear language asserting the requirement that incarcerated minors have a legal entitlement to receive special education services and protections, access to both continues to remain limited.¹⁰⁶ For example, a study of juvenile correctional centers in Southern states found that while 70% of children in correctional facilities qualified for special education services under IDEA, only 30% received the required services.¹⁰⁷ Recently, a Washington D.C. judge held the District in contempt for failing to provide special education services to students with disabilities who were incarcerated in the D.C. jail.¹⁰⁸ A New Jersey court ruled that formerly

¹⁰⁰ David B. Leitch, *A Legal Primer for Special Educators in Juvenile Corrections: From IDEA to Current Class Action Lawsuits*, 64 J. CORR. EDUC. 63, 65 (2013).

¹⁰¹ Geis, *supra* note 22, at 527-28.

¹⁰² Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-213.

¹⁰³ FREE APPROPRIATE PUBLIC EDUCATION FOR STUDENTS WITH DISABILITIES: REQUIREMENTS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC. (2010), <https://www2.ed.gov/about/offices/list/oer/docs/edlite-FAPE504.html>.

¹⁰⁴ See Statement of Interest of the United States of America, *G.F. v. Contra Costa County* *supra* note 44, at 12 ("The fact that youth have been charged with or convicted of a crime does not diminish their substantive rights, procedural safeguards, and remedies provided under IDEA to youth with disabilities and their parents."); see also Dear Colleague Letter from Melody Musgrove & Michael K. Yudin, U.S. DEP'T OF EDUC., 1, 6 (Dec. 5, 2014) [hereinafter Dear Colleague Letter], <https://sites.ed.gov/idea/files/idea-letter.pdf>.
¹⁰⁵ 34 C.F.R. §§ 300.101-02 (2021); *Id.* at §300.324(d) (1) (i). Of note, there is growing support that those specific exceptions within IDEA for 18-21-year olds should be removed. See, e.g., Blakely Evanthia Simoneau, *Special Education in American Prisons: Risks, Recidivism, and the Revolving Door*, 15 STAN. J. CIV. RTS. & CIV. LIBERTIES 87, 111-13 (2019).

¹⁰⁶ Waldman *supra* note 56 (detailing the abuses at the Acadiana Center for Youth in Louisiana).

¹⁰⁷ Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218, 224 (2002). Of note, this piece doesn't speak to the actual quality of those services being offered, only whether they were being offered at all. *Id.* A study examining the quality of what services were offered would likely result in even more abysmal figures.

¹⁰⁸ Press Release, Wash. Laws. Comm. for Civ. Rts. & Urb. Affs., Federal Court Judge Finds DC in Contempt for Failing to Comply with Court Order to Provide Special Education to Students at the DC Jail (Feb. 16, 2022), <https://www.washlaw.org/federal-court-judge-finds-dc-in-contempt-for-failing-to-comply-with-court-order-to-provide-special-education-to-students-at-the-dc-jail/>. The preliminary injunction in this case ordered the District of Columbia to provide students "with the full hours of special education and related services mandated by their [Individualized Education Program (IEP)] through direct, teacher-or-counselor-led group classes and/or one-on-one session, delivered via live videoconference calls and/or in-person interactions by July 1, 2021. Yet, as the District's own reports have shown, they have never met this benchmark. In his Contempt Order, Judge Nichols noted that 'every student currently enrolled in the Program remains at an inexcusable educational deficit for this school year- a failure all the more baffling

incarcerated individuals can receive up to \$8,000 for each year between 2015 and 2020 that they failed to receive special education services they were entitled to receive under law but did not receive while incarcerated.¹⁰⁹

Much of the existing litigation surrounding FAPE access thus far has arisen under failure to implement IEPs and failure to provide adequately trained teachers.¹¹⁰ However, these are not the only impediments to accessing FAPE. When students are denied access to their education, whether it is through failure to provide proper educational services or physical removal from an educational setting, both can constitute a denial of FAPE, and both of these are barriers to a student's ability to access their education.¹¹¹

