

# The Proactive Model: How to Better Protect the Right to Special Education for Incarcerated Youth

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*The Individuals with Disabilities Education Act (IDEA) guarantees access to a specialized, appropriate public education for youth with disabilities in the United States. While progress has been made and this right to education extends to incarcerated youth as well as those outside the juvenile justice system, there is nonetheless a fundamental limitation on how this federal requirement is imposed in the carceral context: it is enforced through primarily reactive mechanisms. Lawsuits, state compliance regimes, and consent decrees can hold states and juvenile facilities accountable after systemic failures to comply with the IDEA; however, the inherent inconsistency and slow pace of this system call for a paradigm shift toward a more active federal government role in enforcing the right to special education in juvenile facilities. This paper will first explore the way scientific understandings of disability and the social context of disability inform this need for change, then provide a walkthrough of the current state of how the law has addressed this issue, and lastly identify how a more aggressive monitoring and compliance regime might improve access to education for youth with disabilities who are caught in the juvenile justice system.*

## INTRODUCTION

It is hard to imagine how twenty-three-hour-per-day confinement to a prison cell or verbal abuse by staff would ever comport with our basic sense of right and wrong, let alone with legal educational requirements placed on juvenile correctional facilities for youth with disabilities. Yet in 2011, a Southern Poverty Law Center lawsuit addressed this exact problem involving a Jackson, Mississippi youth correctional facility.<sup>1</sup> And on a larger scale, Mississippi and Mississippi facilities faced several lawsuits on behalf of individuals with disabilities in the 2000s and early 2010s addressing widespread issues of poor staff training, mistreatment and violence toward incarcerated youth, inadequate medical and mental health services, failure to develop special education plans, and—perhaps most alarmingly—a statewide failure to monitor the number of youth with disabilities and special educational needs who were in the system.<sup>2</sup> Facility by facility, lawsuit by lawsuit, the locations that committed the most egregious violations in the state were compelled to correct many of these failures and abuses. The legal changes brought by those lawsuits occurred first at the individual facility level and to some extent at the state level resulting from Department of Justice (DOJ) and Department of Education (DOE) involvement.<sup>3</sup>

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1. Sarah Butrymowicz & Jackie Mader, *Pipeline to Prison: How the Juvenile Justice System Fails Special Education Students*, HECHINGER REP. (Oct. 26, 2014), <https://hechingerreport.org/pipeline-prison-juvenile-justice-system-fails-special-education-students/> [<https://perma.cc/C2PS-LFGY>].

2. *Id.*

3. *Id.*

While this progress made in Mississippi facilities is laudable, these changes are surely no comfort to individuals with disabilities who reached adulthood in this system unable to read or write, unlike what we might expect from their public-school peers. Indeed, while waiting for these changes there is no way for students to get these critical years back—missing even a year of education can be devastating on educational outcomes for any student.<sup>4</sup> Mississippi's example reflects the unfortunate reality that administrative remedies and lawsuits operate on the timescale of months or years,<sup>5</sup> state monitoring regimes are inconsistent and slow to respond to problems when they arise,<sup>6</sup> and resource limitations and inherent properties of carceral facilities make accountability and transparency less attainable than can be expected of ordinary public-school systems.<sup>7</sup>

This Article urges a rethinking of this spotty and lumbering accountability paradigm for juvenile justice facilities that are responsible for educating incarcerated youth with disabilities. In Part I, this Article will provide context to understanding the needs of youth with disabilities, including overviewing the statistical prevalence of disabilities in the juvenile justice context, providing background for understanding the diversity and uniqueness of needs for disabled youth, exploring intersectional components of disability as applied to youth such as race and poverty, and illuminating how disabilities ought to be understood as a lived experience as opposed to a purely medical disease to be cured or managed. In Part II, this Article will explore how the legal system in the United States has responded to failures in special education in the juvenile context, including an explanation of the explicit provisions of the Individuals with Disabilities Education Act (IDEA), how lawsuits have been used as a tool for remedying failures to meet those regulations, and what kind of monitoring and compliance regime currently exists.

In Part III, this Article will discuss a proposed future approach to this problem in which a more *proactive*, instead of *reactive*, regime would prevent failures before they happen. The proposed solutions include borrowing from state models that have addressed the problem, amending the IDEA to include a much more active and

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4. See J. Jacob Kirksey, *Academic Harms of Missing High School and the Accuracy of Current Policy Thresholds: Analysis of Preregistered Administrative Data from a California School District*, 5 AERA OPEN 1, 1–2 (2019); see also Elizabeth Christani, Laura Revetti, Ashleigh Young & Karen H. Larwin, *Effects of School Absences on GPAs for Disabled Students*, 4 INT'L J. OF EVALUATION & RSCH. EDUC. 165 (2015) (discussing the negative impact absence from school has on long-term school performance and GPA for disabled students).

5. A 2017 report from the National Council on Disability summarizes government data and reports that show that resolution of IDEA compliance issues often takes years, and in some cases as many as six years. NAT'L COUNCIL ON DISABILITY, FEDERAL MONITORING AND ENFORCEMENT OF IDEA COMPLIANCE 21–22 (2018).

6. *Id.*

7. See, e.g., Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, STAN. L. & POL'Y REV. 455, 456–63 (2011) (overviewing failure of transparency and accountability surrounding jails and prisons in the South, including a “culture of secrecy”); JOHN HOWARD ASS'N ILL., PROMOTING TRANSPARENCY AND ACCOUNTABILITY IN JUVENILE DETENTION FACILITIES: A REPORT ON THE JOHN HOWARD ASSOCIATION'S VISIT TO THE ROBERT W. DEPKE JUVENILE COMPLEX, LAKE COUNTY, ILLINOIS 1–3 (2016) (discussing the rationale and need for transparency in juvenile justice facilities).

hands-on inspection and monitoring regime for juvenile facilities, the creation of a national Individualized Education Program (IEP) system, imposition of facility requirements that relate to environmental facets of education outside of just the classroom, reducing barriers to parental involvement in seeking compliance, the exploration of school-to-correctional-facility partnerships, and improvements to family involvement. Though by no means an exhaustive set of solutions, amending the IDEA along these lines would provide more robust oversight for incarcerated youth with disabilities across all fifty states.

#### I. THE SOCIAL AND SCIENTIFIC CONTEXT OF JUVENILE JUSTICE AND DISABILITIES

The first key context for addressing the issue is the scope and scale of how disabilities and juvenile justice interact. According to the Department of Education, roughly 54,000 youth reside in juvenile corrections facilities, with estimates of how many have disabilities ranging from 30-60%, with some estimates as high as 85%.<sup>8</sup> The youth population at large, meanwhile, has a significantly lower incidence of individuals who qualify for and receive special education—roughly 15%.<sup>9</sup> The Department of Education further elaborates that from 2012 to 2013 in juvenile facilities, an estimated 16,000 students with specific learning disabilities, emotional or behavioral disorders, intellectual disabilities, attention hyperactivity disorders, and others were served under the Individuals with Disabilities Education Act (IDEA).<sup>10</sup> Yet, less than half of those individuals reported receiving special education services.<sup>11</sup> Even these figures suffer from inherent limitations because they do not involve “reporting at multiple contact points,” and instead rely mostly on data that falls directly under IDEA compliance at single facility-based headcounts or data directly from clinics and schools.<sup>12</sup> Several theories have been offered to explain this disproportionate representation, including susceptibility to delinquent activity, higher school failure and drop-out rates, and differential treatment by schools and the justice system.<sup>13</sup>

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8. *Supporting Youth with Disabilities in Juvenile Corrections*, U.S. DEP’T OF EDUC.: OFF. OF SPECIAL EDUC. & REHAB. SERVS. BLOG (May 23, 2017), <https://sites.ed.gov/osers/2017/05/supporting-youth-with-disabilities-in-juvenile-corrections/> [<https://perma.cc/PP7Y-YHCW>]. “This means that in a class of 15 students, anywhere from 5 to 13 of those students are likely to have a disability, most commonly specific learning disabilities (SLD), emotional or behavioral disorders (EBD), intellectual disability (ID), or attention deficit hyperactivity disorders (ADHD).” [hereinafter *Supporting Youth*] *Id.*

9. Maya Riser-Kositsky, *Special Education: Definition, Statistics, and Trends*, EDUC. WEEK (July 22, 2022), <https://www.edweek.org/teaching-learning/special-education-definition-statistics-and-trends/2019/12> [<https://perma.cc/3LJX-RCTC>].

