

NCLN

National Children's Law Network

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In School, The Right School, Finish School

A Guide to Improving Educational Opportunities for Court-Involved Youth

Children and Family Justice Center of Northwestern School of Law, Illinois
Children's Law Center of Massachusetts
Children's Law Center of Minnesota
JustChildren, Virginia

Oklahoma Lawyers for Children, Oklahoma
Public Counsel, California
Rocky Mountain Children's Law Center, Colorado
Support Center for Child Advocates, Pennsylvania



April 2007 edition

We hope you find this resource guide helpful. The information contained in this guide is not intended to constitute legal advice nor should it be relied upon as authoritative in any particular case. The law in the areas cited herein is subject to continual developments and changes, and it is imperative that the reader check carefully for updates before using the information.



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It Doesn't Have To Be This Way—An Introduction

Too often, professionals and attorneys who work with court-involved children accept the obstacles, the hardships, and the suffering placed in the paths of their clients as inevitable. They fail to imagine a better way, fail to challenge the status quo, fail to ask hard questions of themselves and the system. The best of them, however, those attorneys and professionals we admire most, look at the obstacles, the entrenched bureaucracies, the professional blinders placed on those working in the system, and say to themselves, their clients and their communities, “It doesn't have to be this way.” They do the hard work, ask the uncomfortable questions, and maintain high expectations for themselves, their clients, the courts and the service delivery systems upon which children depend.

One of those perceived realities or barriers that we too often accept as unchangeable is that children who come through our nation's courts cannot do well in school. As explained below, we are working hard to change this belief, this reality. We welcome your interest in joining the effort, and hope that you will come to agree that when it comes to court-involved children not staying in school, not succeeding in school, not finishing school, it does not have to be this way any longer.

A few of the problems we confront

We see too many school system personnel who espouse the belief that excluding children from school is the only way to hold them accountable and that safe schools only exist when children who most need to be there are not—in school that is. We see paperwork being lost, records not being sent, children being denied admission, credits and graduation. Foster children are moved from school to school because their overworked social workers cannot find suitable or long-term foster homes. These foster children see the frown on the registrar's face when she hears that this is a *foster* child from a different county (what is one more frown to a child who has seen so many?). It doesn't have to be this way.

We all watch as children with disabilities are medicated, neglected, rejected, their emotional and behavioral issues not adequately addressed in school, only to be criminalized in the courts. Behavior that used to result in a call to and meeting with parents now leads to a call to the police. Children who are truant are placed into foster care before anyone bothers to ask whether the child's education is adequate. We know parents who, while trying to hold down a job and keep their children from going back into state care, get called to come pick up their “troublesome” child from school every day. Drip, drip, drip, , like some kind of water torture, the phone rings every afternoon, the supervisor glowers, the parent is torn between her fear of her child being expelled or losing her job. It doesn't have to be this way.

In our nation's cities, in our nation's impoverished communities, children who need the most often get the least. Teachers are fleeing the most challenged school districts, not wanting to get penalized by No Child Left Behind, not wanting to work either in a school with 30% teacher and administrative turnover, and 50% student turnover, every year, or with children who have not had access to quality pre-school education.

In most states, the percentage of students on free lunch in a school or school district is the single biggest predictor of low test scores, inexperienced teachers, and inadequate school funding. It doesn't have to be this way.

What we are trying to do

In 2002, eight children's law centers from around the country formed the National Children's Law Network and agreed: children involved in the foster care and juvenile justice systems could and should do better in school, and court professionals needed to be responsible for making this happen. The members, spread across the country from Los Angeles to Boston, from Minnesota to Virginia have dedicated themselves to developing training models and materials and spreading the word to anyone who would listen: You need to do better and you must. We have a campaign theme—*In School, The Right School, Finish School*—and are rolling it out, training by training, locality by locality, state by state.

The materials compiled in this manual are part of the effort to increase the ability of professionals in the court system—lawyers, social workers, probation officers, judges—to become effective educational advocates for the children they serve. For every child, in every case, at every hearing, the children need us to be asking the right questions—Is the child in school? Is it the right school? And with the services s/he has can s/he finish school? —and to be pushing for change if the answers are not satisfactory.

We have also included materials on special education, the educational rights of homeless youth and youth in the foster care system, vocational and technical education, education for youth involved with the juvenile justice system, and school discipline.

But these are only tools. They are useless if left lying in the box. For every child, in every case, at every hearing, we need to remember the consequences of not asking the right questions and getting the right answers. Our prisons, our welfare rolls, our homeless shelters, are too frequently filled with those children who we are rearing together: former foster children and juvenile probationers who have no diploma, who read below their age level, who never completed school. Every time we look at our clients, we must remember this reality, ask those hard questions, and not stop working until we have the right answers.

Most importantly, we must also remember that with the right opportunities our clients, these children, can do well. We cannot be among the doubters; we must be among the promoters, the ones with hope for the futures of our young people. We must fight hard for these futures, demanding that everyone—lawyers, parents, social workers, probation officers, teachers, principals, school board members—is working toward the educational success of the child before them, just as if it were their own child whose life was at stake. No school meeting is too insignificant to attend, no teacher too unimportant to call, no statute too complicated to read.

These children, these students, in other words, require more from us if we are to expect more from them.

In School, The Right School, Finish School

So many court-involved children are now out of school or trapped in failing schools, that the chance for them to complete school may seem remote. But we can change that, child by child, question by question, by asking, again and again and again, for these three things—that each child is in school, that the school in which the child is enrolled is the right school, and that the services are in place for him or her to finish school. We do not have to ask for much, only these three things. And yet, by asking for these three simple opportunities, or even better, demanding them—*In School, The Right School, Finish School*—we could literally change their worlds and ours. Every day in court we hear judges and others, including ourselves, say to so many kids, “You need to make your education a priority.” Isn’t it time, that we made it our priority too?

Out of school, in the wrong school, dropping out—it doesn’t have to be this way any longer. Thank you for your dedication to this important cause. Please let us know how we can help you help our children.

The No Child Left Behind Act

Note: In 2007 the No Child Left behind Act of 2001 is up for Congressional Reauthorization with Congressional hearings likely occurring in the winter months of 2007.

The No Child Left Behind Act of 2001 (NCLB) is designed to improve the academic achievement of disadvantaged children so that every child has academic and occupational opportunity that can lead to success. NCLB aims to close the achievement gap through accountability, flexibility and school choice.

How does NCLB hold schools accountable?

NCLB requires schools, local educational agencies, and states to be held accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students. Each state must establish statewide annual measurable objectives and must have a system for determining whether a school has made adequate yearly progress. There must be yearly student academic assessments in reading or language arts, mathematics, and science. Adequate yearly progress is demonstrated by continuous and substantial improvement of all students, and achievement by economically disadvantaged students, students from major racial and ethnic groups, students with disabilities and students with limited English proficiency. Schools that fail to make adequate yearly progress for two consecutive years are then identified as schools in need of improvement.

How do I know if a school is in need of improvement?

Each year every local educational agency (LEA) must collect data about each school in its district and release a "report card." This report card must: 1) identify each school served by the LEA; 2) state whether the school has been identified for school improvement and 3) show how the school's student achievement levels on statewide academic assessments compare to students' achievement both in the rest of the school district and in the state as a whole. The LEA must make this data widely available to the public through such means as the internet and the media. The LEA must also make sure that each parent receives an understandable statement of the information. To the extent possible this information must be in a language the parent understands.

What are the choices if a child attends a school in need of improvement?

If a school is identified as needing improvement, the school district must provide all students enrolled in the school with the option to transfer to another public school served by the school district that has not been identified for school improvement. This can include public charter schools. When providing the option to transfer, priority is given to the lowest achieving children from low-income families.

Who is responsible for transporting a child to a different public school?

The local educational agency must provide or pay for transportation to the public school if a parent has decided to transfer their child from a school in need of improvement. The child may stay at the new school until he or she has completed the highest grade in that school. However, the local educational agency is only required to provide transportation if the school from which the child transferred is in need of improvement. Once the school is removed from that list, transportation will only be provided until the end of the current school year.

What if all schools in the local educational area are in need of improvement?

To the extent possible, the local educational area must establish a cooperative agreement with other local educational agencies in the area, which allows students to transfer to another district.

Are there any other choices besides transferring the child to a new school?

If, after three years, a school continues to fail to make adequate yearly progress, the school must continue to offer the option to transfer, and the LEA must make supplemental educational services available to children who remain in the school. Parents must be given notice about the availability of these services, a brief description of the services, and a list of approved providers. Supplemental services include tutoring and other instruction, in addition to what is available during the regular school day, that are designed to increase academic achievement of eligible children.

What if an eligible student is not being offered school choice and/or supplemental services?

Contact the State Department of Education. If that does not get results, contact the U.S. Secretary of Education's Regional Representative for the region, or your local Legal Aid program.

Where is more information about No Child Left Behind?

- The U.S. Department of Education No Child Left Behind website, <http://www.nochildleftbehind.gov>
- The U.S. Department of Education Choices for Parents website, <http://www.ed.gov/nclb/choice/help/edpicks.jhtml>
- The U.S. Department of Education Supplemental Services Brochure, <http://www.ed.gov/parents/academic/involve/suppservices/index.html>

Individuals with Disabilities Education Improvement Act of 2004

Note: On July 1, 2005, Congress reauthorized the IDEA as The Individuals with Disabilities Education improvement Act of 2004.

What is the Individuals with Disabilities Education Improvement Act?

The Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§1400, et seq., (IDEIA) is the main federal statute addressing the education rights of children who have disabilities. Federal legislation for educational assistance to children with disabilities has been in existence for decades. Since 2004, it has been known as Individuals with Disabilities Education Improvement Act (“IDEIA”). The IDEIA provides federal funds to assist state and local education agencies in meeting the needs of disabled children. In exchange, state and local agencies must abide by the Act’s substantive and procedural requirements. Public schools must identify children with disabilities (including homeless children and wards of the state) who may need specialized education and provide them with individualized education programs and related services designed to meet their needs and to prepare them for employment and independent living.

New federal regulations pertaining to the IDEIA were published in final form on August 14, 2006, and became effective on October 13, 2006. These regulations are numerous and should be reviewed carefully. Some of the substantive changes that were made include definitional changes; clarifications made to the FAPE Requirements, to children with disabilities who are enrolled in private schools by their parents and to the protocols used to determine if a child has a specific learning disability, procedural safeguards (i.e. independent evaluations, notice, filing due process complaints, resolution process...) and to the discipline procedures utilized for students with disabilities. (*see section on where do I get more information about the IDEIA*). It is of particular importance to individuals working with court-involved youth who are placed in congregate care or institutions to note that the regulations allow the court to appoint surrogate parents for education purposes in certain situations. See 20 U.S.C. § 1401 (36) & 34 CFR § 300.45.

What are states required to do under IDEIA?

