



2013 Juvenile Defender Conference
August 16, 2013 / Chapel Hill, NC

ELECTRONIC MATERIALS*

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2013 Juvenile Defender Conference *Client Centered Advocacy*

August 16, 2013 / Chapel Hill, NC

*Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services*

8:00 to 8:45am	Check-in
8:45 to 9:00	Welcome Eric Zogry, Juvenile Defender, Office of Juvenile Defender, Raleigh, NC
9:00 to 9:30	Defending Children: A Three Dimensional Approach [30 min.] Eric Zogry
9:30 to 10:30	Staying Abreast: Case Law and Legislative Update [60 min.] LaToya Powell, Professor of Public Law and Government, School of Government, UNC—CH, Chapel Hill, NC
10:30 to 10:45	Break
10:45 to 11:30	Understanding the System: The Division of Juvenile Justice, Court Services [45 min.] Chuck Mallonee, Western Area Administrator, NC Department of Public Safety – Division of Juvenile Justice, Swannanoa, NC
11:30 to 12:15	Client Centered Advocacy: Special Education Issues [45 min.] Peggy Nicholson, Powell Fellow and Director of the Juvenile Re-entry Action Project, Advocates for Children's Services, Durham, NC
12:15 to 1:15	Lunch (<i>provided in building</i>)*
1:15 to 2:15	Client Centered Advocacy: LGBTQ Children [60 min.] Laura Austen, Assistant State Public Defender, Juvenile Division, Office of the Ohio Public Defender, Columbus, OH
2:15 to 3:15	Putting Cases Together [60 min.] Roger Starcher, Investigator & Renee Jarrett, Lead Attorney, Council for Children's Rights, Charlotte, NC
3:15 to 3:30	Break (<i>light snack provided</i>)
3:30 to 4:30	Why it Matters: Collateral Consequences and Juvenile Justice [Ethics] [60 min.] Daryl Atkinson, Staff Attorney, Southern Coalition for Social Justice, Durham, NC & Whitney Fairbanks, Assistant Legal Counsel, Administrative Office of the Courts, Raleigh, NC

*IDS employees may not claim reimbursement for lunch

**A group of faculty and attendees will be meeting for a pay-on-your-own group dinner on Thursday, August 15 at 6:00 p.m. at Brixx Pizza in Meadowmont Village in Chapel Hill. You are welcome to join.

Defending Children: A Three Dimensional Approach

August 2013

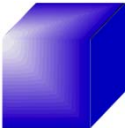


Defending Children: A Three Dimensional Approach

2013 Juvenile Defender Conference
Client Centered Advocacy
August 16, 2013
Chapel Hill, NC



Defending Children in 3-D



- Depth
- Length
- Width



Defending Children in 3-D: Depth

Client-Centered Advocacy



Defending Children in 3-D: Depth

- o *Gault*: “the juvenile needs the assistance of counsel” to make decisions “at every step in the proceedings against him”
- o NCRPC: “a lawyer zealously asserts the client’s position” when the client is a minority the lawyer shall “as far as reasonably possible, maintain a normal client-lawyer relationship”

Defending Children in 3-D: Depth

- o IDS/OJD: “juvenile’s voice to the court” owing the “same duties as an attorney owes to an adult criminal defendant”
- o NJDC: “counsel must provide competent, diligent, and zealous advocacy to protect the client’s procedural and substantive rights...Counsel’s primary and fundamental responsibility is to advocate for the client’s expressed interests”

Defending Children in 3-D: Depth

- o Protection of procedural and substantive rights
- o Individualized justice
- o Force other actors in their roles



Defending Children in 3-D: Depth



- Strengthening the bond between attorney and client
- Procedural fairness

Defending Children in 3-D: Length

Expanding and Improving Representation at All Stages



Defending Children in 3-D: Length

- Appointed immediately
- “Every stage of the proceedings”
- Post-disposition



Defending Children in 3-D: Length

Appointed immediately:

- Self-incrimination
- Meet and prepare
- Offer alternatives
- Prior to filing?

Defending Children in 3-D: Length

At all stages:

- Secure custody
- Probation violations
- Placement reviews
- Other “reviews”

Defending Children in 3-D: Length

Post-Disposition:

- Maintaining contact
- Pending violations/placement changes
- Collateral consequences
- Committed juveniles:
 - YDC reports
 - Advocacy projects
 - PREA

Defending Children in 3-D: Width

Representing the Whole Child



Defending Children in 3-D: Width

- Education rights
- Abuse/neglect/dependency court
- Mental health
- Special needs juveniles

Defending Children in 3-D: Width

Education rights:

- School discipline
- Special education
- School-to-prison pipeline

Defending Children in 3-D:
Width

Abuse/neglect/dependency court
and Mental Health:

- o Placement
- o Probation compliance
- o Inform/expressed interest voice

Defending Children in 3-D:
Width

Special needs
juveniles:

- o DMC
- o Hispanic/Latino
- o LGBTQ

6

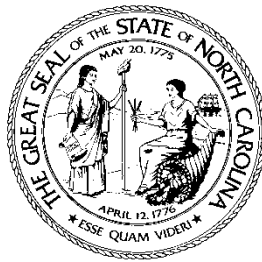
North Carolina
Sentencing and Policy Advisory Commission

**JUVENILE RECIDIVISM
STUDY:
FY 2008/09 JUVENILE SAMPLE**

Prepared By

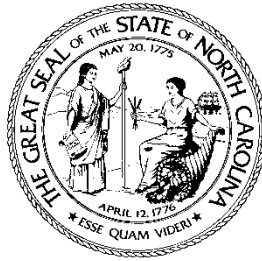
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**Submitted Pursuant to G.S. § 164-48
May 1, 2013**

JUVENILE RECIDIVISM STUDY: FY 2008/09 JUVENILE SAMPLE



**North Carolina Sentencing and Policy Advisory
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CHAPTER ONE

JUVENILE RECIDIVISM

STUDY DIRECTIVE AND METHODOLOGY

INTRODUCTION

In the 2005 Session of the General Assembly, the legislature amended Chapter 164 of the General Statutes to direct the North Carolina Sentencing and Policy Advisory Commission (hereinafter referred to as the Sentencing Commission) to conduct biennial juvenile recidivism studies on adjudicated youth in the state:

§ 164-48. Biennial report on juvenile recidivism.

The Judicial Department, through the North Carolina Sentencing and Policy Advisory Commission, shall conduct biennial recidivism studies of juveniles in North Carolina. Each study shall be based on a sample of juveniles adjudicated delinquent and document subsequent involvement in both the juvenile justice system and criminal justice system for at least two years following the sample adjudication. All State agencies shall provide data as requested by the Sentencing Commission.

The Sentencing and Policy Advisory Commission shall report the results of the first recidivism study to the Chairs of the Senate and House of Representatives Appropriation Committees and the Chairs of the Senate and House of Representatives Appropriation Subcommittees on Justice and Public Safety by May 1, 2007, and future reports shall be made by May 1 of each odd-numbered year.

This is the Sentencing Commission's fourth biennial report on juvenile recidivism, submitted to the North Carolina General Assembly on May 1, 2013.

THE JUVENILE JUSTICE SYSTEM

In North Carolina, juveniles are considered to be under the jurisdiction of the juvenile court if they are at least six years old and not older than 16 years old at the time that they are alleged to have committed a delinquent offense. However, juveniles who are at least 13 years of age and are alleged to have committed a felony may be transferred into the criminal justice system and tried as adults. For a juvenile who is alleged to have committed a Class A felony at age 13 or older, the court must transfer the case to Superior Court if probable cause is found in juvenile court. Juveniles who are alleged to have committed a delinquent offense are processed by, supervised by, and committed to the Department of Public Safety's Division of Juvenile Justice (DJJ).¹

¹ Effective January 1, 2012, Session Law 2011-145, Part XIX, consolidated the North Carolina Departments of Correction, Crime Control and Public Safety, and Juvenile Justice and Delinquency Prevention (DJJDP) into a single Department of Public Safety (DPS). The responsibilities of the former DJJDP have been assumed by DPS's Division of Juvenile Justice. The report refers to the departmental structure that became effective January 1, 2012.

In order to provide some context for this study, the following sections describe the processing of juveniles within the juvenile justice system. Juveniles who were adjudicated and received a disposition, as well as dispositional alternatives available to the court, are particularly highlighted.

Intake Process

All juveniles enter the juvenile justice system by having a formal complaint lodged by a law enforcement officer or private citizen. There are two types of complaints – the delinquency complaint alleges that a juvenile committed a criminal offense, while the undisciplined complaint alleges non-criminal behavior (*e.g.*, running away, unlawful absences from school, incorrigible behavior within the home). For purposes of this study, only juveniles who had a delinquency complaint will be discussed.

Any juvenile who is subject to a delinquency complaint must go through the intake process for the complaint to be screened and evaluated by a DJJ court counselor. The court counselor has up to 30 days to determine if a complaint should be handled outside the court, or if a complaint should be filed as a petition and set for a hearing before a juvenile court judge. The length and extent of the intake process is based primarily on whether a juvenile is charged with one of the most serious, statutorily defined group of offenses (*i.e.*, nondivertible offenses²) and/or whether a juvenile is confined in a detention center. During the intake phase, a court counselor conducts interviews with the juvenile, the parent, guardian, or custodian legally responsible for the juvenile, and other individuals who might have relevant information about the juvenile. Beginning in 2006, the risk and needs assessment was incorporated into the intake process for use in the initial decision to approve or not approve a complaint for filing, as well as for use at disposition. These assessments contain information pertaining to the juvenile's social, medical, psychiatric, psychological, and educational history, as well as any factors indicating the probability of the juvenile engaging in future delinquency. (*See Appendix A.*) Upon reviewing the information gathered during the evaluation, the court counselor determines if the complaint should be closed, diverted, or approved for filing as a petition and brought before the court.

If the court counselor decides that a case does not require further action, either by some form of follow-up by a court counselor or through a court hearing, the case is deemed closed. The juveniles in closed cases are typically less problematic and generally have little, if any, history of delinquent behavior. Closed cases constitute the lowest point of involvement in the juvenile justice system.

