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But What Can We Do? How Juvenile Defenders Can Disrupt The Schoolto-Prison Pipeline

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INTRODUCTION

The School-to-Prison Pipeline[1] is one of the greatest causes of racial and economic inequality in the United States.[2] Through the use of exclusionary discipline policies, youth, particularly youth of color, are pushed out of schools and onto a path that ends in incarceration. This article is designed to

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[1] During the *Courts Igniting Change Conference* (October 10, 2014), Executive Director of TeamChild in Washington State, Anne Lee, critiqued the use of the "school-to-prison pipeline" as a term used to describe the inequities evidenced in this article. She noted that describing the process as a pipeline infers linearity, with an entrance and exit point. The process can be more accurately described as a "slippery slope," where the top of the slope is the goal of exiting the juvenile justice system with no criminal history. Youth are placed on this "slope" by the actions of schools and various barriers that hinder them from reaching the top. I agree with this illustration. For purposes of this article, however, I will continue to describe this process as The School-to-Prison Pipeline. Anne Lee, Exec. Dir., TeamChild, Address at the Courts Igniting Change Conference (Oct. 10, 2014).

[2] *See* Catherine Y. Kim, *Procedures for Public Law Remediation in School-to-Prison Pipeline Litigation: Lessons Learned from* Antoine v. Winner School District, 54 N.Y. L. SCH. L. REV. 955, 956 (2010).

expose the causes of this problem and to offer practical solutions for juvenile defenders looking to disrupt it.

This article begins by exploring the background behind The School-to-Prison Pipeline. This includes an examination of the data underlying the problem and identifying the populations that suffer most because of exclusionary discipline policies. Four school practices are then presented as potential causes of The School-to-Prison Pipeline: (1) zero tolerance discipline policies; (2) increased law enforcement presence in schools; (3) placement of disruptive students in alternative schools; and (4) racial profiling of minority students with disabilities.

In light of these causes, recommendations contained in this article are organized to effect change within and outside the juvenile justice system. For juvenile defenders that want to focus their efforts within the system, they can keep their clients in school by advocating for their educational needs, pursuing alternative legal resolutions, educating judges, building relationships with probation officers, and collaborating with advocates in the civil system. Outside of the system, juvenile defenders can disrupt the pipeline by participating in policy development in their jurisdiction and counteracting implicit biases[3] they may have about their clients of color. Sewn throughout this article are suggestions extracted from interviews with juvenile defenders, prosecutors, probation officers, and civil advocates. The recommendations provided below are by no means exhaustive, but they can be used as a guideline for juvenile defenders looking to combat the disparate treatment of children of color in the juvenile justice system.

I. BACKGROUND OF THE PROBLEM

The School-to-Prison Pipeline is a "collection of education and public safety policies . . . that push our nation's schoolchildren out of the

[3] *See infra* Part III.B.2.

classroom" and into the juvenile and criminal justice systems.[4] Put another way, The School-to-Prison Pipeline is "a pathway from school to prison."[5] There are two ways students can enter the criminal justice system: directly or indirectly.[6] Students enter the criminal justice system directly when they are "arrested and charged for school misbehavior."[7] For example, a student who throws a pencil that hits a teacher could be charged with assault, or a student who curses at a school administrator could be charged with disorderly conduct.[8]

Another path onto the pipeline is an indirect one, where students are pushed out of school through exclusionary school discipline policies (such as suspensions and expulsions) and into the juvenile justice system.[9] Rather than dealing with the disruptive behavior, administrators can expel students to avoid addressing the needs of the disruptive students. Furthermore, most of these push-outs are for nonviolent offenses.[10] "Of the 3.3 million children suspended from school each year, 95 percent are sanctioned for nonviolent offenses like disruptive behavior and violating dress codes."[11] These sanctions coincide with the use of zero tolerance school discipline policies, discussed in Part III,[12] which mandate "penalties automatically for certain predetermined infractions, regardless of the circumstances."[13] The overuse

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[4] Deborah N. Archer, *Introduction: Challenging The School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010).

[5] Elizabeth E. Hall, *Criminalizing Our Youth: The School-to-Prison Pipeline v. The Constitution*, 4 S. REG'L BLACK L. STUDENTS ASS'N L.J. 75, 77 (2010).

[6] Kim, *supra* note 2, at 956.

[7] *Id.*

[8] Interview with Megan Manlove, Juvenile Defender, Counsel for Def., in Spokane, Wash. (Dec. 3, 2014) [hereinafter Interview with Manlove].

[9] Kim, *supra* note 2, at 956.

[10] ROBERT L. LISTENBEE, JR. ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEP'T OF JUSTICE, REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 183–84 (2012).

[11] *Id.*

[12] *See infra* Part III.

[13] Kim, *supra* note 2, at 956.

of such school policies "contributes to academic and social disengagement[,]" and increases the likelihood of more disciplinary problems in the future.[14]

Students who are pushed out of school for disruptive behavior are often sent back to environments that can be the source of their problems. Those students who are excluded from their learning environments "become hardened, confused, [and] embittered."[15] Even when these students return to school, some will feel "stigmatized and fall behind in their studies . . . [and] eventually decide to drop out of school altogether[.]"[16] This stigma is especially high for students forced out of regular school environments and sent to alternative placements for students with behavior problems.[17] These alternative schools have much higher dropout rates, and students attending these schools are much more likely to engage in criminal activity that leads to incarceration.[18]

Young men of color that have a disability are the most likely to suffer from The School-to-Prison Pipeline. In one study conducted by the Office for Civil Rights, "males [were] 49% of enrollment in the [districts examined], but received 74% of expulsions."[19] In the same study, students

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[14] *Dismantling the School to Prison Pipeline*, CHILDREN'S DEF. FUND–CALIFORNIA, http://www.cdfca.org/zz-testing/archives/april2015website/policy-priorities/dismantling-the-school-to-prison-pipeline/ (last visited Apr. 26, 2015) [hereinafter *Dismantling the School to Prison Pipeline*].

[15] Carla Amurao, *Fact Sheet: How Bad Is The School-to-Prison Pipeline?*, TAVIS SMILEY REP., http://www.pbs.org/wnet/tavissmiley/tsr/education-under-arrest/school-to-prison-pipeline-fact-sheet/ (last visited Nov. 3, 2013).

[16] *Id.*

[17] *See infra* Part II.C.

[18] Hall, *supra* note 5, at 77.

[19] Lynn M. Daggett, *Book 'Em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. 203, 225 (2013) (citing OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CDRC) 13 (2012), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf (examining

with disabilities were twice as likely to receive one or more out-of-school suspensions compared to general education students.[20] While suspension rates have gone up for all racial groups, "the spike has been most dramatic for children of color."[21] Students of color are far "more likely to be arrested at school than their white counterparts, even when they are accused of the same offenses."[22] For example, in the Los Angeles Unified School District, Black students represent more than 50 percent of the suspensions and expulsions, even though they represent less than ten percent of the student population.[23] In this same district, Latinos have the second-highest rate of school suspensions and expulsions.[24] The US Department of Education reports that Black children in California "receive out of school suspensions at a rate of 171 per 1000 students—*over two times* the average rate for the state (75 per 1000 students)."[25] Most recently, in 2012, the Office of Civil Rights released data showing that Black and Latino students were "[o]ver 70% of the students involved in school-related arrests or referred to law enforcement" even though they only made up 42% of the enrolled students in those districts.[26]

There is a direct correlation between Black and Latino students being pushed out of school and those same students entering the criminal justice

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data from 72,000 schools in about 7,000 districts, representing about 85 percent of United States K–12 public school students)).

[20] OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CDRC) 3 (2012), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf.

[21] Kim, *supra* note 2, at 957.

[22] *Id.*

[23] Anthony Asadullah Samad, *Cracking The School-to-Prison Pipeline*, CAL. PROGRESS REP. (Apr. 17, 2013), http://www.californiaprogressreport.com/site/cracking-school-prison-pipeline.

[24] *Id.*

[25] *Dismantling the School to Prison Pipeline*, *supra* note 14.

[26] Daggett, *supra* note 19, at 223 (citing OFFICE FOR CIVIL RIGHTS, THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION (CDRC) 2 (2012), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf).

system. This is abundantly clear when two facts are considered: (1) "70% of prison inmates [are] school dropouts;"[27] and (2) Blacks and Latinos "represent more than 70% of the state's prison population."[28] This correlation reveals the tremendous disparate impact exclusionary discipline policies can have on children of color.

It should be noted that the disparate impact The School-to-Prison Pipeline has on children of color has nothing to do with these students displaying more disruptive behavior in schools. Research on student discipline has found no evidence that children of color display higher rates of misbehavior compared to White students.[29] In fact, one study reviewing racial disparities in school discipline policies found that "White students were referred to the office significantly more frequently for offenses that are relatively easy to document objectively (e.g., smoking, vandalism, leaving without permission, and using obscene language)[,] [while] African American students . . . were referred more often for behaviors that . . . require more subjective judgment on the part of the person making the referral (e.g., disrespect, excessive noise, threatening behavior . . .)."[30] By the end of this study, researchers concluded that there was "no evidence that racial disparities in school discipline can be explained by more serious patterns of rule-breaking" among students of color, and it was possible that these students were "being unfairly singled out" when it came to prosecuting such behavior.[31]

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[27] Samad, *supra* note 23.
[28] *Id.*
[29] DANIEL J. LOSEN, NAT'L EDUC. POLICY CTR., DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE 6–7 (2011), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/discipline-policies-successful-schools-and-racial-justice/NEPC-SchoolDiscipline-Losen-1-PB_FINAL.pdf.
[30] *Id.* at 7.
[31] *Id.*

II. POTENTIAL CAUSES OF THE SCHOOL-TO-PRISON PIPELINE

Although it is difficult to pinpoint the one reason why The School-to-Prison Pipeline exists, there are four school practices that, taken together, significantly contribute to the phenomenon. These practices include: (1) zero tolerance discipline policies; (2) increased law enforcement presence in schools; (3) placement of disruptive students into alternative schools; and (4) racial profiling of minority students.