States must provide a **free appropriate public education** (FAPE) to all children aged 3 through 21 with disabilities who reside in the state, including children who have been suspended or expelled from school. A **FAPE** is special education and related services that: 1) are provided at public expense and under public supervision and direction; 2) meet the standards of the state educational agency; 3) include appropriate preschool, elementary, or secondary school education, and 4) conform with the child’s written Individualized Education Plan (IEP).

For infants and toddlers (birth to age 2), states must identify a state agency to provide special education and related services, and implement an Individualized Family Service Plan (IFSP) that focuses on the entire family of a child with a disability.

States must establish a goal of providing a full educational opportunity to all children with disabilities. This includes identifying all children with disabilities residing in the state, developing an IEP for each disabled child, educating children with disabilities in the least restrictive environment and to the extent possible with children who are not disabled, enacting procedural safeguards for parents and maintaining confidentiality.

Who is a child with a disability?

Under IDEIA, a **child with a disability** is a child who by reason of one or more of the enumerated conditions, **needs special education and related services**. The enumerated conditions include: mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities.

Under IDEA, “special education services” means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings as well as instruction in physical education. Related services must be provided to children with disabilities who need them to benefit from special and other educational services. These related services may include transportation, or developmental, corrective, and other supportive services, including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, though medical services shall be for diagnostic and evaluation purposes only. Related services do not include surgically implanted medical devices.

Who is authorized to act as a parent?

The term “**parent**” includes: 1) a natural, adoptive or foster parent (unless state law prohibits foster parents from acting as parents); 2) a legal guardian (except where the child’s legal guardian is the state); 3) an individual acting in the place of a natural or adoptive parent (including but not limited to grandparent, stepparent or other relative) with whom the child is living; 4) a person who is legally responsible for the child’s welfare or 5) a surrogate parent appointed under the statute.

There are special rules for children who are “**wards of the state.**” A “ward of the state” is defined as a child who is in foster care or is in the custody of a public child welfare agency who does not have a foster parent who meets the definition of “parent” described above.

A “**surrogate parent**” is an individual who is assigned by the state or the court overseeing the child’s care to act as a surrogate for the parents. The individual assigned cannot be an employee of the state department of education, the local school district, or any other agency that is involved in the education or care of the child. Surrogate parents can be appointed when: 1) no parent can be located; 2) the child is a ward of the state and 3) the child is an unaccompanied homeless youth as defined by the McKinney-Vento Homeless Assistance Act. A surrogate parent should be assigned within 30 days of the determination that a child needs one.

How is a child determined to be disabled for educational purposes?

Parents, school personnel, or personnel of other state or local agencies may request an initial evaluation to begin the process of identifying a child with a disability. Once the evaluation has occurred, the school holds a meeting of the child’s educational team to make a determination of eligibility for services.

In order to document that a request for an initial evaluation was made, it should be in writing. After receiving a request for initial evaluation, the local school district must obtain the consent of the parent for the child to be evaluated. Within the time frame established by the state, but no later than 60 days from the date the district receives consent from the parent, the child must be evaluated by a qualified team of professionals, including the child’s parents, to determine whether the child is disabled and, if so, to identify the specific needs of the child. (**Note:** check state law for shorter time frames for completing the evaluation and identification process.)

A school must try to obtain informed parental consent before evaluating a child for disabilities. Parental consent to an evaluation does not obligate the parent to agree to services or placement of the child in special education. If a parent refuses to or fails to respond to a request for consent to an initial evaluation, the school district can file for a due process hearing in order to obtain consent from a hearing officer.

What is involved in the evaluation process?

The child is evaluated to provide the child's educational team with sufficient information to identify whether the child is a child with a disability and if so, what services would allow the child to access the general curriculum. When evaluating a child, school districts must use a variety of **assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parents, and information related to enabling the child to progress in the regular curriculum.** Evaluative techniques may not discriminate based on race or culture and must be administered in the language and form most likely to yield accurate information unless it is not feasible to do so. A child shall not be determined to be disabled if the determinant factor is limited English proficiency and lack of instruction in reading or math.

Generally, once the child is determined to be eligible for special education services, the child must be re-evaluated every three years. If the parents and the district agree, this three year requirement can be waived. In addition, the child can be reevaluated if: 1) the child's educational achievement or functional performance warrants it or 2) the child's parent or teacher makes a request for re-evaluation. The child also must be evaluated before special education services can be terminated.

What if a parent disagrees with the results of his or her child's evaluation?

If a parent or guardian disagrees with the results of an evaluation, he or she has a right to an **Independent Educational Evaluation (IEE)**. Someone outside of the school system completes the evaluation. The parent should make the request for an IEE in writing. Within five days of the parent's request, the school district either must agree to pay for the independent evaluation or show at an impartial due process hearing that its evaluation was appropriate.

What happens after a child is evaluated?

Within the time frame established by the state, but no later than 60 days from the date the district receives consent for evaluation from the parent, the Individualized Education Program (IEP) team must meet to discuss the evaluation results and determine whether the child is a "child with a disability" under the meaning of the IDEIA. Although a child may be diagnosed with a particular condition, if the child does not need special education or related services to access the general curriculum, the child will not qualify under the act.

The IEP Team for any properly held IEP meeting must include: the parents of the child, a special education teacher, a regular education teacher, a representative from the local educational facility who is knowledgeable about school district programs and resources, qualified individuals who can interpret the results of the evaluations, other qualified individuals who have knowledge or special expertise regarding the child and the child, if appropriate. The presence of some of these individuals can be excused for all or part of a team meeting if a particular person's input is not needed because the member's area of curriculum is not being modified or discussed in the meeting. Even if the member's area of curriculum is being discussed, that person may also be excused if the parent agrees, in writing, and the member submits input in writing to the parent and the team. The parent also may invite other individuals to the meeting including therapists, lawyers, advocates, and/or other supportive or professional individuals.

The team must determine whether: 1) the child meets the definition(s) of disability described by the IDEIA; 2) the child's disability results in the child's failure to make effective progress in the general curriculum; and 3) the child needs special education and related services to make such progress.

What happens after a child with a disability is found eligible for special education services?

Once a child is determined to be eligible for special education services, the IEP Team must create an **Individualized Education Program (IEP)** for the child. (Please refer to state law for the time frames in which this must be completed.) When developing the IEP, the IEP Team must consider the strengths of the child, the concerns of the parents, the results of the initial or most recent evaluation of the child, and the academic, developmental, and functional needs of the child.

The team must also consider special factors in the following situations: 1) if the child's behavior impedes the child's learning or that of others, the team must consider the use of positive behavioral interventions, supports, and other strategies; 2) if the child is of limited English proficiency, the language needs of the child; 3) if the child is blind or visually impaired, the appropriateness of Braille instruction; 4) if the child is deaf or hard of hearing, the child's language and communication needs including opportunities for direct instruction, and 5) the need for assistive technology devices and services.

What is an Individualized Education Program?

The IEP is a written statement that has specific information about the child including information about: the child's current levels of achievement and functional performance; how the child's disability affects the child's involvement and progress in the general education curriculum; recent testing and evaluation results; measurable annual academic and functional goals so that the child can make progress in the general education curriculum; a description of how the child's progress toward meeting the annual goals will be measured; the special education and related services that are to be provided; the date, location, frequency, and duration of services; accommodations necessary for standardized and district-wide testing and any other pertinent information.

Beginning at age 16, the IEP must contain appropriate measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. The IEP also must contain and provide transition services, including courses of study, that the child will need to reach those goals.

A new IEP is drafted at least once a year, or more frequently, if necessary. The IEP should be modified when the needs of the child dictate or the child's behaviors impede their educational progress, and the parent consents to the modification.

How is a child's special education placement determined?

After writing an IEP that includes the services necessary for the child to access the general curriculum, the IEP team determines the setting in which the child will receive those services. The educational setting or placement must be capable of providing the services described in the IEP and must be in the least restrictive environment. School districts may only place disabled children in special classes or separate schools when the nature or severity of the disability makes it so that the disabled child cannot be educated in the regular classroom even with the use of supplementary aids and services. The IEP must include an explanation of why and the extent to which the child will not participate with non-disabled children in academic, non-academic, and extracurricular activities.

- Is a parent required to consent to evaluations, medication administration, eligibility determinations or IEP services and placement?
- Parents are not required to consent to evaluations, medication administration, eligibility determination, or particular IEP services or placement.
- Parents can accept some services and/or findings and reject others. A parent also can reject a team decision that determines that a child is ineligible for services or omits specific recommended services. Any services that a parent accepts should be implemented immediately.
- Districts cannot, as a condition of the child attending school, require parents to: 1) obtain and administer medication to their child; 2) consent to an evaluation of their child or 3) consent to special education and related services for their child.
- If a parent refuses to consent to special education and related services or if a parent fails to respond to a request to provide consent then the school district shall not be considered to be in violation of its responsibilities to provide the child with a free and appropriate public education.

What are the rights of a parent under IDEIA?

Parents of a child with a disability must be allowed to:

- Examine and have copies of their child's school records
- Be notified in writing of and participate in IEP meetings
- Obtain independent evaluations and assessments of the child
- Consent to or reject changes in placement and services
- Have copies of all evaluations 48 hours prior to the eligibility meeting (requests for these evaluations should be in writing)
- File a complaint about any matter occurring within the last two years relating to the identification, evaluation, or educational placement of, or the provision of FAPE to their child
- Schools must provide prior written notice to parents, and in some cases, obtain parental consent (in their native language) in the following circumstances:
 - Before evaluating or assessing the child
 - Before changing a child's identification as a child with or without a disability
 - Before changing or refusing to change a child's placement
 - Before convening annual, emergency, and/or manifestation determination IEP meetings regarding the child
- The prior written notice must include:
 - a description of the district's proposed or refused action(s)
 - an explanation of why the district proposes or refuses to take the action and a description of each evaluation, assessment, record and/or report that was used as a basis for the decision
 - a description of other options that the team considered and the reasons why those options were rejected
 - a description of factors relevant to the school district's decision
 - a statement that the parents have due process rights, and the means by which the parent can obtain a copy of their rights
 - a list of sources for the parents to contact to obtain assistance in understanding their rights
- Parents must be given written notice of these procedural safeguards.
- States must create and pay for a clear and impartial process by which parents, students and schools can file complaints and requests for mediation for the resolution of disputes.

What can parents do if they feel their child is not receiving adequate educational services or an appropriate placement?

- Under IDEIA, parents of a disabled child must be given an opportunity for 1) mediation of their dispute with the school district and 2) an impartial due process hearing with a right to appeal.
- Parties to a hearing have a right: 1) to be accompanied and advised by counsel and by individuals with special knowledge or training as to children with disabilities; 2) to present evidence and confront, cross-examine, and compel the attendance of witnesses; 3) to receive an exact copy of the hearing; 4) to receive an exact copy of the findings and decision; 5) to appeal and 6) to bring a civil action in state or federal court.
- The cost of representation or assistance by attorney or other individual is at the expense of the parent or student; however, if the parents or student prevail after a hearing, the court is permitted to award attorneys' fees.
- If a school district can prove that a parent or parent's attorney filed a due process hearing request for an improper purpose, the parent or the attorney may be required to pay the attorney's fees of the school district.
- Unless certain exceptions apply, a disabled child must remain or "stay put" in his or her educational program during the due process hearing or civil action. If the proceeding is brought in order to establish the child's eligibility for special education services, the child must remain in the public school system until the proceedings are completed.