When a court counselor determines that a juvenile's case should not be brought to court, but that the juvenile is in need of follow-up and referral to a community-based resource (*e.g.*, restitution, counseling), the counselor can then divert the juvenile pursuant to a diversion plan that is developed in conjunction with the juvenile and the juvenile's parent, guardian, or custodian. If a more formal diversion plan is needed, the court counselor, juvenile, and juvenile's

² Nondivertible offenses are defined in N.C. Gen. Stat. (hereafter G.S.) 7B-1701 as murder, first- or second-degree rape, first- or second-degree sexual offense, arson, felony drug offense under Article 5 of G.S. Chapter 90, first-degree burglary, crime against nature, or a felony involving the willful infliction of serious bodily injury or which was committed by use of a deadly weapon.

responsible party enter into a diversion contract. Both the plan and the contract are in effect for up to six months, during which time a court counselor conducts periodic reviews to ensure the compliance of the juvenile and his/her parent, guardian, or custodian. Compliance with the recommendations of the plan or contract results in the finalization of the juvenile's diversion. If the parties fail to comply, the counselor may re-evaluate the decision to divert and subsequently file the complaint as a petition in juvenile court.

If a court counselor concludes, at any point in the intake process, that the juvenile would be best served by referring the case to court, the counselor can authorize the filing of the complaint as a petition and schedule it for a hearing before a juvenile court judge.

Pre-Dispositional Hearings

Probable Cause Hearing³

Probable cause hearings are held for all felony petitions in which the juvenile was at least 13 years old at the time of the alleged offense. During these hearings, the district attorney's office must present sufficient evidence to the court that shows there is probable cause to believe that the alleged offense was committed by the juvenile in question. If probable cause is not found, the court may either dismiss the proceeding or find probable cause that the juvenile committed a lesser included offense (*e.g.*, a misdemeanor) and proceed to the adjudicatory hearing, which can immediately follow the probable cause hearing or be set for another date. If probable cause is found and transfer to superior court is not statutorily required (*i.e.*, non-Class A felonies), the court may proceed to a transfer hearing, which can occur on the same day.

Transfer Hearing

At the transfer hearing, the court considers a number of factors in reaching a decision on whether the juvenile's case will be transferred to superior court. If the case is transferred, the juvenile is tried as an adult and is subject to the adult sentencing options. If the judge retains juvenile court jurisdiction and does not transfer the juvenile to superior court, the case then proceeds to the adjudicatory hearing, which can immediately follow the transfer hearing or be set for a later date.

Adjudicatory Hearing

The adjudicatory hearing allows for the court to hear evidence from the district attorney, the juvenile's attorney, and their witnesses in order to make a determination of whether or not the juvenile committed the act(s) alleged in the petition(s). If the court finds that the allegations in the petition have not been proven "beyond a reasonable doubt," the petition is dismissed and the matter is closed. If the court finds that the allegations have been proven, the juvenile is adjudicated delinquent and the court proceeds to the dispositional hearing.

³ Prior to a probable cause hearing, juveniles with a felony petition are scheduled for a first appearance hearing during which a judge determines whether the juvenile has an attorney and provides the juvenile and parent or responsible party with information pertaining to the allegation and future hearings.

Dispositional Hearing

Overview of the Process

The dispositional hearing, which may or may not occur on the same date as the adjudicatory hearing, marks the part of the process in which the court decides the sanctions, services, and conditions that will be ordered for the juvenile as a result of the adjudicated offense(s). G.S. 7B-2500 states that the purposes of a disposition are “to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public.”

In most cases, juvenile court judges use the predisposition report, which is prepared by the court counselor’s office, in developing a disposition. Risk and needs assessments are attached to this report.

As shown in Table 1.1, the court’s selection of dispositional alternatives is governed by statute through a graduated sanctions chart that classifies juvenile offenders according to the seriousness of their adjudicated offense (vertical axis) and the degree and extent of their delinquent history (horizontal axis). (See Appendix B for more detailed information.)

Table 1.1
Juvenile Disposition Chart

Offense Classification	Delinquency History Level		
	Low 0 – 1 point	Medium 2 – 3 points	High 4 or more points
Violent Class A – E felonies	Level 2 or 3	Level 3	Level 3
Serious Class F – I felonies Class A1 misdemeanors	Level 1 or 2	Level 2	Level 2 or 3
Minor Class 1 – 3 misdemeanors	Level 1	Level 1 or 2	Level 2

Once the court has determined the offense classification and the delinquency history level for the juvenile, the dispositional level can be ascertained. Each cell within the juvenile disposition chart authorizes one or more dispositional levels for a particular combination of offense classification and delinquency history level. There are three different dispositional levels – Level 1, Level 2, and Level 3 – each of which offers its own list of dispositional alternatives.

Dispositional Alternatives

Level 1 (Community)

A Level 1 or community disposition offers the court less restrictive dispositional alternatives such as probation, community-based programs, non-residential and residential treatment programs, lower degrees of community service and restitution, and sanctions that place specific limitations on a juvenile (*e.g.*, curfew, no association with specified persons, not be in specified places). (See Appendix C for a complete list of dispositional alternatives for all three levels.) It is noteworthy that many of the community-based programs for adjudicated youth who can receive a Level 1 or 2 disposition are funded through Juvenile Crime Prevention Council (JCPC) allocations.

Level 2 (Intermediate)

Level 2 or intermediate dispositions are generally more restrictive than Level 1 dispositions. Level 2 dispositional alternatives include options such as intensive probation, group home placements (*e.g.*, multipurpose group homes), regimented training programs, and house arrest. For Level 2 dispositions, a juvenile can be ordered to make restitution that is in excess of \$500 or perform up to 200 hours of community service. The court can also utilize any Level 1 dispositional option for a juvenile adjudicated at Level 2.

Several Level 2 options that offer a more restrictive environment for adjudicated juveniles are available for Level 1 dispositions as well. Wilderness programs serve juveniles with behavioral problems in a year-round, residential therapeutic environment.⁴ Supervised day programs, which allow a juvenile to remain in the community through a highly structured program of services, also represent an alternative that is available at both Level 1 and Level 2 dispositional levels.

An even more restrictive option is available for Level 1 or 2 dispositions in the form of intermittent confinement in a detention center. Detention centers are facilities that are approved to provide secure, temporary confinement and care for juveniles who meet statutorily defined criteria.⁵ The court can impose intermittent confinement for no more than five 24-hour periods as part of a Level 1 disposition. When a Level 2 disposition is authorized, the court can impose confinement on an intermittent basis for up to fourteen 24-hour periods. Because of the short-term nature of detention, programs and services offered in these centers are limited.

Level 3 (Commitment)

A Level 3 or commitment disposition provides the most restrictive sanction available to a juvenile court judge, commitment to the DJJ for placement in a Youth Development Center

⁴ The wilderness camps serve a diverse group of juveniles, including those displaying problematic behavior who are not court-involved.

⁵ In addition to utilizing a detention placement as a dispositional alternative, juveniles can also be detained by the court pending their adjudicatory or dispositional hearing, or their adult hearing following the transfer of the case from juvenile court.

(YDC). A YDC, as defined in G.S. 7B-1501(29), is “a secure residential facility authorized to provide long-term treatment, education, and rehabilitative services for delinquent juveniles committed by the court to the Division [DJJ].” Unless a youth is under the age of 10, a court exercising jurisdiction over a juvenile for whom a Level 3 disposition is authorized must commit the juvenile to the DJJ for placement in a YDC.⁶ However, G.S. 7B-2513(e) states that the DJJ, following assessment of a juvenile, may provide commitment services to the juvenile in a program not located in a YDC or detention facility (*i.e.*, community placement). Another exception gives the court discretion to impose a Level 2 disposition rather than a Level 3 disposition if the court makes written findings that substantiate extraordinary needs on the part of the juvenile in question.

The length of a juvenile’s commitment must be at least six months; however, there are statutory provisions for extended jurisdiction for committed youth.⁷ Upon completion of their term of commitment, juveniles are subject to a minimum of 90 days of post-release supervision. The DJJ currently houses approximately 250 committed juveniles in four YDCs.

JUVENILE RECIDIVISM RESEARCH DESIGN

The research design for the 2013 biennial juvenile recidivism study was first specified in the Sentencing Commission’s “Report on the Proposed Methodology for Measuring Juvenile Recidivism in North Carolina” to the General Assembly.⁸ Based on that blueprint, the research strategy for the current study included:

- The selection of a population of juveniles brought to court with a delinquent complaint adjudicated, dismissed, diverted, or closed during the sample period of July 1, 2008 through June 30, 2009.
- The tracking of all juveniles in the sample for a fixed three-year follow-up period from their first court involvement in the sample period.
- The definition of recidivism as all subsequent delinquent complaints and adult arrests within the three years following the first event date that placed the juvenile in the sample.

It should be noted that this methodology expands the study beyond its legislatively mandated scope. Juveniles adjudicated delinquent are studied within the context of all juveniles who were the subject of a delinquent complaint in FY 2008/09, and the sample is followed for a three-year period to capture their delinquent and criminal re-involvement.

⁶ Pursuant to G.S. 7B-2508(d), a court may impose a Level 3 disposition (commitment to a YDC) in lieu of a Level 2 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action. Additionally, G.S. 7B-2508(g) allows for juveniles who have been adjudicated of a Minor offense to be committed to a YDC if the juvenile has been adjudicated of four or more prior offenses.

⁷ G.S. 7B-2513(a).

⁸ North Carolina Sentencing and Policy Advisory Commission, *Report on the Proposed Methodology for Measuring Juvenile Recidivism in North Carolina Pursuant to Session Law 2004-124, Section 16.5*, Raleigh, NC: North Carolina Sentencing and Policy Advisory Commission, 2005.

Sample

There were 17,660 juveniles identified in the DJJ's automated database who had their delinquent complaint either adjudicated, dismissed, diverted or closed without further action between July 1, 2008 and June 30, 2009. The three-year fixed follow-up was calculated individually for each juvenile from the date of the event that prompted their inclusion in the sample. If a juvenile had more than one sample event during the sample period, his/her case was grouped based on the earliest of these events. If a juvenile had two or more court events on the same day, the most serious of these events was counted as the prompt for inclusion in the sample.