While incarceration presents particular challenges pertaining to educational services for students, it does not limit, alter, or change the protections of IDEA for all students with disabilities.¹¹² Cognizant of potential issues, the U.S. Department of Education has issued guidance around education for students who are incarcerated.¹¹³ This guidance affirmatively states, "The fact that a student has been charged or convicted with a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the Individuals with Disabilities Education Act (IDEA) to students with disabilities and their parents."¹¹⁴ Unless a specific exception applies, all IDEA protections apply to students with disabilities in correctional facilities.¹¹⁵

B. The involvement of multiple agencies does not negate the requirement to provide FAPE.

IDEA explicitly applies to juvenile correctional facilities that "are involved in the education of children with disabilities."¹¹⁶ To that end, "every agency of government

given that the Court entered its Preliminary Injunction months before the school year began... it is beyond doubt (indeed it is essentially conceded) that Defendants have failed, and are continuing to fail, to comply with the Preliminary Injunction. They have had ample time to do so, yet remain out of compliance."

¹⁰⁹ Kelly Heyboer, *Ex-Inmates Can Get Up to \$8K For Each Year They Didn't Get Special Ed Classes in N.J. Prisons, Court Says*, NJ ADVANCE MEDIA (Mar. 10, 2022), <https://www.nj.com/education/2022/03/ex-inmates-can-get-up-to-8k-for-each-year-they-didnt-get-special-ed-classes-in-nj-prisons-court-says.html>.

¹¹⁰ See NAT'L CTR. ON EDUC., DISABILITY, & JUV. JUST., SUMMARY OF CLASS ACTION LITIGATION INVOLVING SPECIAL EDUCATION CLAIMS FOR YOUTH IN JUVENILE AND ADULT CORRECTIONAL FACILITIES, <http://www.edjj.org/Litigation/> (last visited Apr. 15, 2022).

¹¹¹ See *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 143 (W.D.N.Y. 1999) ("The denial of FAPE over an extended period does constitute harm, and the longer that denial continues, the more irreparable it comes.")

¹¹² Dear Colleague Letter, *supra* note 104, at 8.

¹¹³ *Id.* at 1.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 34 C.F.R. § 300.2(b)(1)(iv) (2021); *see also*, *Handberry v. Thompson*, 219 F. Supp. 2d 525, 528 (S.D.N.Y. 2002) (requiring that a correctional facility provide children with IDEA-compliant educational services), *aff'd in relevant part*, 446 F.3d 335 (2d Cir. 2006); *Alexander S. v. Boyd*, 876 F. Supp. 773, 788 (D.S.C. 1995) (finding IDEA applicable to school-aged detainees in juvenile detention facilities); *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993) (holding that IDEA applies to children held in pretrial detention).

[including correctional facilities] that are involved in the provision of special education and related services to students in correctional facilities must ensure the provision of [a free appropriate public education.]”¹¹⁷ In the correctional context, this exact language is particularly important. It is not uncommon for multiple agencies to share responsibility for the operation of distinct functions within the same agency, including functions such as education.¹¹⁸ However, even if obligations are shared with another agency, public entities cannot avoid their respective IDEA obligations.¹¹⁹ It is important to avoid bureaucratic confusion about who is responsible for IDEA implementation. To remedy this confusion, “[s]tates must have interagency agreements or other methods for ensuring interagency coordination in place so that it is clear which agency or agencies are responsible for providing or paying for services necessary to ensure FAPE for students with disabilities in correctional facilities.”¹²⁰

In their July 2000 bulletin, the Office of Juvenile Justice and Delinquency Protection explicitly stated that their bulletin was directed for judges, advocates, probation officers, attorneys, institutions staff, mental health professionals, educators, and service providers.¹²¹ This bulletin did not state that the policies outlined under IDEA applied only to educators providing direct services nor did it limit these policies to explicit application during the period of educational hours only. Despite this seemingly broad guidance on who is responsible for IDEA compliance, failures continue.

¹¹⁷ Dear Colleague Letter, *supra* note 104, at 5.