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- There are very strict timelines for filing and responding to a request for hearing. There also are very specific steps that the parties must file before they can have a full hearing in front of a hearing officer. We strongly advise that anyone who wants to file or has to respond to a request for hearing contact a lawyer who has experience in special education law. We have compiled a list of resources found at the back of this guide.

During an appeal, what educational services will a child receive?

- Generally, unless the district and the parent agree otherwise, the child will remain in his then current educational setting, or if the child is applying for initial admission to a public school, the child, with the consent of his or her parents, shall be placed in a public school setting.
- There are exceptions to this rule. When the appeal involves objection to a placement in the context of a disciplinary incident, a manifestation determination, or the dangerousness of a child, the child will remain in an interim alternative educational setting until the hearing officer renders a decision or 45 school days have passed, whichever occurs first. (See below for further discussion of discipline.)

What happens when a disabled child misbehaves?

Disciplinary procedures for disabled children differ from those for children without disabilities. Generally, a school cannot change a child's placement without notice to and consent of a parent. However, school personnel may remove the child from school for disciplinary incidents in limited circumstances and for limited periods. School personnel may:

- Consider any unique circumstances of the child when determining whether to change a placement for a child with a disability
- Suspend the disabled student for violation of the school discipline code for no more than 10 days in a school year
- If the conduct that is a violation of the school discipline code is not determined to be a manifestation of the child's disability, the child can be disciplined in the same way as non-disabled children would, except that the child must still receive a free and appropriate public education (a program with services that meet his educational goals in the least restrictive setting)

Within ten days of any decision to change a child's placement (including by suspension) for more than 10 days in a school year, the school district, parent, and "relevant" members of the IEP team (as determined by the parent and district) shall meet and hold a manifestation determination meeting. At the meeting, the team shall review all relevant information in the student's file, including the student's IEP, teacher observations, and information provided by the parents to determine:

- If the conduct in question was caused by, or had a direct and substantial relationship to the child's disability
- If the conduct in question was a direct result of the local educational agency's failure to implement the IEP¹

If either of the two items above is found to be true, then the student's conduct is deemed to be a manifestation of his or her disability. In that case, the school shall conduct a functional behavioral assessment; implement a behavior plan; and, unless otherwise agreed upon by the parents and district, return the child to the placement from which s/he was removed.

¹ The new federal regulations add language that states if the child's behavior was a direct result of the LEA's failure to implement the child's IEP, the LEA must take immediate steps to remedy the situation. 34 CFR § 300.45.

Are there any situations in which a school can change a child's placement without notice to or consent of the child's parents?

Yes. School personnel may:

- Suspend the disabled student for violation of the school discipline code for no more than 10 days in a school year
- Remove a student to an interim alternative educational setting for not more than 45 school days if the child
 - Carries or possesses a weapon to or at school, on school premises, or at a school function; or knowingly possesses or uses illegal drugs, sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function; or
 - Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function

If the school district believes that maintaining the child's placement is substantially likely to result in injury to the child or others, it may request a hearing before a hearing officer.

What services must a disabled child receive during the period s/he is removed from his or her current educational placement?

The child must continue to receive a Free and Appropriate Public Education. This means that the child shall:

- Continue to receive educational services described in his or her IEP so that the child will be able to continue to participate in the general education curriculum, although in another setting, and make progress toward meeting the goals set out in the child's IEP
- Receive a functional behavioral assessment, behavioral intervention services, and modifications that are designed to address the conduct so that it does not recur

Can the parent appeal any disciplinary determinations?

Yes. Among other things, a parent may appeal the results of 1) the manifestation determination and 2) the appropriateness of an interim alternative setting (*i.e.*, its failure to provide FAPE and/or to meet the provisions of the student's IEP). During these appeals, the child must remain in the interim alternative setting for 45 school days or until the hearing officer decides otherwise, whichever occurs first.

What if a child is not yet identified as a child with a disability; but it is suspected that the child has a disability that has affected his or her performance or behavior?

Even after being subject to disciplinary action, a child may argue that he or she has a disability and is entitled to protection under IDEIA. The child will be given IDEIA protection (and the right to a free and appropriate public education) if the local educational agency knew or had reason to know that the child had a disability before the child was involved in the alleged incident. Automatically, the law determines that the agency knew or should have known that the child had a disability if, before the conduct occurred:

- The parent of the child wrote to the child's teacher or to supervisory or administrative personnel of the school district, expressing concern that the child was in need of special education and related services
- The child's parent requested an evaluation of the child or
- The child's teachers or other school personnel have expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the special education director or other supervisory school personnel

Exception—a school is not deemed to have known that the child is a child with a disability if:

- The parent of the child has refused to allow a child to be evaluated
- The parent of the child has refused special education services or
- The child was previously evaluated and it was determined that the child was ineligible for special education and related services

Where do I get more information about IDEIA?

- Families and Advocates Partnership for Education (FAPE), <http://www.fape.org>
- U.S. Department of Education, Office of Special Education Programs, <http://www.ed.gov/about/offices/list/osers/osep/index.html?src=mr>
- Kid Source, <http://www.kidsource.com/kidsource/content3/ada.idea.html#Individuals>
- Federal Resource Center for Special Education, <http://www.dssc.org/frc/index.htm>
- National Education Association, <http://www.nea.org/specialed/>
- Wrights Law (special education advocates), <http://www.wrightslaw.com>
- Contact your state department of education for information about the application of IDEIA to your state's special education system
- For the Final Regulations: <http://www.ed.gov/legislation/FedRegister/finrule/2006-3/081406a.pdf>
- For a summary of the new regulations: <http://www.wrightslaw.com/idea/law/idea.regs.sumry.chngs.pdf> and <http://www.ode.states.oh.us/GD/Templates/Pages/ODE/ODEDetail.aspx?page3&TopicRelationID=1159&Content=21400> (Although written by the Ohio Department of Education it provides valuable information.)

Please note that state law may provide greater protections to children with disabilities.

The McKinney-Vento Homeless Assistance Act

Note: In 2007 the McKinney-Vento Homeless Assistance Act is up for Congressional Reauthorization with Congressional hearings likely occurring in the winter months of 2007.

The McKinney-Vento Homeless Assistance Act, “McKinney-Vento,” is a federal law, reauthorized in 2001 under the No Child Left Behind Act. McKinney-Vento requires each state to ensure that each homeless child or child of a homeless individual has access to the same free public education as other children and youths, including public preschool programs. It also requires each state to revise all laws, regulations, practices or policies that may act as barriers to the enrollment, attendance, or success in school of homeless children and youths.

McKinney-Vento is intended to guarantee homeless children and youth access to education and other services that will allow them the opportunity to meet the same state student academic achievement standards to which all students are held.

Who is covered by McKinney-Vento?

“**Homeless children and youths**” is defined at 42 U.S.C. §11434(a) as individuals who lack a fixed, regular, and adequate nighttime residence. The term includes children and youths, ages 3 to 22, who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailers, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are “awaiting foster care placement.” (*For children in state custody check state rules for breadth of local definition.*) The term “homeless children and youth” also includes children and youths who have a primary nighttime residence that is not designed for or ordinarily used as a regular sleeping accommodation for human beings, as well as children and youths living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings. Migratory children and youths will also qualify if they live in any of the circumstances described above.

What are a student’s rights under McKinney-Vento?

Right to Choose School of Attendance

McKinney-Vento gives the child’s guardian (or in the case of an unaccompanied youth, the youth and his/her local educational agency liaison) the right to choose where the child should attend school. This can be either the “school of origin,” or any public school that other non-homeless students living in the same attendance area are eligible to attend. “School of origin” is the school in which the child or youth was last enrolled or the school that the child or youth was attending when s/he became homeless. It is important to note that the choice regarding placement can be made regardless of whether the child or youth lives with the homeless parents or has been temporarily placed elsewhere.

Right to Immediate Enrollment

McKinney-Vento requires a school to immediately enroll a homeless child in the school selected, even if the child is unable to produce records normally required for enrollment. This includes previous academic records, medical records, and proof of residency. If the child or youth needs to obtain immunizations or medical records, the school must immediately refer the parent or guardian to the local educational agency liaison for homeless children, who must assist in obtaining the necessary immunizations or records.

Right to Admission to School of Choice Pending Dispute Resolution

If the local educational agency sends the child or youth to a school other than the school of origin or a school requested by the guardian, the agency must provide a written statement to the parent or guardian, including a statement regarding the right to appeal. In the case of an unaccompanied youth, the homeless liaison must provide notice to such youth of the right to appeal. ***If a dispute arises over school selection or enrollment, the child or youth must be immediately admitted to the school of the youth’s or guardian’s choice until the dispute is resolved.***

What happens when a homeless child moves to a permanent home?

A child who moves to a permanent home during a school year has the right to remain at his or her current school for the remainder of the academic year. The child's guardian has the right to make the decision. If the parent or guardian decides to keep the child in the school s/he was attending while homeless and that school is not within the boundaries of the school district where the child is permanently housed, the child has a right to appropriate transportation paid for by the school district(s).

What if transportation is a problem?

McKinney-Vento requires the state and its local educational agencies to provide transportation to and from the school of origin. This is the case even if the child or youth begins living in an area served by another local educational agency. Homeless children are also entitled to the same transportation services offered to other students in the school.

What services are available to homeless youth?

Homeless children are entitled to the same services offered to other students in the school, including educational programs for children with disabilities, educational programs for children with limited English proficiency, programs in vocational or technical education, programs for gifted or talented students, and school nutrition programs.

Who do I contact if a homeless child is being treated unfairly?

If you know a child or youth who is being treated unfairly, please contact your state's Office of the Coordinator for Education for Homeless Children and Youth or go to: <http://www.ed.gov/programs/homeless/contacts.html/>.

Where can I get more information about McKinney-Vento?

- The National Association for the Education of Homeless Children & Youth website, <http://www.naehcy.org/>
- The U.S. Department of Education website, <http://www.ed.gov/programs/homeless/index.html>
- The National Coalition for the Homeless website, <http://www.nationalhomeless.org/publications/facts/education.pdf>

If you do not have internet access, call your state's department of education or your local legal aid program.

Carl D. Perkins Career and Technical Education Act²

The Carl D. Perkins Career and Technical Education Act, 20 U.S.C. § 2301, et. seq. (2006) (“Perkins Act”), is a federal law that provides funding to states and local school boards to create career and technical education programs for high school students. The law also provides funding for Tech-Prep programs that help in a student’s transition from high school to postsecondary education and then to the workforce. Through this law, Congress hopes to help students who enroll in these programs develop the academic, career and technical skills needed to succeed in high skill, high wage and high demand occupations.