Applying these criteria, the 17,660 sample juveniles were divided into four groups based on their level of involvement for their first court event: juveniles with cases adjudicated (n=5,826), dismissed (n=2,117), diverted (n=5,014), or closed (n=4,703).

Outcome Measures

The primary outcome measure of recidivism was defined as either a delinquent juvenile complaint or an adult arrest that occurred within the three-year follow-up subsequent to the initial event. Additional measures of recidivism included the offense severity of recidivistic events, as well as subsequent adjudications and convictions.

Data Sources and Enhancements

Information for this report was collected from two sources:

- North Carolina Juvenile Online Information Network (NC-JOIN) – the DJJ's management information system contains data on all juveniles brought to court with delinquent and undisciplined complaints received in a juvenile court counselor office; their demographic and social history information; sample offense and disposition; and prior and subsequent involvement in the juvenile justice system.⁹
- North Carolina Department of Justice (DOJ) automated database – the Computerized Criminal History (CCH) system – includes information on fingerprinted adult arrests and convictions for the sample subjects.¹⁰

⁹ DJJ's NC-JOIN data that were used to determine the most serious delinquent activity alleged in the complaint (*i.e.*, sample offense), prior delinquent complaints/adjudications, and subsequent complaints/adjudications include all felonies and misdemeanors. These data exclude infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included.

¹⁰ DOJ's CCH data were used to determine recidivist arrests and convictions in North Carolina. Recidivist arrests were defined as fingerprinted arrests that occurred after a juvenile in the sample turned 16 years old. Although North Carolina's local law enforcement jurisdictions are required to fingerprint all felonies and only the more serious misdemeanors, most misdemeanor arrests have been consistently fingerprinted across the state. This report includes Class A1 through Class 3 misdemeanor arrests and convictions. Similar to the data extracted from DJJ's NC-JOIN, the data exclude infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included.

The final data set for this study consists of over 150 items of information (or variables) for the sample of 17,660 juveniles. A case profile was constructed for each juvenile, comprised of personal and delinquency history characteristics, the most serious current delinquent complaint, the outcome of that complaint (*e.g.*, adjudicated, dismissed, diverted, or closed), and re-involvement with the juvenile justice system (*i.e.*, subsequent complaints and adjudications) or criminal justice system (*i.e.*, adult arrest and conviction).

In addition to elements included in the Sentencing Commission's prior reports, several enhancements were made to the data provided in this report:

- Measures of prior juvenile justice activity are included in the analysis of delinquency history. These measures include prior delinquent complaints, prior adjudications, prior detention center admissions, and prior Youth Development Center commitments.
- This study included Risk and Needs Assessments administered to juveniles during the intake process for all four of the sample groups.

ANALYSIS AND REPORT OUTLINE

Chapter Two provides a basic statistical profile of the juveniles whose cases were adjudicated delinquent, dismissed, diverted, or closed in North Carolina between July 1, 2008 and June 30, 2009. It also describes the sample in terms of risk and needs as determined by the Risk and Needs Assessments.

Chapter Three describes the sample's subsequent (*i.e.*, recidivistic) involvement in the juvenile and criminal justice systems during the three-year follow-up period.

Finally, Chapter Four summarizes the findings of the report and offers some policy implications and conclusions.

CHAPTER TWO

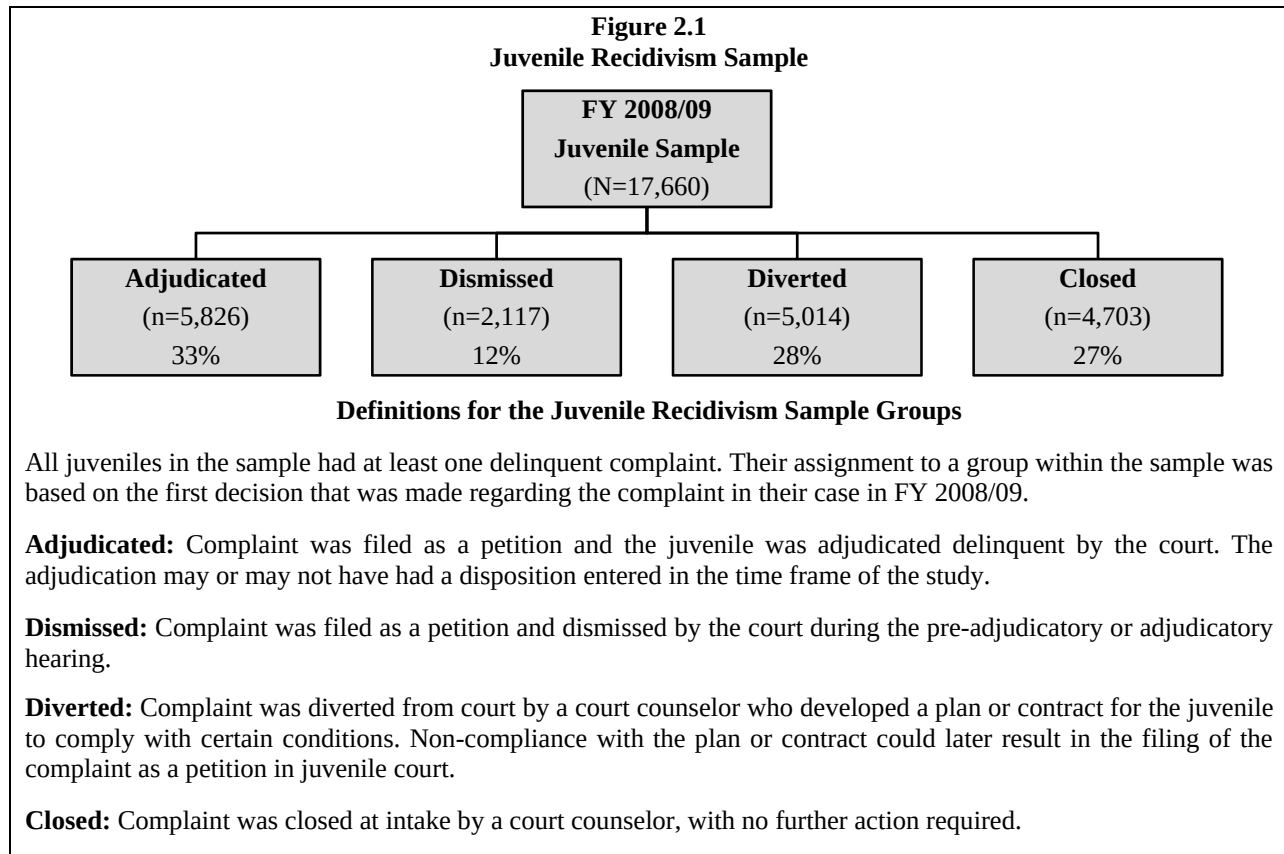
STATISTICAL PROFILE OF THE FY 2008/09 JUVENILE SAMPLE

This chapter profiles a cohort of juveniles processed through North Carolina's juvenile justice system from July 1, 2008 through June 30, 2009. The chapter describes the sample selection process and provides a statistical profile of the juvenile sample.

SAMPLE SELECTION

All of the 17,660 juveniles studied in the sample were brought to the attention of the juvenile justice system with at least one delinquent complaint. Based on the first decision that was made regarding their case in FY 2008/09, they were assigned to one of four levels of involvement – juveniles with complaints that were adjudicated, dismissed, diverted, or closed.¹¹ If more than one decision or event occurred on the same day, the juvenile was assigned to a group based on the most serious event, as determined by the level of involvement in the system from a closed case (least serious) to diversion, dismissal, and adjudication (most serious).

As shown in Figure 2.1, there were 5,826 juveniles in the sample whose cases were adjudicated, 2,117 juveniles whose cases were dismissed, 5,014 juveniles whose cases were



¹¹ See Appendix D for additional information about juveniles who were adjudicated and disposed and Appendix E for additional information about juveniles who were diverted.

diverted, and 4,703 juveniles whose cases were closed during the sample period. The information available for all four sample groups included basic demographic data, delinquency history, offense charges, and risk and needs assessments.

PERSONAL CHARACTERISTICS

Table 2.1 presents the distribution of the demographic characteristics for the closed, diverted, dismissed, and adjudicated groups. At the time of their alleged delinquent act, the juveniles' mean age was 13.6 years, with a median of 14.0 years. The majority of juveniles (64.3%) were 14 or 15 years old when the offense occurred. The adjudicated group had a slightly lower proportion of juveniles nine years or younger and a higher proportion of juveniles 14 years and older.

Table 2.1
Demographic Profile of Juveniles by Level of Involvement

Demographic Profile	Level of Involvement				All	
	Adjudicated n=5,826	Dismissed n=2,117	Diverted n=5,014	Closed n=4,703	N=17,660	
Gender	%	%	%	%	#	%
Male	78.7	73.7	68.3	65.3	12,642	71.6
Female	21.3	26.3	31.7	34.7	5,018	28.4
Race^a	%	%	%	%	#	%
Black	50.7	56.3	45.9	52.6	8,924	50.5
White	37.9	32.4	44.0	36.2	6,801	38.5
Latino	6.3	5.7	5.5	6.6	1,074	6.1
Other/Unknown	5.1	5.6	4.6	4.6	861	4.9
Age at Offense						
Mean	13.9	13.6	13.5	13.5	13.6	
Median	14.0	14.0	14.0	14.0	14.0	
Age at Offense	%	%	%	%	#	%
6-9 Years	1.1	3.0	3.5	4.2	499	2.8
10 Years	1.1	2.5	2.3	2.1	337	1.9
11 Years	3.5	4.4	5.0	5.3	796	4.5
12 Years	8.7	8.7	11.8	9.0	1,707	9.7
13 Years	16.9	17.3	17.8	15.5	2,971	16.8
14 Years	28.3	26.5	27.5	26.7	4,842	27.4
15 Years	40.4	37.6	32.1	37.2	6,508	36.9

^a Due to low percentages, American Indian, Asian, and multi-racial juveniles were combined with other/unknown into one category.