¹¹⁸ Dear Colleague Letter *supra* note 104 at 6. For example, in New Orleans the Travis Hill School is contracted with the Orleans Parish School Board to provide educational services. However, as the correctional custodial institution the Juvenile Justice Intervention Center still has a responsibility to ensure education access.

¹¹⁹ See Statement of Interest of the United States of America, *supra* note 44, at 9 “Public entities cannot avoid their ADA and IDEA obligations by contracting, transferring them to, or sharing them with, another entity, especially one that is unwilling or unable to meet those obligations.” This statement is referring to the Office of Education alleging that was is not responsible for the denial of special education or related services while youth with disabilities are locked in restrictive security programs because according to the Memorandum of Understanding (MOU) the County is the entity with sole legal authority to discipline youth. The Statement of Interest denied this statement asserting that “a public agency designated as the educational agency under the IDEA remains responsible for ensuring IDEA compliance, even if another non-educational agency shares in that obligation.” *Id.* at 10, quoting 20 U.S.C. §1412(a) (12); 34 C.F.R. §300.154. See generally Statement of Interest of the United States of America, *H.C. v. Bradshaw*, No. 18-Civ-80810 (S.D.Fla) in Florida in October 2018 the United States filed a statement of interest regarding children who were being held in solitary confinement at the Palm Beach County Jail. The lawsuit named as defendants both the Palm Beach County Sheriff’s Office and the Palm Beach County School Board. The complaint alleged that the defendants were depriving students with disabilities in solitary confinement access to special education services in violation of the IDEA. Both agencies denied their responsibility by alleging that the other agency was responsible for ensuring students with disabilities receive special education services. The United States asserted “Both defendants are public agencies with obligations under the IDEA...The IDEA’s statutory scheme accounts for situations where, as here, a non-educational public agency in the State shares responsibility for providing special education and related services to children with disabilities...” *Id.* at 8.

¹²⁰ Dear Colleague Letter, *supra* note 104, at 3.

¹²¹ BURRELL & WARBOYS, *supra* note 23.

Investigations by the Department of Justice's Civil Rights Division have routinely found that youth in need of special education and rehabilitative services in the juvenile justice system are not only entitled to those educational services while in secure care, but are also often denied those services.¹²² In a September 2020 Statement of Interest filed in South Carolina,¹²³ the United States concluded that practices and policies, such as solitary confinement, that place children in "prolonged and excessive isolation"¹²⁴ denied them their due process rights. The complaint filed also alleged that the isolation practices resulted in children's failure to receive educational services, including required special education services.¹²⁵

In December 2021 the DOJ's investigation into the Manson Youth Institution found that Manson failed to provide special education services to children with disabilities, despite being a facility where two-thirds of the children housed were eligible for special education services.¹²⁶ Students were placed in disciplinary isolation for extended periods of time, where they were denied access to special education and related services even if these services were required under that child's IEP.¹²⁷ Manson referred to their isolation practice for disciplinary rule infractions as "confined to quarters" or CTQ.¹²⁸ At its highest level, children are kept in a barren cell at a minimum of 23 hours per day, and only permitted phone calls, recreation or showers during the one hour window, if they are allowed at all. The children are not allowed to attend school or any other programming. The DOJ found that Manson sent children to CTQ "on a routine

¹²² See generally Special Litigation Sections Cases and Matters: Juvenile Justice, U.S. Dep't of Just, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download#juv> (last visited on May 19, 2022).

¹²³ Statement of Interest of the United States of America, Protection & Advocacy for People with Disabilities Inc., v. Cannon et al., No. 2:20-cv-02738-DCN (D.S.C. 2020 filed Sep. 14 2020)

¹²⁴ *Id.* at 10.

¹²⁵ *Id.* at 3, FN 3.