10. *Supporting Youth*, *supra* note 8.

11. *Id.*

12. Aleksis P. Kincaid, *Prevalence of Youth with Disabilities in the Juvenile Justice System 15* (June 2017) (Ph.D. dissertation, University of Minnesota), (available at [https://conservancy.umn.edu/bitstream/handle/11299/190546/Kincaid\\_umn\\_0130E\\_18289.pdf?sequence=1&isAllowed=y](https://conservancy.umn.edu/bitstream/handle/11299/190546/Kincaid_umn_0130E_18289.pdf?sequence=1&isAllowed=y)) [<https://perma.cc/XYK8-TXET>].

13. *Id.* at 17–18. The school failure theory describes how having a disability might “lead[] to school failure either directly or through behavioral and emotional issues that affect educational outcomes, leading to dropping out of school and delinquency.” *Id.* “Susceptibility

Additionally, the school-to-prison pipeline persists in a pervasive way for students with disabilities. Students with disabilities represent 58% of those secluded from the general student body, 75% of students who are restrained by school staff, and more than 13% of students who are subjected to out-of-school suspension.<sup>14</sup> Furthermore, students who are explicitly eligible for disability accommodations under the provisions of the IDEA account for 25% of students who are referred to law enforcement or arrested in a school context.<sup>15</sup> Even so-called “status offenses” such as truancy, running away, or general ungovernability can result in juveniles with disabilities being incarcerated instead of attending school.<sup>16</sup> While youth with disabilities have this higher propensity to interact with the criminal justice system, improving access to education, whether in the juvenile or non-juvenile education context, has a marked impact on reducing recidivism.<sup>17</sup>

Beyond the statistical interrelationships between the juvenile justice and the special education systems, understanding the diversity of needs among youth with disabilities further contextualizes the issue. For example, students with attention deficit hyperactivity disorder (ADHD) may need medical treatment and more intensive behavioral classroom management;<sup>18</sup> while neurodiverse youth, also referred to as youth with autism, may require a more comprehensive and environmental sort of accommodation to improve their learning outcomes.<sup>19</sup>

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theory posits that due to cognitive and personality differences that predispose them to committing delinquent acts at a higher rate than youth without a disability, such as poor impulse control, suggestibility and irritability, and a general inability to anticipate consequences of their actions.” *Id.* Lastly, “[t]he differential treatment theory holds that [youth with disabilities] commit delinquent acts with the same frequency and intensity as youth without a disability, but that the juvenile justice system responds to them differently than to youth without a disability.” *Id.*

14. Darla Stuart & Erica Dennison, *Behavioral Challenges Can Push Youth with Disabilities into School-to-Prison Pipeline*, JUV. JUST. INFO. EXCH. (Jan. 25, 2021), <https://jjiie.org/2021/01/25/behavioral-challenges-can-push-youth-with-disabilities-into-school-to-prison-pipeline/> [<https://perma.cc/Y4NH-SQVZ>].

15. NAT’L COUNCIL ON DISABILITY, *BREAKING THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS WITH DISABILITIES* 85 (2015).

16. See Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y. L. SCH. L. REV. 875, 879–80 (2009).

17. See ALISON HILL, *EDUCATION REDUCES RECIDIVISM* (2015), <https://www.luc.edu/media/lucedu/law/centers/childlaw/childed/pdfs/2015studentpapers/Hill.pdf> [<https://perma.cc/Y4M2-M463>]. For adults, “[n]early half of released offenders will recidivate when not provided with educational services compared to 13% who are offered services.” *Id.* at 6. For children, Hill points out that most delinquent children outgrow their delinquency into young adulthood. *Id.* at 6–7.

18. See *ADHD in the Classroom: Helping Children Succeed in School*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 9, 2022), <https://www.cdc.gov/ncbddd/adhd/school-success.html> [<https://perma.cc/Q86Y-HP88>]. Common classroom accommodations include extra time on tests, instruction and assignments tailored to the child, positive reinforcement and feedback, using technology to assist with tasks, allowing breaks or time to move around, changes to the environment to limit distraction, and extra help with staying organized. *Id.*

19. See DANYA INT’L & ORG. FOR AUTISM RSCH., *LIFE JOURNEY THROUGH AUTISM: AN EDUCATOR’S GUIDE* 11, 37–40 (2004).

Individuals with autism offer another paradigmatic example. In *Law and Neurodiversity*, authors Dana Lee Baker, Laurie A. Drapela, and Whitney Littlefield offer a comprehensive analysis of how autism and the juvenile justice system interact.<sup>20</sup> Baker, Drapela, and Littlefield note that incarcerated juveniles with autism face difficulties with aspects of incarceration. Facilities suffer from communicative and language barriers with various facility staff issues involving the daily scheduling inside the facility, social withdrawal and behavioral issues, the sensory and tactile features of carceral facilities, and a lack of autism-specific training, which would help avoid misinterpretations of communicative and non-communicative signals by autistic youth.<sup>21</sup> Autism-specific approaches to the needs of juveniles who are incarcerated would not only improve educational outcomes, but reduce the deleterious effects the stressors of incarceration can have on individuals with autism.<sup>22</sup> So when analyzing disability in a juvenile justice context, it is important to remember that the IDEA and the special education system address “disabilities” in broad terms. However, within any given classification of disability, such as developmental disabilities like autism or learning disabilities like ADHD, there are unique considerations for how to best provide for a student’s education.

It is not only important to acknowledge diversity within the meaning of the term “disability,” but also to acknowledge the ways other forms of diversity intersect with the experiences of youth with disabilities. As another thematic example, consider the question of race or ethnicity. Research has shown that there are significant disparities in terms of outcome and opportunity for persons of color who need accommodation for disabilities,<sup>23</sup> and subconscious bias can play a role in not only limiting the appropriate identification of disabilities among students but can outright lead to exclusion from services brought to bear under the IDEA.<sup>24</sup> This bias cannot be explained away easily—for more medically defined categories of disability that rely on objective criteria, black and white students showed similar rates of disability prevalence.<sup>25</sup> However, for subjective, behavioral categories of disability, black students were disproportionately likely to be categorized as such.<sup>26</sup>

Overrepresentation extends through all stages of the school-to-prison pipeline: identification of disability, imposition of harsh disciplinary measures, placement in

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20. DANA LEE BAKER, LAURIE A. DRAPELA & WHITNEY LITTLEFIELD, *LAW AND NEURODIVERSITY: YOUTH WITH AUTISM AND THE JUVENILE JUSTICE SYSTEMS IN CANADA AND THE UNITED STATES* (2020).

21. *See id.* at 148–50.

22. *See id.* at 152 (“Incarceration can have devastating effects on youth with autism . . . and can often *reverse* progress in behaviour change.”).

23. *See generally* CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2010).

24. NAT’L COUNCIL ON DISABILITY, *supra* note 15, at 47 (“A growing body of research on stereotyping and implicit bias supports this notion that implicit bias influences educators’ perceptions and contributes to racial disparities in discipline. A number of studies have shown that administrators dole out harsher punishment to students of color than white students for the same or similar behavior.”).

25. Subini Annamma, Deb Morrison & Darrell Jackson, *Disproportionality Fills in the Gaps: Connections Between Achievement, Discipline, and Special Education in the School-to-Prison Pipeline*, 5 BERKELEY R. EDUC. 53, 58 (2014).

26. *Id.*

the juvenile justice system, and failing to meet achievement benchmarks.<sup>27</sup> By one metric, “minority youth are 1.70 times as likely to be arrested as their White peers, . . . only 0.70 times as likely to receive an agreement that would keep them out of the court system, . . . and 1.20 times as likely to be incarcerated.”<sup>28</sup> For black youth, these rates are even higher.<sup>29</sup> This illustrates that any conversation about addressing failures within the juvenile justice and special education system must not ignore the ways various identities and experiences such as race, poverty, gender, or sexuality complicate the question of how to properly provide for the education of youth who are incarcerated.

