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## Defending the Whole Child: Education Advocacy as an Integral Part of Holistic Juvenile Defense

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Stacie Nelson Colling,<sup>1</sup> Elie Zwiebel,<sup>2</sup> and Madeleine Hart<sup>3</sup>

The American legal system recognizes that young people are fundamentally different than adults; in turn, courts must regard young people differently when they engage in delinquent or criminal behavior.<sup>4</sup> In addition to having distinctly undeveloped brain function, young people, as opposed to adults, typically spend the majority of their daily lives engaging with educational systems. And yet, the delinquency and criminal systems rarely incorporate a young person's educational history, status, and needs into criminal and delinquency proceedings.

It is now clear that “zero tolerance” school discipline and policing in schools have contributed to what has become widely known as the “school-to-prison pipeline.”<sup>5</sup> This term is broadly used to describe a system of policies and practices that create a culture wherein young people are criminalized or punished for behaviors part and parcel to (or indicative of) being a child.<sup>6</sup>

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<sup>4</sup> See *Miller v. Alabama*, 567 U.S. 460, 472–73 (2012) (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)).

<sup>5</sup> *Infra* pp. 3–4.

<sup>6</sup> *School-to-Prison Pipeline*, ADVANCEMENT PROJECT, <https://advancementproject.org/issues/stpp/> [<https://perma.cc/6MND-R9NZ>].

Regardless of one's personal beliefs or political stance on the criminal system or on school discipline practices, acknowledging the role education plays in the delinquency and criminal systems and the need for a more equitable and fair system should not be controversial. To this end, educational advocacy is an integral part of holistic juvenile defense and should be incorporated into more juvenile defense programs. Unfortunately, the young people who most need educational advocacy as part of their juvenile defense are often those who can least afford it. Therefore, educational advocacy must be adequately funded as part of the public defense system.

This article explains why educational advocacy within holistic juvenile defense can contribute to breaking the school-to-prison pipeline. Section I defines the "school-to-prison pipeline" and its discriminatory and lasting impacts on students of color and students with disabilities. Section II describes the concept of "holistic defense" and why it is a best practice in defending all people, but especially in defending young people. Section III explores how educational advocacy is integral to holistic juvenile defense, and the constitutional rights that are implicated when incorporating (or failing to incorporate) educational advocacy into juvenile defense. Section IV describes organizations that have already begun incorporating educational advocacy into a holistic juvenile defense. Section V discusses the role of school districts in ending the school to prison pipeline. Finally, Sections VI and VII are a call to action describing policy and legal solutions to ensure educational advocacy through holistic defense contributes to breaking the school-to-prison pipeline.

## I. WHAT IS THE SCHOOL TO PRISON PIPELINE?

The school-to-prison pipeline is a system of policies and practices that push students out of schools and into juvenile and criminal systems and is a system that disproportionately targets and punishes students of color and

students with disabilities.<sup>7</sup> This dynamic grew out of the “tough on crime” attitudes of the 1980s and 1990s when the trend in national culture became increasingly obsessed with harsh penalties for criminal activity.<sup>8</sup> Through the racist portrayal of Black teenagers as “superpredators,” political scientists, such as John Dilulio, exacerbated the public’s fears of the predicted sky-high crime rates.<sup>9</sup> Dilulio and his peers perpetuated the idea that there were groups of young people who were naturally—or even genetically—predisposed to committing violent crime or wreaking havoc on society.<sup>10</sup> Popular magazines featured photographs of Black boys holding weapons accompanying stories anticipating the crime wave that the “superpredators” would cause.<sup>11</sup> Policymakers myopically focused on punishment over nuanced solutions and ignored the socio-economic, environmental factors that contributed to rising crime rates, such as failing schools, police violence, substandard housing, and lack of drug treatment facilities.<sup>12</sup>

During this time, more types of conduct became criminalized under juvenile codes, penalties for juvenile misconduct increased, and young people were more frequently referred to the adult criminal system—where they were treated more harshly than they would have been had they remained in the juvenile delinquency system.<sup>13</sup> These political and societal changes set the stage for school-based policies, both local and federal in origin, to form the school-to-prison pipeline.

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<sup>7</sup> *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline> [<https://perma.cc/QH8D-2EC6>]; see *ABA Roadmaps way to turn off spigot to school-to-prison pipeline*, ABA (Feb. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/aba-roadmaps-way-to-turn-off-spigot-to-school-to-prison-pipeline/> [<https://perma.cc/Q8B8-4BU2>].

<sup>8</sup> Judith A.M. Scully, *Examining and Dismantling the School-To-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 963 (2016).

<sup>9</sup> *Id.* at 964–67.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 965.

<sup>12</sup> *Id.* at 963.

<sup>13</sup> *Id.* at 966–67.

To best explain the mechanics of the school-to-prison pipeline, this section is broken into four subsections. The first subsection discusses how zero tolerance policies increased law enforcement on school sites, the No Child Left Behind Act, and how alternative schools contribute to the school-to-prison pipeline. The second subsection explains how these policies push students toward the carceral system, both directly and indirectly. The final two subsections address the impact that these policies and practices have upon students.

Students removed from their mainstream educational environments for nonviolent school code violations or displays of typical adolescent behavior are more likely to drop out of school and enter the delinquency and criminal systems.<sup>14</sup> “Yet, students charged with crimes occurring in schools are often expelled or suspended, in addition to already pending charges.”<sup>15</sup> This is devastating and compounds how the school-to-prison pipeline disproportionately impacts students with disabilities, students of color, and students living in poverty.

#### A. “Zero Tolerance” Policies and School Push Out

Zero tolerance discipline policies “mandate[] predetermined consequences . . . for specific offenses.”<sup>16</sup> The adoption and en masse proliferation of these policies stemmed from the effort to combat violence in schools in the late 1990s, particularly after the devastating Columbine shooting.<sup>17</sup> Initially,

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<sup>14</sup> Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868–69 (2010).

<sup>15</sup> Jonathon Arellano-Jackson, *But What Can We Do? How Juvenile Defenders Can Disrupt The School-To-Prison Pipeline*, 17 SEATTLE J. FOR SOC. JUST. 751, 785 (2015) (citing 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)).

<sup>16</sup> Scully, *supra* note 8, at 967 (quoting PHILLIP KAUFMAN ET AL., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., INDICATORS OF SCHOOL CRIME & SAFETY 117 app. A (1999), <http://nces.ed.gov/pubs99/1999057.pdf> [<https://perma.cc/FT7N-WENM>]).

<sup>17</sup> Arellano-Jackson, *supra* note 15, at 757; Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 268 (2008).

policies focused on automatic expulsion for bringing weapons to school.<sup>18</sup> However, over time, schools increasingly mandated harsh consequences for a broader variety of offenses—paralleling the increasingly punitive cultural obsession with “tough on crime” policies.<sup>19</sup> Administrators gained immense discretion to dole out suspensions and expulsions based on subjective criteria for offenses such as “insubordination” or “school disturbance.”<sup>20</sup> Schools hoped harsh punishments would deter other students who might be potential offenders.<sup>21</sup> This fallacious premise paralleled the erroneous assumption that “tough on crime” policies would deter criminal activity.

“Of the 3.3 million children suspended from school each year, 95 percent are sanctioned for nonviolent offenses like ‘disruptive behavior’ or violation of dress codes.”<sup>22</sup> “‘Zero-tolerance’ policies criminalize minor infractions of school rules . . . .”<sup>23</sup> The Colorado Attorney General’s Office notes that these punitive measures create a cycle that is harmful for both students and their communities.<sup>24</sup> In Colorado schools, most suspensions and a substantial portion of expulsions are the result of “relatively minor—and subjective—violations of school codes of conduct,” as well as violations involving marijuana, alcohol, and tobacco, which are often best addressed through behavioral health solutions.<sup>25</sup>

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<sup>18</sup> Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into a Nightmare? The American Dream’s Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 UC DAVIS J. JUV. L. & POL’Y 289, 303 (2005).

<sup>19</sup> *Id.* at 303–09.

<sup>20</sup> Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 571, 573 (2009).

<sup>21</sup> Hanson, *supra* note 18, at 301–02.

<sup>22</sup> ROBERT L. LISTENBEE, JR. ET AL., OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP’T OF JUST., REPORT OF THE ATTORNEY GENERAL’S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 183–84 (Dec. 12, 2012), <https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf> [<https://perma.cc/KT55-YT7M>].

<sup>23</sup> ACLU, *supra* note 7.

<sup>24</sup> Adam Rice & Felicia Schuessler, *School Justice Roundtable1: Engaging the Experts*, 4.

<sup>25</sup> *Id.*

Zero tolerance policies have a demonstrable negative impact on students and communities. “The American Psychological Association has found that these practices harm academic achievement for all students while increasing the chances that those excluded will be held back, drop out, and become involved with the juvenile and criminal justice systems.”<sup>26</sup> “Despite these findings, school discipline rates are at their all-time highs—double those of the 1970s.”<sup>27</sup> “Pressed by high-stakes testing and inadequate resources, many schools are choosing to forego mentorship and intervention for students in favor of exclusion and arrest.”<sup>28</sup> “Indeed, the current approach to educational accountability offers educators the perverse incentive to choose whom to educate—and to remove the rest.”<sup>29</sup> Moreover, zero tolerance policies often conflict with the Individuals with Disabilities Education Act (IDEA), as the policies inherently do not account for individual circumstances of the student as the punishments are predetermined.<sup>30</sup>

Suspensions add another obstacle to students’ lives as those students strive to grow and learn. According to the Department of Education’s Office of Civil Rights, in the 2009–2010 school year, over three million students were estimated to have lost hours and days of learning due to out-of-school suspensions.<sup>31</sup> Many of these students were suspended multiple times.<sup>32</sup> Katherine Dunn explains,

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<sup>26</sup> *School to Prison Pipeline*, NAACP LEGAL DEF. FUND, INC. (Feb. 16, 2018), <https://www.naacpldf.org/case-issue/school-prison-pipeline> [<https://perma.cc/2GR6-LCNK>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Lisa M. Geis, *Courtroom, Classroom, Commitment: Using Special Education and Disability Rights to Keep Youth Out of Secure Facilities*, 8 J. MARSHALL L. J. 521, 532 (2015).

<sup>31</sup> DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIV. RTS. PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL, 6, 10 (Aug. 2012), <https://escholarship.org/uc/item/3g36n0c3> [<https://perma.cc/8MH3-VD7Q>].