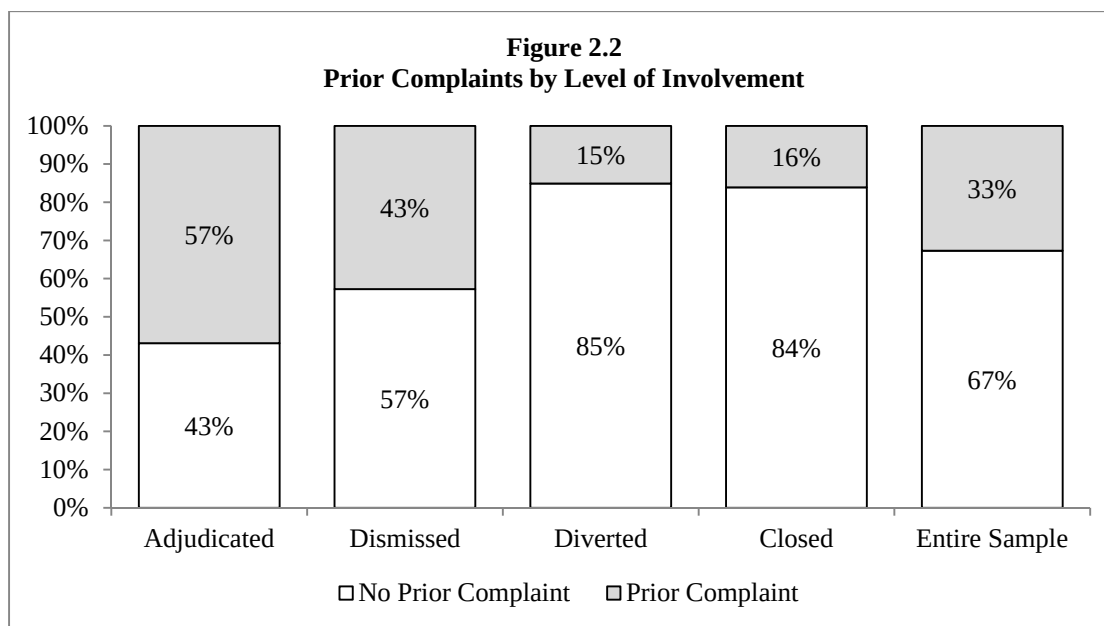
Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Almost 72% of the sample juveniles were male. Adjudicated juveniles had the highest percentage of males at 78.7% while the juveniles whose cases were closed had the lowest percentage of males at 65.3%.

Almost 51% of the juveniles in the sample were black, 38.5% were white, 6.1% were Latino, and 4.9% were identified as other or unknown. The dismissed group had the highest percent of black juveniles (56.3%), while the diverted group had the lowest percent (45.9%).

DELINQUENCY HISTORY

It is important to look at whether or not juveniles in the sample had contact with the juvenile justice system prior to their entry into the sample to gain an understanding of the juveniles' frequency of interaction with the system.¹² Figure 2.2 and Table 2.2 contain information on the juvenile's prior delinquent complaints by level of current involvement. Overall, 33% of the juveniles had at least one delinquent complaint prior to sample entry. Fifty-seven percent of the adjudicated juveniles, the highest percentage compared to the other groups, had at least one prior complaint. Forty-three percent of the dismissed juveniles had a prior complaint. Both the adjudicated and dismissed groups had substantially higher percentages of juveniles with a prior complaint than the diverted and closed groups at 15% and 16% respectively. It should be noted that a possible reason for the adjudicated and dismissed groups having higher percentages of juveniles with a prior complaint than the diverted and closed groups is due to the relationship between a juvenile having a prior complaint and having their case referred to court.



Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

¹² For the purposes of this report, the term “prior complaint” refers to the most serious delinquent activity alleged in the complaint for the adjudicated, dismissed, diverted, or closed groups. Infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses were excluded from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included. Prior complaints, adjudications, and detention admissions occurred prior to the date the delinquent complaint was received that placed the juvenile in the sample.

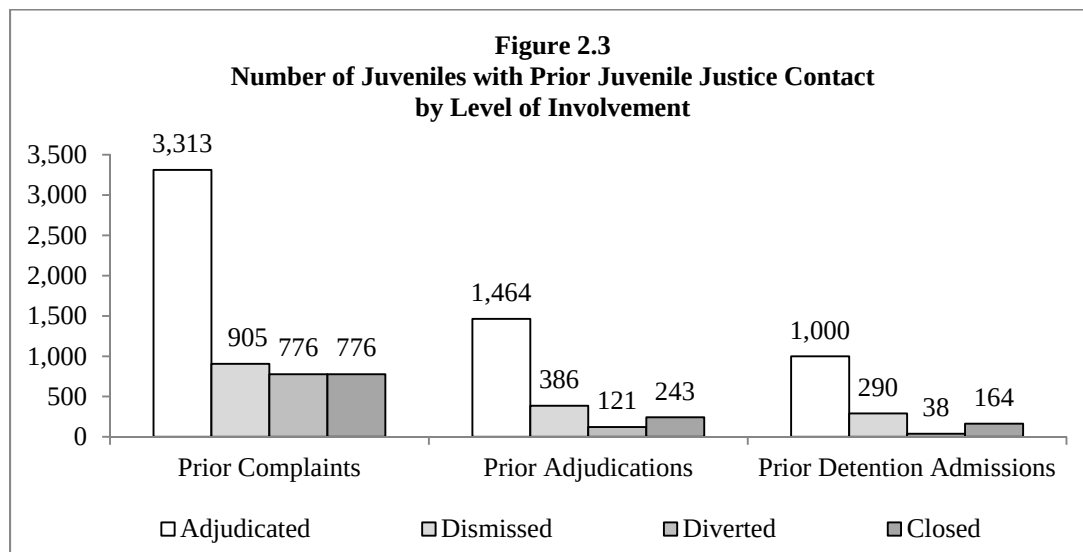
To examine the length of time available for the juveniles to have prior contact with the juvenile justice system, Table 2.2 contains the percentage of juveniles with at least one prior contact by the age at sample event. As expected, the younger juveniles, six to nine years at sample entry, had fewer prior complaints filed (8.3%) compared to the older juveniles – 36.4% for 14 to 15 year olds and 51.8% for those 16 years and over. This finding holds true regardless of the level of involvement.

Table 2.2
Prior Complaints by Age at Sample Event and Level of Involvement

Level of Involvement	N	Overall % with a Prior Compl.	% with at Least One Prior Complaint by Age at Sample Event				
			6-9 Years n=435	10-11 Years n=1,004	12-13 Years n=4,188	14-15 Years n=10,690	16+ Years n=1,343
Adjudicated	5,826	56.9	20.0	41.2	46.1	60.9	62.9
Dismissed	2,117	42.8	14.3	18.0	28.8	46.7	58.1
Diverted	5,014	15.5	7.6	7.4	11.3	18.3	28.6
Closed	4,703	16.5	5.0	6.3	11.0	19.6	27.0
TOTAL	17,660	32.7	8.3	15.4	23.6	36.4	51.8

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

In addition to the prior complaints, the prior juvenile justice contact measures included adjudications, YDC commitments, and detention admissions. Figure 2.3 provides the number of juveniles by the type of prior juvenile justice contact and by level of involvement. More



Note: Detention admissions include both pre- and post-adjudication detention.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

adjudicated juveniles had experienced prior contacts with the juvenile justice system than the other three groups, whether it was complaints, adjudications or detention admissions. Overall, the diverted group had the least number of juveniles with any prior delinquent activity. The figure does not report prior YDC commitments due to the low number of juveniles with a prior YDC commitment. Only 59 juveniles out of the 17,660 in the sample were committed to a YDC by DJJ prior to sample entry – 33 of the adjudicated, 18 of the dismissed, two of the diverted, and six of the closed group.

DJJ SUPERVISION

Eight percent of the 17,660 juveniles in the sample were under some type of DJJ supervision at the time the alleged sample delinquent act was committed (see Table 2.3). The adjudicated and dismissed juveniles whose cases penetrated further into the juvenile justice system were more likely to be under DJJ supervision (18.2% and 12.7% respectively) than the juveniles who had their cases diverted or closed (0.4% and 2.4% respectively). As previously seen in the prior complaints findings, there is a relationship between those juveniles referred to court and having prior contact with the juvenile justice system (*e.g.*, under DJJ supervision).

Table 2.3
Under DJJ Supervision at the Time of Sample Offense by Level of Involvement

DJJ Supervision at the Time of Sample Offense	Level of Involvement				All	
	Adjudicated n=5,826	Dismissed n=2,117	Diverted n=5,014	Closed n=4,703	N=17,660	
	%	%	%	%	#	%
Under Supervision	18.2	12.7	0.4	2.4	1,459	8.3
Not Under Supervision	81.8	87.3	99.6	97.6	16,201	91.7

Note: DJJ supervision includes YDC commitment, probation supervision, post-release supervision, continuation of services, protective supervision, or other situations where a court counselor provides supervision and service for a juvenile.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

MOST SERIOUS SAMPLE OFFENSE

A comparison of the groups with respect to their offense profile is provided in Table 2.4. The most serious delinquent activity alleged in the complaint was used to compare juveniles whose cases were closed, diverted, dismissed, or adjudicated.¹³

¹³ For the purposes of this report, the term “sample offense” refers to the most serious delinquent activity alleged in the complaint for the adjudicated, dismissed, diverted, or closed groups. Infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses were excluded from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included.