A. Zero Tolerance Discipline Policies

The first factor that contributes to The School-to-Prison Pipeline is the enactment of zero tolerance discipline policies in schools across the nation. After the 1999 Columbine shootings, many school administrators across the United States "adopted zero tolerance policies as a means of strengthening school safety."[32] Out of this tragic event came rhetoric from politicians across the nation citing the need for a "tough on crime" approach to protect schools.[33] This "tough on crime" approach was used to enact zero tolerance discipline policies which "mandate[d] predetermined consequences or punishments for specific offenses."[34] Rather than provide administrators with flexibility in determining a punishment for a school offense, zero tolerance policies required a fixed punishment for a specific crime. These punishments can be severe for very minor crimes.[35] Furthermore, since Columbine, zero tolerance discipline policies have expanded not only to address violent behavior in schools, but also to cover "ambiguous, non-

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[32] Tona M. Boyd, *Symposium Response: Confronting Racial Disparity: Legislative Responses to The School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 573 (2009).
[33] *See id.*
[34] *Id.* (quoting PHILLIP KAUFMAN ET AL., U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY 117 (1999)).
[35] *See* Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public School*, 54 N.Y.L. SCH. L. REV. 977, 980 (2010).

violent offenses such as insubordination and school disturbance."[36] As a result, students are now pushed out of schools for behavior that would not have resulted in such severe punishment in the past.

An example of this is illustrated by the 1999 Decatur School District incident, where four African American boys were "expelled for two years for fighting briefly, without weapons or serious injuries at a football game."[37] At the time, engaging in a physical altercation at a school event was a zero tolerance policy of the district. These students were automatically suspended ten days, and eventually expelled for two years, despite the relatively minor altercation.[38] This encounter with the juvenile justice system eventually led to two of these students being involved in the criminal justice system as adults.[39] These types of discipline policies have been deemed completely "ineffective as a deterrent, unproductive in teaching appropriate behavior, and useless in promoting a safe school climate[.]" [40] In fact, these policies have had "substantial negative consequences on the academic achievement of suspended students." [41] Students removed from their mainstream educational environment for

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[36] Boyd, *supra* note 32, at 573.

[37] Thurau & Wald, *supra* note 35, at 980 (citing Bob Wing, *Zero Tolerance: An Interview with Jesse Jackson on Race and School Discipline,* COLORLINES (Mar. 10, 2000), http://www.colorlines.com/articles/zero-tolerance-interview-jesse-jackson-race-and-school-discipline).

[38] Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 817–18 (D.C.D. IL. 2000) (noting that the school district argued the students violated three provisions of the District's Student Discipline Policy: Rule 10, Gang–Like Activities; Rule 13, Physical Confrontation/Physical Violence with Staff or Students; and Rule 28, Any Other Acts That Endanger the Well-Being of Students, Teachers, or Any School Employees).

[39] *Id.*; *see also* John O' Connor, *Decatur's Scars Still Show Decade After Expulsions*, BLACK ENT. TELEVISION (Nov. 23, 2009, 9:12 AM), http://www.bet.com/news/news/2009/11/23/nationaldecatursstillshowdecadeafterexpulsions.html.

[40] Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URBAN SOC'Y 359, 360 (2006).

[41] *Id.* (noting in study that suspended students had lower average reading achievement scores than students not suspended).

nonviolent violations or displays of typical adolescent behavior are much more likely to drop out of school and enter the criminal justice system.[42] Given these outcomes, the Department of Education and the Department of Justice have recently released a joint school discipline guidance package opposing the use of zero tolerance discipline policies in schools.[43]

B. Increased Law Enforcement Presence in Schools

In addition to zero tolerance discipline policies, the pipeline is also caused by an increased law enforcement presence in schools. As described above,[44] since the Columbine tragedy, police officers have moved into public schools in record numbers to strengthen school safety. These police officers are known as "School Resource Officers" ("SROs"), and their responsibilities "range from strict enforcers of rules and laws, to surrogate parents, to counselors and coaches[.]"[45] However, SROs most exacerbate The School-to-Prison Pipeline problem when they function exclusively in their roles as strict enforcers of the law. This is because SROs have learned to target "student behaviors that in the past would have been addressed through a call to parents or after school detention."[46]

Furthermore, the rights of students in schools are not adequately protected since the level of suspicion SROs need to search students can be lower on school property than it is in the general public.[47] Normally, under the Fourth Amendment, police must have probable cause and a warrant to

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[42] Archer, *supra* note 4, at 868–69.
[43] Arne Duncan, U.S. Sec'y of Educ., Remarks at the Release of the Joint DOJ-ED School Discipline Guidance Package: Rethinking School Discipline (Jan. 8, 2014) (transcript available on U.S. Dep't of Educ. Website, http://www.ed.gov/news/speeches/rethinking-school-discipline).
[44] Boyd, *supra* note 32*,* at 573–74.
[45] Thurau & Wald, *supra* note 35, at 978.
[46] *Id.* at 978–79.
[47] *See* New Jersey v. T. L. O., 469 U.S. 325, 340–41 (1985).

conduct a search.[48] However, the Supreme Court has held that, when conducting school searches, school officials only need reasonable suspicion to search a student.[49] The Supreme Court has yet to answer whether SROs also need reasonable suspicion or the higher standard of probable cause to search a student on school property.[50] Nationally, many jurisdictions permit searches by SROs under the lowered reasonable suspicion standard.[51] This has led to far more arrests on school property than would normally occur outside of school property.[52] Since the number of SROs nationally is now estimated to be 17,000, the lowered level of suspicion can have a tremendous impact on funneling students into the pipeline.[53] Schools, especially in low-income areas, feel more like prisons because of the

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[48] *Id.*
[49] *Id.*
[50] *See* Daggett, *supra* note 19, at 230.
[51] *Id.* at 232 (citing as examples Gray v. Bostic, 458 F.3d 1295 (11th Cir. 2006) (lower school search standard applies); Cason v. Cook, 801 F.2d 188 (8th Cir. 1987) (school search standard); Martens v. Dist. No. 220 Bd. of Educ., 620 F. Supp. 29, (N.D. Ill. 1985) (school search standard); In re D.D. 554 S.E.2d 346(N.C. App. 2001) (school search standard); People v. Dilworth, 661 N.E.2d 310 (Ill. 1996) (school search standard); People v. William V., 4 Cal. Rptr. 3d 695 (Cal. App. 2003) (school search standard); R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008) (school search standard); Commonwealth v. J.B., 719 A.2d 1058 (Penn. Super. 1998) (school search standard); In re Randy G., 110 Cal. Rptr. 2d 516 (2001) (school search standard); State v. Alaniz, 815 N.W.2d 234, (N.D. 2012) (school search standard); M.D. v. State, 65 So. 3d 563 (Fla. Dist. Ct. App. 2011); Wilson v. Cahokia Sch. Dist., 470 F. Supp. 2d 897 (S.D. Ill. 2007) (school search standard); Patman v. State, 537 S.E.2d 118 (Ga. 2000) (probable cause required); In re Josue T., 989 P.2d 431 (N.M. Ct. App. 1999) (probable cause standard); Pacheco v. Hopmeier, 770 F. Supp. 2d 1174 (school standard not applicable to search for non-school purposes)).
[52] Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. OF CRIM. JUST. 280, 280–87 (2009) (showing that schools with an SRO have nearly five times the rate of arrests as schools without an SRO).
[53] JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 7 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

presence of SROs,[54] and this increased presence can be another major contributor to the referral of students to the juvenile justice system.

C. Placing Disruptive Students into Alternative Schools

In addition to the increased presence of SROs, the pipeline is also caused by removing disruptive students from their mainstream learning environments and placing them in alternative schools. Historically, alternative schools were designed to provide adequate resources to help students with behavioral problems, but many students now perceive alternative schools as a step on the road to dropping out.[55] Unfortunately, some alternative schools can be academically inferior to mainstream institutions.[56] Labeled by some as "shadow systems," these schools can sometimes be run by private companies that are "immune from educational accountability standards (such as minimum classroom hours and curriculum requirements) and may fail to provide meaningful educational services to the students who need them the most."[57] As a result, struggling students either "return to their regular schools unprepared" or are "funneled through alternative schools into the juvenile justice system."[58] The placement of youths in alternative schools is especially concerning since administrators at

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[54] *Id.* at 19–20 (noting that the presence of SROs cause students to feel intimidated and to act with hostility, suspicion, and mistrust).
[55] *See* Hall, *supra* note 5, at 77.
[56] *See* SUSAN ROTERMUND, CAL. DROPOUT RES. PROJECT, ALTERNATIVE EDUCATION ENROLLMENT AND DROPOUTS IN CALIFORNIA HIGH SCHOOLS 1 (2007), *available at* http://www.hewlett.org/uploads/files/CDRP_AlternativeEdEnrollment.pdf (noting that although alternative schools in California comprised only 8 percent of the total student enrollment, they accounted for 33 percent of the total student dropouts in the state).
[57] *What is The School-to-Prison Pipeline?*, AM. C.L. UNION, https://www.aclu.org/racial-justice/what-school-prison-pipeline (last visited May 3, 2015).
[58] *Id.*

alternative schools are much more likely to refer students to the juvenile justice system.[59]