<sup>32</sup> *Id.*

These high suspension rates are due in part as a consequence of zero tolerance discipline policies- when certain behaviors mandate out of school time for a student . . . However, high suspension rates are also a result of vague and subjective discipline policies that employ a get-tough approach, rather than a rehabilitative one. Under this approach, students are punished instead of being taught proper behavior.<sup>33</sup>

### *B. Increased Policing in School*

Increased police officer and security guard presence in schools creates an environment where students feel unsafe and unwelcome.<sup>34</sup> The history of policing in school dates back to the 1940s, when police were deployed to enforce racial segregation between schools and within school hallways.<sup>35</sup> Policing hallways has always had a racially discriminatory aspect, including when law enforcement presence in schools increased to suppress student organizing in the 1970s.<sup>36</sup> Since its introduction to schools, law enforcement presence on campuses has gradually increased and parallels zero-tolerance and “tough on crime” policies that disproportionately target communities of color.<sup>37</sup>

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<sup>33</sup> Katherine Dunn, *School-to-Prison Pipeline Panel*, 5 FAULKNER L. REV. 115, 123 (2013).

<sup>34</sup> Kristin Henning, “Cops at the Schoolyard Gate” VOX (July 28, 2021), <https://www.vox.com/the-highlight/22580659/police-in-school-resource-officers-sro> [<https://perma.cc/B2S2-QN7J>] (“Police don’t make students feel safer — at least not Black students in heavily policed communities. To the contrary, police in schools increase psychological trauma, create a hostile learning environment, and expose Black students to physical violence. . . . As schools increasingly rely on police officers to monitor the hallways and control classroom behavior, students feel anxious and alienated by the constant surveillance and fear of police brutality. . . . Not only do students *feel* less safe in school, but they *are* less safe.”).

<sup>35</sup> MEGAN FRENCH-MARCELIN, ET AL., ACLU, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 2, 3 (Apr. 2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_bullies\\_in\\_blue\\_4\\_11\\_17\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf) [<https://perma.cc/RQ6M-ADXD>].

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* at 29.



In 2005, 68% of students reported the presence of security guards or police officers in their schools—an increase of 14% since 1999.<sup>38</sup> Many schools justified the presence of law enforcement through concerns over student safety in the wake of highly publicized juvenile crimes and the then-public obsession with the myth of “superpredators.”<sup>39</sup> In many schools, students suddenly began their day walking through metal detectors and under the watchful, often invasive, police presence in hallways between classes.<sup>40</sup>

As a result, school resource officers (SROs) became the norm—regarding students as suspects and patrolling schools as if they were jails. SROs are often federally-funded local law enforcement personnel who enforce both criminal law and school policy.<sup>41</sup> Arrests for infractions originating at school sites have increased significantly as a result of allowing SROs to enforce school policies.<sup>42</sup> Inviting “cops in[to] schools” and allowing them to enforce school policies has “[led] to students being criminalized for behavior that should be handled inside the school.”<sup>43</sup> “Not surprisingly, one immediate consequence of placing education ‘on lockdown’ is that law enforcement intervenes in minor incidents formerly viewed as typical childish behavior and ‘teachable moments’ from which students might grow without suffering from the permanent, negative, and long-term consequences of police

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<sup>38</sup> Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and A New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L. J. 1671, 1677 (2011).

<sup>39</sup> *Id.*

<sup>40</sup> Henning, *supra* note 34.

<sup>41</sup> Scully, *supra* note 8, at 976.

<sup>42</sup> *Id.* at 977.

<sup>43</sup> ACLU, *supra* note 7.

involvement.”<sup>44</sup> In some of the worst cases, administrators have police precincts located directly on campus.<sup>45</sup>

Moreover, these increased “security measures” fail to increase school safety, and, in many cases, result in overly excessive punishment.<sup>46</sup> For example, in 2010, the United States Department of Education’s Office of Civil Rights division received about 7,000 complaints on the disproportionate number of suspensions, expulsions, arrests, and dropouts of marginalized students.<sup>47</sup> Moreover, students in disciplinary hearings have minimal due process rights, which allows for patent “arbitrariness” and discrimination in determining liability and punishment.<sup>48</sup>

Consequently, enhanced surveillance and punishment measures taken by schools have turned schools from “institutions of learning into institutions of control.”<sup>49</sup> In one particularly odious circumstance in Meridian, Mississippi, the police department’s policy was to arrest any child referred to them.<sup>50</sup> Some of the infractions that students as young as ten were arrested

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<sup>44</sup> 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, 657 (2013); see Bernardine Dohrn, “Look Out Kid / It’s Something You Did”: Zero Tolerance for Children in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 89–94 (William Ayers, Bernardine Dohm & Rick Ayers eds., 2001).

<sup>45</sup> Scully, *supra* note 8, at 978–79.

<sup>46</sup> Dunn, *supra* note 33, at 123; Best, *supra* note 39, at 1677–78.

<sup>47</sup> Rosa Hirji & Benétta Standly, *The OCR as a Tool in Dismantling the School-to-Prison Pipeline*, ABA (May 23, 2011), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2011/ocr-as-tool-dismantling-school-to-prison-pipeline> [<https://perma.cc/N7EY-HB69>].

<sup>48</sup> Rivkin, *supra* note 17, at 271.

<sup>49</sup> Best, *supra* note 39, at 1677.

<sup>50</sup> Scully, *supra* note 8, at 979 (citing Julianne Hing, *The Shocking Details of a Mississippi School-to-Prison Pipeline*, COLORLINES (Nov. 26, 2012, 9:34 AM), <https://www.colorlines.com/articles/shocking-details-mississippi-school-prison-pipeline> [<http://perma.cc/ZDV2-FMT9>]).

for included dress code violations, passing gas in class, and using profanity.<sup>51</sup> Every child who was arrested was Black.<sup>52</sup>

### *C. The Disparate Impact of School-to-Prison Pipeline Policies*

The school-to-prison pipeline disproportionately impacts children with disabilities, children of color, and children of color with disabilities. Students with disabilities are twice as likely to receive one or more out-of-school suspensions compared to general education students.<sup>53</sup> “Students with disabilities represent 12 percent of the overall student population, yet make up 25 percent of all students involved in a school-related arrest, 58 percent of all students placed in seclusion, and a staggering 75 percent of all students physically restrained at school.”<sup>54</sup> As many as 85% of students in juvenile detention facilities qualify for special education.<sup>55</sup>

A 2011 study by the Council of State Governments Justice Center found that 23% of the youth in the study who were involved in school disciplinary actions were also involved in delinquency proceedings.<sup>56</sup> This number was only 2% for the students who were not involved in disciplinary actions.<sup>57</sup>

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<sup>51</sup> Scully, *supra* note 8, at 979 (citing *Meridian, Mississippi Sued by Federal Civil Rights Lawyers for Operating “School-to-Prison” Pipeline*, HUFFINGTON POST (Oct. 25, 2012, 5:40 PM), [https://www.huffpost.com/entry/federal-civil-rights-lawy\\_n\\_2018947](https://www.huffpost.com/entry/federal-civil-rights-lawy_n_2018947) [<https://perma.cc/MK2V-TMLX>]).

<sup>52</sup> *Id.*

<sup>53</sup> OFF. FOR CIV. RTS., THE TRANSFORMED CIVIL RIGHTS DATA COLLECTION 1, 2 (Mar. 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> [<https://perma.cc/7C73-W88E>].

<sup>54</sup> *School-to-Prison Pipeline*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/legal-advocacy/school-to-prison-pipeline> [<https://perma.cc/GZ3N-GDVH>].

<sup>55</sup> *Supporting Youth with Disabilities in Juvenile Corrections*, U.S. DEP’T OF EDUC. (May 23, 2017), <https://sites.ed.gov/osers/2017/05/supporting-youth-with-disabilities-in-juvenile-corrections> [<https://perma.cc/T35Q-6FQP>] (the lowest estimate being approximately 30%).

<sup>56</sup> DISABILITY RTS. EDUC. & DEF. FUND, *supra* note 56.

<sup>57</sup> Best, *supra* note 39, at 1678–79.

Further, 75% of “students who qualified for special education services during the study period were suspended or expelled at least once.”<sup>58</sup>

Latinx and Black students account for only 45% of the student body, yet those same students suffer 56% of the zero tolerance expulsions.<sup>59</sup> Black students are not only disproportionately suspended and expelled,<sup>60</sup> they are also more likely to get arrested at school.<sup>61</sup> In 2018, although Black students comprised 5% of the student body in Colorado, they experienced 36% of arrests for “public peace” offenses.<sup>62</sup>

The continued prevalence of zero tolerance policies disproportionately and adversely affects students of color, who are more likely to be punished in schools than their white peers.<sup>63</sup> Black students are particularly likely to suffer from these discipline policies: According to the Department of Education’s Office of Civil Rights, one in five Black male students received an out-of-school suspension in the 2009–2010 school year.<sup>64</sup> Black students are over 3.5 times more likely to be suspended or expelled than white students.<sup>65</sup> In Minneapolis, for example, although Black students make up only 41% of the school district, they represent 76% of district-wide suspensions.<sup>66</sup>

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<sup>58</sup> Scully, *supra* note 8, at 977; see Evie Bald & Alex Harwin, *Black Students More Likely to be Arrested at School*, EDUCATIONWEEK (Jan. 24, 2017), <https://www.edweek.org/leadership/black-students-more-likely-to-be-arrested-at-school/2017/01> [<https://perma.cc/CT5F-DBTC>].

<sup>59</sup> Rice & Schuessler, *supra* note 24, at 5.

<sup>60</sup> Geis, *supra* note 30, at 533.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (citing TONY FOBELO ET AL., COUNCIL OF STATE GOV’T JUST. CTR. & PUB. POL’Y RSCH. INST., *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, at xi (2011), [https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf) [<https://perma.cc/3DER-ZQFA>]).

<sup>63</sup> Boyd, *supra* note 20, at 574.

<sup>64</sup> OFF. FOR CIV. RTS., *supra* note 55, at 3.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> Erica L. Green, *Why Are Black Students Punished So Often? Minnesota Confronts a National Quandary*, N.Y. TIMES (Mar. 18, 2018),

While zero-tolerance policies are meant to mandate a specific punishment, it has been shown that Black students are more often reported for behaviors that “require more subjective judgement on the part of the person making the referral (e.g., disrespect, excessive noise, threatening behavior . . . ).”<sup>67</sup> The authors of the Minneapolis study suggest that rather than an actual disparity in behavior existing between students of different racial backgrounds, Black students are being unfairly singled out when it comes to prosecuting these subjective offenses.<sup>68</sup> Because schools now frequently turn students over to law enforcement for infractions committed while on campus,<sup>69</sup> Black students are also experiencing a disproportionate number of arrests for school misbehavior.<sup>70</sup>

Not surprisingly, students of color with disabilities are the most likely to suffer the adverse consequences of the school-to-prison pipeline.<sup>71</sup> In other words, the most marginalized students are also the most likely to fall victim to the school-to-prison pipeline. “African-American students with disabilities represent 18.7 percent of the special education population, but 49.9 percent of special education students in correctional facilities.”<sup>72</sup>

This disparity has to do with the implicit biases teachers and administrators have when working with students with disabilities; while misbehavior by a white student is perceived as stemming from a disability and indicative of a need for extra care and attention,<sup>73</sup> the same behavior by a student of color is

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<https://www.nytimes.com/2018/03/18/us/politics/school-discipline-disparities-white-black-students.html> [<https://perma.cc/Y7Z7-PW5U>].

