

# TOP TEN LIST

## Top Ten Things a Judge in Delinquency or Criminal Court Can Do Under the Individuals with Disabilities Education Act (IDEA) Regarding Young People with Education-Related Disabilities Who are Facing Charges

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### **1. Determine the child's special education status.**

Determine if the child is in school, if the child has previously been identified as needing special education, and if the child had an Individualized Education Program (IEP) in the last educational placement. This information may be critical for determining whether the school system has an obligation to educate and serve a student aged 18-21 in an adult correctional facility. 20 U.S.C. § 1412 (a)(1)(B)(ii), 34 C.F.R. § 300.311 (a).

### **2. Find a way to get the child evaluated for special education eligibility.**

Insist that the parent have the child evaluated; or tell a probation officer to push for the evaluation; or refer the child yourself to school system personnel for comprehensive current evaluations. *See, e.g.*, 34 C.F.R. § 300.532 regarding evaluation procedures and your local school regulations regarding referral for special education by a judicial officer. Upon request, school system personnel must assess the child, without charge, in all areas of suspected disability. Thus, by pushing special education evaluation, a court can ensure that -- without charge to the parent *or to the court* -- comprehensive evaluations have been completed. Left to their own systems and means, delinquency and criminal courts often fail to obtain *any* evaluation of a child. When the court does obtain its own evaluation (regarding a child in adult criminal court), the evaluation is likely to be a forensic screening regarding competency or amenability to rehabilitation or perhaps a clinical psychological evaluation addressing the child's cognitive level (IQ) and basic diagnoses. Through the special education process, the parent and the child are entitled, as noted above, to evaluations relevant to any area of suspected disability. In addition to a complete psycho-educational, speech/language, hearing, and vision testing, the child may also have, for example, a clinical psychological, an occupational and physical therapy evaluation, a neurological and/or psycho-neurological, an evaluation of adaptive functioning and non-verbal intelligence, and a complete vocational evaluation.

### **3. Ensure that someone acquires and organizes for the court the child's educational records.**

Particularly for disposition (in delinquency cases), for sentencing (in criminal cases), and for transfer (between delinquency and criminal court), the judge should see the child's educational history. *See*, 34 C.F.R. § 300.560 *et seq.* Typically, one will discern a failure by

school system personnel over a period of many years, beginning in early elementary school, to identify the child as eligible for special education services and a failure to provide the child with required special education services. The court should insist that an advocate for the child or an expert appointed by the court prepare a chart to provide for the court a summary of the child's school history. (Reviewing clearly-documented evidence that educators responsible for the child failed for a period of years -- in violation of federal, state, and local law -- to provide comprehensive services to the child, how can one conclude that a child is not amenable to services?)

**4. Appoint an educational expert to advise the court.**

Locate an educational psychologist or other professional with expertise in psycho-educational matters (*i.e.*, education-related disabilities and special education evaluations and services). An expert can review the child's educational history (including current and past evaluations), review the child's current and past IEP's (or the lack thereof), evaluate the child's current educational placement and services (or the lack thereof), and help the court and the parties to find appropriate and comprehensive services for the child.

**5. Push the parent (or a child who is 18 or older) to find and hire a special education lawyer.**

One may have trouble initially finding attorneys who know and practice special education law and, in particular, finding attorneys willing to represent (regarding special education) parents of young people who have cases in the delinquency or criminal court. With some persistence, however, one can find and develop these connections, particularly as lawyers learn that attorneys' fees are available at market rate for parents who prevail in special education matters against the school district. 34 C.F.R. § 300.513.

**6. Understand what "special education", "free appropriate public education" (FAPE), "related services", and "transition services" are.**

Read the list of definitions provided to you (along with this Top Ten list). The services available through the school system to a child with education-related disabilities are comprehensive and meaningful. Provided and supervised properly, these services can help the child become stable, safe, and productive. Thus, the court should view these services as an alternative to incarceration and to punitive handling of the child through the criminal or delinquency system. The court can make attendance or residence at a special education placement and participation in special education services a condition of probation or pre-trial release.