D. Racial Profiling of Minority Students

Finally, school officials also contribute to The School-to-Prison Pipeline by racially profiling minority students for discipline. This is especially true for minority students with undiagnosed disabilities. For many White students with disabilities, educators will perceive defiant behavior as lacking the necessary attention of a skilled special educator.[60] However, for disabled students of color, the same behavior can be perceived as "defiant or criminal[,] rather than an expression of their special needs[.]"[61] This is a form of racial profiling in schools that "partly explain[s] why minority students are more likely to be suspended for behavior [that is] viewed as disrespectful, while White students are typically suspended for carrying weapons or drug infractions[.]" [62] Some schools are not adequately identifying or providing therapeutic services to minority students with disabilities. Instead, these schools are expelling students for behaviors they believe to be uncontrollably disruptive. As a result, many students of color are left without the support they need for behaviors that are actually "manifestations of their disabilities."[63] Part of the reason children are being racially profiled can be explained by the stereotypes that exist for adults of color, and the implicit biases that school employees may have of their

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[59] *See* Sheena Molsbee, *Zeroing Out Zero Tolerance: Eliminating Zero Tolerance Policies in Texas Schools*, 40 TEX. TECH L. REV. 325, 345–46 (2008).
[60] Mary Christianakis & Richard Mora, *Feeding The School-to-Prison Pipeline: The Convergence of Neoliberalism*, *Conservativism, and Penal Populism*, J. EDUC. CONTROVERSY (2012), *available at* http://www.wce.wwu.edu/Resources/CEP/eJournal/v007n001/a001.shtml.
[61] *Id.*
[62] *Id.*
[63] Thurau, *supra* note 35, at 981.

students.[64] Ultimately, whatever the source of the racial profiling, it is a major contributing factor to The School-to-Prison Pipeline.

III. PRACTICE RECOMMENDATIONS FOR JUVENILE DEFENDERS

Many juvenile defenders are aware of what causes The School-to-Prison Pipeline. Knowledge is not the problem for these attorneys; it is how to proceed with this knowledge that can be challenging. Helping clients navigate the juvenile justice system is challenging enough without adding the consideration of systemic issues like The School-to-Prison Pipeline. To help juvenile defenders, several practice recommendations are presented below that outline how attorneys can effect change both within and outside the juvenile justice system.

A. Effecting Change within the Juvenile Justice System

Various actors within the juvenile justice system are influential when it comes to keeping youth in schools. One could argue juvenile prosecutors are in the best position to effect change within the system, considering they have the discretion to decide whether a case enters or stays in court.[65] However, juvenile defenders play an important role in disrupting The School-to-Prison Pipeline because they are often the only actors in the system that represent the stated interests of the youth during court proceedings. In this position, juvenile defenders learn about their clients and their clients' school environments. With that personal knowledge, juvenile defenders can keep their clients out of the juvenile justice system by doing five things: (1) advocating for the educational needs of clients; (2) pursuing alternative legal resolutions during plea negotiations; (3) educating judges during detention hearings and dispositions; (4) building relationships with

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[64] *See infra* Part III.B.2.

[65] Interview with Jenny Zapone Bornholdt, Spokane County Juvenile Prosecutor, in Spokane, Wash. (Dec. 1, 2014) [hereinafter Interview with Zapone].

probation officers; and (5) identifying and collaborating with advocates in the civil system.

1. Advocating for the Educational Needs of Clients: Utilizing School Records, Interviewing School Officials, and Asserting Special Education Rights

Advocating for the educational needs of clients is crucial to keeping them out of The School-to-Prison Pipeline since keeping youth in schools reduces recidivism.[66] Yet, it is easy for a juvenile defender to focus solely on the defense of a particular charge without considering how educational advocacy would benefit the case.[67] Defense attorneys can advocate for the educational needs of their clients by immediately requesting school records, interviewing school officials, and asserting federal education protections for clients with disabilities.

a) Using School Records to Assess Competence and Comprehension

School records are immensely valuable in advocating for a client throughout their case. Most school records are not included in the initial discovery packet attorneys receive[68] and they can be difficult to obtain by schools.[69] So when a juvenile defender receives a case, the file should be reviewed to determine whether an incident occurred in school.[70] If so, school records should immediately be requested. Even when a crime does not occur in school, attorneys should still consider requesting records

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[66] *See* Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 882 (2014) (citing Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 8, 2009, at A12, *available at* http://www.nytimes.com/2009/10/09/education/09dropout.html).
[67] Interview with Manlove, *supra* note 8.
[68] Geis, *supra* note 66, at 889.
[69] *Id.*
[70] Interview with Manlove, *supra* note 8.

because doing so can yield valuable information to the representation of a client. There are various ways educational records can be requested, but most records can be obtained through a "release of records" form or a court subpoena if necessary.[71]

One way school records can be used is to assess whether a client is competent to stand trial. To be competent, a "criminal defendant must have 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'"[72] and "the ability to 'assist in preparing his defense.'"[73] A complete request of school records will yield valuable information such as discipline history, Individual Education Plans ("IEP"), attendance records, grades, and personal evaluations by educators.[74] These records can be used to determine whether a competency evaluation should be requested.[75] School records can be helpful in determining whether a client is competent because they offer the perspective of educators who have personally worked with the student.[76] Assessing competency is important to a case since an incompetent client will be removed from the system, allowing her needs to be better served elsewhere.

Even when found competent, juvenile defenders still have an ethical obligation to ensure that a client effectively comprehends the juvenile court proceedings.[77] A learning disability can affect how a client conveys or

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[71] Eric J. Zogry, *The Case for Practicing Juvenile Delinquency Defense*, *in* JUVENILE DEF. STRATEGIES 4 (2012 ed.).

[72] Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle The School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & EDUC. 653, 670 (2013) (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

[73] *Id*. (quoting Drope v. Missouri, 420 U.S. 162, 171 (1975)).

[74] Interview with Manlove, *supra* note 8.

[75] Langberg & Fedders, *supra* note 72, at 670.

[76] Interview with Manlove, *supra* note 8.

[77] NAT'L JUVENILE DEFENDER CTR, NATIONAL JUVENILE DEFENSE STANDARDS 29 (2012), *available at* http://njdc.info/wp-

processes information during the case.[78] To effectively represent clients, juvenile defenders must become aware of how specific learning disabilities can impact their understanding of the court proceedings. School records can provide information that will help attorneys reach this level of understanding. For example, a school records request may yield an IEP for a client. The IEP will likely provide recommendations for breaking down complex information so that the client can understand it. Juvenile defenders can use the recommendations listed in the IEP to break down court processes and legal concepts so that a client can comprehend them. If an attorney learns that a client has difficulty processing information in an IEP, the attorney can frequently pause to determine whether the client is retaining the information.[79] With the client's consent, learning disabilities can also be brought to the judge's attention so court proceedings can be slowed down if necessary. Outside of evaluating competency and capacity, school records will also yield information useful to pursing the other recommendations discussed below.[80]

b) Interviewing School Officials

Outside of obtaining school records, the educational needs of clients can also be protected by interviewing school officials involved in an incident. Often, school officials will use the juvenile justice system to hold students accountable for misbehavior in school.[81] This is especially true when a school official cannot suspend or expel a student with a disability because their behavior is a manifestation of the disability under the IEP.[82] When a

content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf [hereinafter *Defense Standards*].

[78] Interview with Krista Elliott, Juvenile Defender, Counsel for Defense, in Spokane, Wash. (Dec. 4, 2014) [hereinafter Interview with Elliott].

[79] Langberg & Fedders, *supra* note 72, at 669.

[80] *See infra* Part III.A.2–5.

[81] Interview with Elliott, *supra* note 78.

[82] *See* 34 C.F.R. § 300.530(c).

school official cannot punish a student in school, he or she always has the option of referring a case to the juvenile justice system; these referrals are often submitted without any accountability for doing so. For these reasons, attorneys should request interviews with every school official involved in a crime for evidentiary and accountability reasons. Through these interviews, attorneys can advocate for the educational needs of clients by questioning the circumstances that led to a criminal referral.[83] These interviews will also provide crucial evidence for the defense of a client's case.[84]

Before an interview, defense attorneys should contact school officials to obtain the policies relating to submitting criminal referrals.[85] These policies can be examined in detail before the interview so that attorneys can prepare to question the school officials and determine whether they complied with their policies during the incident. Attorneys can also ask for the policies of the school relating to the discipline of the client. If a client was suspended or expelled, this information will be helpful in collaborating with civil advocates to get a client back into school.[86]

Interviews will also provide crucial evidence for the defense of a client's case. "Interviews with teachers, administrators, guidance counselors, school psychologists, and other staff" will also support a client's case by "supplement[ing] the [school] records and provid[ing] a more complete picture of the child's educational history and needs than would otherwise be available."[87] This information will be important in presenting alternative legal resolutions to the prosecutor and keeping the case out of criminal court.[88] For example, during interviews, attorneys often learn that school

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[83] Interview with Manlove, *supra* note 8.
[84] Langberg & Fedders, *supra* note 72, at 664.
[85] Interview with Rosey Thurman, Staff Attorney, TeamChild, in Spokane, Wash. (Dec. 5, 2014) [hereinafter Interview with Thurman].
[86] *See infra* Part III.A.5.
[87] Langberg & Fedders, *supra* note 72, at 665.
[88] *See infra* Part III.A.2.