<sup>67</sup> Daniel J. Losen, *Discipline Policies, Successful Schools, and Racial Justice*, NAT’L EDUC. POL’Y CTR. 1, 7 (Oct. 2011), <https://escholarship.org/uc/item/4q41361g> [<https://perma.cc/7RCC-WREN>].

<sup>68</sup> *Id.*

<sup>69</sup> Hanson, *supra* note 18, at 328.

<sup>70</sup> Arellano-Jackson, *supra* note 15, at 755.

<sup>71</sup> *Id.* at 754.

<sup>72</sup> *Id.* at 762.

<sup>73</sup> *Id.*

seen as “defiant or criminal.”<sup>74</sup> “Over a quarter of African-American boys with disabilities, and 19 percent of African-American girls with disabilities, received at least one out-of-school suspension in 2011-2012.”<sup>75</sup> Instead of working to identify and serve students of color who have disabilities, schools are more likely to deem them as irreparably disruptive and expel them.<sup>76</sup> Paired with stringent zero-tolerance policies, the failure of schools to identify and address students’ disabilities sets these children up to face severe consequences for behavior they cannot control.<sup>77</sup> “The increasing use of suspensions, expulsions, and school-based referrals to law enforcement - the “school-to-prison pipeline” - compound these issues by pushing these same students out of school and into juvenile justice systems.”<sup>78</sup>

#### *D. The Results of System Involvement on Individual Student Outcomes*

Harsh discipline produces students who are more likely to do poorly in school and are more likely to be involved with the criminal justice system as adults. Students who attend high-poverty schools with large populations of students of color are most likely to have fewer resources and fewer highly qualified teachers.<sup>79</sup> These students are also more likely to drop out of school and attain lower levels of education.<sup>80</sup> Harsh discipline and referrals to law enforcement only exacerbate these issues without addressing the core of the problems.

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<sup>74</sup> *Id.* (citing Mary Christianakis & Richard Mora, *Feeding The School-to-Prison Pipeline: The Convergence of Neoliberalism, Conservatism, and Penal Populism*, J. EDUC. CONTROVERSY (2012)).

<sup>75</sup> *See id.* at 761–62.

<sup>76</sup> DISABILITY RTS. EDUC. & DEF. FUND, *supra* note 56.

<sup>77</sup> *Id.*

<sup>78</sup> Dunn, *supra* note 33, at 116.

<sup>79</sup> Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, 99 NEW DIRECTIONS FOR YOUTH DEV. 9 (2003); *see also, e.g.*, Sam Dillon, *Districts Pay Less in Poor Schools, Report Says*, N.Y. TIMES, <https://www.nytimes.com/2011/12/01/education/us-education-department-finds-salary-gap-in-poor-schools.html> [https://perma.cc/R5J8-PW8R].

<sup>80</sup> Wald & Losen, *supra* note 81, at 9.

Suspensions, expulsions, and mandatory transfers can have adverse impacts on student mental health, including an association with depression, drug addiction, and problems at home.<sup>81</sup> Disciplinary exclusion from school can cause students to feel ashamed, alienated, and rejected, and can damage healthy bonds with adults.<sup>82</sup> “Being suspended or expelled can cause damage to a young person’s psyche.”<sup>83</sup> Schools with frequent suspensions and expulsions often show low student satisfaction with the school climate.<sup>84</sup> When students feel alienated from their school, they become more likely to engage in risky behaviors the school sought to prevent.<sup>85</sup> “Further, over-reliance on exclusionary responses and arbitrary punishment policies can damage and prevent the formation of healthy bonds between students and adults, bonds needed for students to thrive.”<sup>86</sup>

Advocating for the educational needs of young people is crucial to keeping them out of the school-to-prison pipeline.<sup>87</sup> For many young people arrested

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<sup>81</sup> JANE SUNDIUS & MOLLY FAMETH, PUTTING KIDS OUT OF SCHOOL: WHAT’S CAUSING HIGH SUSPENSION RATES AND WHY THEY ARE DANGEROUS TO STUDENTS, SCHOOLS, AND COMMUNITIES 7 (2008), [https://www.opensocietyfoundations.org/uploads/fc2dea1b-4260-433e-a86e-e2f5ee8fd68/whitepaper2\\_20080919.pdf](https://www.opensocietyfoundations.org/uploads/fc2dea1b-4260-433e-a86e-e2f5ee8fd68/whitepaper2_20080919.pdf) [https://perma.cc/2NFW-WPA7] (citing AM. ACAD. OF PEDIATRICS, OUT-OF-SCHOOL SUSPENSION AND EXPULSION, e1000 (2013), <https://pediatrics.aappublications.org/content/pediatrics/131/3/e1000.full.pdf> [https://perma.cc/NQ5G-ZCAX]).

<sup>82</sup> *Id.* at 7–8; *See also* PUB. COUNS. L. CTR., FIX SCHOOL DISCIPLINE: HOW WE CAN FIX SCHOOL DISCIPLINE TOOLKIT 1, 5 (2012) (explaining how students who are suspended and expelled are more likely to feel ashamed, alienated and rejected).

<sup>83</sup> Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts are Failing Students*, 13 UNIV. OF MARYLAND L. J. OF RACE, RELIGION, GENDER & CLASS 179, 200 (2013) (citing Robyn Gee, *Psychiatrist Says Suspensions Cause Psychological Damage*, YOUTH RADIO (Feb. 28, 2012)).

<sup>84</sup> Best, *supra* note 39, at 1679.

<sup>85</sup> *Id.*

<sup>86</sup> Buckingham, *supra* note 85.

<sup>87</sup> *See* Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 UNIV. MEM. L. REV. 869, 882 (2014) (citing Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES (Oct. 8, 2009), <http://www.nytimes.com/2009/10/09/education/09dropout.html> [https://perma.cc/3H53-ERTE]).

for crimes allegedly committed in schools, detention in juvenile facilities is a traumatic and life-altering experience. In juvenile detention facilities, health, substance abuse, and educational issues often go unassessed or untreated.<sup>88</sup> This undertreatment has severe repercussions, as approximately two-thirds of children in detention facilities meet the criteria for at least one mental health disorder.<sup>89</sup> Further, rehabilitation in the juvenile system is “nearly impossible without appropriate services that are specific to meet an individual child’s needs.”<sup>90</sup> While incarcerated, many young people experience one or more incidents of sexual victimization, and most are denied educational and rehabilitative services.<sup>91</sup> Moreover, students charged with a felony may be suspended or expelled from school, further compounding the devastating effects of the school-to-prison pipeline.<sup>92</sup> A study done by the National Bureau of Economic Research found that children incarcerated as juveniles are 39% less likely to complete high school than other children from their neighborhood.<sup>93</sup> More than half of the students with disabilities released from detention either did not return to school or dropped out within a few months of release.<sup>94</sup> Involvement with the juvenile system “makes it more difficult to get accepted to college, receive financial aid, and find employment.”<sup>95</sup>

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<sup>88</sup> Stephen Phillippi et al., *Holistic representation in juvenile defense: An evaluation of a multidisciplinary children’s defense team*, 39 BEHAV. SCI. & L., 1, 71 (2020).

<sup>89</sup> *Id.* at 66.

<sup>90</sup> Geis, *supra* note 30, at 533.

<sup>91</sup> Lisa A. Polansky, *Holistic Client-Centered Advocacy in Juvenile Delinquency Cases*, 2 STETSON J. OF ADVOC. & L. 1, 12 (2015).

<sup>92</sup> Langberg & Fedders, *supra* note 46, at 660.

<sup>93</sup> Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges* 19 (Nat’l Bureau of Econ. Rsch., Working Paper no. 19102, 2013).

<sup>94</sup> See generally Micheal Bullis et al., *The Importance of Getting Started Right: Further Examination of the Facility- to-Community Transition of Formerly Incarcerated Youth*, 38 J. OF SPECIAL EDUC. 80 (2004); see also LINDA A. LEBLANC, UNLOCKING LEARNING 1-1-1-5 (1991), <https://files.eric.ed.gov/fulltext/ED339775.pdf> [<https://perma.cc/R4QK-YVN3>].

<sup>95</sup> Best, *supra* note 39, at 1680.



Children “forced into detention make connections that increase their likelihood for committing crimes in the future.”<sup>96</sup> Incarceration as a juvenile increases the probability of recidivism as an adult by 22–26%.<sup>97</sup> Keeping young people in school reduces recidivism.

Colorado witnessed a shift in school discipline after the state legislature ended its zero-tolerance policy for certain school-based offenses.<sup>98</sup> The Attorney General’s Office reported that after the law was enacted in 2012, expulsions decreased by approximately 50% statewide and by 90% in some schools.<sup>99</sup> Referrals to law enforcement also decreased.<sup>100</sup> This points to restorative justice as not just a viable alternative but a necessary replacement for harsh discipline.<sup>101</sup>

## II. WHAT IS HOLISTIC DEFENSE AND WHY IS IT IMPORTANT?

The goal of holistic defense is to address the circumstances that contribute to increased rates of involvement in the delinquency or criminal systems, and this goal is particularly salient concerning children and young people.<sup>102</sup>

Our laws recognize that adolescents are different from adults, and there are many things we don’t let minors do because we believe them to be too immature. This is precisely why we don’t let people under twenty-one buy alcohol – because we don’t think they’re responsible enough to handle it. This is the logic behind having a minimum age for driving, or dropping out of school, or even getting married without parental permission. Somehow, though, we lose sight of this logic when a young person commits a serious crime. But committing a crime, no matter how serious, doesn’t turn an adolescent brain into an adult brain . . . in order to make the

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<sup>96</sup> Arellano-Jackson, *supra* note 15, at 777; *see* Geis, *supra* note 89.

<sup>97</sup> Aizer & Doyle, Jr., *supra* note 95.

<sup>98</sup> Rice & Schuessler, *supra* note 24, at 5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Restorative Justice seeks alternatives to punishment. OFF. FOR CIV. RTS., *supra* note 55, at 8.

<sup>102</sup> Polansky, *supra* note 93, at 101.

punishment fit the crime, we need to look not just at the crime, but at the criminal.<sup>103</sup>

The delinquency and criminal systems recognize that the systems must treat young people differently than adults who engage in the same or similar behavior because young peoples' minds are still developing. Significantly, young people are generally less likely than adults to consider the consequences of their actions.<sup>104</sup> People are less likely to take the same risky behavior they would have taken as a young person once their brains have an opportunity to develop.<sup>105</sup> Most children and young people who commit serious offenses and receive appropriate treatment in light of their circumstances demonstrate low or zero involvement in criminal activity years after court involvement.<sup>106</sup>

Young people charged with crimes are at pivotal stages in their development. What they may have done does not necessarily, or even likely, correlate to whom they can become and what they can accomplish. Adolescence is a crucial time when children need to be supported and

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<sup>103</sup> LAURENCE STEINBERG, *AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE* 188 (2014); see Elizabeth Scott & Laurence Steinberg, *In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk*, 44 L. & SOC. INQUIRY 3, 781 (2019) ("Adolescents' criminal choices are likely to be driven by influences linked to immature brain development, such as poor impulse control and emotional regulation, and heightened reward seeking.").