Another important contextualization for analyzing disabilities in the juvenile context is understanding the competing traditional medical model and social model for understanding disability. Namely, the traditional medical model is the historically present and often problematic view that disabilities such as autism or physical disabilities are “defect[s] within the individual,” where these defects must be “cured, fixed, or completely eliminated.”<sup>30</sup> Contrarily, the social model of understanding disability acknowledges the existence of impairments but recognizes the immense role discrimination, lack of accommodation, and societal structures play in preventing participation in society for individuals with disabilities.<sup>31</sup> Indeed, approaches like the traditional medical model should be avoided in a juvenile justice reform context, because “eliminat[ion] [of] disability is to eliminate the possibility of discovering alternative ways of being in the world, to foreclose the possibility of recognizing and valuing our interdependence.”<sup>32</sup> This Article should be understood as adopting the social model of understanding disability, through which incarcerated juveniles with disabilities may better overcome societal barriers to participation.

Lastly, regarding the language used to discuss disabilities and education, many use person-first language when referring to the students involved who have disabilities. Person-first language “puts the person before the disability, and describes what a person has, not who a person is,”<sup>33</sup> the difference for example between “a person with autism” and “an autistic person.” Proponents of the person-first approach argue that the use of person-first language helps combat negative societal stereotypes about disabilities and can have positive effects on the self-worth and self-esteem of students and other individuals who are exposed to person-first approaches.<sup>34</sup> Critics of this approach argue that, especially for children with disabilities, the use and discussion of person-first language becomes a way to bring attention to disability all on its own, amounting to an “overcorrect[ion] to the point

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27. *Id.* at 58–60.

28. Kincaid, *supra* note 12, at 14–15.

29. *Id.*

30. Off. of Developmental Primary Care, *Medical and Social Models of Disability*, UNIV. OF CAL., S.F., <https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability> [<https://perma.cc/EHS2-ZPB6>].

31. *Id.*

32. ALISON KAUFER, FEMINIST, QUEER, CRIP 83 (2013).

33. Off. of Disability Rts., *People First Language*, DC.GOV (2006), <https://odr.dc.gov/page/people-first-language> [<https://perma.cc/59W8-SL4X>].

34. See Joan Blaska, *The Power of Language: Speak and Write Using “Person First,”* 10 PERSPS. ON DISABILITY 25, 25–28 (1993).

of stigmatizing disability.”<sup>35</sup> This Article uses person-first language regarding disability, as is the tendency in most recent academic literature.<sup>36</sup> This choice is not intended to take a strong position on the question of person-first language, as both person-first and more traditional approaches to referring to disability can be done respectfully, however for consistency only one was applied here.

## II. EXISTING REGULATION, ENFORCEMENT, AND MONITORING REGIMES UNDER THE IDEA

Turning first to the body of federal law providing a right to special education for youth, there are several key provisions of the IDEA and other federal regulations that define this right. Not all the protections provided to students with disabilities come directly from the IDEA. For example, the Americans with Disabilities Act<sup>37</sup> and the Rehabilitation Act of 1973<sup>38</sup> provide for broad protections for Americans with disabilities in which failures to accommodate are understood as violations of the civil rights of an individual.<sup>39</sup> However, given the specific special education focus, this Article will focus on the relevant provisions of the IDEA despite the utility of these other provisions in contexts both inside and outside of the educational sphere.

### *A. Free and Appropriate Public Education*

What protections does the IDEA provide? First, the IDEA states that all students with disabilities must receive a Free and Appropriate Public Education (FAPE).<sup>40</sup> This includes all individuals aged three to twenty-one in the juvenile justice or adult correctional system,<sup>41</sup> except for individuals aged eighteen to twenty-one who have not taken advantage of IDEA provisions in the past and currently live in adult correctional facilities.<sup>42</sup> A FAPE is defined as providing:

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35. See Morton Ann Gernsbacher, *Editorial Perspective: The Use of Person-First Language in Scholarly Writing May Accentuate Stigma*, 58 J. CHILD PSYCH. & PSYCHIATRY 859, 860 (2017).

36. *Id.* at 860–61.

37. 29 U.S.C. § 794.

38. 42 U.S.C. § 12101 *et seq.*

39. SUE BURRELL & LOREN WARBOYS, *Special Education and the Juvenile Justice System*, DOJ OFF. JUV. JUST. & DELINQ. PREVENTION 2 (July 2000), <https://www.ojp.gov/pdffiles1/ojjdp/179359.pdf> [<https://perma.cc/L6VV-HBSW>].

40. *Id.* at 2–3 (citing 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.121(a)) (“Every youth with a disability, as defined by IDEA, is entitled to free appropriate public education (FAPE). This entitlement exists for all eligible children and youth, including those involved in the juvenile justice system, ‘. . . between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.’” (footnotes omitted)).

41. See 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101 (2021).

42. See 20 U.S.C. § 1412(a)(1)(B)(ii); 34 C.F.R. § 300.102 (2021). For an in-depth examination and criticism of this exception, which leaves many adults in need of specialized education services without recourse in the adult corrections system of many states, see Melissa Edelson, *Special Education in Adult Correctional Facilities: A Right Not a Privilege*, 50 LOY. L.A. L. REV. 93 (2017).

special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program . . .<sup>43</sup>

The Supreme Court recently addressed what counts as a sufficiently “appropriate” education under the FAPE requirement, expanding the standard from an educational program merely calculated to provide some educational benefit to a slightly more aggressive standard that requires schools to provide an education that is “appropriately ambitious” based on the individual needs and level of development of a student.<sup>44</sup> Unfortunately, in setting these standards the Court relies on evidence that students are passing from grade-to-grade as strong evidence of appropriate education, rejecting the “position that that every child must be afforded opportunities to achieve academic success, attain self-sufficiency, and make societal contributions substantially equal to opportunities afforded children without disabilities.”<sup>45</sup>

This grade-by-grade standard can pose a unique challenge to educational access for incarcerated youth with disabilities because “[m]ost incarcerated youth do not have access to the same educational and vocational services as their peers in the community and do not attend schools that have the same rigorous curriculum and student performance standards . . . .”<sup>46</sup> Even more alarmingly, “[m]ost states do not collect, track, and report student outcome data for incarcerated youth in all facility schools.”<sup>47</sup> Thus, the grade-by-grade “appropriately ambitious” standard set forth by the Supreme Court may not provide much of any protection for students with special

43. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2021). The individualized education program will be discussed in a subsequent paragraph.

44. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1000 (2017) (moving away from the old *de minimis* standard established in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)). Additionally, the Court acknowledged that the “appropriately ambitious” standard it established to expound upon the *Rowley* standard was nonetheless somewhat vague and “a general standard, not a formula.” *Id.*

45. MARK C. WEBER, *UNDERSTANDING DISABILITY LAW* 107 (3d ed. 2019).

46. Council of Juvenile Correctional Administrators, *Blueprint for Change: Educational Success for Youth in the Juvenile Justice System*, YOUTUBE, AT 07:45 (Feb. 13, 2018), <https://www.youtube.com/watch?v=j1CANQLjzyE> [<https://perma.cc/53AF-LZMP>] [hereinafter *Blueprint for Change Webinar*]. See also Lucy Walke, *Education Behind Bars: How Education is Failing Incarcerated Youth*, BROWN POL. REV. (June 2, 2018), <https://brownpoliticalreview.org/2018/06/education-behind-bars-education-failing-incarcerated-youth/> [<https://perma.cc/3HHQ-RLRM>] (“Classes are typically much larger in these facilities than in public schools, are likely to be organized by age rather than ability, and have curricula that are far less rigorous than those of community schools. When placed in solitary confinement, youth often receive little to no schoolwork at all. In one striking example from Los Angeles County, a student was found to have graduated with a high school diploma from the Challenger Memorial Youth Center without ever being taught to read.”).