The Perkins Act also creates an accountability system to ensure that students enrolled in career and technical education programs are actually learning. The accountability system is directly tied to student performance in these programs. State funding is dependant on students’ ability to develop skills, graduate from high school, graduate from certificate programs, pursue post-secondary education, and ultimately secure high paying jobs.

What is career and technical education?

Career and technical education is defined at 20 U.S.C. § 2302 (2006). A career and technical education (CTE) program is a program that offers a sequence of courses designed to help students learn skills that will prepare them for careers in current or emerging businesses. It must also include applied learning and teaching techniques that contribute to the student’s success in the workplace. States offer courses in computer repair, professional photography, practical nursing, cosmetology, air conditioning and refrigeration and many other professions including professions that may require a college or graduate degree. CTE programs provide technical skill proficiency, an industry recognized credential, a certificate, or an associate degree.

What programs are funded by the Perkins Act?

The Perkins Act funds two types of programs. First, the Perkins Act funds traditional career and technical education programs through the Basic State Grant. These programs must integrate academics with career and technical education through a sequence of courses that strengthen and develop academic and career skills. Each state must submit to the Secretary of Education for approval local plans for career and technical education programs. A new provision of the Act requires participation of private school personnel in professional development and on request, participation of students in non-profit schools in the career Tech Education program.

Second, the Perkins Act funds “Tech-Prep” programs through a separate funding stream to the state, or if requested, through combined funding with the Basic State Grant. Tech-Prep programs are designed to provide preparation in career fields including engineering technology, applied science, a practical art or trade, agriculture, health occupations, business or applied economics while building a student’s skills in math, science, reading and writing in a contextual learning environment. State-created Tech-Prep programs link a student’s high school education with a two-year apprenticeship program or course work at a local community college or other institution of higher learning. This program helps career and technical students earn their associate’s or bachelor’s degree. Tech-Prep programs connect a two-year secondary school program with a two-year, and sometimes four-year, postsecondary school program that helps students learn about all aspects of a particular industry.

The Perkins Act also provides funding both to train teachers in effective and efficient career and technical education teaching techniques and to help teachers integrate new technology in the classroom. Perkins funds can be used to pay for industry certification for students under the Perkins accountability system.

² The Carl D. Perkins Vocational Education Act of 1998 was amended by the Carl D. Perkins Career and Technical Education Act (Public Law 109-270) which was signed by President Bush in August, 2006. For further information, consult the Department of Education website at www.ED.gov, and the Association for Career and Technical Education website at www.acteonline.org.

Are there ways for parents to get involved?

In order to qualify for federal funding, each state must submit a 6 year plan after receiving input from parents, students, teachers, representatives of business and industry, and labor organizations on the development, implementation and evaluation of career and technical education programs. Local school districts must also present plans concerning how to keep parents informed and aware of the requirements of the Perkins Act.

Additionally, the Perkins Act is designed to help parents and students take an active role in career planning. The only way a state can qualify for Perkins Act funding is to provide to parents information and planning resources that relate to student career goals and expectations. The Perkins Act also requires that the state formulate a program to help educate teachers, administrators and counselors in ways to help parents and students explore careers, education opportunities, and ways to pay for schooling beyond high school.

Where can I get more information about career and technical education programs funded by the Perkins Act?

- For general information about the Perkins Act, contact the U.S. Department of Education, Office of Vocational and Adult Education, <http://www.ed.gov/about/offices/list/ovae/pi/cte/index.html>
- Contact your local school board for a listing of career and technical education courses offered by high schools and community colleges in your area as well as to find out what specific programs they have developed to help parents take a more active role in a student's education and vocational career planning.
- Contact the Association for Career and Technical Education for information about upcoming legislation and details of programs conducted around the country on the internet at <http://www.acteonline.org/index.cfm> or by phone at 800-826-9972.

School Discipline

What are zero tolerance policies?

In recent years many public school districts have implemented “zero tolerance” discipline policies to discourage students from both committing violent acts in school and using or distributing drugs and alcohol on school property. Despite these goals, the policies apply to a wide variety of rule violations including school disruption of all kinds, smoking violations, and even conduct that occurs off school grounds. Typically zero tolerance policies are school or district wide and mandate predetermined harsh punishments including long-term suspension and expulsion regardless of extenuating circumstances or the students’ previous record of conduct. The effect of these mandates is that school administrators retain little flexibility to impose alternate punishment or punishment on a “case-by-case” basis. As a result, even relatively minor infractions can lead to suspensions or expulsions.

Zero tolerance policies, as they currently are implemented, are often ineffective. There has been little to no evidence to suggest that they contribute to school safety; rather, evidence has shown that these policies have a negative effect on students, including increasing school drop out rates and disproportionately affecting minority students.³ In addition, between 30% and 40% of suspended students are repeat offenders, a fact that suggests that zero tolerance policies fail to deter negative student behavior as intended.⁴

Although administrators, policymakers, courts and advocates all agree that establishment and maintenance of student safety in school is essential for the creation of a productive learning environment, many students who are suspended or expelled as a result of zero tolerance policies do not pose an ongoing or serious threat to school safety.⁵ The lack of flexibility inherent in zero tolerance policies has led some students, who do not have a prior history of disciplinary incidents or who might otherwise be considered “good students,” to be removed from school. Seemingly minor infractions, such as bringing nail files, paper clips and inhalers to school, have resulted in expulsion or suspension, and have tarnished the student’s permanent record.⁶ In addition, if a student commits an offense on school property, school officials may have the obligation to report the student’s offense to the appropriate law enforcement authorities. For example, some states require that students be arrested for assault including minor schoolyard scuffles. Students who fight on the playground can later be charged with juvenile delinquency, leading to detention and other serious consequences.

Special education students also can be negatively affected by zero tolerance policies. Just as they affect non-disabled students, zero tolerance policies that require long-term suspension or expulsion displace special education students from their school placements and limit their access to the services they need during the disciplinary period. Repeated and/or long-term school interruptions aggravate the problems that special education students experience and can increase the chances that they will not complete high school.

What rights do students have when facing discipline?

All students who face expulsion or suspension from school, even for a period of less than 10 days, have a right to a hearing in front of an impartial tribunal or hearer. The processes that are used for disciplinary hearings range from informal meetings with the principal to formal hearings. The level of due process provided to a student depends on the degree of misconduct involved and seriousness of the punishment that may be imposed. When a student faces short-term suspension, only rudimentary due process is required while long-term suspensions or expulsions require more formal procedures.

³ *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice and Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, Russell J. Skiba (<http://www.indiana.edu/~safeschl/ztze.pdf>)

⁴ *Fast Facts About Zero Tolerance*, Phi Delta Kappa International, Russell J. Skiba

⁵ Harvard University Civil Rights Project http://www.civilrightsproject.harvard.edu/resources/civilrights_brief/discipline.php

⁶ *Fast Facts About Zero Tolerance*, Phi Delta Kappa International, Russell J. Skiba

Even if the student is subject only to a short-term suspension, administrators at the school must provide the student with each of the following:

- notice of the charges pending against them (this notice is often oral for short-term suspensions)
- basis for the accusations, including an explanation of the evidence authorities have against him/her
- opportunity for the student to tell his/her side of the story

For short-term suspensions, these three things often happen informally, immediately after the incident. Parents should be notified in writing that their child is being suspended, even if for a short period. If parents have not received such notice, the parent should request it.

What rights do students have when facing long-term suspension or expulsion?

If a student faces major disciplinary sanctions, including long-term suspension or expulsion, school officials must act fairly and give the student an opportunity to be heard at a meaningful time and in a meaningful manner. While there are no hard and fast rules governing the process that should be used for students facing disciplinary action, the following rules have been adopted by many courts for long-term suspensions and expulsions:

A Written Notice of Charges

The principal must give the student a written explanation of why the student is in trouble. This includes a notice of the exact provision of law or school discipline code that the school believes the student violated. The notice must be in the primary language of the student's parent or guardian and should be provided reasonably in advance of the hearing so that the student can prepare.

A Written Notice of the Hearing

The principal must give the student a letter stating the time, date and place of the hearing. This notice also must be in the primary language of the student's parent or guardian and it must be given to the student prior to the hearing date.

The Right to Bring a Representative

A student can have a lawyer or advocate present during the hearing. If the student or his family is trying to locate an attorney to help work on the case, the student can ask for the hearing to be postponed until a later date.

The Right to Bring Witnesses and Evidence

An accused student has the right to have people attend the hearing who can help the student's case or bring evidence to prove the student's case.

Access

A student should be allowed to look at the school's evidence against them and at their own school record. The student should make a written request for all of the evidence that the school intends to present and a list of all the witnesses that the school intends to call against the student. Sometimes schools have rules against calling other students as witnesses for fear that the charged student may retaliate.

The Right to an Impartial Decision-Maker

The student has a right to have his or her case judged by someone who is impartial. The law allows the principal to make the decision, but if the student is charged with assaulting the principal, or if the principal is a witness against the student, the student should ask for another person to substitute for the principal.

The Right to a Record of the Hearing

The student has a right to have the hearing tape recorded or recorded in some other way. Always ask for a copy of the tape.

A Written Decision

A student should get a copy of the principal's decision to suspend or expel the student, explaining why the decision was made. This written notice should be in the student's native language. The notice of suspension or expulsion should indicate how long the student must stay out of school and should have an explanation of the student's right to appeal the decision.

Right to Appeal to the Superintendent or School Committee

Depending on the offense, the student has the right to appeal the decision of the principal to the district's superintendent or school committee. The student has an appeal period by which s/he must inform the district if s/he wants to appeal (this period is defined by state law). Then, another hearing about the matter should be scheduled and held. The student has the same rights at the superintendent's hearing as he or she has at the principal's hearing. The superintendent may consider other suspensions and disciplinary incidents that the student may have had.

Note: Anything the student says or writes at any hearing can be used against him or her at a later criminal or juvenile delinquency trial. If the student has been or may be charged with a crime because of the conduct, the child should not make any statements about the incident.

If a student is facing an expulsion hearing, or other formal hearing, we highly recommend that the student try to locate an attorney or advocate to be present at the hearing.

What rights of appeal does a student have?

Generally, a parent who disagrees with the punishment imposed on his or her child can appeal decisions to the school board, superintendent, or school committee depending on state and local law and rules. Usually there is a limited period during which the appeal can be requested. The written findings and decision imposing punishment should also contain a statement notifying parents of their right to appeal including the length of the appeal period and to whom the appeal should be directed. Note also, that these notifications should be translated into the parent's native language. If a parent believes that the discipline imposed or process used was unfair, the parent should request an appeal regardless of whether their child has already served the suspension or expulsion. If a decision is not appealed, the disciplinary action will remain on the student's record. If the parent believes the discipline is unfair, but is seeking legal representation, the parent should file any appeal before the deadline to ensure that the right to appeal is not lost.