Table 2.4
Most Serious Sample Offense by Level of Involvement

Most Serious Sample Offense	Level of Involvement				All	
	Adjudicated n=5,826	Dismissed n=2,117	Diverted n=5,014	Closed n=4,703	N=17,660	
	%	%	%	%	#	%
Offense Type						
Felony	29.6	20.4	3.0	1.6	2,380	13.5
Misdemeanor	70.4	79.6	97.0	98.4	15,280	86.5
Offense Classification						
Violent	4.3	2.7	0.0	0.0	311	1.8
Serious	34.0	24.4	8.7	5.6	3,195	18.1
Minor	61.7	72.9	91.3	94.4	14,154	80.1

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Almost 87% of the 17,660 juveniles had a misdemeanor as their most serious sample offense. Felonies comprised 29.6% and 20.4%, respectively, of the offenses for the adjudicated and dismissed groups, but only 3.0% and 1.6%, respectively, of the offenses for the diverted and closed groups. Overall, 1.8% of the sample were charged with violent offenses (felony offense classes A through E), 18.1% were charged with serious offenses (felony offense classes F through I and misdemeanor class A1), and 80.1% were charged with minor offenses (misdemeanor classes 1 through 3).¹⁴ None of the juveniles with closed or diverted cases were charged with violent offenses and only a small percentage were charged with serious offenses. These findings reflect both legal and court counselor considerations such as continued court involvement for nondivertible and other serious felonies with further penetration in the juvenile justice system, and closing the case or seeking diversion for those juveniles with less serious offenses (especially those charged with misdemeanors).

RISK AND NEEDS ASSESSMENTS

DJJ staff administers risk and needs assessments to all juveniles to assess the risk of future delinquency and the individual needs of all juveniles during the intake process.¹⁵ Table 2.5

¹⁴ See Chapter One and Appendix B for a discussion of offense classifications in the Juvenile Disposition Chart.

¹⁵ Prior to 2006, only the juveniles adjudicated were required to have these assessments completed. See Appendix A for a copy of the North Carolina Assessment of Juvenile Risk of Future Offending and the North Carolina Assessment of Juvenile Needs instruments. See Appendix A for information on the number and percentage of juveniles with a risk and/or needs assessment for the sample. Overall, 84.2% of the juveniles had a completed risk and/or needs assessment. Most juveniles adjudicated (96.5%) and juveniles diverted (88.4%) had a risk and/or needs assessment completed. Fewer juveniles dismissed (73.3%) and juveniles closed (69.5%) had completed risk and/or

Table 2.5
Select Risk and Needs Indicators

Risk Assessment	Adjudicated n=5,498 %	Dismissed n=1,520 %	Diverted n=4,335 %	Closed n=3,195 %	All N=14,548 %
First Referral Before Age 12	12.5	14.7	11.9	13.2	12.7
Prior Intake Referrals	51.5	43.0	16.6	18.5	33.0
Prior Adjudications	29.3	21.9	3.3	5.5	15.5
Prior Assaults	23.6	20.9	9.8	9.8	16.2
Had Run Away	16.5	13.3	3.9	3.3	9.5
Had School Behavior Problems	89.5	82.4	81.1	75.1	83.1
Parents/Guardians Unwilling/Unable to Provide Parental Supervision	28.6	22.4	7.3	5.8	16.6
Needs Assessment	n=5,597 %	n=1,531 %	n=4,263 %	n=3,179 %	N=14,570 %
Functioning Below Academic Grade Level	18.9	14.7	9.1	7.5	13.1
Juvenile Parent Status (<i>i.e.</i> , is a parent)	1.1	1.2	0.5	0.8	0.8
History of Victimization	20.4	14.9	11.5	8.5	14.6
Risky Sexual Behavior	10.1	7.2	2.6	1.4	5.7
Mental Health Needs Are Being Addressed	75.7	57.0	49.2	31.1	56.3
Basic Needs Are Not Being Met	0.7	0.4	0.1	0.1	0.4
Impaired Functioning (<i>i.e.</i> , medical, dental, health/hygiene)	0.8	0.5	0.4	0.4	0.6
Conflict in the Home	27.9	21.8	11.2	7.0	17.8
Parent, Guardian or Custodian has Disabilities	5.0	4.8	2.5	1.7	3.5
One or More Members of Household Have Substance Abuse Problems	12.8	10.8	6.3	3.6	8.7
Indication of Family Members Involvement in Criminal Activity	42.8	34.9	26.5	21.7	32.6
Combined Risk and Needs Measures	n=5,619 %	n=1,551 %	n=4,431 %	n=3,269 %	N=14,870 %
Substance Use	40.5	29.5	20.4	12.3	27.1
Gang Affiliation	13.5	10.1	3.4	2.5	7.7
Negative Peer Relationships	79.6	71.8	50.9	39.2	61.4

Note: There were 3,112 juveniles with missing risk assessments, 3,090 juveniles with missing needs assessments, and 2,790 juveniles missing risk and/or needs assessments for the combined risk and needs measures.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

needs assessments; therefore, some caution should be taken when interpreting the risk and needs findings for these two groups. For this report, risk and/or needs assessments were analyzed if the assessment was completed within a year of the date the complaint was received. Eighty-one percent of the juveniles with a risk and/or needs assessment had their assessment completed within 30 days.

lists select results of the assessments for the four groups and for the sample. Most notable among the risk factors, 83.1% of the juveniles had school behavior problems, 33.0% had at least one prior intake referral, 16.2% had at least one prior assault, and 16.6% had parents/guardians who were unwilling or unable to provide parental supervision. In general, the adjudicated and dismissed groups had more risk factors than the diverted and closed groups. For two of the risk indicators, having a first referral before age 12 and having school behavior problems, all four groups were similar in their risk behavior.

The needs assessment revealed that very few juveniles had basic needs that were not being met (0.4%). Most juveniles identified with mental health needs were having those needs addressed (56.3%). Problems related to home-life were also evident, with 32.6% of the juveniles having criminality in their family, 17.8% experiencing conflict in the home, and 14.6% having some history of victimization. As seen with the risk indicators, the adjudicated and dismissed groups had more needs than the diverted and closed groups, with the adjudicated group having the highest percentage for all the needs indicators compared to the other groups.

Combining risk and needs indicators, 27.1% of the juveniles had substance abuse problems, while 61.4% had negative peer relationships and 7.7% reported some type of gang affiliation. Again, adjudicated juveniles had a greater proportion of juveniles with higher risk and needs indicators compared to the other three groups.

Using the assessment instruments, separate risk and needs scores were computed for each juvenile, placing the juvenile in a low, medium, or high level for both risk and needs. Table 2.6 contains the risk and needs levels for each group and for the entire sample. Overall, there were

Table 2.6
Risk Level and Needs Level by Level of Involvement

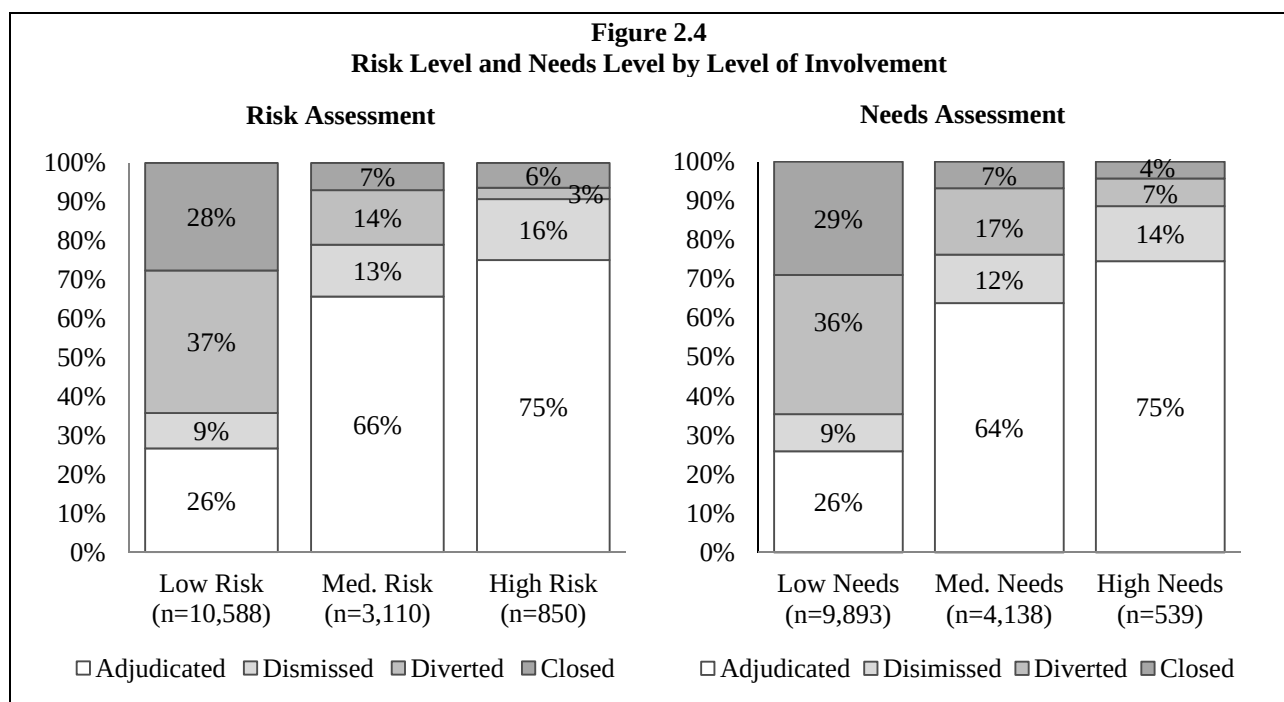
	Level of Involvement				Total
	Adjudicated	Dismissed	Diverted	Closed	
Risk Level	n=5,798 %	n=1,520 %	n=4,335 %	n=3,195 %	N=14,548 %
Low	51.3	64.0	89.4	91.5	72.8
Medium	37.1	27.2	10.1	6.8	21.4
High	11.6	8.8	0.6	1.7	5.8
Needs Level	n=5,597 %	n=1,531 %	n=4,263 %	n=3,179 %	N=14,570 %
Low	45.7	61.6	82.6	90.4	67.9
Medium	47.1	33.4	16.5	8.9	28.4
High	7.2	5.0	0.9	0.7	3.7

Note: There were 3,112 juveniles with missing risk assessments and 3,090 juveniles with missing needs assessments.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

few juveniles that were high risk or high needs (5.8% and 3.7% respectively). Almost two-thirds of the juveniles were low risk or low needs (72.8% and 67.9% respectively). Fewer adjudicated and dismissed juveniles were low risk and more were high risk than the diverted and closed juveniles; the same trend was found with the needs level.