<sup>104</sup> *Miller v. Alabama*, 567 U.S. 469, 472–73 (2012) (citing *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005)).

<sup>105</sup> Laurence Steinberg et al., *Age of Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCH. 1764, 1764–65; see STEINBERG, *supra* note 106, at 783 ("[B]ecause much juvenile crime is the product of youthful immaturity, most juvenile offenders will mature out of their inclination toward criminal activities if the justice system response does not undermine their ability to do so.").

<sup>106</sup> Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 2, 453 (2010) (suggesting community-based alternatives offer better rehabilitative options than incarceration or institutional placement).

challenged with resources and opportunities to mature and grow in their community rather than face the harsh consequences of the criminal system.<sup>107</sup>

Holistic defense embraces a multidimensional understanding of a client's needs and interests. This approach represents an important step towards addressing the school-to-prison pipeline.<sup>108</sup> "In contrast to the traditional . . . defense model, with its emphasis on criminal representation and courtroom advocacy by a single lawyer, the holistic defense model is based on the idea that to be truly effective advocates for their clients, defenders must adopt a broader understanding of the scope of their work."<sup>109</sup>

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<sup>107</sup> "Not surprisingly, early exits from formal education have been linked to a range of problems during adolescence and adulthood, including difficulty in the labor market, recidivism, and poor mental health." He Len Chun et al., *Understanding the School Outcomes of Juvenile Offenders: An Exploration of Neighborhood Influences and Motivational Resources*, J. YOUTH ADOLESCENCE 2 (Jan. 6, 2011); Jordan Beardsless et al., *Under the Radar or Under Arrest: How is Adolescent Boys' First Contact with the Juvenile Justice System Related to Future Offending*, 43 L. & HUM. BEHAV. 4, 343–44 (2019) ("[M]ore punitive interventions, such as court hearings, time in detention, and formal probation, might expose adolescents to more serious offenders and unstable living environments, and cause them to spend time away from positive influences like prosocial peers, family, and traditional schools . . . may also connect adolescents with necessary services (mental health, educational, and substance use), structure, and supervision. More lenient interventions, such as diversion programs, may also connect adolescents with needed services, but without disruptions to their family or school environments and without increasing their exposure to more deviant youth . . . protect youth against long-term damage to their reputation or social standing . . . [M]ore punitive processing styles and sanctions (e.g. court appearances, supervised probation, and placement) are associated with worse outcomes than less punitive sanctions").

<sup>108</sup> The juvenile system is currently facing the consequences of the 1980s and 1990s tough-on-crime policies. Langberg & Fedders, *supra* note 46, at 662. The pipeline developed as a result of a "law and order" approach to student behavior, which includes zero-tolerance disciplinary policies that require suspension or expulsion. *Id.* at 654; *see also supra* Section I (for more on the school to prison pipeline, its advent, and its disparate and lasting impact).

<sup>109</sup> James M. Anderson et al., *Holistic Representation: An Innovative Approach to Defending Poor Clients Can Reduce Incarceration and Save Taxpayer Dollars — Without Harm to Public Safety*, RAND CORP. 1 (2019), [https://www.rand.org/pubs/research\\_briefs/RB10050.html](https://www.rand.org/pubs/research_briefs/RB10050.html) [<https://perma.cc/AP6C-JK6U>].

To this end, defenders must address not only the immediate case at hand but also the enmeshed, or collateral, legal consequences of criminal system involvement (such as loss of employment, public housing, custody of one's children, and immigration status) and the underlying life circumstances and nonlegal issues that so often play a role in driving clients into the criminal legal system in the first place (such as drug addiction, mental illness, [past trauma,] or family or housing instability).<sup>110</sup>

The model provides for a team of professionals, including, but not limited to, investigators, family and immigration lawyers, and nonlawyer advocates.<sup>111</sup> This team is tasked with addressing both individual criminal representation and the driving factors for a client's involvement in the criminal legal system.<sup>112</sup> Through the holistic model, advocates seek to address underlying issues and create a positive long-term effect on the child and the community.<sup>113</sup>

The holistic defense model is particularly significant in juvenile defense cases. If the defense does not present students' educational history, needs, and potential through the assistance of education advocates, the prosecution and courts will not fully understand the young person before them. Holistic defense ensures educational services denied, needed, or developed are considered throughout and beyond the life of a particular delinquency or criminal case.

Several studies have shown positive results from the holistic defense model. A 2019 study of holistic defense found that it reduced custodial sentencing by 16% and reduced sentence length by 24%.<sup>114</sup> A 2016 study on the impact of holistic representation on first-time offenders' functioning showed improvements in several areas, including withdrawal/depression,

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<sup>110</sup> *Id.*

<sup>111</sup> James M. Anderson et. al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 821 (2019).

<sup>112</sup> *Id.* at 822.

<sup>113</sup> Polansky, *supra* note 93, at 13.

<sup>114</sup> Anderson, *supra* note 114, at 883.

thought and attention problems, and rule-breaking behaviors.<sup>115</sup> Additionally, a comparative study of three public defender offices found that using a multidisciplinary defense team improved client experience and increased case efficiency without diminishing the quality of client outcomes.<sup>116</sup>

Communities that have used the holistic defense approach have experienced success under the model. The Rand Corporation conducted a ten-year study to examine the approach of Bronx Defenders, a legal aid organization operating under the holistic defense model.<sup>117</sup> The study determined “holistic representation in the Bronx prevented more than 1 million days of incarceration.”<sup>118</sup> “Holistic defense reduced the likelihood of a prison sentence by 16 percent—and actual prison-sentence length by 24 percent.”<sup>119</sup> “Holistic representation of clients [additionally] saved taxpayers an estimated \$160 million in inmate housing costs alone.”<sup>120</sup>

In the Santa Barbara Model, attorneys from the Santa Barbara County Office of the Public Defender work collaboratively with each client and a social worker trained and employed by the Family Service Agency.<sup>121</sup> “The social worker, attorney, and client form the core of each holistic defense team.”<sup>122</sup> A study of the Santa Barbara Model determined that holistic defense clients “saw a higher percentage of their arraignment charges

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<sup>115</sup> Susan A. McCarter, *Holistic Representation: A Randomized Pilot Study of Wraparound Services for First-Time Juvenile Offenders to Improve Functioning, Decrease Motions for Review, and Lower Recidivism*, 54 FAM. CT. REV. 250, 257 (2016).

<sup>116</sup> BRIAN J. OSTROM & JORDAN BOWMAN, EXAMINING THE EFFECTIVENESS OF INDIGENT DEFENSE TEAM SERVICES: A MULTISITE EVALUATION OF HOLISTIC DEFENSE IN PRACTICE 47 (Feb. 2020), <https://www.ojp.gov/pdffiles1/nij/grants/254549.pdf> [<https://perma.cc/MTQ6-VUT7>].

<sup>117</sup> Anderson et al., *supra* note 112.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Heather M. Harris, *Building Holistic Defense: The Design and Evaluation of a Social Work Centric Model of Public Defense*, 31 CRIM. JUST. POL’Y REV. 800, 803–04 (2020).

<sup>122</sup> *Id.*

dismissed: 40.5% of the charges on which clients were arraigned were dismissed, whereas only 25.2% of the charges on which [clients in the control group] were arraigned were dismissed[.]”<sup>123</sup> “Holistic defense clients plead guilty to 42.3% of charges, whereas [clients in the control groups] plead guilty to 60.9% of charges.”<sup>124</sup> “Holistic defense clients were sentenced to 67.5 fewer days of incarceration than their control [group] counterparts.”<sup>125</sup> “The holistic defense pilot reduced the costs associated with incarcerating 48 holistic defense clients after a single legal case by approximately . . . \$250,000, which exceeds the . . . \$110,000 cost of providing holistic defense to 82 clients for 1 year.”<sup>126</sup>

Furthermore, an evaluation of the Children’s Defense Team of the Louisiana Center for Children’s Rights yielded positive results for the Center’s holistic approach. While represented by the Center, 80% of young people avoided adjudication or conviction on new offenses.<sup>127</sup> The length of representation by the Center was positively correlated with school enrollment and enrollment in other programs and negatively correlated with increased chances of recidivism.<sup>128</sup> Moreover, the program prevented expulsion for 73% of clients and secured employment for 60% of clients.<sup>129</sup>

The resonating effects of the school-to-prison pipeline and school disciplinary policies demonstrate the pressing need for holistic defense and educational advocacy for child clients. The damaging consequences of criminal charges and incarceration require defense services that address not only the child’s delinquency or criminal case, but also the underlying factors that led to system involvement. The holistic defense model improves outcomes for both individual young people as well as for the community.

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<sup>123</sup> *Id.* at 817.

<sup>124</sup> *Id.* at 817–19.

<sup>125</sup> *Id.* at 819.

<sup>126</sup> *Id.*

<sup>127</sup> Phillippi et al., *supra* note 90, at 78.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 79.

### III. HOW IS EDUCATIONAL ADVOCACY PART OF HOLISTIC JUVENILE DEFENSE?

Holistic defense can perform an important role in reducing recidivism and addressing barriers to better life outcomes within the juvenile system.<sup>130</sup> Educational advocacy is a critical part of this process. Ensuring child clients are regarded as children and students instead of as “respondents” or “defendants” is essential to holistic defense. When clients face delinquency or criminal charges, being labeled a “respondent” or “defendant” can be dehumanizing and decentralizes a fundamental truth: This person is a child.<sup>131</sup> Holistic defense is grounded in a promise of letting kids be kids.

To this end, educational advocacy can be both a shield and a sword for juvenile defenders. As a shield, educational advocacy protects a client against overly harsh school discipline or criminal punishment; as a sword, educational advocacy galvanizes support systems, establishes stronger educational interventions, and promotes healthier outcomes. Educational advocacy is important for a holistic defense approach because educational advocacy allows a defense attorney to understand a client’s education history, defend against school push-out, promote better case outcomes, identify and illuminate special education needs, invoke a client’s right to a manifestation determination review, and create lasting change including sustained stability.

#### *A. Understanding a Client’s Education History*

Research shows that juvenile defenders are “uniquely situated” to dismantle the school-to-prison pipeline and that investigating and understanding a client’s education history helps defenders work towards this goal.<sup>132</sup> School records, special education testing results, individualized

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<sup>130</sup> *Id.* at 78; McCarter, *supra* note 118, at 257.