Always check with the local district for policies that apply at the student's school. These policies usually are listed in the school's discipline code and/or student handbook. If a final decision is issued, then students may still seek relief in a court through a temporary or permanent injunction.

What if a student has been disciplined based on racial factors?

If a student has been unfairly disciplined because of racial factors, parents can challenge the action based on the Equal Protection Clause of the Fourteenth Amendment. Parents or students may file a complaint with the Office for Civil Rights of the U.S. Department of Education. These complaints must be based on the student either receiving different treatment because of his/her race or being subject to a disciplinary action which impacts one race more than another race. (*See Action Kit: Zero Tolerance and School Discipline*). Complaints must be filed within 180 days of the disciplinary action. To file a complaint, contact the Office for Civil Rights at:

Office for Civil Rights
U.S. Department of Education
Office of Civil Rights – Customer Service Team
550 Twelfth Street, S.W.
Washington, D.C. 20202-1100
Tel: 800-421-3481
TDD: 877-521-2172
Fax: 202-245-6840
<http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>

Are procedures different for students with special needs?

Yes. The educational rights of students with special needs are contained in the Individuals with Disabilities Education Improvement Act (IDEIA) and Section 504 the Rehabilitation Act of 1973. Under IDEIA, students with disabilities are guaranteed the right to a “free and appropriate public education” that will meet their special needs regardless of their conduct. (See 34 C.F.R. 300.1) Therefore, even if a special needs student is disciplined, the student must still

be provided with an education that meets his or her individual needs.

For more information on disciplinary protections of students with special needs, please refer to the section of this guide on the Individuals with Disabilities Education Improvement Act of 2004.

Resources on school discipline

- *Action Kit: Zero Tolerance and School Discipline*, Harvard University Civil Rights Project, at http://www.civilrightsproject.harvard.edu/resources/civilrights_brief/discipline.php
- *Your Right to Fair Treatment*, American Civil Liberties Union Fact Sheet, at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=13148&c=158>
- *Discipline for Children with Disabilities: Questions and Answers from OSEP*, Wrightslaw, at http://wrightslaw.com/advoc/articles/discipline_faqs_osep.htm
- *Zero Tolerance: Resisting the Drive for Punishment in Our Schools* (William Ayers *et al.* eds., The New Press, 2001)
- Individuals with Disabilities Education Improvement Act, Pub. L. No. 101-476; 34 C.F.R. 300; revision from 71 F.R. 46540 effective October 1, 2006.
- James A. Rapp, Education Law §9.09 (2004)
- Rehabilitation Act, 29 U.S.C. §794 (1973)
- Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*. Indiana Education Policy Center (Aug. 2000), at <http://www.indiana.edu/%7Eesafeschl/ztze.pdf>
- *Special Education Students and Parents! Know Your Rights Regarding School Discipline*, Northwest Justice Project, at <http://www.nwjustice.org/pdfs/1114.pdf>
- *Zero Tolerance and Alternative Strategies: A Fact Sheet for Educators and Policymakers*, National Mental Health and Education Center, at http://www.naspcenter.org/factsheets/zt_fs.html
- *Zero Tolerance Policy Report*, ABA Juvenile Justice Policies, at <http://www.abanet.org/crimjust/juvjus/zerotolreport.html>

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 (Section 504) is a federal law enacted to protect qualified individuals from discrimination based on a disability. The law prohibits employers and organizations that receive financial assistance from the federal government from excluding individuals from or denying them access to the program based on disability:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of her or his disability be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program, service or activity receiving federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal service.

Who enforces this law?

Each federal agency has its own set of Section 504 regulation that applies to its programs. If an agency distributes federal funds, the entities that receive this aid must also comply with Section 504 regulations. For educational matters, complaints should be filed with the U.S. Department of Education, Office of Civil Rights. OCR will investigate whether the complaints are legitimate.

Although each federal agency is responsible for enforcing its own regulations, Section 504 may also be enforced through private lawsuits.

Who is protected by this law?

Section 504 of the Rehabilitation Act of 1973 is a national law that protects qualified individuals with disabilities from discrimination based on their disability. The Section 504 definition of an individual with a disability is broader than the definition found under the Individuals with Disabilities Education Improvement Act.

An “individual with a disability” is any person who:

- has a physical or mental impairment which substantially limits one or more of such person’s major life activities
- has a record of such a physical or mental impairment that substantially limits one or more major life activity
- is regarded as having such a physical or mental impairment that substantially limits one or more major life activity

In addition to the above definition, “otherwise qualified individual with a disability,” for purposes of receiving services, education or training, are persons who satisfy all other normal and essential eligibility requirements of the program, service or activity. More specifically, for purposes of public preschool, elementary and secondary school services, programs and activities, an “otherwise qualified individual with a disability” protected by Section 504 is one who is: 1) of any age during which non-handicapped persons are provided with such services; 2) of any age during which it is mandatory under state law to provide such services to handicapped persons or 3) someone IDEIA requires the state to provide with a free appropriate education [34 C.F.R. §104.3(1)(2)].

What is a “physical or mental impairment” under Section 504?

The term “**physical or mental impairment**” may include, but is not limited to the following examples:

- Blindness or visual impairments
- Cerebral palsy
- Chronic illnesses, such as:
 - arthritis
 - cancer
 - cardiac diseases
 - diabetes

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- multiple sclerosis
 - muscular dystrophy
 - psychiatric disorders
 - HIV or AIDS
 - Deafness or hearing impairments
 - Drug or alcohol addiction (Section 504 covers former users and those in recovery programs not currently using drugs or alcohol. Section 504 does not protect persons currently addicted to or using drugs illegally.)
 - Epilepsy or seizure disorders
 - Mental retardation or mental illness
 - Orthopedic handicap or other mobility impairment
 - Specific learning disability
 - Speech disorder
 - Spinal cord or traumatic brain injury

Please refer to Department of Education regulations for definitions specifically applicable to school children.

What are major life activities under Section 504?

The term “**major life activity**” may include, but is not limited to, self-care, walking, seeing, hearing, walking, breathing, performing manual tasks, caring for one’s self, learning, speaking, writing, reading or working.

What does “substantially limit” mean under Section 504?

Section 504 does not explicitly define the term “substantially limits . . . a major life activity.” The Office for Civil Rights has ruled that the phrase “substantially limits” is to be defined by the school district. (Letter to McKethan. 23 IDELR 504 [OCR 1994]).

One guide is the **Americans with Disabilities Act of 1990** which offers the following definitions:

A major life activity is substantially limited if a person is “unable to perform a major life activity that the average person in the general population can perform” [29 C.F.R. 1630.2(j)(1)(I)].

OR

A major life activity is substantially limited if a person is “significantly restricted in the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that major life activity” [29 C.F.R. 1630.2(j)(1)(ii)].

In public education, a student’s mental or physical impairment “substantially limits” the major life activity (of learning, writing, reading, *etc.*), can be determined by comparing the student’s academic progress to that of an “average child” of comparable age, not a child of similar intellectual potential. A student who is simply not achieving his or her potential is not “substantially limited.”

What are children’s rights under this law?

The following sections provide general information about children’s rights in education as determined by regulations of USDOE pursuant to Section 504.

Generally

A child has the right to participate in any program, service or activity that receives federal assistance. The child cannot be required either to accept different or lesser programs or services than what others receive or to participate in separate programs or services, unless such programs or services are comparable and necessary to afford equal access and opportunity.⁷

Free and Appropriate Education

Section 504 regulations require public school systems to provide children with disabilities with a free and appropriate education. 34 C.F.R. 104.33(a). An **“appropriate education”** is one comparable to that provided to students without disabilities and may include regular or special education and related aids and services. See 34 C.F.R. § 104.33(b)(2). Services developed and implemented under the IDEIA will usually satisfy Section 504. See 34 C.F.R. § 104.33(b)(2). A **“free education”** means that services provided under the Act must be at public expense, without any cost to the child, parents or guardians. 34 C.F.R. 104.33(c). This rule prohibits school district use of social security benefits and/or health insurance to pay for education costs and services if such use may impose financial loss upon the parent or child as determined in Shook v. Gatson County Board of Education, 882 F.2d 119 (4th Cir. 1989).

Enforcement

The Office for Civil Rights of the U.S. Department of Education (USDOE) enforces Section 504 in programs and activities that receive federal financial assistance. Under Section 504, students with disabilities must not be assigned to segregated classes, separate facilities or courses of special education unless such placement is necessary to provide equal education opportunity to them. Disabled students must be educated with non-disabled students to the maximum extent consistent with the needs of the disabled student. See section 34 C.F.R. 104.34(a). If the school district recommends placing a child in a setting other than the regular classroom so that the child can receive educational benefit (*i.e.* for meaningful progress on appropriate goals and objectives), the district must first demonstrate that it provided support services and aids to assist the child in the regular classroom and that such efforts have failed. See id. If a child is placed in a separate facility, that facility must provide comparable programs and services. 34 C.F.R. § 104.33(b). The home school district remains responsible for providing a free and appropriate education and must provide transportation, if necessary, at no greater cost than would be incurred if the student were placed in the home district.

Children with current limiting physical or mental disabilities must be evaluated consistent with parental notice requirements. Section 504 requires that evaluation information be obtained from a variety of sources, that all information be documented and considered, and that evaluation and placement decisions be determined by a consensus of a group of persons knowledgeable about the student, evaluation data, services and placement options. If the child is eligible for Section 504 services, an accommodation plan must be developed and implemented.

Children without current mental or physical disability who qualify under Section 504 based on a “record” of disability or because they are “regarded” as having a disability are not entitled to evaluation for special services and placement, but are protected from discrimination

If a child does not require special education services under IDEIA, is the child still eligible for Section 504 services?

Yes, if the child qualifies under Section 504, he or she may receive services. For example, the child may receive adjustments or learning aids in the regular classroom.

⁷ Note: Section 504 does not require special education programming for students with disabilities but does require institutions to make appropriate academic adjustments and reasonable modifications to policies and practices to allow for full participation of students with disabilities.

Do parents have rights if they do not agree with the identification, evaluation or placement of a child under Section 504?

Yes. Section 504 requires local education agencies to afford parents an impartial hearing in which they may participate and be represented by counsel.

Does Section 504 provide protection in nonacademic services and activities?

Yes. Section 504 prohibits discrimination against qualified students with disabilities on the basis of their disabilities in non-academic services and activities, including but not limited to recreational activities, health services, transportation, school sponsored clubs, counseling services, student employment and agency referrals for assistance to disabled persons.

Who may file a complaint?

Any individual who believes that he or she (or his or her child) has been discriminated against on the basis of disability by a person or entity that receives federal funds, a representative of such an individual or entity, a member of a class of persons so situated, or the authorized representative of a member of that class, may file a complaint. Complaints must be filed within 180 days of the alleged discrimination although this may be extended for “good cause.”