¹²⁶ US Dep't of Just, Civ. Rts. Div., Statement RE: Investigation of Manson Youth Institution (Dec. 21, 2021), <https://www.justice.gov/crt/case-document/file/1458101/download>. The investigation showed the almost all of the children housed at the facility had at least one mental health diagnosis. *Id.* at 2. The Statement provides 15 year old Ryan as example of Manson's failure to provide adequate care. "Throughout his time at Manson, Ryan exhibited numerous concerning behaviors, such as anger, irritability, anxiety, pressured speech, and mania that may be symptoms of serious mental illness. Ryan regularly expressed not knowing how to cope with his feelings of anger. Ryan also reported trauma-related symptoms, for example, recurring nightmares about violence. Meanwhile, Ryan often got into trouble at Manson for infractions such as fighting, assaults, threats and "interfering with safety and security." Sometimes, Ryan got in trouble at school. Other times, he got in trouble on his living unit. Frequently, he was punished with periods of time in disciplinary isolation, where his mental health deteriorated significantly. But there is little evidence in Ryan's record that mental health staff explored whether his misbehaviors were symptoms of serious mental illness and/or trauma that required treatment as opposed to punishment, notwithstanding ample evidence suggesting that he was, indeed, experiencing a serious mental illness and trauma. Likewise, Manson failed to adequately explore whether Ryan's special education services were sufficient to meet his needs and, if not, whether this deficiency was contributing to his classroom behavior." *Id.* at 3.

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 3.

basis and often for relatively minor offenses.”¹²⁹ Critically, most of the children at Manson have mental health and other disabilities, yet no investigation was made into whether or not the behaviors that caused the children to be punished with CTQ had any relation to their underlying mental health or special education needs.¹³⁰

Disciplinary concerns do not negate a correctional facilities obligation to provide special education and related services for eligible students with disabilities. Special education laws and disability rights protect all children in contact with public agencies,¹³¹ including state education providers that work in juvenile correctional facilities.¹³²

C. Disciplinary change of placements are entitled to procedural protection.

Prior to IDEA's passage, children with disabilities were routinely disciplined via removal from the classroom setting.¹³³ By creating procedural protections, the envisioned goal was to no longer subject children with disabilities to discrimination based on behavioral manifestations of their disability.¹³⁴ In *Honig v. Doe*, the Supreme Court examined provisions of the Education of the Handicapped Act (a precursor to the current IDEA) and found that it was proper for a District Court to enjoin a school district “from indefinitely suspending a disabled student or otherwise unilaterally altering his then current placement,” essentially stating that a school could not unilaterally exclude a child for disruptive behavior that was caused by his disability.¹³⁵ However, this usage of isolation as a disciplinary tool still results in the exclusion of the child from her educational setting.

Disciplinary removal is protected under IDEA when it amounts to a change in placement.¹³⁶ Change of placement is defined as disciplinary removal for more than ten consecutive school days, or a series of removals adding up to more than ten days that creates a pattern of removal.¹³⁷ This change of placement triggers several procedural safeguards under IDEA.¹³⁸ As it pertains to behavior and discipline for incarcerated minors, one of the most important safeguards is the manifestation determination review (MDR).¹³⁹ The purpose of the MDR is to determine whether the behavior that caused the

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 6.

¹³¹ 20 U.S.C. § 1412(a)(1)(A).

¹³² 34 C.F.R. § 300.2(b)(1) (2021).

¹³³ See generally U.S. Dep't of Educ., *A History of the Individuals with Disabilities Education Act*, IDEA, <https://sites.ed.gov/idea/IDEA-History#Pre-EHA-IDEA> (last visited Apr. 15, 2022).

¹³⁴ *Id.*

¹³⁵ *Honig v. Doe*, 484 U.S. 305, 328 (1988) (demonstrating the intent of Congress to prohibit the exclusion of disabled children, including emotionally disturbed youth, from school for disruptive or dangerous behavior manifested in their disabilities).

¹³⁶ 34 C.F.R. § 300.530 (2021).

¹³⁷ *Id.*

¹³⁸ *Id.* at § 300.519.