officials do not want a case prosecuted, especially when a client has already been punished in school.[89] If a client is receiving extensive services at school such as psychological support, counseling, social work services, and parent counseling,[90] this information can be used to persuade the prosecutor to dismiss or divert a case, considering that any additional services a client would receive on probation would be unnecessary.[91]

Interviews with school officials can also be used to challenge the voluntariness of a Miranda rights waiver. Under the Fifth Amendment, the police must warn juveniles of their right to remain silent and of their right to have counsel present during interrogations in order to use statements obtained during custodial interrogations.[92] The Supreme Court has noted that the "totality of circumstances" should be considered in determining the admissibility of a youth's waiver, including the "evaluation of the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him[.]"[93] Furthermore, the Supreme Court has recently held that a juvenile's age is relevant in determining whether a student is "in custody," which would trigger the requirement to warn them of their Miranda rights before questioning.[94]

Cases arising from school referrals often include confessions or inculpatory statements from young clients in the police report.[95] Youth are often pressured to waive their Miranda rights by the same school officials they look up to.[96] When attorneys are concerned about the voluntariness of a waiver, interviews with school officials can provide insight into the

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[89] Interview with Manlove, *supra* note 8.
[90] Langberg & Fedders, *supra* note 72, at 664.
[91] *See id.* at 672.
[92] Miranda v. Arizona, 384 U.S. 436, 472 (1966).
[93] Fare v. Michael C., 442 U.S. 707, 725 (1979).
[94] J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2396 (2011).
[95] Interview with Manlove, *supra* note 8.
[96] *Id.*

environment where a waiver was garnered. For example, in determining whether a client was in custody, interviews "may reveal that the client was questioned in a closed and confined space, such as a principal's office . . . [and whether] law enforcement initiated and controlled the interrogation[.]"[97] School records can provide some of the information necessary to determine the voluntariness of a waiver, including information regarding learning disabilities revealing a client's capacity to understand warnings, but interviews will also aid an attorney in truly evaluating the relationships with school authority figures during the waiver.[98] School authority figures and law enforcement "often do not present Miranda warnings and waivers in a manner that is comprehensible by juvenile waivers"[99] and juvenile defenders should conduct interviews to evaluate the language used that garnered the waiver for their client.[100]

c) Asserting Federal Special Education Rights

Defense attorneys can also advocate for the educational needs of their clients by asserting the educational rights of their clients with disabilities. Juvenile defenders struggle to assert the special education rights of their clients during advocacy because special education law can be perceived as "cumbersome to contemplate or non-applicable in delinquency matters."[101] Yet, statistics show that youth with disabilities are being disproportionately sent to the juvenile justice system.[102] Attorneys looking to reduce these disparities must advocate for the special education rights of their clients.

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[97] Langberg & Fedders, *supra* note 72, at 676.
[98] *See id.* at 677.
[99] Geis, *supra* note 66, at 901.
[100] Interview with Manlove, *supra* note 8.
[101] Geis, *supra* note 66, at 873.
[102] *See Youths with Disabilities in the Juvenile Justice System*, NAT'L DISABILITY RTS. NETWORK 1 (2007), *available at* http://www.ndrn.org/images/Documents/Issues/Juvenile_Justice/NDRN_JDAI_handout_prevalence_92607.pdf (citing data estimating between 50–75 percent of incarcerated youth have diagnosable mental health problems).

There are several federal statutes that can be used as creative and effective tools for advocating for students accused of crimes, such as the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act.[103] In her article *An IEP for the Juvenile Justice System: Incorporating Special Education Law throughout the Delinquency Process,* Lisa M. Geis describes the relationship between these statutes:

> [T]he IDEA requires the provision of special education services so that the student receives educational benefit. For example, if a child is blind and only requires adaptive materials in the classroom, a 504 Plan may require that the child be provided with Braille books. By comparison, if the student's ability to learn and make academic progress is impacted by his blindness, he is eligible for special education services under the IDEA.[104]

Each of these statutes will protect students with disabilities, "when they are in contact with state agencies, including . . . police stations, courthouses, [and] detention facilities[.]"[105] Generally, if students are given an IEP, they are then entitled to a free appropriate public education ("FAPE")[106] and placement in the least restrictive environment ("LRE")[107] to accommodate their disabilities. Volumes could be filled with ideas for how juvenile defense attorneys could assert the special education rights of their clients. Discussed below are only a few selected recommendations for juvenile defenders.

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[103] NAT'L JUV. DEFENDER CTR., TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM 11 (2009), *available at* http://njdc.info/wp-content/uploads/2013/09/MfC_Training_Curriculum_Overview.pdf [hereinafter *Toward Developmentally Appropriate Practice*].
[104] Geis, *supra* note 66, at 893–94.
[105] *Id.* at 898 (citing 20 U.S.C. § 1412(a); 29 U.S.C. § 701(c); 42 U.S.C. § 12132).
[106] 20 U.S.C. § 1412 (2006).
[107] *Id.*

First, juvenile defenders can seek accommodations for their clients with disabilities so they can participate in judicial proceedings.[108] These accommodations can be asserted through the IDEA.[109] For example, a client with emotional disturbance issues should be "allocate[ed] more time for the explanation of rights," placed in "a quiet atmosphere," and given a "written explanation of juvenile rights." Furthermore, administrators should provide "careful repetition of important information" and engage in "[n]on-confrontational communication."[110]

Juvenile defenders can also seek release or transfer of their client when juvenile detention is not providing the special education services a client needs. The court "must consider the youth's emotional, educational, and developmental needs when considering placement."[111] "If a prison or a correctional facility is a recipient of federal funds . . . it must provide special education or related services to children with disabilities under Section 504."[112] "Juvenile justice residential facilities must implement reasonable modifications to their policies, practices, or procedures to ensure that youth with disabilities are not placed in . . . restrictive security programs because of their disability-related behaviors[.]"[113] If the facility intends to remove a student for more than 10 days, and the student's conduct is determined to be a manifestation of her disability, the facility must return her to her previous setting.[114] If detention staff is not able to do

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[108] Tennessee v. Lane, 541 U.S. 509, 533 (2004).
[109] *Id.*
[110] Geis, *supra* note 66, at 906–07.
[111] *Id.* at 904 (citing several state statutes showing the requirement of considering social history when detaining youth).
[112] Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law,* 4 U.C. DAVIS J. JUV. L. & POL'Y 125, 153 (2000) (citing 34 C.F.R. § 104.33).
[113] DEAR COLLEAGUE LETTER, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC. 6 (2014), *available at* http://www2.ed.gov/policy/gen/guid/correctional-education/cr-letter.pdf.
[114] *See id.* at 6.

so, attorneys can argue the client should "either be released from detention and provided with services from his 'regular' school, or . . . detained in the least restrictive environment where she can receive appropriate, unique services."[115]

2. Pursuing Alternative Legal Resolutions During Plea Negotiations

Outside of advocating for the educational rights of a client, one of the best avenues for keeping youth out of the juvenile justice system is through the pursuit of alternative legal resolutions ("ALRs"). ALRs are programs or courts that are used to divert juveniles away from involvement with the traditional juvenile justice system. ALRs will differ depending on the jurisdiction, but they often include: drug treatment courts, youth courts, mental health courts, pretrial diversionary programs, or deferred prosecution contracts. These options, and when to pursue them, are presented below.

a) Pretrial Diversionary Programs

"Pretrial diversion is a formalized procedure authorized by legislation [or court rule] . . . whereby persons who are accused of certain criminal offenses and meet preestablished criteria have their prosecution suspended for a three month to one year period and are placed in a community-based rehabilitation program."[116] The "common elements" in pretrial diversionary programs include: "restitution, community service, parental involvement, continuing education, continuing monitoring and supervision, and counseling."[117] These programs are often limited to first-time offenders or minor offenses.[118] Attorneys should pursue pretrial diversionary programs

[115] Geis, *supra* note 66, at 904.
[116] *Note*: *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974).
[117] Cheri Panzer, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community's Involvement*, 18 J. JUV. L. 186, 195 (1997).
[118] *E.g.*, WASH. REV. CODE § 13.40.070 (2014).

when they learn that a client could benefit from a formalized and highly structured program.

b) Alternative Courts

Alternative courts are proceedings established outside the traditional juvenile justice system that offer opportunities for juveniles to engage in services, and be held accountable for their actions, without accruing criminal history. As a broad category, alternative courts include: drug treatment courts, youth courts, and mental health courts. Whether to pursue an alternative court will depend highly upon the circumstances of a client's case and the jurisdiction. Drug treatment courts select certain juveniles "involved in substance abuse" to enroll in an "intensive judicial intervention" to "address problems that may be contributing to their use of drugs."[119] These courts are beneficial for clients whose actions are motivated by drug abuse or addiction. In youth courts, peer volunteers can "serve as prosecutors, defenders, clerks, juries, and sometimes judges . . . [to] give sentences that focus on rehabilitation, including 'essays, apologies to victims, workshops, or community service.'"[120] This structure "allow[s] students to collaborate with one another to solve behavioral problems in their schools[,]"[121] rather than be placed in the pipeline. Evidence has shown that "youth courts can be effective in changing student behavior."[122] These courts are beneficial for clients that are persuaded by peer interaction. Mental health courts "provide intensive case management to youth in the