47. *Blueprint for Change Webinar*, *supra* note 46, at 08:00.



educational needs who are subjected to the much lower standards and reduced accountability of state juvenile correctional facilities.

### *B. Individualized Education Programs*

Another crucial provision of the IDEA is the requirement for the creation and implementation of an Individualized Education Program (IEP) to address the particular circumstances of any given student with special educational needs.<sup>48</sup> An IEP is defined as a “written statement for each child with a disability that is developed . . . in accordance with section [20 U.S.C.] 1414(d).”<sup>49</sup> Pursuant to section 1414(d), IEPs require a team effort involving a statement of annual, measurable progress and goals including specific special education aids and services to be provided to the student all prepared by a team including the student’s parent(s), at least one teacher from both non-special education and special education curriculum, a representative of the educational agency, and wherever possible the child themselves.<sup>50</sup>

Like broader FAPE requirements, IEPs must comply with certain standards. Generally, whatever the IEP team puts into the IEP must be justifiable, such that there is a “‘cogent and responsive explanation for their decisions’ that the IEP is ‘reasonably calculated’ for the child to progress.”<sup>51</sup> Most notably for the juvenile justice context, though IEPs must include “related services” such as medical services, speech therapy, occupational therapy, transportation needs, and other individualized services in order for the student to benefit from special education. However, frequently access to these basic elements of an IEP and FAPE are reduced or not provided to students in juvenile justice facilities as compared to public schools.<sup>52</sup> Implementation of pre-existing IEPs is expected of these facilities when a student is transferred there or placed there following a judicial proceeding,<sup>53</sup> but this presumes that the IEP was successfully transmitted to the receiving institution. Guaranteeing the proper implementation of an IEP to match performance at a typical public school depends on whether correctional facility staff understand their IEP obligations and have received the IEP in the first place.

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48. 20 U.S.C. § 1414(d)(1)(A)(i).

49. *Id.* § 1401(14).

50. *Id.* § 1414(d)(1)(B).

51. Council of Juvenile Correctional Administrators, *PYO Webinar - Special Education in Juvenile Correctional Settings: The Law and Practice*, YOUTUBE, at 13:25 (Nov. 8, 2018), <https://www.youtube.com/watch?v=ohnBNU9gqAQ> [https://perma.cc/6TRU-4U86] [hereinafter *Law and Practice Webinar*].

52. *Id.* See generally Regina M. Foley & Jing Gao, *Correctional Educational Programs Serving Incarcerated Juveniles: A Status Report*, 53 J. CORR. EDUC. 131 (2002).

53. Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 904 (2014) (citing 34 C.F.R. § 300.114–.118).

*C. Least Restrictive Environment, “Child-Find,” and Due Process Provisions*

Within the concept of FAPE and beyond the implementation of IEPs, education providers are also required to provide the Least Restrictive Environment to students (also known as a “mainstreaming policy”).<sup>54</sup> This essentially means that, wherever practicable, schools must not isolate the student with disabilities by placing them in classes exclusive to special needs students.<sup>55</sup> The IDEA’s provisions and “the consensus of educational experts” support mainstreaming policies,<sup>56</sup> but some criticize mainstreaming efforts because of insufficient training by staff and potential conflict among peers arising from the shared space.<sup>57</sup> Without proper training and the resourcing to provide aide in the general classroom environment, systemic issues may limit the practicability of providing the Least Restrictive Environment for students with disabilities. In juvenile correctional settings, this resource-limited dilemma can be even more pronounced due to small total student count and staff availability, such that facilities may resort to having special education and general education teachers co-teach in the regular classroom.<sup>58</sup> This one-room schoolhouse approach demonstrates how the carceral system pulls youth with disabilities away from their original peers and home school, only to then comply with a resource-scarce, potentially problematic integration with the general student body at the facility.

Additionally, the IDEA requires institutions to develop “Child Find” procedures to identify, locate, and evaluate children in juvenile justice facilities who have disabilities as they arrive or show signs of needing services.<sup>59</sup> When transfers occur, “[t]he new public agency in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents . . . from the previous public agency in which the child was enrolled . . . .”<sup>60</sup> This means that the proper transmission of a child’s educational plan for new arrivals to juvenile correctional facilities might fall through the cracks, especially when there is not a dedicated staff member to pursue their original IEPs—and when states offer little in the way of guidance for how this process should work outside of a normal public

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54. 20 U.S.C. § 1412(a)(5)(A).

55. Lauren A. Koster, *Who Will Educate Me? Using the Americans with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, B.C. L. REV. 673, 679 n.34 (2019).

56. WEBER, *supra* note 45, at 111.

57. *See id.* (citing Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789 (2006)).

58. MELODY MUSGROVE & MICHAEL K. YUDIN, U.S. DEP’T OF EDUC.: OFF. OF SPECIAL EDUC. & REHAB. SERVS., *Dear Colleague Letter*, U.S. DEPARTMENT OF EDUCATION 4 (Dec. 5, 2014), <https://sites.ed.gov/idea/files/idea-letter.pdf> [<https://perma.cc/8BZK-4NFU>] [hereinafter *Dear Colleague Letter*].

59. *Id.* at 3–4 (“States and their public agencies must have child find policies and procedures in place to identify, locate, and evaluate students who are in correctional facilities who may have a disability under the IDEA and are in need of special education and related services, regardless of the severity of their disability and consistent with the State’s child find and eligibility standards. This responsibility includes students who have never been identified as a student with a disability prior to their entry into the facility.”).

60. 34 C.F.R. § 300.323(g)(1) (2021); *see also* 20 U.S.C. § 1414(d)(2)(A)–(C).

school setting.<sup>61</sup> Child Find becomes more complicated in juvenile corrections settings when common systematic issues such as overreliance on simple worksheets for lesson plans, instructional time is lower than state averages and requirements, and substitute teachers are hard to obtain.<sup>62</sup> Given these shortcomings and the limited or constrained resources of some juvenile facilities, many incarcerated juveniles may go extended periods of time without anyone recognizing they need special educational services.

Lastly, the IDEA requires states to assess and maintain staff qualifications relating to special needs education.<sup>63</sup> The IDEA provides procedural safeguards allowing administrative review and appeal for potential violations of IDEA provisions along with a requirement that any and all deprivations of access to educational programming lasting beyond ten days must be shown to have been the result of genuine disciplinary or safety considerations *not* related to the individual student's disabilities.<sup>64</sup>

#### *D. Enforcement of IDEA Provisions Through Legal Action*

Enforcement of IDEA provisions also poses serious challenges. As far back as 1997, commentators have observed that lawsuits are the primary mechanism of enforcement for these provisions when state actors fall out of compliance, essentially amounting to a wait-and-see approach.<sup>65</sup> The bases of these suits range from repugnant and excessive use of disciplinary measures against students with disabilities (such as lengthy solitary confinement)<sup>66</sup> to more garden variety but nonetheless extremely concerning failures to comply with the basic provisions set forth in the IDEA.<sup>67</sup> Plaintiffs bring lawsuits against states and state juvenile corrections facilities for failure to provide competent staff trained in special education,<sup>68</sup> failure to provide for the Least Restrictive Environment for students,<sup>69</sup> impermissible imposition of disciplinary action depriving students of their access to

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61. *Law and Practice Webinar*, *supra* note 51, at 22:18.

62. *Id.* at 24:50.

63. 34 C.F.R. § 300.309(b)(1)–(2) (2021). Qualifications standards for instruction and intervention under the IDEA also require that the instructor be certified or specialized in the area or discipline they practice, rather than just a teacher of some kind. *See* 34 C.F.R. § 303.119(b) (2021); *Dear Colleague Letter*, *supra* note 58, at 8.

64. *Dear Colleague Letter*, *supra* note 58, at 5.

65. Peter E. Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, 17 CHILD. LEGAL RTS. J. 2, 3–5 (1997).

66. *See, e.g., V.W. ex rel. Williams v. Conway*, 236 F. Supp. 3d 554 (N.D.N.Y. 2017).

67. *See, e.g., Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017).