¹³⁹ *Id.* at § 300.530.

disciplinary exclusion was caused by or resulting from the student's disability.¹⁴⁰ In order to make the behavior determination, evaluation and diagnostic tools, such as the behavior intervention plan and functional behavior assessment discussed *supra*, as well as general observations of the youth, are considered.¹⁴¹

If the behavior that caused the removal is deemed a manifestation of the student's disability, or was the direct result of the failure to implement the student's IEP, then the child must be returned to the placement they were in prior to the disciplinary action.¹⁴² However, even if the child's behavior is not determined to be a manifestation of their disability, it does not negate the requirement to provide educational services.¹⁴³

Using solitary confinement to deny students access to their education is not a recent endeavor. On February 13, 2014, the United States Department of Education filed a *Statement of Interest of the United States of America in G.F et al. v. Contra Costa County, et al.*¹⁴⁴ In this case, the plaintiffs, incarcerated youth with disabilities at Contra Cost County Juvenile Hall, were "often subjected to solitary confinement because of their disabilities and denied special education, related services, and rehabilitation services."¹⁴⁵ The minors were allegedly placed into solitary, restrictive environments where they were denied basic educational service under the guise of punishment.¹⁴⁶

The Department of Education's statement asserted that, even under the guise of institutional discipline, "Defendants [Contra Costa County] . . . have a legal obligation to avoid placing students with disabilities in restrictive security programs on the basis of their disabilities."¹⁴⁷ Legal responsibilities to adhere to the requirements of IDEA, including ensuring children's access to free appropriate public education, do not "end" simply because those children are placed in restrictive security programs.¹⁴⁸ Even if a youth with a disability is permissibly placed in solitary confinement or another restrictive security program, he or she must continue to receive education services consistent with his or her rights under FAPE.¹⁴⁹ Solitary isolation cannot be used as an impediment to educational access.

Any exclusion from the classroom, let alone solitary isolation, is particularly harmful for students with disabilities in correctional facilities. Disciplinary exclusion should be limited both in time and scope. Guiding language from the Department of Education states that a student with a disability in a correctional facility who violates a

¹⁴⁰ See generally *Advocs. for Child. of N.Y., AFC's Guide to Manifestation Determination Review (MDR): Protections for Students with Disabilities Who Face Discipline* 3 (2017), https://www.advocatesforchildren.org/sites/default/files/library/mdr_guide.pdf?pt=1.

¹⁴¹ BURRELL & WARBOYS, *supra* note 23, at 6.

¹⁴² 34 C.F.R. § 300.530(f)(2) (2021). There are two exceptions to this, if the behavioral infraction involved special circumstances of weapons, drugs or serious bodily injury or if the parents agree to change the child's placement as part of the modification of the BIP. *Id.* at §300.520(g)(1),(2), (3).

¹⁴³ BURRELL & WARBOYS, *supra* note 23, at 6; Leitch, *supra* note 100, at 67.

¹⁴⁴ See *Statement of Interest of the United States of America, GF v. Contra Costa County*, *supra* note 44.

¹⁴⁵ *Id.* at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 12.

code of student conduct is entitled to the protections that must be afforded to *all* students with disabilities related to discipline procedures, including those related to a change of placement, manifestation determination, and provision of services beginning with the eleventh cumulative day of removal in a school year.¹⁵⁰ Further, these disciplinary protections apply regardless of whether a student is subject to discipline in the facility or removed to restricted settings, such as confinement to the student's cell or living quarters or "lockdown" units.¹⁵¹ Despite these guiding principles, students are still denied access to protections of IDEA while they are incarcerated.

III. IDEA PROTECTIONS SHOULD APPLY ANYTIME A CHILD'S ABILITY TO ACCESS FAPE IS INHIBITED.

As discussed above, case law and statutory language show that IDEA protections extend to all children with disabilities. Yet, routinely, incarcerated children are denied the protections of IDEA and are subjected to exclusionary punishment. Recent Department of Justice investigations,¹⁵² 'Dear Colleague Letters from Departments of Justice and Education,¹⁵³ and consistent shocking news stories¹⁵⁴ from these juvenile facilities make it apparent that these facilities both have failed and continue to fail to provide eligible youth the education, services, and protections they are entitled to. Whether this is because the rules regarding FAPE access and disciplinary procedures are convoluted, or simply because these facilities believe IDEA rules do not apply to them, is unclear.