[119] BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE 7 (Mar. 2003), *available at* https://www.ncjrs.gov/pdffiles1/bja/197866.pdf.
[120] Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1273–74 (2014).
[121] *Id.* at 1274.
[122] *Id.* (citing several studies, one of which showed that only nine percent of those young people that participated in a Missouri youth court reoffended within six months).

juvenile justice system with serious mental illness."[123] A case management program is usually developed to focus "on obtaining and coordinating services necessary for the participant to remain at home, in school, and out of the juvenile detention system."[124] These courts are beneficial for clients with mental health needs.

c) Contracts for Deferred Prosecution

Contracts for deferred prosecution offer the most room for creativity since an attorney actually creates the conditions for dismissal.[125] Some situations where a prosecutor is open to a contract for a deferred prosecution may include when the victim does not want the case prosecuted, the juvenile has severe mental health issues, the juvenile is already receiving supervision in another program, the juvenile lives in a difficult home environment, or the juvenile is a first time offender. In a contract for deferred prosecution, a client's case will be stayed for a period of time agreed upon by the parties while the juvenile completes a series of conditions, such as: completing community service, attending counseling, or engaging in a mentoring program.[126] Upon completion of the conditions, "the youth must be released from supervision and any filed petition for the case should be dismissed."[127] Upon dismissal, the record of the charge is often immediately sealed.[128] These contracts can be used when an intake

[123] *Juvenile Mental Health Court Initiative*, NAT'L CTR. FOR YOUTH LAW http://www.youthlaw.org/policy/advocacy/juvenile_mental_health_court_initiative/ (last visited Nov. 26, 2014).
[124] *Id.*
[125] Hon. Arthur L. Burnett, Sr., *What of the Future? Envisioning an Effective Juvenile Court*, 15 CRIM. JUST. 6, 8 (2000).
[126] *See id.*
[127] Michele Deitch et al., *Seventeen, Going on Eighteen: An Operational and Fiscal Analysis of A Proposal to Raise the Age of Juvenile Jurisdiction in Texas*, 40 AM. J. CRIM. L. 1, 62 n.163 (2012).
[128] Kevin Lloyd Collins, *Juvenile Defense: It is Not Child's Play*, *in* JUVENILE CRIMINAL DEF. STRATEGIES 4 (2012 ed.).

officer will not accept a client for a formal diversionary program[129] or when the circumstances of the case warrant an innovative solution.

d) Benefits of Pursuing Alternative Legal Resolutions

ALRs should be the first consideration after an attorney obtains a client's school records.[130] For youth that actually go to court, school dropout rates increase by four hundred percent.[45] From the defendant's viewpoint, dismissal of a case is always preferable, although it is not always feasible when the crime involves extreme violence or costly property damage.[131] When prosecutors are not willing to dismiss, attorneys can fashion ALRs to keep clients out of the juvenile justice system.

After gathering the relevant school, social, and mental health records on a client, attorneys can persuade the prosecutor that an ALR will best protect the community and rehabilitate the juvenile.[132] "Juvenile prosecutors are the gatekeepers; they are the ones who have the power to open the door to the juvenile justice system and shut it."[133] Prosecutors can have a tremendous impact on The School to Prison Pipeline and juvenile defenders are in the best position to persuade them.[134] Prosecutors have complete discretion, within the bounds of the law, to decide what happens in a case.[135] Juvenile defenders should discuss with prosecutors any racial disparities of school referrals in their jurisdiction and encourage prosecutors to investigate the incident by "calling victims and school administrators to learn more about

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[129] *See* Ronald P. Corbett, Jr., *Juvenile Probation on the Eve of the Next Millennium*, 63 FED. PROBATION 78, 79 (1999).
[130] Interview with Manlove, *supra* note 8.
[131] Collins, *supra* note 128, at 4.
[132] Interview with Manlove, *supra* note 8.
[133] Interview with Zapone, s*upra* note 65.
[134] *Id.*
[135] Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 427 (2013).

the alleged crime."[136] These recommendations are especially important considering that "[p]rosecutors are more likely to charge youth of color, compared to [W]hite students, even when the alleged crimes and criminal records are the same."[137]

Too often juveniles are labeled as drug dealers or criminals when they enter the juvenile justice system.[138] Successful petitions for ALRs will humanize clients by presenting the mitigating circumstances of their case, such as good behavior at school or home, "good grades or participat[ion] in extracurricular activities," "mental health considerations," "changes in the client's environment since the referral," parental supervision, and any other "extenuating circumstance" in a client's case.[139]

3. Educating Judges During Detention and Disposition Hearings

In addition to advocating for the educational needs of clients, juvenile defenders can also disrupt The School-to-Prison Pipeline by educating judges during detention and disposition hearings. Given their dockets, many judges do not have the time to research data in their jurisdictions concerning school referrals and some judges are not even aware that disparities exist.[140] Juvenile defenders have an opportunity to inform judges of the relevant trends in their jurisdictions regarding disparate treatment of students of color. The most immediate way to do this is by pushing for release of

[136] Interview with Zapone, s*upra* note 65.
[137] *See generally* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805 (2012) (showing that prosecutors, like all Americans, harbor negative implicit attitudes toward Blacks and other students of color); *see also* Henning, *supra* note 135, at 425 ("in deciding whether to charge, what charge to bring, and whether to transfer a youth to criminal court, prosecutors are vulnerable to racialized perceptions of aggressiveness, violence and danger").
[138] Interview with Elliott, *supra* note 78.
[139] Bradley P. Temple, *Principles of Pretrial Diversion Deferred Prosecution*, 75 TEX. B.J. 118, 120–21 (2012).
[140] Interview with Manlove, *supra* note 8.

clients during detention hearings. When it is impossible to keep a client out of the system, juvenile defenders can also educate judges using adolescent brain development research at trial and disposition.

a) Combating Judicial Bias and Pushing for Release During Detention Hearings

Detention hearings are a crucial entrance point for students entering The School-to-Prison Pipeline. When juveniles are detained, it will often be the first interaction these youth have with the juvenile justice system. At detention hearings, judges will decide whether a juvenile will be kept in a juvenile facility. Because of this, juvenile defenders should educate judges about systematic issues in their jurisdiction and use this data to push for release, especially when detention will interfere with school or other social services necessary for the well-being of the client.[141]

For many youth arrested for alleged crimes committed in schools, detention in juvenile facilities can be a traumatic and life-altering experience. Juveniles forced into detention make connections that increase their likelihood for committing crimes in the future.[142] It has also been found that detention can "disrupt education, mental health or family services[,]" and lead to further criminal behavior.[143] Juveniles that are not in school because they are detained are more likely to become involved in physical fights, carry weapons, and use drugs.[144] Youth who remain in detention are also much more likely to drop out of school.[145] In fact, "one in

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[141] Interview with Elliott, *supra* note 78.
[142] Geis, *supra* note 66, at 881–82.
[143] Langberg & Fedders, *supra* note 72, at 673.
[144] Geis, *supra* note 66, at 881–82 (citing *Comm. on Sch. Health, Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003), *available at* http://pediatrics.aappublications.org/content/112/5/1206.full.pdf).
[145] *Id.* at 882 (citing Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 8, 2009, at A12, *available at* http://www.nytimes.com/2009/10/09/education/09dropout.html).

every 10 male high school dropouts [are] in jail or juvenile detention[.]"[146] Students detained will "face a fairly high risk of recidivating."[147]

In determining whether to keep a youth in custody, judges start by considering whether any of the statutory requirements to detain have been met.[148] In Washington, for example, judges cannot detain a juvenile unless they have "probable cause to believe that" the youth "has committed an offense or has violated the terms of a dispositional order" and they also find "[t]he juvenile will likely fail to appear for further proceedings," "[d]etention is required to protect the juvenile from himself," or [t]he juvenile is a threat to community safety[.]"[149] Because these statutory elements are crucial to a judge's decision to detain, defense attorneys should consider if there is any argument that the statutory elements of detention can be met, and if so, how they can be minimized.[150] One way these elements can be minimized is by finding community-based alternatives that will protect the community while benefitting the juvenile.[151] In many jurisdictions, community agencies provide drug or behavioral treatment programs that can last for part or all of the day. For example, Excelsior Youth Center located in Washington State offers a comprehensive behavioral health day program where juveniles attend treatment for over forty hours a week Monday through Friday.[152] If a client consents, a juvenile defender can present enrollment into one of these programs as an alternative to detention and condition of release to the judge.

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[146] *Id.*
[147] *Id.*
[148] *E.g.,* WASH. REV. CODE § 13.40.040(2)(a)(i)–(iii).
[149] *Id.*
[150] Interview with Elliott, *supra* note 78.
[151] Langberg & Fedders, *supra* note 72, at 673.
[152] Interview with Elliott, *supra* note 78.

However, in many courtrooms, judges are not relying solely on statutory elements in determining whether to detain the juvenile.[153] Judges, like all people, are "susceptible to the implicit biases that promote racial disparity."[154] Youth of color are much more likely to be detained by judges when compared to White offenders, even when the alleged crime committed is the same.[155] Furthermore, over 60 percent of these detentions are for "offenses that do not pose substantial threats to public safety."[156] This is why attorneys must educate judges about systemic issues in their jurisdiction during initial detention hearings. Juvenile defenders can research racially disproportionate referrals in the jurisdiction and present that information to the judge to combat implicit biases about a client.[157] Beyond combating implicit biases, the use of local data can be a powerful tool to connect systematic issues with individual cases presented in courtrooms. Ultimately, the court "must consider the youth's emotional, educational, and developmental needs when considering placement" and should place a youth in the least restrictive placement possible while protecting the community.[158]

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[153] NAT'L JUV. JUSTICE CENTER & TEX. PUB. POL'Y FOUND., THE COMEBACK STATES: REDUCING YOUTH INCARCERATION IN THE UNITED STATES 43 (2013), *available at http://www.njjn.org/uploads/digital-library/Comeback-States-Report_FINAL.pdf* [hereinafter *The Comeback States*].