For assessed juveniles, Figure 2.4 examines the composition of the risk and needs levels by level of involvement. Of the juveniles assessed as being low risk, the majority (37%) were diverted. Adjudicated juveniles comprised the majority of the juveniles in the medium and high risk levels (66% and 75% respectively). Juveniles whose cases were closed represented the lowest percentage of medium risk juveniles (7%), while those who were diverted represented the lowest percentage of high risk juveniles (3%). A similar pattern was found with the composition of the needs level.



Note: There were 3,112 juveniles with missing risk assessments, and 3,090 juveniles with missing needs assessments.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Sixty-one percent of the juveniles scored in the lowest levels of both needs and risk (61.2%), and only a small group (1.6%) demonstrated both a high level of needs and risk. (See Table 2.7.) Seventy-six percent of the sample placed in the same level of needs and risk (as highlighted in the shaded diagonal cells of Table 2.8). Upon closer examination of the low risk and low needs juveniles (61.2%), there were differences by level of involvement. Fewer adjudicated juveniles (35.7%) were low risk and low needs compared to 51.6% of the dismissed, 78.7% of the diverted, and 87.6% of the closed sample.

Table 2.7
Risk Level by Needs Level

Risk Level	N	Needs Level			% Total n=14,248
		% Low n=9,682	% Medium n=4,039	% High n=527	
Low	10,324	61.2	10.9	0.4	72.5
Medium	3,079	6.3	13.6	1.7	21.6
High	845	0.5	3.9	1.6	5.9
TOTAL	14,248	68.0	28.3	3.7	100.0

Note: For this table, there were 3,412 juveniles missing either a risk or needs assessment.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

CHAPTER SUMMARY

The following bulleted items highlight the key findings in Chapter Two:

- The 17,660 juveniles comprising the FY 2008/09 sample were grouped based on their level of involvement in the juvenile justice system. The four levels, ranked from most to least serious, included juveniles whose cases were either adjudicated (n=5,826), dismissed (n=2,117), diverted (n=5,014), or closed (n=4,703).
- Of the sample juveniles, 71.6% were male, 50.5% were black, and the mean age was 13.6 years.
- Thirty-three percent of the juveniles had at least one delinquent complaint prior to sample entry. Juveniles adjudicated had the highest prior juvenile justice contact (57%) compared to the other three groups. As expected, examination of the juvenile's age at sample entry and prior delinquent history revealed that older juveniles (14 years and older) had the highest percentage of juveniles with a prior delinquent complaint.
- Most juveniles (86.5%) had a misdemeanor as their most serious sample offense. Few juveniles were charged with a violent offense (1.8%) or with a serious offense (18.1%); the majority were charged with a minor offense (80.1%).
- Few juveniles were assessed as being high risk (5.8%) or high needs (3.7%). Most were low risk (72.8%) or low needs (67.9%). For the assessed juveniles, the juveniles adjudicated comprised the majority of medium and high risk as well as the medium and high needs.

The next chapter provides the recidivism results for the FY 2008/09 juvenile sample.

CHAPTER THREE

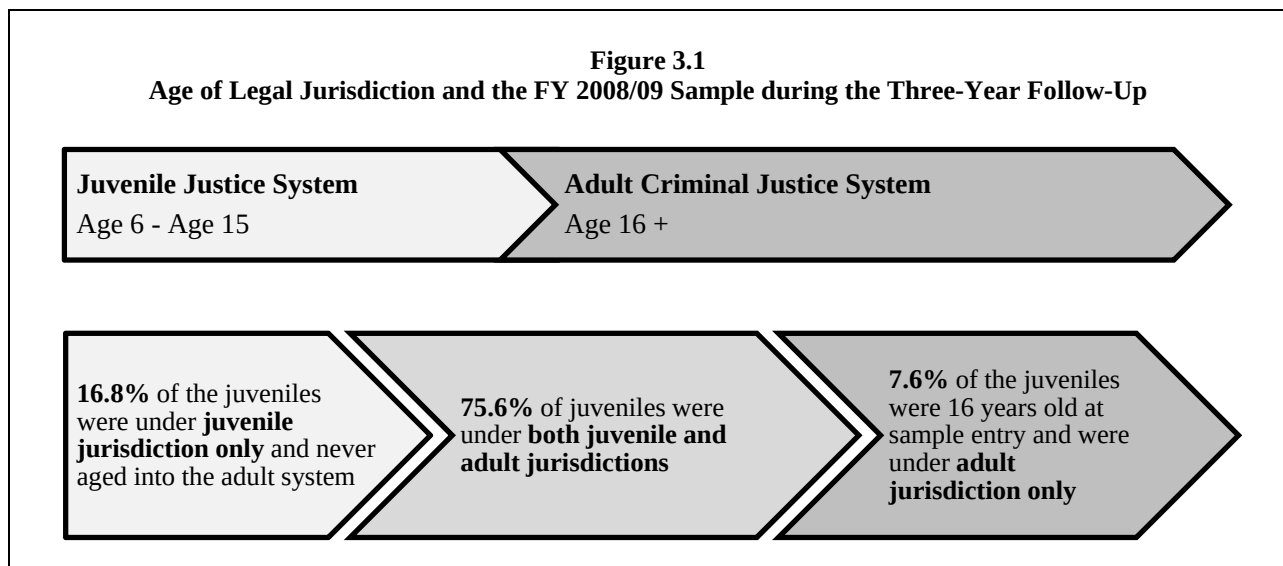
RECIDIVISM IN THE JUVENILE JUSTICE AND CRIMINAL JUSTICE SYSTEMS

Juveniles in the FY 2008/09 sample were tracked in the juvenile justice system and/or the adult criminal justice system to determine whether they re-offended during the three-year follow-up. The primary measures of recidivism for this study were delinquent juvenile complaints and fingerprinted adult arrests that occurred subsequent to the FY 2008/09 event placing the juvenile in the sample.

FOLLOW-UP PERIOD AND TIME AT RISK

Each juvenile in the sample was followed for a period of three years to determine whether subsequent involvement with the juvenile justice or adult criminal justice systems occurred. The follow-up period was calculated individually by using the date a decision (*e.g.*, diversion, adjudication) was reached in the juvenile's case as the starting point.

Given that the age of adult jurisdiction in North Carolina is 16 years, a large number of juveniles in the FY 2008/9 sample reached the age of criminal responsibility during the three-year follow-up. Most juveniles (75.6%) spent at least a portion of the three-year follow-up under both juvenile and adult jurisdiction (*see* Figure 3.1). Another 16.8% of the juveniles remained solely under the jurisdiction of the juvenile justice system for the entire three-year period and

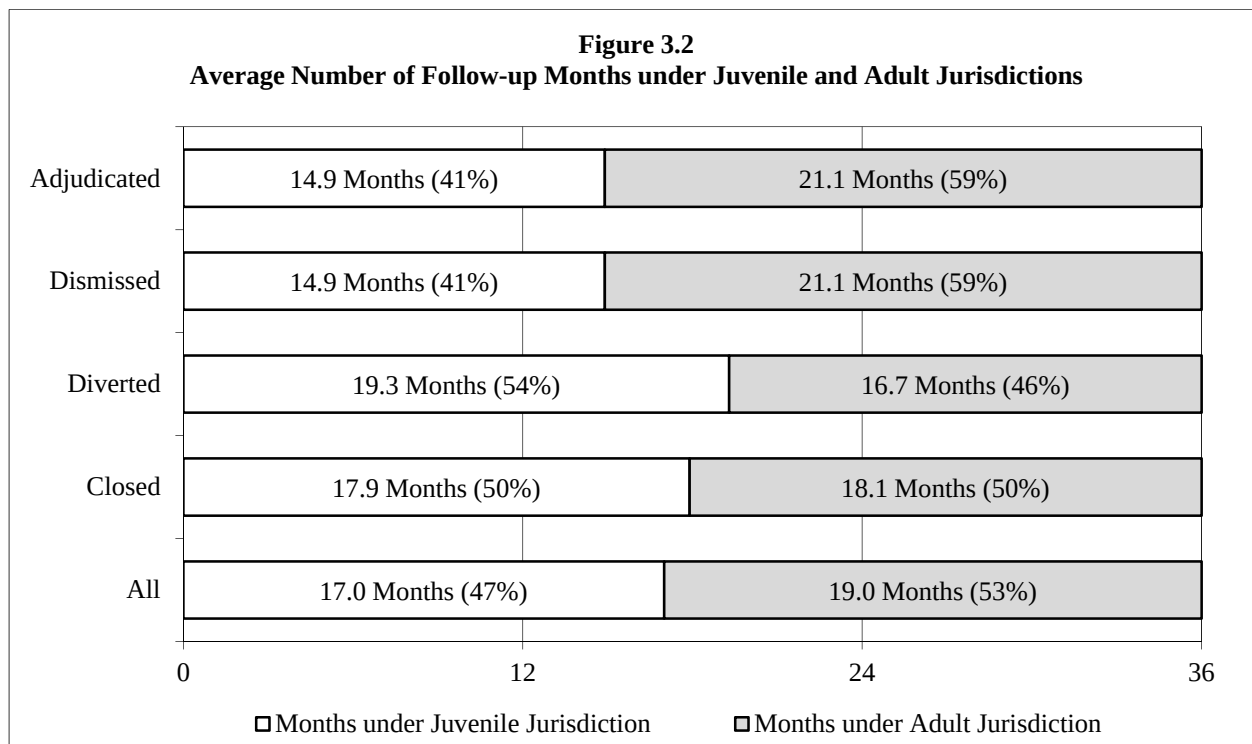


Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

were never under adult jurisdiction. A smaller portion of the juveniles (7.6%) had already turned 16 years old at sample entry and were under adult jurisdiction for their entire three-year follow-up. In examining recidivism as an overall measure, each juvenile – whether under juvenile or adult jurisdiction – was followed for a three-year period for any new encounter (complaint, arrest, or both). In addition, a separate measure of subsequent juvenile complaints was examined for those sample subjects who were under juvenile jurisdiction at least some of the time, and a

measure of adult arrests was computed for those sample subjects who were under adult jurisdiction at least some of the time.