Who do I contact for information about filing a complaint under Section 504?

- <http://www.usdoj.gov/crt/ada/investag.htm>
- <http://www.ed.gov/about/offices/list/ocr/complaintprocess.html>

Who do I contact for general disability rights information?

ADA Information Line

Tel: 800-514-0301

TTY: 800-514-0383

<http://www.ada.gov>

Where do I go to get more information about Section 504?

- <http://www.disabilityinfo.gov/digov-public/public/DisplayPage.do?parentFolderId=217> provides information disability rights and resources in education, employment, housing, transportation, health, income support, technology, community life. The “civil rights” tab provides quick access.

The John H. Chafee Foster Care Independence Act

The John H. Chafee Foster Care Independence Act of 1999 (Chafee Act) is a federal law that offers financial assistance to states for the creation of programs for young adults who are transitioning out of foster care into independent living. The Chafee Act provides funding for additional education or training, housing assistance and counseling services for these young adults. What is available in each state depends on that state's priorities and plan for its Chafee funds. Check the state plan for the specific services available to adolescents in foster care who are approaching age 18 and for young adults who have emancipated from the foster care system.

What are the general purposes of the Act?

The Chafee Act sets forth five types of programs that states may implement with Federal funds.

1. Programs to identify children who are likely to remain in foster care until 18 years of age and to help them transition to living independently by providing services such as:
 - Assistance in obtaining a high school diploma.
 - Career training in daily living skills, budgeting and financial management.
 - Substance abuse prevention and preventative health activities including smoking avoidance, nutrition education and pregnancy prevention.
2. Programs to help children who are likely to remain in foster care until 18 years of age receive the education, training and services necessary to obtain employment.
3. Programs to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and educational institutions such as universities, colleges, technical schools and vocational schools.
4. Programs to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults.
5. Programs to provide support and services to former foster children between 18 and 21 years of age in areas such as finance, housing, counseling, employment and education, in order to ensure that they recognize and accept their personal responsibility for preparing for and making the transition from adolescence to adulthood.

Who is eligible to receive services under the Act?

The Chafee Act defines those eligible for receiving independent living services, other than room and board, as those children "likely to remain in foster care until age 18" and "children aging out of foster care." It is up to each state to determine how it defines those terms, but eligibility is determined regardless of whether or not a child is eligible for the Title IV-E Foster Care Program. To be eligible for **room and board** under the Act, a young person must "have left foster care because [s/he has] attained 18 years of age, and ... [must] not [have] attain[ed] 21 years of age." This includes young people who have gone straight from foster care into independent living programs, as well as those who have lost touch with the agency but return before the age of 21 for assistance.

Eligibility requirements for education and training and other Chafee services vary by state and by program. Please refer to each state plan for specifics. Please see below to obtain state by state information.

What are the requirements for a state to receive funding under this Act?

To receive funding, a state must submit a five-year plan that meets specific requirements of the Act, including how it will implement the plan and cooperate in evaluations of the effects of the Act in achieving the purposes outlined above.

Where can I go for more information about this Act?

All states have detailed plans and specific programs for children who are aging out of foster care and a point person assigned to coordinate programs.

- For your state's Independent Living Coordinator, <http://www.nrcys.ou.edu/yd/resources/ilcoords.php>.
- National Child Welfare Resource Center for youth Development, <http://www.nrcys.ou.edu/nrcyd/>
- If you do not have access to the internet, please contact the National Child Welfare Resource Center for Youth Development, at 918-660-3700 and ask to speak with one of the program specialists about Chafee, or contact the National Foster Care Coalition at 202-454-5608.

Education in the Juvenile Justice System

Youth entitlements

Although juvenile crime has declined, the number of incarcerated juveniles has soared. Consequently, growing numbers of juveniles are spending critical developmental years in institutional settings where education is not a priority. Studies indicate that incarcerated juveniles routinely perform below grade level and have past histories of school suspension and truancy. In addition, 30% to 50% require special education services. If the educational needs of this population are not met, they are at high risk for dropping out of school and returning to the justice system.

Though considerable variation exists among states, each has education statutes and regulations that specify the length of the school day and year, the minimal range and types of course offerings, and the number of courses required for graduation.⁸ In the juvenile correctional setting, these standards are administered by organizations such as the juvenile corrections agency, the state department of education or a local school district.⁹ Despite state and local entitlements for school-age youth, education programs in juvenile correctional facilities are typically under-funded and under-resourced.¹⁰ However, effective educational programs in correctional facilities should provide a comprehensive range of options for incarcerated youth, including:

- Academic courses consistent with school curriculum to ensure credits for students who are likely to return to public schools or earn a diploma while in the correctional system¹¹
- General Educational Development (GED) services for students who are unlikely to return to public schools¹²
- Pre-vocational and vocational education and access to employment opportunities in the community¹³
- State and federally mandated special education services

Youth with disabilities*

Under the Individuals with Disabilities Education Improvement Act (IDEIA),¹⁴ eligible youth under the age of 21 in state-operated programs, such as juvenile correctional facilities, who require special education services are afforded the same rights as youth in public schools.¹⁵ Youth with disabilities also may be entitled to educational services under the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act of 1973.¹⁶

In order to effectively meet the educational needs of incarcerated youth, the following should occur:

- The correctional facility should obtain prior school records for their students, including grades and test scores. If the home school district fails to send the records in a timely fashion, a parent can obtain a copy and send it directly to the correctional facility.¹⁷
- Parents who suspect that their child has a disability can request, in writing, an evaluation from the correctional facility. The correctional facility, in concert with the local school district, is obliged to consider

⁸ Peter E. Leone and Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities*, at http://www.edjj.org/Publications/pub12_20_99.html (last visited July 19, 2006).

⁹ *Id.*

¹⁰ See *Juvenile Correctional Education Programs*, at <http://www.edjj.org/focus/education> (last visited July 19,2006) [hereinafter *Education*].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See 20 U.S.C. §1400 *et seq.*, revised and amended by Pub. L. No. 105-17, 111 Stat. 37 (1997); 34 C.F.R. 300.1 *et seq.* (1999).

¹⁵ *Education*, *supra* note 8.

¹⁶ Lili Garfinkel, *What Parents Need to Know about Children with Disabilities and the Delinquency System*, at

<http://www.pacer.org/jj/parentfactsheet.doc> (last visited July 19,2006). See also 29 U.S.C. § 794; 42 U.S.C. § 12101 *et seq.*

¹⁷ *Id.*

the request and make an individualized determination.¹⁸ At the time of confinement, disabled youth and their parents should receive notification about their rights under IDEIA.¹⁹

- Parents of youth with disabilities have the right to participate in decisions about their student's education. In particular, parents should be involved in developing their incarcerated child's Individualized Education Program (IEP) under the IDEIA or "504 plan" when the child is transferred to the correctional facility.²⁰ It is also advisable that a representative from the child's home school district take part in the IEP meetings.²¹ If attendance at developmental meetings is not possible, parents or IEP representatives should consider telephone conferencing.²²
- If a youth's parent (as defined in 34 C.F.R. § 300.20)²³ cannot be located, or if the youth is a ward of the state (as defined by law), or if the youth is over 18 but cannot advocate for his or her rights because of a disability, the youth is legally entitled to have a surrogate parent act on his or her behalf during educational planning.²⁴ A surrogate parent assumes the rights of the parents' with respect to their child's special education needs. Though the surrogate parent may not be an employee of any agency that may have a conflict of interest with the provision of special education services, case managers, probation officers, social workers, counselors or other corrections staff may be of assistance in educational planning.²⁵

Note: Under the changes to the regulations "Students with disabilities do not have an automatic right to a surrogate parent solely by reason of their confinement at a correctional facility. Public agencies must make case-by-case determinations in accordance with the requirements in 300.519... Whether a student with a disability confined in a state correction facility is considered a ward of the State... is a matter that must be determined under state law."
<http://www.ed.gov/legislation/FedRegister/finrule/2006-3/081406a.pdf> see page 46710

- Licensed personnel, including teachers, psychologists, social workers or mental health professionals should provide special education services.²⁶
- Family members are entitled to educational progress reports.²⁷ Under IDEIA, if the incarcerated youth is not receiving appropriate special education and related services, the parents are afforded the same mediation and due process rights as parents of children who attend public schools.²⁸ If a due process hearing is requested, the mediation process must be scheduled in a timely manner, be held in a place that is convenient to all parties involved, and be conducted by a nonbiased, trained mediator.²⁹ Furthermore, any agreement reached must be put into writing.³⁰
- A youth over the age of 14 must have a transition plan included as part of their IEP. The transition plan includes skills and services that the youth might need once they leave the delinquency system including: assistance in returning to high school, life and social skills, job-seeking and vocational training.³¹ Youth should also participate in aftercare planning before returning to the community.³² Aftercare plans include

¹⁸ *Id.*

¹⁹ S. Burrell and L. Warboys, *Special Education and the Juvenile Justice System*, JUVENILE JUSTICE BULLETIN, July 2000 at 4.

²⁰ Garfinkel, *supra* note 14.

²¹ *Id.*

²² *Id.*

²³ Burrell and Warboys, *supra* note 17 at 4.

²⁴ PACER Center, Inc., *Unique Challenges, Hopeful Responses: A Handbook for Professionals Working with Youth with Disabilities in the Juvenile Justice System*, 2nd ed (1999), available at http://www.edjj.org/Publications/pub02_23_00.pdf (last visited November 21, 2006).

²⁵ *Id.*

²⁶ Garfinkel, *supra* note 14.

²⁷ *Unique Challenges*, *supra* note 22.

²⁸ Burrell and Warboys, *supra* note 17 at 5 (detailing youths' rights under IDEA, including information on due process hearings).
See also Garfinkel, *supra* note 12.

²⁹ Burrell and Warboys, *supra* note 17 at 5.

³⁰ *Id.*

³¹ Garfinkel, *supra* note 14.