IDEA does not carve out an exception for youth detained in juvenile facilities.¹⁵⁵ Thus, incarcerated children are allowed all of the same protections under IDEA as their non-incarcerated peers, including educational opportunities in the least restrictive environment and disciplinary protections around behavior manifestation.¹⁵⁶ If the issue of IDEA's application comes not from willful ignorance of the law but rather convolution as to when IDEA's protections apply in a custodial juvenile context, then perhaps more guidance should be provided on how disciplinary protections apply. This includes language that explains that in a correctional setting where juvenile facilities are responsible both for the residential and educational care (in some capacity) of juveniles, any time disciplinary procedures impede a student with disabilities ability to access FAPE, the disciplinary protections of IDEA should apply. This part will argue that interpreting IDEA's disciplinary protections in this manner both (1) conforms with the purpose of the juvenile justice system; and (2) honors Congress's intent in drafting IDEA.

¹⁵⁰ See 34 C.F.R. §§ 300.530-300.536 (2021).

¹⁵¹ *Id.* at § 300.530(e).

¹⁵² See generally, US Dept't of Just, RE: Manson *supra* note 126; Statement of Int. re: Prot & Adv. for People with Disabilities Inc. v. Cannon *supra* note 123.

¹⁵³ Dear Colleague Letter *supra* note 104.

¹⁵⁴ Waldman *supra* note 56.

¹⁵⁵ Geis *supra* note 22 at 549.

¹⁵⁶ *Id.*

However, there are potential counterarguments to this solution which this article will also briefly address.

A. Educational access is a rehabilitative tool in the juvenile justice system.

If the goal of the juvenile justice system is truly rehabilitation, then educational access for all children in its care is a vital step toward realizing that goal. While understanding the reasons as to why children may reoffend (as either juveniles or adults) is incredibly complex, education serves an important role both for initial rehabilitation and to help ensure future success.¹⁵⁷ Educational access and success alone, without any other supportive measures, likely will not stop juvenile delinquency. However, without educational opportunity, children have a much harder time navigating both current delinquency and their chances for avoiding recidivism.

Recent research has shown that students' success in high-quality juvenile justice schools can serve as a turning point for youth and be the impetus needed for them to earn a decent living.¹⁵⁸ Beyond benevolence purposes, supporting education for incarcerated youth can result in cost savings to the federal and state and governments and the public due to the high financial costs of prolonged incarceration.¹⁵⁹

In 2014, the U.S. Department of Education, in conjunction with the Department of Justice, published the Guiding Principles for Providing High Quality Education in Juvenile Justice Secure Care Settings (Guiding Principles).¹⁶⁰ The Departments of Education and Justice posited five principles that federal, state and local educational agencies should focus on, including what they refer to as "a safe healthy facility-wide climate that prioritizes education" while providing appropriate individual needs of youth and funding for all youth in facilities, including children with disabilities.¹⁶¹ The Guiding Principles call on juvenile justice agencies to take direct responsibility in implementing guiding principles and core activities as a means of "improving education outcomes for committed youth."¹⁶² The agencies make clear that *every* facility is responsible for appropriate educational services for youth with special education needs, not just as a matter of best practice, but also as a matter of federal law.¹⁶³

There are concrete societal benefits to providing education in juvenile correctional facilities. Even though educational access is not dispositive to recidivism, it is linked with a reduction in recidivism.¹⁶⁴ Beyond reoffending and returning to the juvenile or adult

¹⁵⁷ BURRELL & WARBOYS, *supra* note 23, at 9.

¹⁵⁸ S. EDUC. FOUND., JUST LEARNING: THE IMPERATIVE TO TRANSFORM JUVENILE JUSTICE SYSTEMS INTO EFFECTIVE EDUCATIONAL SYSTEMS 27 (2014), <https://files.eric.ed.gov/fulltext/ED555854.pdf>.

¹⁵⁹ Dear Colleague Letter, *supra* note 104, at 1.

¹⁶⁰ 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 (2014), <https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf>.

¹⁶¹ *Id.* at iv.

¹⁶² *Id.* at 2.

¹⁶³ *Id.* at 10-12, 22.