Figure 3.2 provides information on the time at risk of recidivating spent as a juvenile and as an adult during the three-year follow-up. The sample as a whole was at risk to be processed in the juvenile justice system for an average of 17.0 months, or 47% of the 36 follow-up months and was at risk to be charged as an adult in the criminal justice system for an average of 19.0 months, or 53% of the total follow-up months. Based on their age distribution (see Table 2.1 in Chapter 2.), juveniles whose cases were diverted or closed were younger and had a shorter average time at risk as adults (16.7 and 18.1 months respectively) than juveniles whose cases were adjudicated or dismissed (both at 21.1 months).



Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

A fixed follow-up period was used in an attempt to obtain the same “window of opportunity” for each juvenile to re-offend. However, in actuality the window of opportunity was not necessarily similar for each sample subject – some may have been committed to a YDC¹⁶ or admitted to a detention center in the juvenile justice system, while others may have been incarcerated in local jails or in prison in the adult criminal justice system.

¹⁶ Confinement in a YDC, averaging 13.0 months, reduced the time at risk for recidivism, especially during the juvenile portion of the follow-up. See North Carolina Sentencing and Policy Advisory Commission’s *Juvenile Delinquent Population Projections Fiscal Year 2012/13 to Fiscal Year 2016/17*, 2012.

JUVENILE AND ADULT RECIDIVISM

Subsequent delinquent complaints (also referred to as “subsequent complaints”) were used as the primary measure for juvenile recidivism, supplemented with information on subsequent adjudications that resulted from those recidivist complaints.¹⁷ A subsequent delinquent complaint had to occur after the start date of the three-year follow-up period, and the juvenile had to have committed the alleged offense before age 16 in order for the complaint to be considered recidivism. Subsequent adjudications resulting from those complaints also had to conform to those time constraints in the follow-up.¹⁸ In addition, juveniles had to be at risk in the juvenile justice system; therefore, 1,352 juveniles were excluded from the juvenile recidivism analysis because they had already aged out of the juvenile justice system at the start of the follow-up.

Arrests were used as the primary measure for adult recidivism, supplemented with information on convictions.¹⁹ Adult arrests had to occur within the three-year follow-up and the date of arrest had to occur after the juvenile turned 16 years old in order to be counted as recidivism.²⁰ Convictions were defined similarly, and the arrest leading to the conviction also must have occurred in the follow-up period. In addition, juveniles had to be at risk in the adult criminal justice system; therefore, 2,960 juveniles were excluded from the adult recidivism analysis because they were under juvenile jurisdiction for the entire follow-up period.

Finally, a combined measure of subsequent juvenile complaints and/or adult arrests was compiled to indicate any recidivistic involvement in either system, which was supplemented by a similar measure for subsequent juvenile adjudications and/or adult convictions.²¹ All 17,660 sample juveniles were included in analyzing overall recidivism.

¹⁷ DJJ’s NC-JOIN data that were used to determine subsequent complaints/adjudications include all felonies and misdemeanors. These data exclude infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included.

¹⁸ Throughout the report, the term “subsequent adjudications” is used. This term refers to adjudications during the three-year follow-up for juveniles who have no prior adjudications, as well as for those who have prior adjudications.

¹⁹ DOJ’s CCH data used to determine recidivist arrests and convictions in North Carolina. Although North Carolina’s local law enforcement jurisdictions are required to fingerprint all felonies and only the more serious misdemeanors, most misdemeanor arrests have been consistently fingerprinted across the state. This report includes Class A1 through Class 3 misdemeanor arrests and convictions. Similar to the data extracted from DJJ’s NC-JOIN, the data exclude infractions, local ordinances, and most G.S. Chapter 20 (*i.e.*, traffic) offenses from the analysis; only the more serious traffic offenses (*e.g.*, misdemeanor death by vehicle) were included.

²⁰ Although the adult arrest had to occur within the three-year follow-up, the date that the alleged offense occurred could have been prior to the follow-up period.

²¹ Tables referring to only juvenile recidivism, or only adult recidivism, state so specifically. Otherwise, the terms “recidivism” or “overall recidivism” in this report refer to having a subsequent delinquent juvenile complaint, an adult arrest, or both. Whether a juvenile had one or more subsequent complaints and/or adult arrests, the juvenile will be counted as a recidivist. This also applies to overall recidivism rates for subsequent adjudications and/or convictions.

Subsequent Juvenile Complaints and Adult Arrests

Table 3.1 presents the three primary measures of recidivism for the entire sample and the four groups.²² Of the 17,660 juveniles in the sample, 44.0% had a subsequent juvenile complaint and/or adult arrest (“overall recidivism”). Of those juveniles under juvenile jurisdiction during follow-up (n=16,308), 34.4% had a subsequent delinquent complaint. Of those juveniles under adult jurisdiction during follow-up (n=14,700), 23.7% had an adult arrest. The further a juvenile was processed in the juvenile justice system, the more likely that juvenile was to recidivate, with the overall recidivism rate ranging from 33.5% for the group with a closed complaint to 57.1% for the adjudicated group.

Table 3.1
Recidivism Rates for Juvenile Complaints and Adult Arrests
by Level of Involvement during the Three-Year Follow-Up

Level of Involvement	Subsequent Complaints		Adult Arrests		Overall Recidivism	
	n	%	n	%	N	%
Adjudicated	5,192	44.6	5,167	32.4	5,826	57.1
Dismissed	1,778	35.3	1,811	29.8	2,117	46.4
Diverted	4,877	31.0	3,953	16.0	5,014	37.8
Closed	4,461	26.0	3,769	17.0	4,703	33.5
TOTAL	16,308	34.4	14,700	23.7	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

For those juveniles with at least one subsequent delinquent complaint or arrest during the three-year follow-up, the first recidivist event occurred an average of 11.5 months after the beginning of their follow-up. Adjudicated and dismissed juveniles tended to recidivate somewhat earlier (an average of 10.7 months and 11.7 months respectively) than the juveniles whose cases were diverted or closed (an average of 12.3 months and 12.2 months respectively). Of the 7,773 juveniles with a recidivist event, 30.5% (or n=444) had recidivated within three months. It should be noted that a number of juveniles spent some portion of that “time at risk” under some form of supervision in the community or in confinement.

Table 3.2 provides information on the total number of recidivistic events for those juveniles who had a subsequent juvenile complaint, an adult arrest, or both during the follow-up period.²³ The 7,773 juveniles who had at least one subsequent delinquent complaint or adult arrest accounted for a total of 18,962 recidivistic events. The adjudicated group accounted for the

²² For additional recidivism rates of juveniles who were adjudicated and disposed, see Appendix D; see Appendix E for additional recidivism rates of juveniles who were diverted.

²³ In calculating total number of recidivist events, only one subsequent complaint and only one adult arrest were counted per day if multiple complaints or arrests occurred on the same day.

Table 3.2
Recidivistic Events by Level of Involvement

Level of Involvement	Total Number and Average Number of Recidivistic Events during the Three-Year Follow-Up								
	Subsequent Complaints n=16,308			Adult Arrests n=14,700			Overall Recidivism N=17,660		
	# of Juveniles with Any Complaint	# of Complaints	Average # of Complaints	# of Juveniles with Any Arrest	# of Arrests	Average # of Arrests	# of Juveniles with Any Complaint or Arrest	# of Complaints and/or Arrests	Average # of Complaints and/or Arrests
Adjudicated	2,313	5,013	2.2	1,675	3,795	2.3	3,324	8,808	2.6
Dismissed	628	1,282	2.0	539	1,187	2.2	982	2,469	2.5
Diverted	1,511	3,006	2.0	634	1,146	1.8	1,893	4,152	2.2
Closed	1,161	2,307	2.0	641	1,226	1.9	1,574	3,533	2.2
TOTAL	5,613	11,608	2.1	3,489	7,354	2.1	7,773	18,962	2.4

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

highest volume of subsequent complaints and/or adult arrests at 8,808. Table 3.2 also includes information on the mean number of recidivistic events. The average number of overall subsequent complaints and/or adult arrests for those juveniles who re-offended was 2.4 for the three-year follow-up. The adjudicated and dismissed juveniles had a higher average number of recidivist events (2.6 and 2.5 respectively) than the diverted or closed juveniles (both at 2.2) during follow-up.

Subsequent Juvenile Adjudications and Adult Convictions

Table 3.3 details subsequent adjudication and conviction rates for the four sample groups. As expected, adjudication/conviction rates were lower than complaint/arrest rates for two reasons: due to cases being closed or dismissed, and due to a time lag between initial processing and court action, possibly falling outside the follow-up period. Adjudication/conviction rates indicated patterns similar to complaint/arrest rates – the more serious the level of involvement in the juvenile justice system, the higher the rate of subsequent adjudications/convictions. Of those juveniles under juvenile jurisdiction during follow-up (n=16,308), 22.7% had a subsequent adjudication. Of those juveniles under adult jurisdiction during follow-up (n=14,700), 10.4% had an adult conviction. The combined recidivistic adjudication/conviction rate for the sample was 27.3%, with 40.1% for the adjudicated group compared to 17.2% for the group with closed complaints.