68. *See, e.g., A.M. ex rel. J.M.K. v. Luzerne Cnty. Juv. Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004).

69. *See, e.g., Statement of Interest, G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667 (N.D. Cal. 2015) (describing punitive measures and “tutoring” given to students with disabilities in a correctional facility that isolated those students and “[did] not allow youth with disabilities to continue to participate in the general education curriculum”).

classroom time,<sup>70</sup> failure to create or implement IEPs for students,<sup>71</sup> failure to comply with the IDEA's "Child Find" provisions for detecting youth with disabilities,<sup>72</sup> failure to provide proper transition plans for students in short-term custody,<sup>73</sup> and failure to track relevant statistics for youth with disabilities within the state juvenile corrections system.<sup>74</sup> For many of these lawsuits, there are multiple issues present simultaneously, reflecting a systematic inattention to or disregard for the requirements of the IDEA. This purely responsive system of lawsuits brought by willing plaintiffs is even more obviously flawed when unique circumstances produce educational deprivations for disabled and incarcerated youth and a lawsuit must occur to force the system to adapt. A recent Washington, D.C. lawsuit alleged that D.C. juvenile corrections facilities simply failed to provide any educational services to incarcerated youth with disabilities during the COVID-19 pandemic.<sup>75</sup> For incarcerated youth waiting for these lawsuits to resolve or settle, there can be no doubt that special obligations are often left unmet in the interim.

Another difficulty with this fundamentally reactive, not proactive, method of accountability is the regional constraint placed upon it. Every state administers its own education system and state carceral system for juveniles, and often this means that lawsuits successfully challenging systemic failures end up constrained within state border—if not to a single facility. In the Mississippi series of lawsuits offered as an example at the beginning of this Article,<sup>76</sup> the state ended up agreeing to a series of changes including facility-specific reforms and an improved statistical system to track students with disabilities in the juvenile justice system, yet even after this process it became clear that years later Mississippi facilities were still not compliant with the agreed upon reforms.<sup>77</sup> And these issues are not confined to rural states that may lack resources or political will for adequate social welfare services as

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69. *See, e.g.*, T.G. v. Kern Cnty., No. 1:18-cv-0257 JLT, 2019 WL 6529083 (E.D. Cal. Dec. 4, 2019) (summarizing facts of a settlement where plaintiff T.G. was systematically denied access to special education classrooms on punitive grounds, despite having an IEP in place and having multiple mental health related disabilities).

71. *See, e.g.*, T.H. *ex rel.* T.B. v. DeKalb Cnty. Sch. Dist., 564 F. Supp. 3d 1349 (N.D. Ga. 2021) (describing a Georgia county jail failing to implement IEPs for child detainees held there for extended periods of time).

72. *See, e.g., id.* (quoting the local sheriff overseeing a county facility that he had no intention of allowing local schools access to their detainee database to carry out child find obligations).

73. *See, e.g.*, Bowers v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). The court in this case found for the defendant, a chronically overcrowded juvenile correctional facility, because "[d]evelopment of appropriate IEP's for these juveniles has proved to be extremely difficult for DJJ, often for reasons beyond its control." *Id.* at 801. Additionally, the plaintiffs' contention that transition services were inadequately given was rejected because the average stay amounted to only twenty-one days. *Id.* Notwithstanding, the case highlights the failure of existing transition services and plaintiff efforts to correct the issue.

74. *See, e.g.*, Butrymowicz & Mader, *supra* note 1 (discussing suits relating to Mississippi's failure to keep track of relevant data).

75. Complaint, Charles H. v. District of Columbia, 1:21-cv-00997-CJN (D.D.C. 2021).

76. *See supra* Part I.

77. Butrymowicz & Mader, *supra* note 1.

one might expect: Vermont<sup>78</sup> and California,<sup>79</sup> for example, faced lawsuits alleging failures to meet special education requirements. Other states have signed onto consent decrees with the federal government to correct compliance issues and failures to accommodate individuals with disabilities in the juvenile system.<sup>80</sup>

#### *E. Monitoring for IDEA Compliance*

Aside from lawsuits brought by plaintiffs and public interest organizations, federal administrative agencies also play a role in monitoring states for compliance with the IDEA. The Office of Special Education Programs (OSEP), under the Department of Education, is in part responsible for administering the IDEA.<sup>81</sup> The

78. See Liam Elder-Connors, *Federal Lawsuit Alleges 'Dangerous Conditions' For Children Held at Woodside*, VT. PUB. (Jun. 24, 2019, 5:07 PM), <https://www.vpr.org/vpr-news/2019-06-24/federal-lawsuit-alleges-dangerous-conditions-for-children-held-at-woodside> [<https://perma.cc/8C3E-H6JC>].

79. See *Incarcerated Youth with Disabilities Gain Equal Access to Rehabilitation and Education*, DISABILITY RTS. CAL. (Jun. 16, 2020), <https://www.disabilityrightsca.org/press-release/incarcerated-youth-with-disabilities-gain-equal-access-to-rehabilitation-and> [<https://perma.cc/RHW7-QZWN>].

80. One such example occurred in Maryland. See, e.g., Peter E. Leone & Pamela Cichen Wruble, *Education Services in Juvenile Corrections: 40 Years of Prison Reform*, 38 EDUC. & TREATMENT CHILD. 587, 593 (2015)

[T]he Maryland Juvenile Services Administration (JSA) failed to provide free and appropriate public education to students eligible for special education services in state juvenile correctional facilities under the Education for the Handicapped Act (subsequently renamed, the Individuals with Disabilities Education Act, IDEA). Among other things, the complaint alleged that the JSA and school districts failed to exchange records for youth in a timely manner, that student-staff ratios were not consistent with state regulations, and that JSA failed to provide related services consistent with students' Individualized Education Plans (IEPs). The Consent Decree between the parties and approved by the Court required the JSA to create a new education program, develop agreements with local school districts for the transfer of records, meet class size requirements, and provide related services. The Consent Decree also required that staff receive training related to special education requirements and that the Maryland State Department of Education monitor the implementation of the agreement.

81. U.S. Dep't of Ed., *About OSEP*, ED.GOV, <https://www2.ed.gov/about/offices/list/osers/osep/about.html> [<https://perma.cc/AXE7-SZAP>]

OSEP administers the Individuals with Disabilities Education Act (IDEA) which authorizes formula grants to states under Part B, grants to lead agencies for the infants and families program under Part C, and discretionary grants under Part D to institutions of higher education and other non-profit organizations to support grants for state personnel development, technical assistance and dissemination, technology, personnel development, and parent-training and information centers.

OSEP requires states to demonstrate their compliance with IDEA provisions, using tools such as advisory opinions, letters of interpretation, complaint investigations, and compliance reviews.<sup>82</sup> Yet crucially, after 2011 OSEP reviewed substantial IDEA issues as part of its Continuous Improvement and Focused Monitoring System,<sup>83</sup> what remains is a primarily statistically and fiscally oriented apparatus for assessing compliance with the IDEA. However, the OSEP also works with the broader Department of Justice (DOJ), which does involve itself with supervising and pursuing systemic failures when they arise.<sup>84</sup> Often DOJ interventions involve consent decrees requiring states to reform their current system or DOJ lawsuits designed to force compliance for individual facilities.<sup>85</sup> This system of consent decrees and lawsuits brought by the DOJ therefore resembles the true plaintiff-brought lawsuits that also help enforce the IDEA—it is another fundamentally reactive approach to failures to provide special education services.

Furthermore, the National Council on Disability has identified many specific limitations and oversights on the part of the OSEP and the Department of Education in terms of monitoring state IDEA compliance, including: the OSEP has threatened to refer cases to the DOJ for enforcement but has never actually done so for any state; the Department of Education has not developed their own general standards or enforcement sanctions beyond those already in the IDEA; while the OSEP relies on trickle-in reports of non-compliance, there is no formal process in place to analyze those complaints; and not only state but federal IDEA monitoring has suffered from a general lack of budgetary resources since 2002.<sup>86</sup> The OSEP is not entirely toothless, and does indeed provide clarifications for states who write in with questions regarding compliance standards<sup>87</sup> and even intervenes in egregious cases that have caught the OSEP's attention by a very flagrant violation<sup>88</sup> or when data

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82. Sharan E. Brown, *Advocacy for Young Children Under IDEA*, 16 *INFANTS & YOUNG CHILD*. 227, 233 (2003).