<sup>131</sup> Anya Kamenetz, *Delinquent. Dropout. At-Risk. When Words Become Labels*, NPR (Apr. 28, 2015), <https://www.npr.org/sections/ed/2015/04/28/399949478/delinquent-dropout-at-risk-whats-in-a-name> [https://perma.cc/VNF5-MFD8].

<sup>132</sup> Langberg & Fedders, *supra* note 46, at 662.

education programs (IEPs), school counseling records, and disciplinary records are undervalued resources in assisting children in their cases.<sup>133</sup>

First, access to and evaluation of these various records helps build trust between the client and the attorney.<sup>134</sup> Through effective communication with the client, the attorney may become a better advocate for the child's interests.<sup>135</sup>

Second, the attorney may help extricate the client from the juvenile system by understanding the client's educational background. A child client's disabilities may go unaccounted for during a delinquency case because common disabilities are often invisible.<sup>136</sup> However, ensuring that a judge receives special education history, including an IEP, can bring about more effective, responsive, and appropriate resolutions rooted in information about intellectual functioning, developmental history, or objectives of educational programming essential to a client's success.<sup>137</sup> For example, the defender may find that the client's offense at school was a manifestation of their disability and argue that the client should therefore not be prosecuted or may deserve a reduction in charges.<sup>138</sup> Or, the defender may demonstrate that the client should receive educational services in the community that are not

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<sup>133</sup> Polansky, *supra* note 93, at 85.

<sup>134</sup> Langberg & Fedders, *supra* note 46, at 662.

<sup>135</sup> *Id.*

<sup>136</sup> Bradley M. Bittan, *The Mandate to Use Special Education at Juvenile Delinquency Sentencings*, 32 COLO. L. 99, 100 (Oct. 2003).

<sup>137</sup> *Id.*

<sup>138</sup> Bittan, *supra* note 139, at 672; *See* Geis, *supra* note 89, at 889–900 (“Request and use special education records including evaluations, individualized education programs, discipline records, and attendance record. Records should provide information as to how the youth's disability affects his behavior and if IDEA protections apply”). Both Section 504 and the ADA with the IDEA provide protections for people with disabilities but differ in how they apply to school-aged children. Whereas Section 504 and the ADA protect from discrimination due to disability, the IDEA is purposed with providing disabled school-aged youth with an appropriate, individualized education program designed to meet their needs. If a child is found eligible for special education services, the IDEA provides extensive protections for children and parents, including discipline protections when behavior is a manifestation of the student's disability, prior written notice whenever services are changed, review of IEP annually, etc.



available in the detention facility, and that the system should place the client on probation rather than incarcerate them.<sup>139</sup>

“Children who receive appropriate special education services can avoid the sorts of behaviors . . . that lead to status offense charges.”<sup>140</sup> When a young person with a disability receives appropriate interventions to adequately support them as they achieve in academics and engage in their school community, they learn how to cope, compensate, or overcome disabilities that may otherwise manifest in anti-social, maladaptive, or even delinquent manners.<sup>141</sup> Conversely, the absence of adequate and appropriate interventions is a deprivation of opportunity for a young person to learn how to cope, compensate, or overcome disabilities. For indigent clients, loss of such an in-school opportunity often results in a deprivation of possibly the only opportunity for that young person to receive any interventions related to a health need or disability.<sup>142</sup>

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<sup>139</sup> Langberg & Fedders, *supra* note 46, at 664.

<sup>140</sup> Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y. L. SCH. L. REV. 875, 878 (2010).

<sup>141</sup> See, e.g., Steinberg, *supra* note 108, at 16 (“[D]eveloping self-regulation [should be] the central task of adolescence” because young people “who score high on measures of self-regulation invariably fare best – they get better grades in school, are more popular with their classmates, are less likely to get into trouble, and are less likely to develop emotional problems.”); See also *id.* at 206 (thriving during adolescence depends above all on developing strong self-control. Countless studies indicate that people with a superior ability to regulate their feelings, thoughts, and behaviors are more successful in school and at work; less vulnerable to a wide range of psychological difficulties, such as depression, anxiety, and eating disorders; and less likely to engage in risky behavior, such as drug use, delinquency, reckless driving, and unprotected sex. If we can help children and adolescents develop better self-regulation, we will significantly improve the health and well-being of the nation as a whole).

<sup>142</sup> See, e.g., Phyllis Jordan, *Kids Lose Access to Critical Health Care Source When Schools Shutter Due to COVID-19*, GEORGETOWN U. HEALTH POL’Y INST. CTR. FOR CHILD. & FAMS., <https://ccf.georgetown.edu/2020/04/06/kids-lose-access-to-critical-health-care-source-when-schools-shutter-due-to-covid-19/> [<https://perma.cc/ES33-XFBM>].

Third, school records may also indicate that the student was treated differently than other peers involved in the incident. If this is the case, the juvenile defender could move for dismissal due to discrimination.<sup>143</sup>

Finally, educational records may aid the defender in seeking suppression of evidence, especially as it relates to *Miranda* warnings.<sup>144</sup> A study by the Texas Juvenile Justice Department, for example, found that most young people in Texas detention facilities had reading levels between fifth and sixth grade.<sup>145</sup> If the young person does not understand the *Miranda* warning or a confession they may have signed, the defense attorney may move for suppression.<sup>146</sup>

Despite the importance of these records, they are often not included in the defender's regular intake and discovery practices.<sup>147</sup> Even if the defender recognizes the importance of collecting educational records, collection can be time-consuming and difficult to navigate.<sup>148</sup> Moreover, it may be difficult to determine if a child needs special education services in the first place and the defender may need an evaluation of the child to determine eligibility.<sup>149</sup> As a result, an educational advocate may be a useful resource.

### *B. Defending Against School Push-Out and Promoting Better Case Outcomes*

While collecting records is an integral part of a holistic defense, holistic defense should incorporate educational advocacy beyond record collection, analysis, and utilization. "Collaboration with education advocates can help reduce contact with the juvenile system by getting clients back into the school environment, usually through representation in school discipline

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<sup>143</sup> Geis, *supra* note 89, at 900.

<sup>144</sup> *Id.* at 901.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 901–02; Langberg & Fedders, *supra* note 46, at 676.

<sup>147</sup> Geis, *supra* note 89, at 889.

<sup>148</sup> *Id.* at 889–890.

<sup>149</sup> Geis, *supra* note 30, at 563.

proceedings.”<sup>150</sup> When a client faces expulsion or school push-out, the young person has less structure during the day and less engagement with a key component of prosocial community engagement.<sup>151</sup> They will fall further behind and find themselves further disengaged from the key component of prosocial development and community engagement.<sup>152</sup> Educational defense against harsh school discipline can preclude the creation of detrimental records and help demonstrate to prosecutors and judges that a student has uninterrupted community engagement. It is not a stretch to believe that when a student is not expelled and thus has continuity in their education, they are more likely to comply with conditions of pretrial release, probation, and parole.<sup>153</sup>

### *C. Identifying and Illuminating Special Education Needs*

Educational advocacy is key to a holistic juvenile defense when the child has or there is reason to suspect the child has special education needs.<sup>154</sup> Identifying unrecognized, misdiagnosed, or under-treated special education needs can shed light on the circumstances of a child’s life and the case at hand. Significantly, a body of case law specifically addresses the rights of children when interrogated or searched at school;<sup>155</sup> key to any defense in court is understanding the dynamics of, for example, the relationship between your client and an SRO or police officer at school; the general practices of a

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<sup>150</sup> Langberg & Fedders, *supra* note 46, at 670 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)); see Arellano-Jackson, *supra* note 15, at 786.

<sup>151</sup> See Colling et al., *supra* Section II(a), (d).

<sup>152</sup> *Id.*

<sup>153</sup> Texas Appleseed & Texans Care for Children, *Dangerous Discipline: How Texas schools are relying on law enforcement, courts, and juvenile probation to discipline students*, TEX. APPLESEED (Dec. 14, 2016), <https://texasappleseed.org/dangerous-discipline-how-texas-schools-are-relying-law-enforcement-courts-and-juvenile-probation> [<https://perma.cc/W4QH-4VYA>].

<sup>154</sup> Langberg & Fedders, *supra* note 46, at 669; see Arellano-Jackson, *supra* note 15 at 786 (“Education advocates can also encourage the adoption of an IEP for clients with unidentified learning disabilities.”).

<sup>155</sup> See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

school regarding use of law enforcement to investigate misbehavior; and the circumstances surrounding questioning or search of your client. In addition, the following is a noncomprehensive list of ways special education may implicate defense strategy:

- it may require the defender to further explore or challenge a client's competency to proceed;
- it may impact a child's ability to form the required *mens rea* of a charge;<sup>156</sup>
- it may impact the child's ability to understand and waive *Miranda* rights;<sup>157</sup>
- it leads to potential witnesses that the defender may not otherwise have recognized the importance in interviewing, such as teachers and mental health providers;<sup>158</sup>
- when a child is facing adult criminal charges, it provides critical context to the alleged offense and the child, supporting a defender's efforts to keep a child in the juvenile delinquency system and out of the adult criminal system;
- it provides support for a defender's advocacy around less restrictive placement options;<sup>159</sup>

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<sup>156</sup> Geis, *supra* note 89, at 903 (asserting a youth's diminished culpability due to an intellectual disability can provide a challenge to the appropriateness of a specific intent charge) (citing *Atkins v. Virginia*: "Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.").

<sup>157</sup> *Id.* at 901 (noting these challenges are particularly relevant when a student has speech and language impairments, intellectual disabilities, or a disability inhibiting reading comprehension).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 876 ("The ADA requires states to 'accommodate persons with disabilities in the administration of justice' and 'The IDEA requires that public agencies meet its least restrictive environment provisions, ensuring a continuum of special education and related services for youth with disabilities'"). A term of probation will most likely result in the least restrictive environment, but ideal placement accommodations vary by disability. If a youth is committed to a residential or secure facility due to the youth's adjudication, the youth is entitled to an appropriate education program designed to accommodate the youth's unique needs. Defense attorneys may also [argue to] eliminate the overuse of isolation and

- it informs the defender of the need for, and assists in presenting arguments for, courtroom accommodations,<sup>160</sup> and
- it is critical mitigation that must be provided to the prosecution in negotiations, the fact finder in hearings and trials, and the court at sentencing.<sup>161</sup>

While a defense attorney may have experience working with young people who have disabilities, defense attorneys are not necessarily well-versed in how those disabilities should be identified, diagnosed, and addressed in a day-to-day educational and community-based setting.<sup>162</sup> For example, education attorneys can readily identify a violation of “child find” obligations under the IDEA—an incidence when schools failed to meet their federally mandated obligation to identify, locate, and evaluate students suspected of having disabilities.<sup>163</sup> However, defense attorneys may not know the requirements, procedures, and timeline for requesting free school assessments to determine eligibility for special education interventions, preventing them from effectively and timely investigating and developing the aforementioned defense strategies.