[154] Jonathan A. Rapping*, Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1015 (2015).

[155] Gaylene S. Armstrong & Nancy Rodriguez, *Effects of Individual and Contextual Characteristics on Preadjudication Detention of Juvenile Delinquents*, 22 JUST. Q. 521, 532–34 (2005) (citing data showing that, when compared to White juveniles, Hispanic juveniles were 2.5 times more likely to be detained and Black juveniles were 1.5 times more likely to be detained).

[156] *The Comeback States*, *supra* note 153, at 43.

[157] Interview with Manlove, *supra* note 8.

[158] *See* Geis, *supra* note 66, at 904; *see also* WASH. REV. CODE § 13.40.040.

b) Using Research in Adolescent Brain Development to Advocate During Trial and Disposition

One of the greatest areas to educate judges lies in the area of adolescent brain development. Data regarding the adolescent brain is useful when shaping arguments during trial and disposition.[159] At trial, this research can be used to show that a client could not form the requisite intent to be convicted. During disposition, this research can be used as a mitigating factor by showing that a client's reduced culpability made her less culpable during the commission of a crime.

During trial, defense attorneys can use research to bolster the evidence they have already gathered to argue a client could not form the requisite intent to be convicted of a crime.[160] In the last ten years, the fields of science and law have made tremendous advances in knowledge concerning adolescent brain development. Developmental psychology and adolescent neuroscience have shown that "brain development occurs much later in adolescents then [sic] earlier believed, accounting for greater risk-taking and less reflection on consequences of behavior by youth."[161] In fact, the "neuroscience research demonstrates that the last areas of the brain to develop are the frontal lobes and specifically the pre-frontal cortex, which governs decision making, judgment, and impulse control."[162]

This research can be especially useful to advocate for clients who have been found competent, but still struggle with behavioral or learning disabilities. Juvenile defenders can argue that a client's disabilities, in combination with the limited development of the adolescent brain, made it

[159] Interview with Manlove, *supra* note 8.
[160] *Id.*
[161] Gregory Volz et al., *Youth Courts: Lawyers Helping Students Make Better Decisions*, 15 U. PA. J.L. & SOC. CHANGE 199, 204 (2012).
[162] *See* Nancy Ginsburg, *Reimagining the Role of Defense Counsel for Adolescents in the Adult Criminal Court System: Bringing the Community and Policymakers into the Process to Achieve the Goals of Gideon*, 35 CARDOZO L. REV. 1117, 1121 (2014).

impossible to form the necessary intent to commit a crime.[163] For example, in states that have adopted the Model Penal Code, the elements of assault include a "mens rea" component requiring a defendant to act purposely, knowingly, or recklessly in causing bodily injury to another.[164] Using psychosocial evaluations and expert testimony about adolescent brain development, defense attorneys can argue that a client was unable to act purposely or knowingly in causing bodily injury to an alleged victim.[165]

In addition to trial, research in adolescent brain development can be used as a mitigating factor during disposition by arguing that a client was less culpable during the commission of a crime. Adolescent brain development research has had "a remarkable impact on the evolution of Supreme Court jurisprudence regarding minors' culpability in the criminal justice system."[166] Most recently, the Court used this developmental research to reach its holdings in *Graham v. Florida*[167] and *Miller v. Alabama.*[168] These cases "highlighted three key differences between juveniles and adults that justify differential treatment of juveniles in the criminal courts[,]"[169] including: (1) "juveniles' immaturity and susceptibility to negative influences means 'their irresponsible conduct is not as morally reprehensible as that of an adult'";[170] (2) "youths' 'vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment'"; and (3) "youth are still forming their identities [and] 'it is less supportable to conclude that

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[163] Interview with Manlove, *supra* note 8.
[164] MODEL PENAL CODE § 211.1 (2013).
[165] Interview with Manlove, *supra* note 8.
[166] Henning, *supra* note 135, at 401.
[167] 560 U.S. 48 (2010).
[168] 132 S. Ct. 2455 (2012).
[169] Henning, *supra* note 135, at 401.
[170] *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 561 (2005)).

even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.'"[171]

"The purpose of dispositions in juvenile cases is . . . to design a plan to maintain public safety and rehabilitate the juvenile."[172] By using the research in adolescent brain development, school records of a client, and psychosocial evaluations of a client, defenders can assert that "no juvenile court supervision is necessary" for rehabilitation "or that the client should receive a disposition that includes appropriate terms and conditions."[173] This can be especially useful when arguing for a court to grant a deferred disposition. For example, in Washington, after a juvenile pleads guilty, a court can "defer entry of an order of disposition" while they complete the terms of their probation.[174] If the juvenile complies with the terms of the disposition, the case will be dismissed.[175] New information regarding adolescent psychology and brain development can be used to encourage a court to grant a deferred disposition and limit a client's contact with the juvenile justice system.[176] Of course, some judges will not be receptive to reduced culpability arguments standing on their own, so attorneys should deeply evaluate their client's case to determine if such an argument needs to be bolstered by other testimony or psychosocial evaluations of the client.

4. Building Relationships with Probation Officers and Challenging School-Based Violations

Besides judges, another actor of the court that impacts a client's contact with the juvenile justice system is a probation officer. Ideally, juvenile defenders would be able to keep all of their clients out of the juvenile

[171] *Id.* at 401–02 (quoting *Simmons*, 543 U.S. at 570 (2005)).
[172] Langberg & Fedders, *supra* note 72, at 680.
[173] *Id.*
[174] WASH. REV. CODE §13.40.127(4).
[175] WASH. REV. CODE §13.40.127(9)(b).
[176] Interview with Manlove, *supra* note 8.

justice system. In reality, there are situations where the best option for a client is to plead guilty and be placed on probation.[177] When placed on probation, juveniles will be provided with a supervising probation officer and will be required to follow several conditions during the course of their probation.[178] "Probation officers closely monitor and document progress with the [probation] terms set forth by the judge," and when there is a violation, they can bring charges "against the juvenile to formally address behavioral problems and noncompliance with court ordered sanctions and rules."[179] During supervision, probation officers must:

> [E]nforce the orders of the court in the form of victim restitution or curfews, to oversee the activities of the offender as much as possible, to uncover any lapses in behavior or company, and to insure that the juvenile takes advantage of all opportunities for addressing personal problems such as substance abuse or school failings.[180]

Probation officers can be powerful advocates for clients. They are often perceived as objective parties by the court and they get to know a client and a client's family.[181] Probation officers can also be a major cause of The School-to-Prison Pipeline, considering that "[a] significant number of young people end up in detention for violating probationary terms."[182] "In 2010, for example, 22% of detained juveniles were held for violating probation or parole, and 14% of the committed juvenile offenders were incarcerated for probation or parole violations."[183] Probation officers

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[177] Interview with Manlove, *supra* note 8 (for example, if a client has multiple referrals in the system and a prosecutor will drop them in exchange for a plea).
[178] Interview with Patti Spilker, Juvenile Probation Officer, Spokane County Probation, in Spokane, Wash. (Dec. 2, 2014) [hereinafter Interview with Spilker].
[179] Hilary Smith et al., *Race, Ethnicity, Class, and Noncompliance with Juvenile Court Supervision*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 111 (2009).
[180] Corbett, *supra* note 129, at 79.
[181] Interview with Spilker, *supra* note 178.
[182] Curtis, *supra* note 120, at 1270.
[183] *Id.*

exacerbate The School-to-Prison Pipeline most when they try to detain students for incidents that occurred in school, such as truancy or fighting, under the guise of a probation violation.[184] Even small violations for school-based incidents, such as missing class or arguing with a teacher, can be used to extend the term of probation leading to longer contact with the juvenile justice system.[185] Because of this, attorneys must build relationships with probation officers to challenge recommendations they make to detain students for school-based incidents.[186] To build a working relationship with a probation officer, "a juvenile defender must appear to be reasonable, fair, and objective" when presenting arguments.[187] This can be a challenge for zealous advocates representing the stated interest of their clients,[188] but finding the balance between advocacy and objectivity can be persuasive to probation officers presenting recommendations to the court.[189]

5. Identifying and Collaborating with Advocates in the Civil System

One of the best ways attorneys can keep their clients out of the juvenile justice system is by identifying and collaborating with advocates in the civil system. The information gathered from collaborating with advocates in the civil system can be invaluable to juvenile defenders advocating their cases. Unfortunately, "the systems do not communicate [well] to coordinate service delivery[,]" but when they do, collaboration "can provide the socially positive redirection that can lead to a positive case outcome."[190] Defining the civil system is difficult, but it includes social workers, dependency attorneys, therapists, and other service providers that provide

[184] *Id.*
[185] Interview with Elliott, *supra* note 78.
[186] Interview with Spilker, *supra* note 178.
[187] *Id.*
[188] Interview with Elliott, *supra* note 78.
[189] Interview with Spilker, *supra* note 178.
[190] Ginsburg, *supra* note 162, at 1136.

for the needs of clients outside of the public defender's representation. For juvenile defenders looking to collaborate with civil advocates, the first step is to identify them.[191] This can be accomplished through interviews of clients and their families to determine the agencies involved in the client's life.[192] Identification can also be done through research and conversations with service providers in the area.[193] Three groups of advocates most helpful to disrupting The School-to-Prison Pipeline are those working in the areas of education, dependency, and mental health.

a) Education Advocates

In addition to juvenile defense, youth referred to the criminal system for school-based offenses need education advocacy. In *Gault,* the Supreme Court noted that children have due process rights including the right to "receive timely notification of charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel."[194] This reasoning was echoed in *Goss,* where the Court found that due process requires that a public school provide students with notice and a hearing when they are facing removal for more than a "trivial period."[195]

Unfortunately for many juvenile defenders, the scope of their representation does not extend to defense in school disciplinary proceedings. Yet, students charged with crimes occurring in schools are often expelled or suspended, in addition to already pending charges.[196]

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[191] Interview with Thurman, *supra* note 85.
[192] *Id.*
[193] *Id.*
[194] Hall, *supra* note 5, at 79 (citing In re Gault, 387 U.S. 1 (1967)).
[195] Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 593 (2009) (citing Goss v. Lopez, 419 U.S. 565 (1975)).
[196] Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts Are Failing Students*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 179, 199–200 (2013).