83. *State Monitoring and Support*, ED.GOV, <https://sites.ed.gov/idea/state-monitoring-support/>.

84. *Cf. Dear Colleague Letter*, *supra* note 58, at 19 (acknowledging joint efforts between the DOJ and DOE to address juvenile corrections issues including a joint letter summarizing the Obama administration's efforts to address special education in juvenile corrections).

85. *See Department of Justice Actions in Juvenile Justice*, NJDC.INFO, <https://web.archive.org/web/20210308113237/https://njdc.info/departement-of-justice-actions-in-juvenile-justice/> [<https://perma.cc/SN8M-5QSW>] (offering a non-exhaustive list of DOJ actions addressing special education in juvenile corrections facilities); Department of Justice, *Special Litigation Section Cases and Matters: Juvenile Justice*, JUSTICE.GOV, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters/download#juv> [<https://perma.cc/AC99-5HDP>].

86. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 5, at 27–28 (“Since at least 2002, the U.S. Commission on Civil Rights identified a lack of adequate resources for state and federal monitoring and enforcement programs.”).

87. *See id.* at 27 (“OSEP . . . issues policy letters that are direct responses to requests for clarification on a variety of issues raised by parents, advocates, and school personnel. Again, while they do not carry the weight of law, these letters are helpful in providing clarification on specific circumstances that might not be directly addressed in IDEA law or federal regulations.”).

88. *See id.* at 28 (explaining how OSEP responded quickly to a federal judge who argued

suggests that a systematic form of non-compliance is occurring across many states.<sup>89</sup> Troublingly, the National Council on Disability also points out that the OSEP's current method of review of state data is limited in that it is mainly suited for aggregate nationwide findings and is poor at identifying particular states that are non-compliant<sup>90</sup> and, furthermore, that complaints made to state monitoring organizations are not used as a source of information for the federal OSEP.<sup>91</sup> In short, the federal monitoring system for IDEA non-compliance is ill-equipped to address individual states that fall out of compliance and does not make proper use of information that could be available to the OSEP.

This wait-and-see approach combined with inconsistent monitoring has direct parallels with another major area of needed reform in the United States: police reform. The system of consent decrees and occasional federal intervention in the most egregious circumstances of abuses has been criticized in the American policing context as a similar wait-and-see system that needs replaced with a more proactive approach.<sup>92</sup> The deleterious effects of failing to intervene early and often creates opportunities for states to systematically deprive citizens of their rights until a sufficiently horrific and obvious problem arises. But what might a more proactive approach in the context of incarcerated youth with disabilities look like?

#### IV. THE PROACTIVE MODEL – AMENDING THE IDEA TO LOOK FORWARD

This Article proposes a more aggressive, forward-looking system for ensuring compliance with the IDEA for juveniles with disabilities who are incarcerated. This approach, dubbed the “Proactive Model,” involves five changes to IDEA provisions, including (1) several helpful borrowings from supplemental disability education statutes among the states, (2) a more robust monitoring system, including on-the-ground inspectors and a national IEP tracking system, (3) a broadening of the Part B provisions of the IDEA to cover aspects of education that are not directly related to the classroom, (4) school-to-corrections-facility partnerships designed to ensure students are placed in the Least Restrictive Environment in the truest sense, and (5) improvements to family involvement for students who are incarcerated.

##### *A. Borrowing from State Approaches to Special Education*

The first component of the Proactive Model, a liberal borrowing of state statutes that expand upon the provisions of the IDEA, would help ensure that the existing compliance regime and IDEA provisions set better special education standards in the first place. One model state is California, which has implemented shorter timelines

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that children with severe disabilities were not entitled to any sort of services).

89. *See id.* at 47–48. The NSC report includes a very helpful bulleted list of monitoring and compliance inadequacies by OSEP. *Id.*

90. *Id.* at 48. Perhaps most alarmingly, OSEP has *never* designated a state as “needing substantial intervention,” instead opting for lesser classifications when states show troubling signs of non-compliance. *See id.* at 47.

91. *Id.*

92. *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1 (2009).

to ensure records are available to parents and facilities upon request,<sup>93</sup> a seventy-two-hour time frame for the release of IEP records following release from a correctional facility,<sup>94</sup> a mandate for IEP meetings within thirty days of any request by the parent,<sup>95</sup> a prohibition of denial of enrollment in public schools based on prior incarceration<sup>96</sup> or a failure to transfer records therefrom,<sup>97</sup> a guarantee of a right to reenroll in the youth's school of origin post-incarceration,<sup>98</sup> and the appointment of "educational liaisons" from the school of origin to ensure a smooth return to school life at the original education venue.<sup>99</sup> Collectively, these California provisions impose tighter, more clearly articulated timelines for special education services for students who depend on special education services. Another example of a useful state statute to adopt at the federal level is Illinois' approach to correctly identifying students with disabilities before they enter the juvenile justice system, including a broader definition of qualifying "autism" disabilities than under the IDEA and additional "Child Find" provisions that require annual examination of children below the age of five in order to detect disabilities early on.<sup>100</sup> Adopting state provisions like these on the federal level ensures that speedy timelines, parental involvement, and adequate disability detection take place in order to prevent more individuals with disabilities from falling through the cracks.

Missouri's approach to juvenile justice and education could also inform federal policymaking surrounding IDEA implementation. Missouri utilizes a unified school district that includes its juvenile justice facilities, places emphasis on following through with IEPs, puts youth in the system on twelve-month, year-round class schedule, and provides for extensive transition-to-adulthood services and aftercare planning and monitoring following release.<sup>101</sup> For students with disabilities, some aspects of the Missouri approach show promise, including the use of facilities that are much smaller and less prison-like than traditional juvenile facilities and are closer to home.<sup>102</sup> For students who fall under the IDEA, this means living conditions more closely aligned with the spirit of the IDEA's Least Restrictive Environment requirement.<sup>103</sup> Additionally, the Missouri model encourages family involvement, with immediate outreach to parents upon incarceration from the facility staff, along

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93. Cal. Ed. Code § 56504.

94. *Id.* § 48467(c)(1).

95. *Id.* § 56343.5.

96. *Id.* § 48853.5(f)(8)(B).

97. *Id.* § 48645.5(b).

98. *Id.* § 48853.5(f)(1).

99. *See id.* § 48852.5(c).

100. Ill. Admin. Code § 226.100.

101. *Blueprint for Change Webinar*, *supra* note 46, at 37:10.

102. RICHARD A. MENDEL, *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS* 5, 15–19 (2010) ("Departing sharply from the age-old training school model, Missouri has eschewed large, prisonlike correctional institutions in favor of smaller, regionally dispersed facilities. And instead of standard-fare correctional supervision, Missouri offers a demanding, carefully crafted, multilayered treatment experience designed to challenge troubled teens and to help them make lasting behavioral changes and prepare for successful transitions back to the community.").

103. *See supra* notes 54–58 and accompanying text.



with family therapy and post-release planning with family members.<sup>104</sup> The Missouri model approach to juvenile justice is also successful in terms of recidivism outcomes, with significantly lower rates of re-offending and re-entry into the juvenile justice system compared to other states.<sup>105</sup>

Legislation amending the IDEA to adopt the Proactive Model could reduce missed educational opportunities and improve outcomes for students by combing various state paradigms on juvenile justice and education, including the more stringent California regulatory regime or Missouri's novel, more humanitarian approach to juvenile rehabilitation. Federal special education law should not just help states meet minimum standards—it should also continue to raise standards based on state approaches that show promise.