¹⁶⁴ Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 773 (2008).

justice systems, those children who receive educational access while detained are more likely to return to school following their release than those who do not.¹⁶⁵ The Coalition of Juvenile Justice estimates that due to the high cost of incarceration, society saves around two million dollars per individual who does not end up leading a life of crime.¹⁶⁶ Educational access success reverberates beyond the individual student it serves. However, for the individual child, the education they receive while incarcerated has a profound impact on their ability to succeed following their release.

B. The purpose of IDEA is educational accessibility for all children with disabilities.

The drafters of IDEA recognized that society is best served when it does not exclude individuals with disabilities from educational access.¹⁶⁷ To prevent incarcerated children with disabilities from accessing that same education seems similarly ill-advised. The gaps in IDEA protection, as implemented, have created a system that traps incarcerated children with disabilities in behavior-discipline cycles without recourse. This system severely limits their opportunity for success, creating a circular system for them to return to the justice system following their release.¹⁶⁸ When IDEA was enacted in 1975, it was enacted “in response to a recurring problem within public education—the systematic exclusion of children with disabilities from public schools.”¹⁶⁹ This was achieved through frequent suspensions, expulsions or transfers of “exceptional” children between schools and the classes within them.¹⁷⁰ Given that IDEA’s purpose was to end this practice, it is illogical that legislators would include a loophole in which juvenile correctional facilities could continue to engage in the similar process of systematic exclusion.

IDEA can play a significant role in reducing delinquent behavior by ensuring that a child with disability’s needs are identified and met.¹⁷¹ The disciplinary loophole that is currently utilized by many juvenile correctional facilities is in direct opposition to the spirit of IDEA.¹⁷² IDEA recognizes that it is discriminatory—not to mention wildly ineffective—to punish a child for behavior resulting from their disability. Yet, at the same time, juvenile justice facilities continue to subject youths with disabilities to harmful solitary disciplinary procedures that only further exacerbate their disability, deny them their ability to access their education, and set them in a perpetual cycle of behavior-punishment. Reading IDEA protections to allow for this loophole as it pertains to incarcerated children would appear to contradict both the rehabilitative purposes of the juvenile justice system and the expansive disability protections of IDEA.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 773-74.

¹⁶⁷ Simoneau, *supra* note 105, at 92; *See also* 20 U.S.C. § 1400(c)(1).

¹⁶⁸ Simoneau, *supra* note 105, at 92.

¹⁶⁹ *Id.*

¹⁷⁰ *See* *Mills v. Bd. of Educ.*, 348 F. Supp 866, 868 (D.D.C. 1972); *Pa. Ass’n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 279, 282 (E.D. Pa. 1972).

¹⁷¹ BURRELL & WARBOYS, *supra* note 23.

¹⁷² Simoneau, *supra* note 105 at 92.

C. *Juvenile correctional facilities are not adult facilities.*

Some may argue that because of the restrictive nature of juvenile facilities, IDEA should not fully apply to youths in those facilities on public safety grounds. However, statutory language explicitly states IDEA applies to all facilities where a youth may be placed including “state and local juvenile and adult correctional facilities.”¹⁷³ The only provisional “compelling penological interest” language in IDEA applies to children with disabilities who have been “convicted as adults under State law and incarcerated in adult prisons.”¹⁷⁴ This is important because in an adult correctional setting, prison safety is considered a compelling penological interest and as such, can be used to restrict the rights of adults who are incarcerated.¹⁷⁵

In the crafting of IDEA, Congress concluded that providing educational services and opportunities for children with disabilities is conducive with the security needs of a detention setting.¹⁷⁶ IDEA’s reach is intentionally expansive to ensure that children with disabilities are properly identified for services, evaluated, and provided a free, appropriate public education.¹⁷⁷ The 1997 amendments to IDEA provide a means of amending an individual’s IEP in adult criminal correctional settings only if there is a “bona fide security or compelling penological interest.”¹⁷⁸ However, this same language is not used when referring to amendments in the juvenile context.¹⁷⁹

The language limiting “compelling penological interests” to juveniles housed in adult correctional facilities would appear to negate the presupposition that Congress intended to have those interests considered as they pertain to minors in juvenile correctional facilities. First, examining IDEA through an intentionalism¹⁸⁰ lens, the legislative history supports the argument that the intent of Congress was to provide expansive protections for youths.¹⁸¹ Second, utilizing a version of negative-implication

¹⁷³ 34 C.F.R. § 300.2(b)(1)(iv).