Without education advocacy, clients can go months before ever stepping into a school, hindering their ability to graduate.[197] After investigating, and learning a client has been suspended or expelled, juvenile defenders "should consider referring [the] youth for civil advocacy."[198] Juvenile defenders should be "familiar with available education services" and work "to ensure that clients are in appropriate educational settings."[199] Special education students, especially, should be referred when charged with school referrals considering they have important rights when faced with disciplinary exclusion and their special needs often influence their behavior.[200]

Juvenile defenders can identify education advocates by investigating what local agencies provide legal assistance for educational needs. In Washington, for example, TeamChild is a local advocacy organization that provides representation to youth in education hearings.[201] After identifying them, collaboration with education advocates can help reduce contact with the juvenile justice system by getting clients back into their school environment. This usually occurs through representation in school discipline proceedings.[202] In addition to school discipline proceedings, education advocates can also encourage the adoption of an IEP for clients with unidentified learning disabilities.[203]

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[197] Interview with Thurman, *supra* note 85.
[198] Brent Pattison, *Staying on Track: Protecting Youth in School Discipline Actions, in* CHANGING LIVES: LAWYERS FIGHTING FOR CHILDREN 53, 61 (Lourdes M. Rosado ed., 2014).
[199] Langberg & Fedders, *supra* note 72, at 73 (citing ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 21 (2009), *available at* http://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf).
[200] Pattison, *supra* note 198, at 60.
[201] Interview with Thurman, *supra* note 85.
[202] Langberg & Fedders, *supra* note 73, at 669.
[203] *Id.*

b) Dependency Advocates

Beyond education advocates, collaborating with attorneys and social workers in the dependency system can help keep clients out of court. The percentage of youth in the dependency system that "cross over" into the juvenile justice system is difficult to quantify, considering that the systems "rarely are integrated," but some studies have estimated that "9% to 29% of children in the child welfare system . . . engage in delinquent behavior[.]"[204] Interviewing clients to determine whether they are, or have been, involved in the dependency system can be crucial to keeping them out of the juvenile justice system in the future.

Social workers can be invaluable in providing years of social history that would be impossible to gather otherwise. Social workers can inform juvenile defenders of any "impaired social functioning" of a client "caused by psychological, neurological and family problems[.]"[205] Furthermore, social workers "have an extensive knowledge of community services and programs"[206] that can be useful in fashioning ALRs[207] or recommending placement at detention hearings.[208] However, juvenile defenders should also be prepared for potential conflicts, considering that social workers represent the "best interests" of the client and not the stated interest that the attorney represents.[209]

Dependency attorneys can provide many of the same benefits that social workers provide. However, collaborating with dependency attorneys offers the additional benefit of pursuing alternative placement options when a

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[204] Denise C. Herz et al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305, 306 (2010) (citing multiple studies).
[205] Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123, 1133 (1996).
[206] *Id.* at 1134.
[207] *See supra* Part III.A.2.
[208] *See supra* Part III.A.3.
[209] Stanger, *supra* note 205, at 1125.

client is being abused or neglected at home. For many clients involved in school-based referrals, the behavior displayed in schools can be a product of what is happening at home.[210] In such cases, collaboration between the systems can be useful both in resolving the delinquency case and in obtaining a placement where future delinquent behavior is less likely to be produced.

c) Mental Health Advocates

Lastly, collaboration with mental health advocates can also help garner a successful outcome for a client charged with a school-based offense. "[A]pproximately 70 percent [of youth in the juvenile justice system] . . . suffer from mental health disorders, with at least 20 percent experiencing disorders so severe that their ability to function is significantly impaired."[211] Once a juvenile defender learns that a client has been diagnosed with a mental health disorder, she should have the client sign a release of information so she can contact the mental health professional. Without a signed consent form, the juvenile defender will be unable to speak to any professional about a client's medical records. Mental health professionals, such as counselors, can provide insight into disabilities clients may have that can impact their behavior. This information can be useful for identifying competency or capacity issues.[212] Similar to social workers, mental health professionals also have a wealth of knowledge about

[210] Interview with Thurman, *supra* note 85.
[211] KATHLEEN R. SKOWYRA & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM vii (2006), *available at* http://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf.
[212] Interview with Manlove, *supra* note 8.

community services and programs that can beneficial to pursuing resolutions outside the system.[213]

B. Effecting Change Outside of the Juvenile Justice System

In their excerpt titled *Setting the Record Straight: Child Advocacy and School Responses to Mental Health*, Rosa Hirji and Jenny Chau emphasize the importance of attorneys effecting change outside of the justice system:

> Child advocates should combine individual advocacy efforts with strategies to combat long term institutional problems that impact their clients. Such strategies include educating the public and policy makers about their findings, participating in efforts to change or influence law and policy, and engaging with community-based organizations that work to mobilize local communities around issues that they face.[214]

Two recommendations are presented below for juvenile defenders looking to effect change outside of the juvenile justice system: (1) participating in policy development on the local and state levels; and (2) counteracting implicit biases about clients of color.

1. Participating in Policy Development on the Local and State Level

In some jurisdictions, the structures in the juvenile justice system may make it difficult to implement the recommendations presented above.[215] For attorneys in these jurisdictions, participating in policy development may be the best way to disrupt The School-to-Prison Pipeline. Juvenile defenders are in the best position to promote change in juvenile policy since they have direct knowledge of the strengths and weaknesses of the system.[216] This

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[213] *Id.*
[214] Rosa Hirji & Jenny Chau, *Setting the Record Straight Child Advocacy and School Responses to Mental Health*, *in* CHANGING LIVES: LAWYERS FIGHTING FOR CHILDREN 63, 77 (Lourdes M. Rosado ed., 2014).
[215] *See supra* Part III.A.
[216] Interview with Manlove, *supra* note 8.

unique placement makes juvenile defenders responsible for "chang[ing] court rules, laws, and processes that reduce or eliminate . . . disparate treatment" for children of color.[217] To do this, juvenile defenders can start by identifying potential issues they observe in their jurisdiction and by bringing those issues to the attention of politicians, judges, or the juvenile bar.[218] Some of the policy issues with the greatest potential to disrupt The School-to-Prison Pipeline are presented below.

a) Eliminating Barriers to School Re-Entry

One of the greatest barriers to eliminating The School-to-Prison Pipeline is the challenge students face when trying to reenroll in school after an expulsion. "For youth leaving custody, a return to school is integral to successful reentry into the community."[219] Too often, students forced out of their schools are never offered either an opportunity to come back[220] or an educational alternative to their home-schools. Administrators are able to keep students out of schools "through a variety of informal policies and practices," such as preventing "overage and under-credited students from reenrolling," "us[ing] disciplinary transfers to assign students to schools that are practically inaccessible due to distance from home or because of safety concerns," or simply telling students directly "they cannot return without further explanation."[221]

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[217] *Defense Standards*, *supra* note 77, at 157.
[218] *See id.* at 152.
[219] CORA ROY-STEVENS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OVERCOMING BARRIERS TO SCHOOL REENTRY 1 (2004), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf.
[220] Interview with Thurman, *supra* note 85.
[221] RACHEL S. TAYLOR ET AL., GEORGETOWN L. HUM. RTS. INST., KEEP OUT: BARRIERS TO MEANINGFUL EDUCATION IN THE SCHOOL-TO-PRISON PIPELINE 19 (2012), *available at* http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/KeptOut.pdf.