### *B. Expanding and Centralizing IDEA Compliance Monitoring*

The second component of the Proactive Model, a more intensive monitoring and inspection regime, would be a tremendous improvement over the slow-to-respond system of lawsuits and DOJ investigations that currently address IDEA compliance.<sup>106</sup> One component of expanding this system would be to move away from merely monitoring states' submission of data and documentation demonstrating their compliance. Instead, the government should actively inspect facilities on the ground to make substantial determinations of IDEA compliance. This would involve the employ of federal workers who visit juvenile corrections facilities, specifically analyze facilities, and interview parents and students in-person to ensure compliance. The OSEP at one point was already conducting in-person visits, although these visits were mostly intended to measure procedural compliance such as evaluation timelines and due process hearings.<sup>107</sup> In 2012, the Department of Education outright ceased to conduct verification visits but would “continue to monitor state supervision systems.”<sup>108</sup> The National Council on Disability report on the IDEA compliance-monitoring regime identifies resuming on-site visits as a way to demonstrate to state and local officials that OSEP is playing an active monitoring role.<sup>109</sup> More than merely a show of regulatory force, the resumption of on-site monitoring could also synergize with other aspects of the Proactive Model. The collection of IEPs from states into one centralized federal database, discussed in the paragraph below, would allow the OSEP to comb the data for discrepancies or worrying trends that indicate a need for an on-site visit.<sup>110</sup> Additionally, making better use of internal state compliance datasets as recommended by the National Council on Disability report<sup>111</sup> and streamlining the complaint process so that parents and stakeholders can send

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104. See MENDEL, *supra* note 102, at 33–35.

105. See *id.* at 6–9 (outlining the statistical successes of the Missouri approach to juvenile justice).

106. See NAT'L COUNCIL ON DISABILITY, *supra* note 5.

107. See *id.* at 19–22.

108. *Id.* at 23.

109. *Id.* at 47 (“On-site visits are helpful to indicate to state and local officials and the public that OSEP is actively involved.”).

110. See *infra* text accompanying note 111.

111. See NAT'L COUNCIL ON DISABILITY, *supra* note 5, at 48.

complaints straight to the Department of Education for formal review<sup>112</sup> would allow for this in-person monitoring regime to be driven by data-backed predictors of non-compliance. The Proactive Model seeks to quickly centralize IDEA compliance data, and then send direct on-the-ground support and verification to facilities and states that fall short. Instead of wading through administrative hearings and expensive, time-consuming lawsuits, plaintiffs seeking relief under the IDEA's protections may have their grievances resolved sooner and without placing the burden on already struggling families.

Additionally, forming a new national IEP database for juvenile facilities would improve the quality of IEPs in the future and better monitor facility performance. IEPs would be electronically submitted to the Department of Education, such that the required completion of an IEP within a period of time under IDEA provisions also requires the text and content of the IEP to be submitted electronically. Such a database would not only track metadata about the creation, transfer, and implementation of IEPs via an online submission system, but would also provide federal authorities with the qualitative aspects of IEPs as developed by each student's local IEP team. This would allow for creative analyses or, at the very least, auditing of the substance of IEPs so that OSEP could make better recommendations and guidance for correctional facilities on a targeted basis. It might also open the door for more robust measurement of student progress in IEPs, given that as of 2017 only twelve states require detailed measurement of student progress in IEPs and just twenty-one have altered or expanded the requirements of what goes into an IEP.<sup>113</sup> While at first glance this may sound like an expensive, overly complicated monitoring regime, this system would only be targeted at the fewer than 100,000 juveniles who are incarcerated and may need services under the IDEA but are not receiving them. For example, some juvenile facilities (perhaps out of fear of meeting IEP timeline requirements) output IEPs that lack significant differentiation and instead are "cookie-cutter" compliance measures rather than truly individualized education plans or, in other cases, juvenile facilities output IEPs that are a radical departure from the student's previous IEP, but the facility has not obtained the old IEP to compare.<sup>114</sup> An IEP database would be an excellent resource for the Department of Education and the OSEP to spot and address the "cookie-cutter" problem, while also providing a single go-to location where facilities and stakeholders can instantly retrieve previous IEPs during transition periods to avoid sudden departures or inaccurate disability assessment.

### *C. Diverse Forms of Accommodation*

The third component of the Proactive Model involves expanding the scope of Part B of the IDEA to aspects of education that do not involve the classroom or

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112. *Id.*

113. Will J. Gordillo & Anne Miller, *Progress Monitoring with Data Collection of IEP Annual Goals*, PUB. CONSULTING GRP. (Feb. 2017), [https://www.publicconsultinggroup.com/media/1271/edu\\_ofcl\\_white\\_paper\\_pmdc-final.pdf](https://www.publicconsultinggroup.com/media/1271/edu_ofcl_white_paper_pmdc-final.pdf) (overviewing state data collection and IEP monitoring practices).

114. *See Law and Practice Webinar, supra* note 51, at 41:50.

instructors. For instance, using the autism example provided earlier in this Article,<sup>115</sup> individuals with autism do not merely require disciplinary, curriculum, and classroom accommodations. When an individual with autism is forced to live in an unfamiliar carceral social world, protections could be in place that require facility scheduling or the harsh tactile environment of a correctional facility to be adjusted to accommodate individuals with autism.<sup>116</sup> Another example of the broadening of what counts as components of education would be the provision of increased federal funds for technology used to provide instruction in special education classrooms where computers, tablets, or software, for example, would be provided to juvenile facilities. Given the ways juvenile justice facilities often struggle to maintain staff of appropriate qualifications, technological innovations may provide a bridge for students through virtual learning to connect them with staff from other facilities or schools. It would also allow for technology-based lesson plans that may be less reliant on adequate staffing. These examples demonstrate how the IDEA could be expanded to not just measure compliance and provide assistance for facilities in terms of the classroom and the “least restrictive” environment, but also promote a more holistic and enriching educational environment.

#### *D. School-to-Facility Partnerships*

The fourth component of the Proactive Model would be to utilize IDEA funding incentives to create school-to-facility partnerships. As previously discussed, Free and Appropriate Public Education in the Least Restrictive Environment means not isolating students with disabilities from their peers in school to whatever extent possible.<sup>117</sup> In the broadest sense, placing a youth into the custody of the juvenile justice system is inherently a form of this type of isolation. Given the disproportionate rate of students with disabilities who end up in correctional facilities,<sup>118</sup> in a way, the juvenile justice system violates the spirit of the Least Restrictive Environment requirement, even if it does not plainly violate the law. But what if funding were provided to schools to accommodate incarcerated juveniles and keep them incorporated in a local school system, as opposed to an independent system among state juvenile corrections facilities? For example, the IDEA could be amended to provide additional federal funding to state education agencies that redirect funding for juvenile justice facilities special education programs toward direct integration with local schools. Security, medical and social workers, and correctional facility infrastructure (such as specialized doors and windows) could be provided to local schools. This would reduce delays in educational development caused by the paper shuffle of repeated school and facility transfers within the juvenile system, and schools would be encouraged to take in students with disabilities caught up in the juvenile justice system by adjusting their own staff and facilities to make room for them. This approach is also more consistent with the IDEA’s protections for children with disabilities from discipline based on their

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115. *See supra* text accompanying notes 21–24.

116. BAKER, DRAPOLA, & LITTLEFIELD, *supra* note 20, at 148–49.

117. *See supra* text accompanying notes 54–58.

118. Kirksey, *supra* note 4.

disability—for a student in need of special education services, placement in a juvenile jail separate from their former classmates surely feels punitive.