³² *Unique Challenges*, *supra* note 22.

instruction on what the youth must do to stay out of trouble including: drug counseling, meetings with probation officers and academic goals.³³

**For more information on disciplinary protections of students with special needs who are involved with the juvenile justice system please refer to the section of this guide on the Individuals with Education Improvement Act and Section 504 of the Rehabilitation Act.*

Litigation

Correctional facilities have been slow to respond to the requirements of IDEIA, ADA, Section 504 and other applicable laws.³⁴ Although all state-operated programs are required to provide special education services as a condition of receiving federal funds, the U.S. Department of Education has never withheld funds from states that failed to provide adequate special education programs in juvenile correctional facilities.³⁵ Thus, advocates have initiated more than 20 class action suits as a means to secure appropriate educational services for incarcerated youths with disabilities.³⁶ With a few exceptions, most cases settled two to seven years after the initial complaint.³⁷ Although class action litigation is a lengthy and expensive process, advocates hope these suits will draw attention to and challenge the quality and availability of education for all youth in the correctional setting.³⁸

For additional information see:

- Child Welfare League of America, <http://www.cwla.org/> (including information pertaining to juvenile justice).
- Correctional Education Association, <http://www.ceanational.org/> (Select "Resources" on the left for links for educators and incarcerated youth).
- Robert J. Gemignani, *Juvenile Correctional Education: A Time for Change*, *Juvenile Justice Bulletin* (Oct. 1994), available at <http://www.ncjrs.org/pdffiles/juved.pdf> (last visited July 29, 2006) (discussing federal laws relating to special education and listing examples of effective educational practices in a juvenile correction setting).
- IDEAPractices, <http://www.ideapractices.org/> (providing the text and an overview of IDEIA, including a list of legal cases that implicate the law).
- Sheri Meisel *et al.*, *Collaborate to Educate: Special Education in Juvenile Correctional Facilities*, http://www.edjj.org/Publications/pub01_17_00.html (last visited July 29, 2006) (discussing federal regulations of special education and recommendations for effective implementation).
- National Criminal Justice Reference Service, <http://virlib.ncjrs.org/JuvenileJustice.asp> (including numerous articles pertaining to juvenile delinquency).
- National Juvenile Detention Association, <http://www.njda.com/> (providing resources for administrator, <http://www.njda.com/admin.html>, and juvenile justice links, <http://www.njda.com/links.html>).
- Office of Juvenile Justice and Delinquency Prevention, <http://www.ojjdp.ncjrs.org> (including publications directed at counsel and the public at large).
- Parent Advocacy Coalition for Educational Rights (PACER), <http://www.pacer.org/> (providing resources and articles relating to education and disabilities amongst juveniles, <http://www.pacer.org/jj/BibliographyIntroduction.pdf>).

³³ Garfinkel, *supra* note 14.

³⁴ *Education*, *supra* note 8.

³⁵ Leone and Meisel, *supra* note 6.

³⁶ *Id.*

³⁷ *Id.* See Table 1.

³⁸ *Id.*

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- Census of Juveniles in Residential Placement Databook, <http://ojjdp.ncjrs.org/ojsttb/cjrp>(last visited July 29, 2006) (providing detailed statistics regarding number of juveniles in corrections based on 2003 data).
 - Carter White, *Reclaiming Incarcerated Youth Through Education*, 20 Children's Legal Rights Journal 17.

Resources on education and juvenile justice

- 20 U.S.C. §1400 *et seq.*, revised and amended by Pub. L. No. 105-17, 111 Stat. 37 (1997).
- 29 U.S.C. § 794.
- 34 C.F.R. 300.1 *et seq.* (1999).
- 42 U.S.C. § 12101 *et seq.*
- Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System*, Juvenile Justice Bulletin (July 2000) available at <http://www.ncjrs.org/pdffiles1/ojdp/179359.pdf> (last visited July 27, 2006).
- Lili Garfinkel, *What Parents Need to Know about Children with Disabilities and the Delinquency System* at <http://www.pacer.org/jj/parentfactsheet.doc> (last visited July 27, 2006).
- Robert J. Gemignani, *Juvenile Correctional Education: A Time for Change*, Juvenile Justice Bulletin (Oct. 1994) available at <http://www.ncjrs.org/pdffiles/juved.pdf> (last visited July 27, 2006).
- *Juvenile Correctional Education Programs* at <http://www.edjj.org/focus/education> (last visited July 27,2006).
- Peter E. Leone & Sheri Meisel, *Improving Education Services for Students in Detention and Confinement Facilities* at http://www.edjj.org/publications/pub12_20_99.html (last visited July 27, 2006).
- *Unique Challenges, Hopeful Responses*, available at http://www.edjj.org/Publications/pub02_23_00.pdf (last visited July 27, 2006).

In School, The Right School, Finish School

Practice Tips

- Get complete educational file for each of your children. Review and understand the file.
- Make educational stability and success a priority when identifying a placement for a child, and make sure that the court makes it a priority as well.
- Make sure you know who the “parent” is—if you have any say, get it to be the foster or biological, rather than a surrogate parent.
- Put concerns, confirmation of meetings, agreements, *etc.* in writing—make that record!
- Prepare for education meetings with child and parent, and include the child whenever appropriate—the more there is a unified front and consensus on educational objectives the more successful the meeting and the plan will be.
- Encourage the parent not to agree, or at least to withhold judgment, on adverse eligibility, manifestation, IEP or placement determinations—in other words just say NO!
- Ask parent to ask school, in writing, to include you at meetings (they have the right to bring someone with them). Make sure that others who have valuable information attend as well.
- Give schools as much advance notice as possible when child is transferring from a residential or correctional placement; doing so avoids enrollment delay.
- Make sure to respond immediately when children are facing disciplinary matters—do not miss appeal deadlines and risk the loss of placement.
- Give schools a chance, and the information necessary, to do the right thing before getting confrontational or assuming the worst.
- Call local legal aid, education law, protection and advocacy and children’s law center programs for help.

In School, The Right School, Finish School

10 Questions ...

IN SCHOOL

1. Is the child enrolled in school?
2. Is the child attending school?
3. How many schools has the child attended?
4. Can the child remain in his/her home school?
5. Is the child's living arrangement permanent?
6. Has the child been expelled or suspended from school?
7. Who has discussed the educational plan with the child and what does the child want?
8. Does the child feel safe in the school?
9. How does the child get to school?
10. Who at the school does the child trust?

RIGHT SCHOOL

1. How is the child performing academically, socially, and emotionally?
2. Has the child been observed, assessed or identified as needing special services at any point?
3. Is there a significant discrepancy between the child's age and child's achievement level?
4. Does the child have an appropriate IEP or a Section 504 plan that is being followed and is up to date?
5. For every proposed school, what is the state's assessment (teacher qualifications, graduation rates, class size, No Child Left Behind, *etc.*)?
6. Who has discussed the plans with the child and what does the child want?
7. To what people or activities is the child significantly connected in the current school?
8. What services does the child need to succeed and does the child's school and/or home placement have these services?
9. Is the child in the least restrictive environment?
10. Is the child accruing credits toward high school graduation and college admission?

FINISH SCHOOL

1. What are the child's strengths and interests and how can these be enhanced?
2. What is the future educational and/or vocational plan for the child?
3. What classes does the child need to achieve his/her educational and vocational goals?
4. If the child is 14 or older and has an IEP, what transition planning has occurred?
5. What is the child's plan for independent living and who has discussed this plan with the child?
6. Where will this child live in six months, one or two years, to allow him/her to finish school?
7. Will the child need transitional housing?
8. How will this child access health benefits and medical care?
9. What family and community resources are available and appropriate for the child?
10. What other services or resources does the child need? How long will the child need these services or resources?

Annotated Bibliography

In school: school stability

1. A child may lose four to six months of academic progress with each move to a new school. U.S. Department of Education, *Education for Homeless Children and Youth Program*, Title VII-B of the McKinney-Vento Homeless Assistance Act as Amended by the No Child Left Behind Act of 2001, Draft Non-Regulatory Guidance 30 (2003).
2. For a reference on the detrimental effects of moving children from one foster placement to another, see Lois Weinberg *et al.* (May, 2003), *Improving Educational Prospects for Foster Youth*, where the authors cite research indicating that highly mobile children often miss large portions of the school year, lose academic credit due to moves mid-semester, and have incomplete education records due to missing transcripts, assessments and attendance data (citing J. Eckenrode, M. Land and J. Brathwaite, *Mobility as a Mediator of the Effects of Child Maltreatment on Academic Performance*, 66 *Child Development*, 1130, 1130-42 (1995); California children in foster care attend an average of nine different schools by age 18. (citing Kathleen Kelly, *The Education Crisis for Children in the California Juvenile Court System*, 27 *Hastings Const. L.Q.* 757, 757-73 (2000)).
3. Foster children will attend an average of six different schools from K-12; 60% to 70% of those students will not graduate from high school. TeamChild and Casey Family Programs, *Critical Questions and Strategies for Meeting the Education Needs of Children and Youth in Juvenile and Family Court*, Overview, December 2002. This source is also helpful in analyzing placement and educational needs of court involved youth.
4. The number of changes in placement that a child experiences continues to increase the length of time a child remains in state care. Colorado Department of Human Services, *Alternative to Foster Care 24* (2002).
5. Changes in foster care placement often cause changes in school placement for youth in care. School performance suffers as youth experience school disruption. Students in care are forced to continually adjust to new curricula, teachers, academic demands, group norms and school peers. As a result of placement disruptions, students in care are less likely to receive timely assessments, obtain continuous educational services and have accurate school records. E. Yu, P. Day and M. Williams, *Improving Educational Outcomes for Youth in Care: Symposium Summary Report*, Child Welfare League of America, 2002, p. xvi.
6. A 2001 foster care study in Washington shows typical outcomes across the nation, such as showing that children in foster care score on average 15 to 20 percentile points below other children on statewide achievement tests and repeat a grade twice as often as other students. M. Burley and M. Halpern, *Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care*, Washington State Institute for Public Policy (2001) available at <http://www.wsipp.wa.gov/rptfiles/FCEDReport.pdf>.
7. School connectedness, which is defined as a student's feeling part of and cared for at school, is linked with lower levels of substance use, violence, suicide attempts, pregnancy and emotional distress, according to J. Wald and D. Losen, *Defining and Redirecting a School-to-Prison Pipeline: Framing Paper for the School-to-Prison Pipeline Research Conference*, The Civil Rights Project at Harvard University, May 16-17, 2003, p. 5 (citing C.A. McNeely, J.M. Nonnemaker and R.W. Blum, *Promoting Student Connectedness to School: Evidence from the National Longitudinal Study of Adolescent Health*, 72 *Journal of School Health* (2002)).
8. A recent study of dropouts in the state of Washington found that mobility adds to students' risk of dropping out because they can experience serious disorientation after moving from a community of peers who provided social identity. G. Sue Shannon and Pete Bylsma, *Helping Students Finish School: Why Students Drop Out And How to Help Them Graduate*, Office of Superintendent of Public Instruction, Olympia, WA 24-25 (Dec. 2003), citing G.G. Wehlage, R.A. Rutter, G.A. Smith, H. Lesko and R.R. Fernandez, *Reducing The Risk: Schools as Communities of Support*, New York, NY: The Falmer Press, 1989.
9. Another good source of questions available for analyzing the placement and educational needs of a child is: J. Osofsky, C. Maze, C. Lederman, M. Grace and S. Decker, *Questions Every Judge and Lawyer Should Ask About Infants and Toddlers in the Child Welfare System*, Technical Assistance Brief, National Council of Juvenile and Family Court Judges (Dec. 2002).

The right school: appropriate school placement

The following facts all appear in the frequently quoted Weinberg *et al.* article, *supra* note 2. The citations following each statistic are the sources that Weinberg credits.