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mechanical restraints in secure facilities. Defense attorneys can even challenge the necessity of a court exercising jurisdiction over a young person based on the young person’s need for adequate care and not “rehabilitation” through the delinquency or criminal systems.

<sup>160</sup> *Id.* at 904–05.

<sup>161</sup> *Id.* at 889–90 (understanding a client’s disabilities helps a defense attorney better understand and communicate with the young person whom they are representing).

<sup>162</sup> *Id.*

<sup>163</sup> 20 U.S.C. § 1412(a)(3)(A). “Officials in many instances are not aware of their legal obligations to identify and accommodate children with disabilities.” Tulman & Weck, *supra* note 143, at 878. (“A child facing status offense charges is likely to be a child for whom school system personnel failed to provide appropriate special education services, and with whom parents have become increasingly frustrated. As such, an attorney should use that failure in conjunction with a well-grounded understanding of federal special education law as a key component of the defense strategy.”)

#### *D. Manifestation Determination Reviews*

If a student has a disability, they likely have increased protections against school push out—thus supporting mitigation efforts by the defense attorney.<sup>164</sup> Manifestation determination reviews (MDR) are held whenever a student on an IEP faces possible expulsion or a suspension that exceeds ten days.<sup>165</sup> At MDR hearings, educational and mental health professionals as well as parents and guardians must collectively answer two questions: (1) was the “conduct in question . . . caused by, or [did it] ha[ve] a direct and substantial relationship to, the child’s disability”; or (2) was the “conduct in question . . . the direct result of the [school district’s] failure to implement the IEP.”<sup>166</sup> An educational advocate can support a student at an MDR by arguing the conduct in question was a manifestation of a disability or a result of a school failing to fulfill its promise to the student. With a successful MDR, the educational advocate can both defend against push out as well as help a prosecutor or judge understand how the allegations in question were also manifestations of a disability or a result of professionals failing to provide the federally mandated support to students. This has obvious implications if the allegations are for the same conduct that led to the school

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<sup>164</sup> BRENT PATTISON, *STAYING ON TRACK: PROTECTING YOUTH IN SCHOOL DISCIPLINE ACTIONS, CHANGING LIVES: LAWYERS FIGHTING FOR CHILDREN* 53, 61 (Lourdes M. Rosado ed., 2014); see Arellano-Jackson, *supra* note 15; see Geis, *supra* note 89.

<sup>165</sup> 20 U.S.C. § 1415(k)(1)(E)(i). see Geis, *supra* note 86 (“The IDEA (Individuals with Disabilities Education Act) and zero-tolerance policies are in conflict: The IDEA requires a “manifestation determination review” when determining whether the conduct of a special education student was caused by, or had a direct and substantial relationship to, the child’s disability. Conversely, zero-tolerance policies do not allow for any consideration of individual circumstances, as the punishments for certain conduct and behaviors are predetermined.”).

<sup>166</sup> 20 U.S.C. § 1415(k)(1)(E)(i)(I)–(II). Whether a manifestation is determined or not, students will benefit from an advocate fighting for the school or district to conduct a functional behavioral assessment and to create a behavior intervention plan. These special education devices ensure the educational professionals involved in the young person’s life are staying as attuned to the young person’s needs as possible and may shift the special education plan(s) to provide more or increasingly targeted interventions. See Tulman & Weck, *supra* note 143, at 889.

discipline or if the allegations resemble the conduct leading to the school discipline.<sup>167</sup>

### *E. Lasting Change and Sustained Stability*

Far beyond the juvenile or criminal case at hand, “[e]ffective use of special education advocacy can insulate the child from the juvenile court, re-establish the child in school, and help to stabilize a family in crisis.”<sup>168</sup> Once a student with previously unidentified disabilities has a proper special education plan in place, the goals and benchmarks part and parcel to that plan will be used to monitor the student’s progress. Suddenly, a community-based accountability and support system is intricately involved in the student’s life—ensuring the student learns to cope with disabilities. The student then on has a lifeline for engaging with school and community.

Additionally, an IEP may address transition and reentry services.<sup>169</sup> First, engagement and attention from professionals and other adults can reduce a student’s opportunities to engage in maladaptive or delinquent behaviors. Second, students gain the coping skills to regulate their own behavior within the context of a diagnosis. Third, the provision of additional services and supports can alleviate pressure for a family that had previously not known or understood what was going on with the student or how best to support them after years of not having the accurate disability identified.

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<sup>167</sup> Geis, *supra* note 89 (“Challenge the appropriateness of a charge: When the youth’s behavior is a manifestation of his disability, charges can be reduced; The manifestation might be considered a mitigating factor, potentially reducing the degree or seriousness of the charges.”).

<sup>168</sup> Tulman & Weck, *supra* note 143, at 878.

<sup>169</sup> Geis, *supra* note 89 (“A defendant is guaranteed a free public *appropriate* education. Appropriate education might include related and transition services including trainings like vocational training and independent living training.”).

Whether used as a shield through school discipline defense, or as a sword in special education representation, educational advocacy plays a key role in a holistic juvenile defense strategy.<sup>170</sup>

#### IV. ORGANIZATIONS ACROSS THE COUNTRY HAVE SEEN SUCCESS IN COMBATING THE SCHOOL-TO- PRISON PIPELINE BY USING EDUCATION LAW AS A TOOL IN THEIR DEFENSE OF CHILDREN

Below, we highlight a few organizations that are demonstrating how educational advocacy can and should be a key component of holistic juvenile defense: the University of the District of Columbia David A. Clarke School of Law, the DC Public Defender Service, the EdLaw Project in Massachusetts, and the Center of Juvenile and Criminal Justice in San Francisco’s Legal Education Advocacy Program (LEAP).

##### *A. University of the District of Columbia David A. Clarke School of Law*

A project of the University of the District of Columbia David A. Clarke School of Law demonstrated the effectiveness of training juvenile defenders in special education law.<sup>171</sup> Professors Scholefield and Tulman, the latter of whom directed the Juvenile and Special Education Law Clinic for multiple decades beginning in 1986 and helped lead the charge in incorporating special education advocacy into juvenile defense,<sup>172</sup> stress the importance of enforcing existing education policy, as opposed to bringing “large and risky

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<sup>170</sup> The scope of this article does not address other means by which educational advocacy plays an essential role in holistic juvenile defense. For example, young people who are homeless, unhoused, or in unstable housing may have additional rights and protections under the McKinney-Vento Homeless Assistance Act. There are a slew of education laws (federal and state) and civil rights protections that offer additional protections to young clients as they face charges and the school-to-prison pipeline.

<sup>171</sup> Kylie Scholefield & Joseph B. Tulman, *Reversing the School-to-Prison Pipeline: Initial Findings from the District of Columbia on the Efficacy of Training and Mobilizing Court-Appointed Lawyers to Use Special Education Advocacy on Behalf of At-Risk Youth*, 18 U. D.C. L. REV. 215 (2015).

<sup>172</sup> *Joseph B. Tulman*, UNIV. OF THE DIST. OF COLUMBIA, <https://law.udc.edu/jtulman/> [<https://perma.cc/V4XE-NNZG>].



‘test’ cases”, in order to effect systemic change and combat the school-to-prison pipeline.<sup>173</sup> In particular, the Washington D.C.-based project sought to enforce the special education rights of children that previously were largely ignored in practice.<sup>174</sup>

The project involved biannual trainings between 1992 and 1997 which ensured that the attorneys who attended would be adequately prepared to provide special education representation.<sup>175</sup> In particular, the trainings focused on the IDEA and federal regulations as well as special education regulations specific to Washington D.C.<sup>176</sup> Of the approximately 100 attorneys who attended the trainings, almost all were court-appointed delinquency and neglect attorneys, and about 50% of them reportedly incorporated special education law into their practice afterward.<sup>177</sup> Following the initial five-year project, the project began operating a clinic at the David A. Clarke School of Law in which faculty provided special education training for court-appointed attorneys in exchange for the attorneys’ participation and collaboration with law students in the clinic.<sup>178</sup> Seven attorneys in total participated in this project, all seven of whom made special education representation a “primary or major focus” in their practice.<sup>179</sup>

The direct outcome of the project was that participating attorneys were able to take the knowledge they learned and put it into practice by educating judges about special education law and alternatives to detention for juvenile clients in court.<sup>180</sup> According to Judge Judith Smith, who is cited as a participant in the project, the implementation of special education advocacy successfully convinced judges to order community-based placements for

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<sup>173</sup> Scholefield & Tulman, *supra* note 174, at 225.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 224.

<sup>176</sup> *Id.* at 226.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 227.

<sup>180</sup> *Id.* at 230.

young people in cases where this type of placement would otherwise be unlikely.<sup>181</sup> Furthermore, project participants educated judges on school disciplinary matters which ultimately had an impact on probation revocation outcomes.<sup>182</sup>

### *B. District of Columbia Public Defender Service*

In addition to the project at David A. Clarke School of Law, the District of Columbia Public Defender Service (PDS) also received federal funding to hire a full-time special education attorney.<sup>183</sup> At the time of writing Scholefield and Tulman's article, the success of implementing special education advocacy as a strategy in delinquency defense led PDS to hire three full-time special education attorneys in permanent staff attorney positions.<sup>184</sup> According to Judge Smith, these substantial changes in the defense of delinquency have made it routine for judges in Washington D.C. to appoint a special education attorney in such matters.<sup>185</sup>

The proliferation of education advocacy in defense of children in Washington D.C. in the mid-1990s to the mid-2000s correlated with a sharp decrease in delinquency arrests and adjudications.<sup>186</sup> Additionally, the number of juvenile incarceration beds in the District decreased by two-thirds.<sup>187</sup> During this time frame, there is a dearth of corresponding data from a similar jurisdiction to serve as a control group and a major juvenile detention center closed for reasons unrelated to the project.<sup>188</sup> Thus, Scholefield and Tulman concede that it would be difficult, if not impossible, to prove causation between the increase in education advocacy and the

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<sup>181</sup> *Id.* (citing Statement of the Honorable Judith Smith, D.C. Superior Court Associate Judge (Sept. 30, 2009) at 230–31).

<sup>182</sup> *Id.* at 231.

<sup>183</sup> *Id.* at 230.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 242.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

aforementioned results.<sup>189</sup> However, one can glean (both intuitively and directly from the Statement of Judge Smith) that the burgeoning use of special education advocacy and its relative receptiveness with judges in the District has at least partially contributed to the overall decrease in rates of juvenile delinquency and incarceration.