#### *E. Equipping and Involving Families*

The final element of the Proactive Model is lowering barriers to involvement for families of incarcerated youth with disabilities. Parental involvement plays a key role in educational outcomes.<sup>119</sup> Notwithstanding, carceral systems impose obstacles to parental involvement, and individuals within those systems are less likely to have any sort of parental involvement in the first place. Specific to the context of incarcerated youth with disabilities, Theresa A. Ochoa and others argue that many obstacles may make family involvement difficult for incarcerated youth with disabilities, including (1) perceptions of power differentials in the family's relationship with school personnel where parents assume a passive role on tasks like IEP teams, (2) parents of justice-involved youth frequently have their own history of involvement in the system and distrust the school, (3) juvenile correctional facilities are highly structured toward both strict regimens for children and security measures that can make parent-child contact difficult logistically, and (4) parents often have outright misunderstanding toward the juvenile system and the educators within it.<sup>120</sup> In the carceral setting, the primary solutions to these obstacles involve developing communication strategies to reach out to parents and students, such as motivational interviewing, staff and parent training, and empathetic rapport building with families.<sup>121</sup> Towards this goal, the IDEA could be expanded to guarantee incarcerated students access to some form of communication with their parents with distance-communication technologies required where the family is geographically distant. Or, for parents who wish to challenge IDEA compliance for their child, there could be a direct and formalized complaint process to the OSEP for parents, so that parents have a more efficient and empowering way of addressing grievances. Lastly, schools and states that receive federal funding under the IDEA could be required to put parents of children incarcerated at the same facility in contact with one another to share expectations and experiences. This could also work to enable group advocacy where parents may feel more comfortable speaking out about what they want for their child who is incarcerated with a disability.

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119. Sandra Wilder, *Effects of Parental Involvement on Academic Achievement: A Meta-Synthesis*, 66 ED. REV. 377, 394 (2017) (“[T]he findings of this meta-synthesis confirmed the significant role of parental involvement in children’s academic achievement.”).

120. Theresa A. Ochoa, Corinne C. Datchi, Nicole M. Weller, Miriam Northcutt Bohmert, & Derek Grubbs, *Education and Transition for Students with Disabilities in American Juvenile Correctional Facilities*, 56(5) INTERVENTION SCH. & CLINIC 293, 297–98 (2021).

121. *Id.* at 298. For an exploration of strategies to improve parent-child involvement before incarceration but while involved in the juvenile justice system as a student with disabilities, see Lili Garfinkel, *Improving Family Involvement for Juvenile Offenders with Emotional/Behavioral Disorders and Related Disabilities*, 36 BEHAV. DISORDERS 52 (2010).

*F. Potential Criticisms of the Proactive Model*

By borrowing from state models that better provide for the needs of students with disabilities, creating a more robust IEP and facility monitoring regime, expanding the IDEA's educational requirements to include broader themes such as thriving physical spaces and technology access, and fostering school-facility partnerships where students with disabilities are more frequently allowed to remain in a local school while still in juvenile custody, the Proactive Model laid out in this Article would reduce the inherent inconsistency of the current regime of reactive IDEA enforcement. Ultimately, the goal of this approach is more equal outcomes for students with disabilities nationwide. However, some expected criticisms of this model should be addressed.

First, there is no national education system provided by the federal government, and this Article suggests a move towards a more centralized system for individuals with disabilities in the juvenile justice system. Why not expand these concepts of "proactive" education standard-setting to all educational contexts or all special education under the IDEA? One important distinction is cost. The proposals in this Article would apply to tens of thousands of highly vulnerable individuals with disabilities caught up in the school-to-prison pipeline and facing societal obstacles to full participation. Put simply, there is a stronger need for government oversight and involvement for vulnerable populations such as persons with disabilities who are behind bars. Another criticism might be concerns about commandeering of state educational systems by the federal government; however, given that all these proposals would involve utilizing the conditional state funding model already in place by the IDEA, it is dubious that such concerns would bar amending the law in this way.

Another point of criticism is the larger question of whether the goal should be to expand IDEA enforcement at all, given criticisms of the IDEA. Catherine Kramarczuk Voulgarides provides one such critique based on how IDEA compliance can create inequities even as it attempts to solve others.<sup>122</sup> One issue, argues Voulgarides, is "opportunity hoarding" in terms of how parents and students exercise their rights under the IDEA.<sup>123</sup> Opportunity hoarding in the educational context refers to parents and families from privileged racial and class backgrounds having the easiest access to educational resources such as information, proposed policy changes, influence with school officials, and other forms of accommodation.<sup>124</sup> In practice, the lawsuit and administrative remedy system prioritizes wealthier, often white, parents who have the time, money, and knowledge of student rights under the

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122. CATHERINE KRAMARCZUK VOULGARIDES, DOES COMPLIANCE MATTER IN SPECIAL EDUCATION? IDEA AND THE HIDDEN INEQUITIES OF PRACTICE 67–68 (Alfredo J. Artiles & Elizabeth B. Kozleski eds., 2018).

123. *Id.* at 67–68. (defining opportunity hoarding as "a process whereby 'categorically bounded network acquire access to a resource that is valuable, renewable, subject to monopoly, supportive of network activities, and enhanced by the network's modus operandi'" through which white, higher class individuals make easier use of resources intended to help all).

124. See R. L'HEUREUX LEWIS-MCCOY, INEQUALITY IN THE PROMISED LAND: RACE, RESOURCES, AND SUBURBAN SCHOOLING 10 (2014).

IDEA, coupled with the education level and status required to pull the right institutional levers to obtain accommodation and educational resources for their child.<sup>125</sup> Go-file-a-complaint provisions provided under the IDEA ensure that only a certain, relatively privileged subset receive adequate educational resources by asserting their rights. Voulgarides thus offers a powerful critique of the structure and function of the IDEA's system of remedies for noncompliance. However, in the case of the Proactive Model proposed here, the effect would be lessened, not exacerbated. This Article's proposal to give the OSEP and Department of Education a more active, centralized role in aggressively pursuing cases of noncompliance before it occurs<sup>126</sup> takes the pressure off families seeking a remedy who do not want to lead the charge in a drawn-out administrative and court battle. Additionally, the intersection of racial disparities in juvenile justice with the question of special education means that the proposals of this Article, which emphasize an expansion of the IDEA to reach incarcerated students with disabilities who need it most, would be increasing protections and enforcement for educational settings where black and brown youth are overrepresented.<sup>127</sup>

Voulgarides offers a second criticism of how the IDEA is applied. The IDEA, Voulgarides acknowledges, was instrumental in increasing access to appropriate public education for many students who previously were not receiving free and appropriate public educations before its passage.<sup>128</sup> However, as it has evolved, the IDEA has become "procedurally dense" and has "negatively impacted educational practice," because educators and institutions worry and obsess over avoiding federal scrutiny and auditing over noncompliance, and thus are incentivized primarily to avoid the appearance of failing to meet standards, as opposed to pursuing maximized educational outcomes or equity.<sup>129</sup> This critique, along with the other point about "opportunity hoarding," illuminates an important closing thought on how the Proactive Model proposed in this Article should be understood. The IDEA is a very complex piece of legislative machinery that does not operate in a vacuum: the focus of this Article is how an addition could be made to the IDEA to specifically combat inequities in the juvenile carceral system. However, it stops short of addressing the much larger question of whether the basic structure and function of the IDEA has become harmful or has lost sight of what equity in education should look like. This Article argues that the juvenile justice system has been slow to catch up to the gains in special education made under the IDEA, hence the need for specific solutions targeting corrections facilities and state juvenile justice administration. So, the larger fate of the IDEA is left unconsidered in this Article.

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125. See VOULGARIDES, *supra* note 122, at 68.

126. See *supra* notes 104–109 and accompanying text.

127. See *supra* notes 23–29 and accompanying text.

128. VOULGARIDES, *supra* note 122, at 102 ("Through [the IDEA and similar legislation] students with disabilities, who had been systematically denied the right to a free appropriate public education, slowly gained educational access and opportunity through disability legislation.").

129. See VOULGARIDES, *supra* note 122, at 102–05.

## CONCLUSION

This Article aimed to provide an overview of the legal and social context for students with disabilities within the juvenile justice system and has proposed a Proactive Model that could be used to expand and update the IDEA to prevent the systematic educational failures that have been litigated in federal and state courts for decades involving juvenile correctional facilities. Rather than waiting for failure, the federal government should take further steps to guarantee the educational rights of individuals with disabilities who continually find themselves placed in institutions that do not live up to the promises of the IDEA. Youth with disabilities should not be quarantined from their peers because of behavioral issues and be left in educational limbo simply because of a government failure to actively take stock of whether the system is living up to its own stated goals. By adopting measures articulated within the Proactive Model, states can evolve their emphasis to help juveniles with disabilities succeed, rather than simply requiring that juvenile justice institutions do not fail.