1. Twenty-five to forty percent of children in foster care are placed in special education compared to 10% to 12% in the general population, according to L. Weinberg and N. Shea, *Who Should be Responsible for the Education of Children in Foster Care: A Literature Review*, Mental Health Advocacy Services, Inc., Los Angeles, CA (2001).
2. Foster children are more likely to have academic and behavioral problems in: N.J. Hochstadt, P.K. Jaudes, D.A. Zimo and J. Schacter, *The Medical and Psychosocial Needs of Children Entering Foster Care*, 11 *Child Abuse and Neglect* 53, 53-62 (1987).
3. A.J. Uriquiza, S.J. Writz, M.S. Peterson and V.A. Singer, *Screening and Evaluating Abused and Neglected Children Entering Protective Custody*, 73 *Child Welfare*, 156-171 (1994).
4. Foster children have higher rates of absenteeism and disciplinary referrals according to: R.M. Goerge, J. vanVoorhis, S. Grant, K. Casey and M. Robinson, *Special-Education Experiences of Foster Children: An Empirical Study*, 71 *Child Welfare* 419-437 (1992).
5. Approximately 75% of foster children perform below grade level and more than 50% have been retained at least one year in school according to Sawyer & Dubowitz, *School Performance of Children in Kinship Care*, 18 *Child Abuse & Neglect* 587-597 (1994).
6. Nearly 40% of foster children fail to graduate from high school. "The Education They Need," *Los Angeles Times*, April 27, 2003, at M.4.
7. One-half of the children in foster care show developmental delay that is approximately four to five times the rate of delay found in the general population according to Osofsky *et al.*, *supra* note 9 at 5 (citing S. Dicker and E. Gordon, *Connecting Healthy Development and Permanency: A Pivotal Role for Child Welfare Professionals*, 1 *Permanency Planning Today* 12-15 (2000)).
8. Students with learning disabilities can experience considerable pain and social stigma because they are often harassed and denigrated by peers who are not learning disabled. Such a negative environment can discourage many students with learning disability from attending school and may explain why most LD students fail. The incidence of special needs students in juvenile centers has been found to be as high as 40%. The incidence of learning disabilities among the general population based on U.S. Department of Education and local service providers is around 5%. Most incarcerated LD youth receive inadequate educational services while they are involved with the juvenile justice system. C. Winters, *Learning Disabilities, Crime, Delinquency, and Special Education Placement*, 32 *Adolescence* at 5 (June 22, 1997).
9. "The incidence of learning disabilities in children in care is so high that many experts believe every child under court supervision should receive an educational assessment," K. Howze, *Health for Teens in Care: A Judge's Guide*, The American Bar Association, at 37 (2002).
10. Between 28% and 43% of incarcerated juveniles have special education needs including learning disabilities. In adult correctional facilities between 30% and 50% of the inmates need special education according to C.M. Fink, *Special Education in the Service for Correctional Education*, 41 *Journal of Correctional Education* 186-90 (1991).
11. While about 7% of all public school students in the United States have been identified as having disabilities, studies estimate the prevalence rate of disabling conditions among incarcerated juveniles is up to 70%. P.E. Leone, B.A. Zaremba, M.S. Chapin and C. Isili, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 *District of Columbia L. Review* at 389 (1995).

Finish school: successful school transitions and long-term planning

1. Imprisoned youth are likely to be school dropouts. Seventy-five percent of youths under 18 who have been sentenced to adult prisons have not completed 10th grade according to J. Wald and D. Losen, *Defining and Redirecting a School-to-Prison Pipeline: Framing Paper for the School-to Prison Pipeline Research Conference*, The Civil Rights Project at Harvard University, p. 4 (May 16-17, 2003).
2. Each year, approximately 20,000 youth in the United States “age out” of foster care when they reach the age of 18, <http://www.cwla.org/programs/fostercare/factsheet.htm>.
3. It is still not unusual to find that as foster children approach their eighteenth birthday, the county’s plan for that child is to ask the court to dismiss the case and for the child to leave the foster home regardless of whether or not the child is prepared to live on their own or even has a place to live. Children’s Law Center of Minnesota, *Transitions for Success: Preparing Foster Youth for Living Independently*, May 2003.
4. States with higher rates of out-of-school suspension also have higher overall rates of juvenile incarceration. Higher rates of out-of-school suspension also are associated with lower rates of achievement in reading, mathematics and writing. J. Wald and D. Losen, *supra* n. 21 at p. 7.
5. Studies conducted in the 1980s have shown that after aging out of the foster care system, many young people encounter serious problems attaining self-sufficient adulthood. In a compilation of several studies, the following statistics were reported:
 - Only about 50% of former foster youth had finished high school.
 - Only about 50% of former foster youth had jobs.
 - Approximately 60% of former female foster youth had given birth.
 - About 25% of former foster youth had experienced homelessness.

“Report to the Congress, Developing a System of Program Accountability Under the John H. Chafee Foster Care Independence Program,” U.S. Department of Health and Human Services Administration for Children and Families Administration on Children, Youth and Families, Children’s Bureau, Appendix A, Outcomes for Foster Youth, September 2001, reprinted with permission in Children’s Law Center of Minnesota, *Transitions for Success: Preparing Foster Youth for Living Independently*, *supra* note 23.

6. Roughly half of the children who had emancipated from the foster care system between two-and-a-half to four years ago had completed high school and fewer than half had jobs. R. Cook, *A National Evaluation of Title IV-E Foster Care Independent Living Programs for Youth, Phase 2* (Westat 1992).
7. By the time youth with emotional disturbances have been out of school for three to five years, 58% have been arrested. Similarly, by the time youth with learning disabilities have been out of school for three to five years, 31% have been arrested. S. Burrell and L. Warboys, *Special Education and the Juvenile Justice System*, Juvenile Justice Bulletin, July 2000, available at <http://www.ncjrs.org/pdffiles1/ojdp/179359.pdf> (last visited August 8, 2006).
8. M.E. Courtney, S. Terao and N. Bost, *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care*, Chapin Hall Center for Children at the University of Chicago, 48-49 (Feb 22, 2002).
9. Dropping out is linked with unemployment, urban poverty, juvenile delinquency and adolescent males. G.S. Shannon and P. Bylsma, *Helping Students Finish School: Why Students Drop Out and How to Help Them Graduate*, Office of the Superintendent of Public Instruction, Olympia, WA at 21 (Dec. 2003).
10. In 1988, the Bureau of Justice Statistics indicated that only 28% of prison inmates had completed high school, 45% of jail inmates had been unemployed and 12% had been employed only part-time. The National Dropout Prevention Network reported that 25% of the nation’s dropouts are unemployed. The NDPN also found that dropouts earn \$250,000 less over their lifetime than do graduates. Further, they cost the nation \$240 billion in crime, welfare and health costs. Winters, *supra* note 17.
11. Without intervention, most of these young people will not complete high school and are at great risk for entering the adult public assistance and criminal justice systems. Weinberg, *supra* note 2, at 1 (citing Kelly, *supra* note 2, at 757-73).
12. The Chafee Independent Living Program Act provides funds to states to provide assistance to former foster youth in obtaining such services as a high school diploma, career exploration, vocational training, job training and

-
- employment services, training in daily life skills, budgeting and money management, substance abuse prevention, preventive health care, preparation for post-secondary education, mentors and interaction with other adults, employment, financial, housing, counseling, education and other services for former foster youth age 18 to 21. Not all states provide all services.
13. In a study of the high school students in foster care, while nearly 50% report having been placed in special education at some point, and over one-third reported five or more school changes, over 50% of the respondents hoped and expected to graduate from college. Courtney, *et al.* at *supra* n. 28 at 39-41.
 14. *Getting Out of The Red Zone*, by Sue Burrell of the Youth Law Center (April 2003) discusses different financial resources available to students that may be struggling to transition out of foster care. The report focuses on California but does have some federal sources. See pages 11 and 12.
 15. On the importance of staying in and completing high school to prevent incarceration see Wald & Losen *supra* n. 21.
 16. For individuals under age 21 who qualify for EPSDT, a comprehensive list of health related services from family planning to eyeglasses to inpatient and outpatient care and prescription drugs must be available if medically necessary. See 42 U.S.C. §1396d(a) and A. English, M. Morreale and A. Stinnett, *Adolescents in Public Health Insurance Programs: Medicaid and CHIP*, Center for Adolescent Health and Law at 62 (1999).
 17. 42 U.S.C. § 675(1)(C)(c)(v)-(viii)-(D) requires that for every child in Title IV-E foster care, the case plan shall include: “Where appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.” In general, case plans under the Adoption and Safe Families Act require documentation of agency effort to provide appropriate services, including education, to all children in Title IV-E foster care.
 18. Early and Periodic Screening, Diagnostic and Treatment Act (EPSDT) requires comprehensive screening for health problems and follow-up treatment as “medically necessary.” Many states extend EPSDT coverage to recipients of Medicaid for age 0 to age 21. Services should include treatment for substance abuse as well as mental health care and reproductive counseling, although these services may be difficult for the teen to access. See Howze *supra* n. 18 at pp. 45-46.
 19. The Adoption and Safe Families Act requires that matters of health and education reflected in the case records maintained by the court include documentation of transitional services that are individualized to meet the individual needs and strengths of each adolescent. 42 U.S. C. §675(1)(C).
 20. On zero tolerance, see: Civil Rights Project at Harvard University (2000). *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*. Report from A National Summit on Zero Tolerance, Washington, D.C.
 21. Sixty-eight percent of state prison inmates did not receive a high school diploma. For more detailed statistics on dropouts, learning disabilities, recidivism, and educational challenges in adult prisons see C.W. Harlow, *Education and Correctional Populations*, Bureau of Justice Statistics Special Report, NCJ 195670 (Jan. 17, 2003).

National Children's Law Network

The mission of the **National Children's Law Network** (NCLN) is to improve the lives and opportunities of court-involved children across the country. We accomplish this mission through three central strategies:

- Enhancing the quality of legal representation of children through the development of best practices, outcome-based assessments of individual legal representation, and the expanded recruitment, training and retention of *pro bono* attorneys to effectively represent children.
- Developing standards and best practices for children's law centers across the country.
- Improving educational opportunities and outcomes for court-involved children.

The NCLN is working to open the educational pipeline for court-involved children as part of its policy and training initiative *In School, the Right School, Finish School*. The goals are to train professionals who work with disadvantaged children and youth to address education as integral to their intervention, to impact court systems (*i.e.*, child protection, delinquency, education, immigration and asylum) to promote, encourage and facilitate school for their child clients, and to impact higher educational institutions with a stream of children of color and other disadvantaged youth.

Each of the eight child advocacy organizations represent youth from low income families who are involved in the justice system due in part to their unmet needs for permanency, family resilience, safety, education, health services or emotional supports, and whose complex problems and needs often confound traditional providers of legal and social services. The NCLN is building on our common strengths to expand the capacity, quality and sustainability of each organization and extend our impact on vital issues of children's policy.

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