**7. Insist that the child have a current, appropriate Individualized Education Program (IEP) and a current notice of placement.**

Order that school system personnel (or personnel from another public agency responsible for providing educational services to students in adult correctional facilities) develop an IEP for the child. See 20 U.S.C. § 1414 (d)(6), 34 C.F.R. §§ 300.311 (b) and (c) (relating to the development of IEP's for children with disabilities in adult prisons) and 20 U.S.C. § 1412 (a)(11)(c) (allowing the state to designate a public agency, other than the school system, to provide educational services for

children with disabilities in adult prisons). Order representatives from appropriate linking agencies -- *i.e.*, agencies that provide certain transition services -- to be present at the development of the IEP. See *e.g.*, 34 C.F.R. § 300.344 (b) (regarding transition services participants); *but see*, 34 C.F.R. § 300.311 (b)(2) (limiting the obligation to provide transition services). Insist that school system personnel (or personnel from another public agency responsible for providing educational services to students in adult correctional facilities) issue a notice of placement that specifies the child's current special education school placement.

### **8. Use the bully pulpit and the court's authority creatively to ensure that the child gets needed services (special education services, related services, and transition services).**

The special education law (*i.e.*, the IDEA) does require that a party exhaust administrative remedies prior to obtaining relief from a court; nonetheless, a judge in a delinquency or criminal case (or a transfer hearing) can insist that parents, probation officers, and others responsible for the child take necessary actions. Moreover, if school system personnel fail to provide an IEP and special education, related services, and transition services, they are -- in effect -- likely interfering with the child's ability to comply with the court's order to attend school. A non-party who interferes with a party's ability to comply with a court's order (and with statutory requirements like mandatory school attendance) may be in civil contempt and/or subject to the court's authority under its own rules to enforce compliance with its orders. Simply summoning in school system authorities to answer the court's questions about the absence of special education, related, and transition services for a child may be sufficient to get people moving to serve the child. Remember two key concepts from case law regarding special education remedies when school system personnel fail to provide free and appropriate special education services: (1) placement of the child by the parent in private facilities at public expense; (2) compensatory education services to make up for time and education lost by the child. By obtaining these remedies through the special education administrative hearing process and using them strategically in relation to the child's criminal matter, an advocate for the child can increase dramatically the potential for identifying and securing, for sentencing purposes, legitimate and practical alternatives to incarceration. Courts should be aware of these possibilities and encourage such outcomes. (See #10, below.)

Judges also can convene inter-agency meetings, bringing officials and administrators together to discuss collaboration between agencies (including pooling money) to coordinate services for children under the IDEA and to avoid the ordinary tendency to push children with disabilities out of school, onto the streets, and into the delinquency system.

### **9. Ensure that a child resides in the least restrictive environment that is consistent with both community safety and with educating the child.**

As noted above, comprehensive special education, related, and transition services can

substitute for harsh treatment of a child in a delinquency or criminal incarceration setting. If a judge determines that a child requires a placement that is not community-based, however, special education law may provide a residential treatment alternative that, as a practical matter, secures the community's protection from the child while ensuring that the child receives special education, related, and transition services. If a child with education-related disabilities needs twenty-four-hour supervision to ensure educational progress, school system personnel must provide that level of care. Thus, a court in a delinquency or criminal matter should insist that school system personnel initiate and complete this residential placement process prior to the court's disposition or sentencing date. To facilitate the child's ultimate placement, the court -- prior to disposition or sentencing -- can issue orders for the child to be released temporarily for the purpose of attending interviews at potential placements. (Placement in a residential treatment center is less restrictive than a hospital or, of course, a prison.)

**10. Recognize that, by ensuring that the child receives education and treatment, you have advanced an outcome that ultimately is best not only for the child and the child's family, but also for the court and for the community.**

Ensuring that a young person has opportunities to become competent and productive and to fulfill legitimate aspirations is the best outcome for everyone involved. Education reduces recidivism. Over the years, courts have allowed school system authorities to shift responsibility for maintaining and training children with serious behavioral problems from the school system to the courts and to the juvenile delinquency system. More recently, that shift has been increasingly to the adult criminal system. The court can require that school system personnel resume responsibility for the child, thus shifting much of the burden back. Whenever appropriate, the court -- in its discretion -- can maintain supervision of the child and of the education/treatment process by making attendance and participation in the special education placement a condition of probation. Unlike disposition or sentencing orders, special education programs (IEP's) are a product of a team of people that includes the parent and the child, expert evaluators, teachers and school system administrators. That team can modify and adjust the IEP at any time to increase its efficacy. IEP's can -- and often do -- contain extensive behavior management programs; individual, group, and family counseling; small teacher:student ratios (including one-on-one, when appropriate); recreational and therapeutic recreational activities, mentoring, tutoring, job coaching, and other services that are, in reality, not available in incarceration settings.