### *C. EdLaw Project*

Another example of an expansive effort to include education advocacy in juvenile defense is the EdLaw Project in Massachusetts.<sup>190</sup> The EdLaw Project is the education advocacy initiative in collaboration with the Youth Advocacy Division (YAD) of the Committee for Public Counsel Services (CPCS)—a provider of indigent defense services in Massachusetts.<sup>191</sup> The EdLaw Project falls under the Youth Advocacy Foundation (YAF), the nonprofit arm of YAD, because education advocacy for students is not government funded.<sup>192</sup>

The EdLaw Project, like the University of the District of Columbia David A. Clarke School of Law project, trains lawyers in the area of education law and has six attorneys on staff who represent clients in education-related matters including school exclusion, reintegration post-detention or incarceration, inadequate education while in custody, and undetected or underserved special needs.<sup>193</sup> In 2017, the EdLaw Project conducted thirty workshops and trainings with a total of 828 attendees.<sup>194</sup> The project also provided direct representation in 204 cases that year, including 36 successful

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<sup>189</sup> *Id.*

<sup>190</sup> Committee for Public Counsel Services, *EdLaw Project*, PUBLICCOUNSEL.NET, <https://www.publiccounsel.net/edlaw/> [<https://perma.cc/4NWJ-9CCR>].

<sup>191</sup> *About — Youth Advocacy Foundation*, YOUTH ADVOC. FOUND., <https://www.youthadvocacyfoundation.org/about> [<https://perma.cc/RTN7-WQEQ>].

<sup>192</sup> *EdLaw Project — Youth Advocacy Foundation*, YOUTH ADVOC. FOUND., <https://www.youthadvocacyfoundation.org/the-edlaw-project> [<https://perma.cc/ADU9-CW8W>].

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

cases involving students acquiring appropriate special education services and 14 cases in which the student avoided suspension or expulsion.<sup>195</sup>

The following examples from the EdLaw Project demonstrate the successful outcomes educational advocacy can achieve. The first involves a mother and her 13-year-old son whose IEP was reevaluated after an incident of “horseplay” at school.<sup>196</sup> The school district determined that he needed to be placed in a more restrictive setting.<sup>197</sup> EdLaw successfully advocated on his and his mother’s behalf to keep him at the same placement with more accommodations which resulted in the boy becoming a successful honor roll student with no further disciplinary issues.<sup>198</sup> In the second case, EdLaw assisted the delinquency attorney of a 15-year-old who was expelled from school after having been denied requests for special education despite the school district’s psychologist making the recommendation.<sup>199</sup> The EdLaw project assisted the attorney, who was unfamiliar with this area of education law, to obtain an independent evaluation for their client, which ultimately allowed the client to start the school year at a new school with appropriate special education services.<sup>200</sup>

#### *D. The Center of Juvenile and Criminal Justice Legal Education Advocacy Program*

The Center of Juvenile and Criminal Justice in San Francisco runs the Legal Education Advocacy Program (LEAP), which also operates in the cross-section of juvenile defense and education advocacy.<sup>201</sup> The LEAP team represents all children who have been ordered to attend the Principal Center

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Legal Education Advocacy Program*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcj.org/Direct-services/Legal-Education-Advocacy-Program.html> [<https://perma.cc/DL6X-C8P4>].

Collaborative Court School (PCC), which is a high school for young people on probation that also incorporates behavioral health services during the school day.<sup>202</sup> LEAP also represents juvenile clients who are not court ordered into PCC, but who have been referred to the program by the Public Defender's Juvenile Unit.<sup>203</sup> The program provides services for juvenile clients related to long-standing issues of truancy and failing school placements, but also takes an interdisciplinary approach to education advocacy by helping secure tutoring services and GED placements and by conducting workshops to train parents on how to advocate on behalf of their children.<sup>204</sup> Although LEAP is temporarily unavailable at the time of writing this article, the program served up to 100 clients per year while it was operating.<sup>205</sup>

## V. THE ROLE OF SCHOOL DISTRICTS IN ENDING THE SCHOOL-TO-PRISON PIPELINE

While this paper emphasizes the role of juvenile defenders in using educational advocacy to minimize the impact of harmful school push-out and discipline policies, it would be irresponsible not to discuss the role that schools themselves must play in ending the school-to- prison pipeline.

### *A. Remove Law Enforcement (Including School Resource Officers) from School Campuses*

The first necessary reform to stop the criminalization of students is removing law enforcement from campuses.<sup>206</sup> While in 1999 only 54% of students between the ages of 12 and 15 attended schools that had security

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<sup>202</sup> *San Francisco Collaborative Court Programs*, CITY & CNTY. OF S.F., <https://sfgov.org/lhcb/san-francisco-collaborative-court-programs> [<https://perma.cc/D268-RN79>].

<sup>203</sup> CTR. ON JUV. AND CRIM. JUST., *supra* note 204.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Langberg & Fedders, *supra* note 46, at 657.

guards or police officers on campus, by 2005, this figure increased to more than 66% of students.<sup>207</sup> The current estimation of law enforcement officers, or “school resource officers” (SROs), nation-wide is between 14,000 and 20,000 according to The National Association of School Resource Officers.<sup>208</sup> The roles of SROs in school districts can vary drastically; in some districts, SROs might make no arrests in a given school year, while SROs in others “make more arrests per officer than do regular patrol officers.”<sup>209</sup> The increased number of SROs on school campuses is correlated with increased arrests for disorderly conduct, a relatively minor offense.<sup>210</sup>

In Clayton County, Georgia, for example, the number of school-based referrals to the juvenile system increased alongside the national increase in law enforcement on school campuses.<sup>211</sup> While in the 1990s, there were fewer than 100 referrals from schools to the juvenile delinquency system each year, in 2004 this number increased to over 1,400.<sup>212</sup> Furthermore, data shows that in many states, juvenile delinquency complaints frequently originate in schools.<sup>213</sup> For example, in North Carolina in 2018, 44% of delinquency complaints were school-based and the third most common complaint was “disorderly conduct at school.”<sup>214</sup>

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<sup>207</sup> *Id.* at 656.

<sup>208</sup> *Frequently Asked Questions*, THE NAT’L ASS’N OF SCH. RES. OFFICERS, [HTTPS://WWW.NASRO.ORG/FAQ/](https://www.nasro.org/faq/) [<https://perma.cc/8L2B-3HQP>].

<sup>209</sup> Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (2006) (citing PETER FINN ET AL., CASE STUDIES OF 19 SCHOOL RESOURCE OFFICER (SRO) PROGRAMS 53 (2005), <https://www.ojp.gov/pdffiles1/nij/grants/209271.pdf> [<https://perma.cc/TN7E-D9SA>]).

<sup>210</sup> Langberg & Fedders, *supra* note 46 (citing Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Misbehavior*, 37 J. CRIM. JUST. 280, 285 (2009)).

<sup>211</sup> *Id.* at 658.

<sup>212</sup> *Id.* (citing ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK (2005), [https://www.njjn.org/uploads/digital-library/Education-on-Lockdown\\_Advancement-Project\\_2005.pdf](https://www.njjn.org/uploads/digital-library/Education-on-Lockdown_Advancement-Project_2005.pdf) [<https://perma.cc/VB46-7TXU>]).

<sup>213</sup> *Id.* (citing Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Misbehavior*, 37 J. OF CRIM. JUST. 280, 284 (2009)).

<sup>214</sup> N.C. DEP’T OF PUB. SAFETY DIV. OF ADULT CORR. & JUV. JUST., JUVENILE JUSTICE 2018 ANNUAL REPORT 11 (2018),

This correlation supports the idea that law enforcement and SRO presence on school campuses perpetuates the school-to-prison pipeline by serving as a direct conduit from the classroom to the juvenile delinquency or criminal systems likely because of the relative ease with which school administrators can turn students over to authorities. While policy makers and school administrators may believe that increased law enforcement presence on campus increases school safety, research on this topic shows an inconclusive correlation.<sup>215</sup> Because incidents of violence in schools are relatively rare to begin with, students' interests and safety are best served by either decreasing or eliminating law enforcement and SRO presence on school campuses in order to cut off this direct line from the school system to the juvenile delinquency system.<sup>216</sup> Moreover, because research is clear that young people of color are disproportionately represented in the juvenile delinquency and criminal systems and are more likely to receive harsher punishments than their white peers (for example, confinement instead of probation), the increased rates of delinquency complaints originating at schools almost certainly disproportionately affect students of color.<sup>217</sup>

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<https://files.nc.gov/ncdps/documents/files/JuvenileJustice-2018AnnualReport.pdf>  
[\[https://perma.cc/NSK5-FVM6\]](https://perma.cc/NSK5-FVM6).

<sup>215</sup> Langberg & Fedders, *supra* note 46, at 656.

<sup>216</sup> JUST. POL'Y INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest\\_fullreport.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf) [<https://perma.cc/6HXR-7YW7>].

<sup>217</sup> Sarah E. Redfield and Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to- Prison Pipeline*, 47 U. MEM. L. REV. 1 (2016). N.B. In this article, we advocate for the complete removal of SROs and other law enforcement from the halls of our schools. While it is not the method for which we advocate in this article, training existing SROs in adolescent and child psychology as well as increasing the number of adults on campus who can act as counselors and mediators rather than parapolice officers would help alleviate some of the disenfranchisement felt by students who are frequently on the receiving end of harsh punishments. Scully, *supra* note 8. "Exclusionary" punishments like suspension, expulsion, or law enforcement referrals "increase student shame, alienation, and feelings of rejection." *Id.* (citing LAURA FAER & SARAH OMOJOLA, *FIX SCHOOL DISCIPLINE: HOW WE CAN FIX SCHOOL DISCIPLINE TOOLKIT 5* (2012), <http://njpsa.org/documents/pdf/FixSchoolDiscipline.pdf> [<https://perma.cc/G727->

*B. Rewrite School Discipline Law and Codes to Reduce Push Out, Increase Community Engagement, and Promote Restorative and Transformative Justice*

Another channel of the school-to-prison pipeline is the indirect consequence of students feeling disenfranchised at school or being pushed out of the classroom by harsh discipline such as suspension or expulsion.<sup>218</sup> In order to combat this, schools should be disallowed from imposing discipline for behavior without a direct nexus to schools or school activities. This should include imposing strict evidentiary standards for suspension and expulsion from school.

Restorative justice, which seeks alternatives to punishment,<sup>219</sup> is a positive step towards dismantling the school-to-prison pipeline. The Colorado Attorney General's Office advocates for training school officials on restorative justice practices.<sup>220</sup> Several Colorado schools note that restorative justice practices positively influence school culture,<sup>221</sup> which in turn can influence disciplinary policies and their direct impact on students.<sup>222</sup> The Attorney General's Office also recommends that schools provide clearer guidelines for SROs.<sup>223</sup> The school-to-prison pipeline clearly represents a cycle of devastating effects for students and their communities, and the

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RWYA]). As SROs are not trained to recognize this, they may make decisions about arrests that are "wholly distinct from and even anathema to the best interest of the student or the school as a whole." OFF. FOR CIV. RTS., *supra* note 55, at 105. Thus, training SROs in adolescent and child psychology and making sure they are informed about the consequences of juvenile arrests and exclusionary punishments would allow SROs to make better judgement calls about what is actually in the best interest of the student, rather than purely act as law enforcement.