For attorneys looking to pursue policy changes in this area, three elements have been identified as "best practices in school re-entry[,]" including: "(1) re-entry planning that begins coordinating the transition while youth are in juvenile justice placements; (2) communication and collaboration between the educational and correctional systems, youth, and families; and (3) inter-agency transition teams that have clear roles and responsibilities to facilitate enrollment immediately and in an appropriate educational setting."[222] Inter-agency transition teams have been especially effective in combatting barriers to re-entry since the team works collaboratively across the systems "to ensure that students return to appropriate education placements" by "prevent[ing] school districts from automatically placing youth returning from detention in alternative education programs."[223]

b) Implementing Restorative Practices in Juvenile Justice Systems

In addition to eliminating barriers to re-entry, another way juvenile defenders can disrupt The School-to-Prison Pipeline is by implementing restorative practices in their jurisdiction. In the 1990s, there was a movement toward more punitive treatment of juveniles explained by a misperception that youth crime was rampant, growing by the minute, and out of control.[224] As a result, many legislators sought to address this misperception of violence by "enacting legislation designed to 'get tough' on juvenile crime."[225] This change "emphasized punishment based on

[222] Jessica Feierman et al., *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth,* 54 N.Y.L. SCH. L. REV. 1115, 1126 (2010) (summarizing existing best-practice research).
[223] *Id.* at 1126–27.
[224] Samuel Marion Davis, *The Criminalization of Juvenile Justice: Legislative Responses to "The Phantom Menace"*, 70 MISS. L.J. 1, 24 (2000).
[225] *Id.*

present offense and prior record rather than the juvenile courts' previous rehabilitative mission."[226]

Yet, this shift toward retributive justice has had little effect on juvenile crime rates,[227] and many advocates have argued that there needs to be a shift back toward a more rehabilitative focus in the juvenile justice system.[228] These policy makers encourage shaping the juvenile justice system around restorative practices, also known as "restorative justice."[229] The philosophy underlying restorative practices is that "when a crime occurs, there's an injury to the community; and that injury needs to be healed."[230] To heal that injury, systems based on restorative practices emphasize that "those in positions of authority do things *with* [juvenile offenders] . . . rather than *to* them or *for* them."[231] Programs shaped around such a philosophy will create a process "in which those impacted by a crime or harmful event share how they have been affected by it and what can be done to restore their lives."[232]

Such restorative practices should complement the juvenile justice system, not completely replace it.[233] Juvenile defenders can encourage small changes to their system by implementing one of many restorative practices, including "victim-offender mediation, family group conferencing, restorative conferencing, community restorative (reparative) boards,

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[226] Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences,* 10 J. L. & FAM. STUD. 11, 12 (2007).
[227] *See* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 45–47 (Michael Tonry and Norval Morris eds., 1998) (showing that arrest rates fluctuate in cyclical patterns, making any predictions of future behavior based on past arrest rates a flawed response).
[228] Bo Lozoff, *Seven Ways to Fix the Criminal Justice System*, NEW RENAISSANCE MAG., http://www.ru.org/society/seven-ways-to-fix-the-criminal-justice-system.html (last visited Nov. 25, 2014).
[229] *Id.*
[230] *Id.*
[231] Ben Brettell & Jeremy Besbris, *A Balanced and Restorative Approach to Juvenile Justice*, 31 WYO. L. 34, 35 (2008).
[232] Jan Peter Dembinski, *Restorative Justice—Time to Take It Seriously?*, 39 VER. B.J. & L. DIG. 1, 20 (2014).
[233] *Id.*

restorative circles, circles of support and accountability, and sentencing circles."[234] Juvenile defenders can assert that these types of restorative practices serve multiple objectives of the juvenile justice system, considering that implementation leads to higher levels of victim satisfaction, greater compliance with restitution, and decreasing offender recidivism."[235]

c) Reducing Excessive Caseloads

Finally, juvenile defenders can also disrupt the pipeline by reducing excessive caseloads in their jurisdictions. For many attorneys, excessive caseloads can make it difficult to provide the level of advocacy needed to combat disparities in the system. In her article titled *Two Systems of Justice, and What one Lawyer Can Do*, Barbara Fedders describes what a competent and zealous juvenile defender must to do fully advocate for their client's case:

> Attorneys must meet with their clients regularly; investigate the facts; research the relevant law; file meritorious pre-trial motions; prepare for trial; create and deliver sentencing arguments; explain to clients, in plain language, their rights, and their options; and give them the best possible advice of their likelihood of success at trial. They must also, of course, attempt to negotiate a favorable disposition with the prosecutor, and convey all plea offers to their clients.[236]

Some juvenile defenders will never interview witnesses, visit crime scenes, research the viability of filing pre-trial motions, or prepare for trials

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[234] *Id.*
[235] *See generally* Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 THE PRISON J. 127, 142 (June 2005) (conducting a review of studies comparing various restorative justice programs).
[236] Barbara Fedders, *Two Systems of Justice, and What One Lawyer Can Do*, 12 WHITTIER J. CHILD & FAM. ADVOC. 25, 39 (2012).

or dispositional hearings; their caseloads make it impossible to do so.[237] To remedy excessive caseloads, juvenile defenders must advocate for themselves in their jurisdictions.

First, if a caseload level reaches a point where it diminishes competence, juvenile defenders should flatly refuse to take on any additional case assignments.[238] Not only do excessive caseloads hurt client representation, but they also put attorneys at risk of liability.[239] To promote a change in caseloads, juvenile defenders can start by gathering data during litigation documenting how their caseloads are preventing the quality representation described above.[240] This step is most influential when juvenile defenders form working groups with other attorneys in their jurisdiction to collect the data.[241] The information gathered can be used to approach supervisors and discuss structures that will reduce the burden in the future. If supervisors are unwilling to create new structures because of budgetary or political reasons, juvenile defenders can inform community members and judicial, legislative, and executive stakeholders about the scope of the problem.[242] Public support can also be acquired "from Bar Associations and child advocacy agencies" that will help "promote legislation" and "create reasonable caseloads."[243] Juvenile defenders should not stop advocating until their caseload is at a level where they can provide quality representation based on best practice standards.[244]

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[237] *Id.* at 36–37.
[238] Andrew Schepard & Theo Liebmann, *Law and Children: The Law Guardian Caseload Crisis*, N.Y. L. J. 5 (2005).
[239] *Id.*
[240] *See* Fedders, *supra* note 236, at 39; *see also Defense Standards*, *supra* note 77, at 160.
[241] *See* Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 UNIV. OF PENN. J. OF L. AND SOC. CHANGE 25, 34 (2011).
[242] *Defense Standards*, *supra* note 77, at 160.
[243] Schepard & Liebmann, *supra* note 238, at 5.
[244] *See Defense Standards*, *supra* note 77.

2. Counteracting Implicit Biases about Clients of Color

Outside of participating in policy development, individual attorneys can also disrupt the pipeline by being aware of, and counteracting, implicit biases that shape their perceptions of clients. Many juvenile defenders "are unlikely to share the same socio-economic background, cultural values, or kin as the children" they work with.[245] Youth in the juvenile justice system are disproportionately children of color[246] and juvenile defenders are disproportionately White.[247]

Because a majority of the youth in The School-to-Prison Pipeline are children of color, White attorneys should be especially conscious of the implicit biases that may shape their perceptions of clients. Implicit bias "refers to the unconscious influence of beliefs on decision-making."[248] "There are two important types of implicit biases: attitudes and stereotypes."[249] An example of an implicit attitude is if "a person says she feels the same way toward all races, but exhibits a preference for members of her own race."[250] An example of an implicit stereotype is an unconscious belief that all members of a certain group have the propensity toward a specific characteristic, such as a belief that young Black males have a propensity toward violence. These implicit biases "produce behavior that diverges from a person's . . . endorsed beliefs or principles."[251]

It is important for juvenile defenders to counteract implicit biases they have because such biases can damage a client's case. For example, implicit

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[245] Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573, 595 (2008).
[246] *See* Kim, *supra* note 2, at 956.
[247] Appell, *supra* note 245, at 609 (citing data showing that America's general population is about 75 percent White, but the legal profession is nearly 90 percent).
[248] Kerala Thie Cowart, *On Responsible Prosecutorial Discretion*, 44 HARV. C.R.-C.L. L. REV. 597, 601 (2009).
[249] *Id.*
[250] *Id.*
[251] *Id.*

biases "create the risk that children's attorneys will not appreciate, or even comprehend, the social dimensions of the presenting legal problems . . . [which will] lead the attorney to discount the child's clearly stated preferences."[252] Biases can also blind attorneys to "understanding factors contributing to or even causing other legal problems relating to housing, employment, immigration or other family issues."[253] Juvenile defenders "have [an] extraordinary power to either promote or undermine the norms that determine how their clients' interests will be defined and met . . . [and] if the attorneys are inserting or substituting their own substantive values into the representation, the attorneys may be displacing the values of the child or the parents[.]"[254]

One way to combat implicit biases is to ask for outside input from other colleagues regarding the perception of cases. Revealing legal arguments to other attorneys can help uncover hidden assumptions attorneys are making about a client's situation.[255] Attorneys can also take time to get to know their clients in order to better understand their life experiences during interviews.[256] "Some studies have suggested that well-intentioned actors can overcome automatic or implicit biases, at least to some limited extent, when they are made aware of the stereotypes and biases they hold, have the cognitive capacity to self-correct, and are motivated to do so."[257] Public defenders who overcome these biases will make much greater advocates for their clients.

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[252] Appell, *supra* note 245, at 609–10.
[253] *Id.* at 610.
[254] *Id.* at 595–96.
[255] *See* Cowart, *supra* note 248, at 597.
[256] Interview with Elliott, *supra* note 78.
[257] Henning, *supra* note 135, at 432.

CONCLUSION

The School-to-Prison Pipeline will not be remedied by any one solution. It will take efforts by advocacy organizations, attorneys, and all aspects of society to disrupt it. However, as evidenced in this article, there are many steps juvenile defenders can take to impact the disparate treatment of children of color in the system. Whether it is effecting change within or outside the juvenile justice system, small steps will eventually lead to positive changes for youth in the future. These small steps include advocating for the educational rights of clients, fashioning legal arguments to present in court, developing relationships with other court actors, and reaching out to the community for support. Juvenile defenders should also take time to reflect on their own biases that inadvertently shape the steps they take for their clients. Those who choose to represent children assume a great responsibility, and without their advocacy, juveniles would likely be left without a voice in the system.