¹⁷⁴ *Id.* at § 300.324(d)(2) (allowing for revision of an IEP when there is a “bona fide security or compelling penological interest,” particularly as applied to transitional services and the least restrictive environment provisions).

¹⁷⁵ Kevin Frances O’Neil, *Rights of Prisoners*, MIDDLE TENN. STATE UNIV., <https://www.mtsu.edu/first-amendment/article/923/prisons> (last updated June 2017).

¹⁷⁶ Twomey, *supra* note 164, at 775.

¹⁷⁷ *See generally*, U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH *IDEA* (2010), <https://eric.ed.gov/?id=ED515893>.

¹⁷⁸ 34 C.F.R. § 300.324(d)(2).

¹⁷⁹ *Id.* Limitations to the IEP are only listed as it pertains to “adult” prisons vs. juvenile facilities. *Id.*

¹⁸⁰ “Intentionalists maintain that the primacy or exclusive role of the interpreter is finding the intentions of the enacting legislature or of the constitutional framers or ratifies.” *Legal Interpretation*, STAN. ENCYCLOPEDIA OF PHIL. (July 7, 2021), <https://plato.stanford.edu/entries/legal-interpretation/#:~:text=Intentionalists%20give%20primacy%20to%20the,the%20meaning%20of%20the%20text>. While textual meaning is important, it is not dispositive. *Id.*

¹⁸¹ U.S. DEP’T OF EDUC., *supra* note 160, at 5.

canon,¹⁸² the fact that Congress included the words a “compelling penological interest” in a portion of IDEA that referenced adult correctional facilities but omitted it from the remaining text could imply that Congress did not intend for it to be considered in any other context. Congress had the foresight to include it one portion of the statutory language, and if they also wanted it to apply in other contexts they would have included that language elsewhere.

CONCLUSION

The stakes are high, and the consequences potentially life changing, for children with disabilities who find themselves involved in the juvenile justice system. Children with disabilities pushed into the juvenile justice system are already marginalized, and receiving an appropriate public education allows them an opportunity to alter their circumstances. Despite the importance of education, children with disabilities are repeatedly inappropriately disciplined and subsequently denied educational access for behavioral issues that may be a manifestation of their disability. These same children are then subjected to additional isolation disciplinary practices further worsening their mental health, and resulting in additional “bad behavior.” The existing disciplinary procedures for children with disabilities promulgated by juvenile correctional facilities defy logic and fail to meet their desired outcomes and objectives.

Why then, do institutions continue this type of behavior? One potential reason for this is that our current juvenile justice system focuses on retribution instead of rehabilitation. When we continue to punish children for behavioral concerns that frequently serve as a manifestation of their disability, while simultaneously denying them access to educational opportunity, we create a juvenile system that fails all of the parties involved.

While the law makes clear that IDEA does apply to juvenile correctional facilities, the behavior of these facilities implies that their obligation to follow IDEA ends when the educational day does. That assertion is incorrect. In order for IDEA to fulfill its statutory purpose of ensuring a free and appropriate public education for students with disabilities, IDEA protections must apply broadly, any time juvenile correctional disciplinary procedures result in the denial of FAPE. IDEA can both protect children with disabilities and provide a mechanism for juvenile correctional facilities to lower their recidivism rates. It is long overdue for these facilities to see IDEA protections for children with disabilities as a benefit and tool for success, rather than an obstacle.

¹⁸² *A Guide to Reading, Interpreting and Applying Statutes*, GEO. UNIV. L. CTR. 5 (2017), <https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Appling-Statutes-1.pdf> (“The expression of one thing implies the exclusion of others. This means that where certain terms have been explicitly set forth in a statute, that statute may be interpreted not to apply to terms that have been excluded from the statute.”).