<sup>218</sup> OFF. FOR CIV. RTS., *supra* note 55, at 5.

<sup>219</sup> *Id.* at 8.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 7.

<sup>223</sup> *Id.* at 10.



Attorney General's Office emphasizes the urgency of reducing the punitive measures that contribute to this cycle.<sup>224</sup>

In Baltimore, the school district worked to decrease suspensions by limiting suspension for minor offenses, requiring that principals take extra steps before expelling students, and giving teachers bonuses who work in schools with low suspension rates.<sup>225</sup> The Maryland State Board of Education also did away with a zero-tolerance policy that disproportionately suspended boys, special education students, and Black students for minor disciplinary issues.<sup>226</sup> In 2017, suspensions in Baltimore declined significantly and the city reported a 20% decline in suspension and expulsions in the year prior.<sup>227</sup>

Districts around the country should model this approach to limit the amount of time that young people are forced to spend outside the classroom due to behavioral issues.

### *C. School-Based Referral System*

Furthermore, it is imperative that schools connect “at-risk” students and students facing suspension or expulsion with educational advocates. Nonprofits such as Consultants and Advocates for Special Education, Inc. (CASE) in California and My Sister's Keeper Collective in Philadelphia provide educational advocacy services for students with disabilities and girls involved with the Department of Human Services (DHS) respectively.<sup>228</sup>

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<sup>224</sup> *Id.* at 6.

<sup>225</sup> Erica L. Green, *Baltimore suspending many more students from school*, BALT. SUN (Nov. 15, 2016), <https://www.baltimoresun.com/education/bs-md-ci-school-suspension-increase-20161031-story.html> [<https://perma.cc/WW34-CG9U>].

<sup>226</sup> *Id.*

<sup>227</sup> Editorial, *Baltimore is making progress on limiting school suspensions*, BALT. SUN (Oct. 26, 2017), <https://www.baltimoresun.com/opinion/editorial/bs-ed-school-suspensions-20171025-story.html> [<https://perma.cc/N2QL-A9FL>].

<sup>228</sup> *California Special Education Advocates and Consultants*, CAL. SPECIAL EDUC. ADVOCS. AND CONSULTANTS, <https://www.caseadvocates.com/> [<https://perma.cc/F75J-QJG3>]; *The Problem*, MY SISTER'S KEEPER COLLECTIVE, <https://www.mysisterskeepercollective.com/the-problem> [<https://perma.cc/B2MZ-CQYY>].

CASE specializes in determining students' eligibilities for various federal disability services and advocates on the students' behalf at IEP meetings.<sup>229</sup> Some of their success stories include obtaining appropriate services to accommodate a girl whose undetected dyslexia caused her to struggle in school, as well as advocacy in an IEP meeting on behalf of a boy whose severe anxiety prohibited him from attending a traditional school site for a year.<sup>230</sup> At My Sister's Keeper Collective, educational advocates form personal relationships with girls who are involved in DHS to ensure that they get the support and resources they need both in school and in setting up a successful future after they graduate from the public school system.<sup>231</sup>

If more school districts were able to connect "at-risk" young people to programs such as these, free of cost, this would do wonders for helping students navigate their education. This would decrease the number of students falling through the cracks and would reduce the frequency with which students are channeled into the delinquency and criminal systems while providing increased and more widely accessible emotional support so that students feel that someone is looking out for their best interest.

## VI. EDUCATIONAL ADVOCACY MUST BE CONSIDERED AN INTEGRAL PART OF JUVENILE HOLISTIC DEFENSE AND FUNDED ACCORDINGLY

Effectively incorporating educational advocacy into juvenile defense requires widespread acknowledgement that it is an integral part of a constitutionally effective defense. It appears that no statute or court has mandated that competent and effective juvenile defense requires a

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<sup>229</sup> *Services*, CAL. SPECIAL EDUC. ADVOC. & CONSULTANTS, <https://www.caseadvocates.com/special-education-advocate-services/> [<https://perma.cc/BKM9-MZCB>].

<sup>230</sup> *Success Stories*, CAL. SPECIAL EDUC. ADVOC. & CONSULTANTS, <https://www.caseadvocates.com/success-stories/> [<https://perma.cc/KJB5-CYSR>].

<sup>231</sup> *The Educational Advocate Program*, MY SISTER'S KEEPER COLLECTIVE, <https://www.mysisterskeepercollective.com/the-problem> [<https://perma.cc/KG7V-GV44>].

component of educational advocacy as courts have in, for example, the context of advisement of immigration consequences.<sup>232</sup> Further, it is not clear that any jurisdiction always appoints educational attorneys to indigent juvenile clients.

The United States Constitution does not guarantee education as a fundamental right;<sup>233</sup> instead, education is one of the rights implied under the Fourteenth Amendment—though individual states have the right to make education a fundamental right under the state’s constitution.<sup>234</sup> As a right secured by the Fourteenth Amendment, deprivation of education through discipline or as a result of delinquency or criminal proceedings necessarily requires students be afforded certain due process rights.<sup>235</sup>

Nevertheless, young clients may face school removal based on mere allegations and before having their “day in court.” As discussed, forcibly removing a student from school has detrimental effects on the young person and increases the likelihood of compounding issues in the defense’s case and for that young person’s future. In other words, charges can lead to school push-out; school push-out can exacerbate legal and factual circumstances in a defense case. Herein, a strong juvenile defense may rely heavily on a strong educational defense.

When charges stem from issues at school wherein school staff take statements that are later provided as records or evidence in the delinquency or criminal proceedings, students do not have the same constitutional rights to counsel or against self-incrimination<sup>236</sup>—even though what is happening in an educational context carries the weight of and necessarily implicates

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<sup>232</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>233</sup> *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>234</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>235</sup> *Id.*

<sup>236</sup> It is also rare for students to have the right to “confront witnesses” in school disciplinary proceedings.

one's rights as in a prosecutorial proceeding.<sup>237</sup> Herein, juvenile defense may begin with educational defense.

Due process in an educational setting merely requires that a public school provide students with notice and a hearing where they are facing removal for more than a "trivial period."<sup>238</sup> In many states, including Colorado, students who are alleged to have committed a delinquent or criminal act can and often do face expulsion because their action is determined to present harm or danger to the welfare and safety of school.<sup>239</sup> This occurs even when no nexus exists between the alleged acts and school—i.e., the incident did not happen at school, the alleged victim is neither another student nor staff member at the school, the incident was not at a school event, etc.<sup>240</sup>

Beyond the legal theories around why educational advocacy should be a guaranteed right when a young person faces charges, public interest weighs in favor of integrating educational defense as a key component of a holistic juvenile defense. Educational advocacy ensures the young person has access to the most reliable key to opportunity, growth, and rehabilitation: *education*. "[A] less-educated populace, higher crime rates, and mentally and emotionally scarred individuals returned to the community with inadequate

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<sup>237</sup> It is our argument, as outlined below, that the due process right to counsel should extend to any educational proceeding (including informal interviews between school staff and students) when those proceedings might generate records that could be used against a student in a delinquency or criminal proceeding.

<sup>238</sup> Arellano-Jackson, *supra* note 15 (citing *Goss v. Lopez*, 419 U.S. 565 (1975)). As previously mentioned, special education affords students with even more due process rights when facing the possibility of school push out: "Even if excluded from school, a child with a disability is still eligible for special education and related services." Tulman & Weck, *supra* note 143, at 889. The bulk of these due process rights play out in the MDR. IDEA protects children with disabilities who are removed from schools because it "triggers procedural protections" to ensure the removal is not discriminatory or due to behavior that is a manifestation of the disability. *Id.* In Colorado, students who are expelled are still entitled to some form of education; however, the State imposes no requirements or standards upon what education should look like while the student is expelled. COLO. REV. STAT. §§ 22-33-105, -106.

<sup>239</sup> COLO. REV. STAT. § 22-33-106.

<sup>240</sup> *Id.*

resources or support’ is created with so many young people in correctional facilities.’<sup>241</sup> A strong juvenile defense ensures ongoing positive outcomes for the client beyond the life of the case and focusing on education as a key component of these outcomes necessarily promotes safer communities.

Educational and rehabilitative services are often deprived for youths in correctional facilities, which are essential for development. A lack of education creates difficulty when returning to the community. A survey of adult facilities found that 40% of jails provided no educational services at all, only 11% provided special education services, and a mere 7% provided vocational training.<sup>242</sup>

In other words, an educational advocate can support public interest even when the client is pleading guilty or is found guilty.

For decades, law enforcement has been encroaching on schools and blurring the lines between school discipline and formal prosecutions, to the great detriment of the rights and liberty of children. It is time to explicitly recognize that education advocacy is a critical component in the effective defense of any child or young adult charged in juvenile or adult court. This implication arises from how prosecution and school discipline are already coordinated in a manner that compromises students’ rights in school and in their delinquency and criminal proceedings.<sup>243</sup> Courts must recognize the encroachment on students’ rights, administrators of indigent defense systems must request funding for educational advocacy, and legislatures must grant those requests.

Until these measures come to fruition and until the school system is transformed, however, juvenile defenders need to protect their clients through incorporating educational advocacy into holistic defense of all clients. An important first step is funding indigent defense systems to allow

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<sup>241</sup> Polansky, *supra* note 93.

<sup>242</sup> *Id.*

<sup>243</sup> And, unfortunately for students who have been accused of wrongdoing, courts and district attorneys may have an affirmative duty to inform schools of alleged wrongdoing. COLO. REV. STAT. § 22-33-106.5 (2002).

defenders to explicitly do this work as part of juvenile defense. Organizations must request funding, and legislatures must grant such requests, to hire or consult with experts in the cross section of education advocacy and juvenile defense. To be sure, asking a defense attorney to become proficient in education law or to begin practicing education law on top of their existing defense practice is unrealistic and inefficient. The advice of an expert in education is critical to juvenile defense when: the alleged incident occurred at school, was reported by school or school staff, and/or the alleged incident involved someone at school (another student, teacher, coach, etc.); when the alleged incident led to suspension, expulsion, or another form of push-out; when the client has history of attendance issues; when the client has poor grades or low testing results; when the client has an IEP or 504 plan, has or is suspected to have ADD/ADHD, has or is suspected to have a physical, mental, or emotional disability, or has a mental health diagnosis; or when the client has experienced trauma at any point during childhood, has expressed interest in continuing with school or obtaining a particular degree, wants to quit school, or is facing adult charges. In other words, educational advocates and attorneys can and should lend support in nearly every juvenile defense case. The success of several projects around the country has demonstrated the importance of incorporating educational advocacy into public defense, not as an ancillary and inconsistent service provided through alternative funding, but explicitly and as a part of regular case preparation. Publicly funding educational advocacy as a component of holistic juvenile defense is essential to stemming the disparate impact of harsh school discipline policies and practices, to break the school-to-prison pipeline.