Table 3.3
Recidivism Rates for Juvenile Adjudications and Adult Convictions
by Level of Involvement during the Three-Year Follow-Up

Level of Involvement	Subsequent Adjudications		Convictions		Adjudications and/or Convictions	
	n	%	n	%	N	%
Adjudicated	5,192	34.0	5,167	15.5	5,826	40.1
Dismissed	1,778	22.6	1,811	14.4	2,117	28.7
Diverted	4,877	19.0	3,953	5.7	5,014	21.4
Closed	4,461	13.9	3,769	6.5	4,703	17.2
TOTAL	16,308	22.7	14,700	10.4	17,660	27.3

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Personal Characteristics and Recidivism

Table 3.4 provides recidivism rates during the three-year follow-up by the juvenile's personal characteristics: gender, race, and age at the time of the sample offense.²⁴ Overall, males

²⁴ See Table 2.1 in Chapter Two for further details of the sample's personal characteristics.

had higher recidivism rates than females (48.8% and 31.9% respectively). Black juveniles had the highest recidivism rate at 50.2% compared to the other race categories. Juveniles whose race was entered as Other/Unknown had the next highest recidivism rate at 43.9% with Latino and White juveniles having the lowest recidivism rates at 37.8% and 37.0% respectively. As expected, the youngest juveniles had the lowest recidivism rates at 24.7% for six to nine year olds. The rate of recidivism increased to its highest levels for juveniles aged 12 and 13 (49.2% and 51.4% respectively), and declined considerably for the 14 and 15 year olds (to 46.0% and 39.7% respectively).

Table 3.4
Recidivism Rates by Personal Characteristics of Juveniles and Level of Involvement during the Three-Year Follow-Up

Personal Characteristics	Level of Involvement				All	
	Adjudicated n=5,826	Dismissed n=2,117	Diverted n=5,014	Closed n=4,703	N=17,660	
Gender	%	%	%	%	#	%
Male	59.9	51.3	42.2	38.4	12,642	48.8
Female	46.4	32.7	28.2	24.2	5,018	31.9
Race^a	%	%	%	%	#	%
Black	64.1	53.3	43.7	38.0	8,924	50.2
White	48.1	37.8	32.7	27.7	6,801	37.0
Latino	53.7	34.4	31.9	25.7	1,074	37.8
Other/Unknown	57.9	39.0	34.1	37.8	861	43.9
Age at Offense	%	%	%	%	#	%
6-9 Years	33.9	29.7	30.9	14.4	499	24.7
10 Years	50.8	35.9	37.3	31.3	337	38.0
11 Years	60.4	39.4	40.6	34.3	796	43.5
12 Years	64.8	51.6	42.0	39.5	1,707	49.2
13 Years	63.6	51.1	45.2	42.9	2,971	51.4
14 Years	58.1	49.1	39.4	35.7	4,842	46.0
15 Years	52.4	44.0	31.0	28.6	6,508	39.7
TOTAL	57.1	46.4	37.8	33.5	17,660	44.0

^a Due to low percentages, American Indian, Asian, and multi-racial juveniles were combined with other/unknown into one category.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Prior Complaints and Recidivism

Overall, 32.7% (n=5,770) of the juveniles in the sample had at least one prior delinquent complaint before entry into the sample.²⁵ Table 3.5 examines recidivism rates for juveniles with at least one prior complaint in comparison to juveniles with no prior complaint before sample entry. Almost 63% of the juveniles with at least one prior complaint had a subsequent complaint or adult arrest compared to the recidivism rate of 35.0% for the juveniles with no prior complaints. Adjudicated juveniles with at least one prior complaint had the highest recidivism rate at 66.0% with the remaining three groups with a prior complaint having similar rates to one another (dismissed at 59.7%, diverted at 56.7%, and closed at 57.5%).

Table 3.5
Recidivism Rates by Prior Complaints and Level of Involvement
during the Three-Year Follow-Up

Level of Involvement	Recidivism Rates for Juveniles with:				Overall Recidivism	
	No Prior Complaint		at Least One Prior Complaint			
	n	%	n	%	N	%
Adjudicated	2,513	45.3	3,313	66.0	5,826	57.1
Dismissed	1,212	36.5	905	59.7	2,117	46.4
Diverted	4,238	34.3	776	56.7	5,014	37.8
Closed	3,927	28.7	776	57.5	4,703	33.5
TOTAL	11,890	35.0	5,770	62.6	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Sample Offense²⁶ and Recidivism

While the most serious sample offense for the majority of juveniles at all levels of involvement was a misdemeanor, the relative percentage of felony offenses was higher for the dismissed and adjudicated cases (20.4% and 29.6% respectively) than for the diverted and closed cases (3.0% and 1.6% respectively). (See Table 2.4 in Chapter Two.) Juveniles charged with a felony as their most serious sample offense were more likely to recidivate than those charged with a misdemeanor – 50.2% and 43.1% respectively. (See Table 3.6.) However, this finding did

²⁵ This analysis excludes the delinquent complaint that placed the juvenile in the sample. It should be noted that not all juveniles had equal amounts of time to accrue prior complaints. The percentage of juveniles with at least one prior complaint by group are as follows: adjudicated at 56.9%, dismissed at 42.8%, diverted at 15.5%, and closed at 16.5%.

²⁶ As a reminder, the term “sample offense” refers to the most serious delinquent activity alleged in the complaint for the adjudicated, dismissed, diverted, or closed groups. Infractions, local ordinances, and most G.S. Chapter 20 (i.e., traffic) offenses were excluded from the analysis; only the more serious traffic offenses (e.g., misdemeanor death by vehicle) were included.

not hold true for each of the specific groups. Adjudicated and diverted juveniles charged with a *misdemeanor* had a higher recidivism rate (59.3% and 37.8% respectively) than the dismissed and closed juveniles who had a higher recidivism rate when charged with a *felony* (50.2% and 47.4% respectively).

Table 3.6
Recidivism Rates by Sample Offense and Level of Involvement
during the Three-Year Follow-Up

Level of Involvement	Recidivism Rates for Juveniles Charged with a:				Overall Recidivism	
	Felony		Misdemeanor			
	n	%	n	%	N	%
Adjudicated	1,722	51.6	4,104	59.3	5,826	57.1
Dismissed	432	50.2	1,685	45.4	2,117	46.4
Diverted	150	35.3	4,864	37.8	5,014	37.8
Closed	76	47.4	4,627	33.2	4,703	33.5
TOTAL	2,380	50.2	15,280	43.1	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

A comparison of the sample offense and subsequent recidivist offense is provided in Table 3.7 for the 7,773 juveniles with any recidivism. Within the three-year follow-up, juveniles with a sample felony offense were more likely (63.9%) to have a felony offense as their most serious subsequent offense. Similarly, juveniles who had a sample misdemeanor offense were more likely (58.8%) to have a misdemeanor offense as their most serious subsequent offense. It should also be noted that, overall, of those with one or more recidivistic event during the follow-up, 55.3% were charged with a misdemeanor.

Table 3.7
Most Serious Recidivistic Offense by Most Serious Sample Offense

Sample Offense	N	Most Serious Recidivistic Offense during the Three-Year Follow-Up	
		Felony n=3,475	Misdemeanor n=4,298
		%	%
Felony	1,195	63.9	36.1
Misdemeanor	6,578	41.2	58.8
TOTAL	7,773	44.7	55.3

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

As expected, adjudicated and dismissed juveniles were more likely to have a subsequent felony complaint or adult arrest (51.1% and 51.9% respectively) than juveniles whose cases were diverted or closed (34.1% and 39.5% respectively).

Risk/Needs Levels and Recidivism

In terms of risk level and needs level, the majority of juveniles were assessed as low risk (72.8%) and as low needs (67.9%) with few juveniles determined to be either high risk (5.8%) or high needs (3.7%).²⁷ Table 3.8 explores the relationship between the juvenile's risk and needs levels and their recidivism rates. As expected, low risk juveniles had the lowest recidivism rates (38.0%) compared to medium and high risk juveniles (66.5% and 71.4% respectively). However,

Table 3.8
Recidivism Rates by Risk Level and by Needs Level during the Three-Year Follow-Up

	Subsequent Complaints		Adult Arrests		Overall Recidivism	
Risk Level^a	n	%	n	%	N	%
Low	9,980	30.8	8,520	17.6	10,588	38.0
Medium	2,783	52.1	2,804	38.0	3,110	66.5
High	702	55.4	819	49.1	850	71.4
Risk Level Total	13,465	36.5	12,143	24.4	14,548	46.0
Needs Level^b	n	%	n	%	N	%
Low	9,308	30.9	7,984	18.6	9,893	38.6
Medium	3,698	49.1	3,696	35.9	4,138	62.3
High	455	49.9	506	41.7	539	64.4
Needs Level Total	13,461	36.6	12,186	24.8	14,570	46.3

^a Of the 14,548 juveniles with a risk assessment score, 72.8% (n=10,588) were low risk, 21.4% (n=3,110) were medium risk, and 5.8% (n=850) were high risk.

^b Of the 14,570 juveniles with a needs assessment score, 67.9% (n=9,893) were low needs, 28.4% (n=4,138) were medium needs, and 3.7% (n=539) were high needs.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

the gap between the recidivism rates of the medium risk and high risk is smaller compared to the much larger gap between the recidivism rates of the low risk and medium risk juveniles. Similar

²⁷ See Chapter Two for a more detailed description of the risk and needs assessments and Appendix A for a copy of the risk and needs assessment tools.

findings in the recidivism rates are seen when examining the needs level and subsequent complaints and/or adult arrests.

Figure 3.3 examines the recidivism rates by group while controlling for risk level and needs level. Due to the small number of juveniles in the high risk and high needs categories, these two figures combine the medium and high risk levels into one group and the medium and high needs levels into one group. As expected, low risk juveniles had lower recidivism rates than the medium/high risk juveniles for all four groups. The adjudicated juveniles had the highest recidivism rate (48%) compared to the other three groups assessed as low risk. For the medium or high risk levels, the closed juveniles had the highest recidivism rate (78%) compared to the other three groups. Similar findings in the recidivism rates by group are seen when examining needs level and subsequent complaints and/or adult arrests.

Finally, Table 3.9 provides information on the recidivism rates and three of the combined indicators from the risk and needs assessment tools – substance abuse, gang affiliation, and peer relationships. Juveniles with substance abuse assessment and/or treatment had higher recidivism rates (57.5%) than juveniles with little or no substance abuse (41.8%). In addition, juveniles with gang affiliation (whether as a gang member or as an associate of a gang member) had higher recidivism rates (69.1%) than juveniles who were not gang members or who do not associate with gang members (44.2%). Finally, juveniles whose peers provide a negative influence had higher recidivism rates (53.7%) compared to juveniles whose peers provide good support and a positive influence (34.1%).

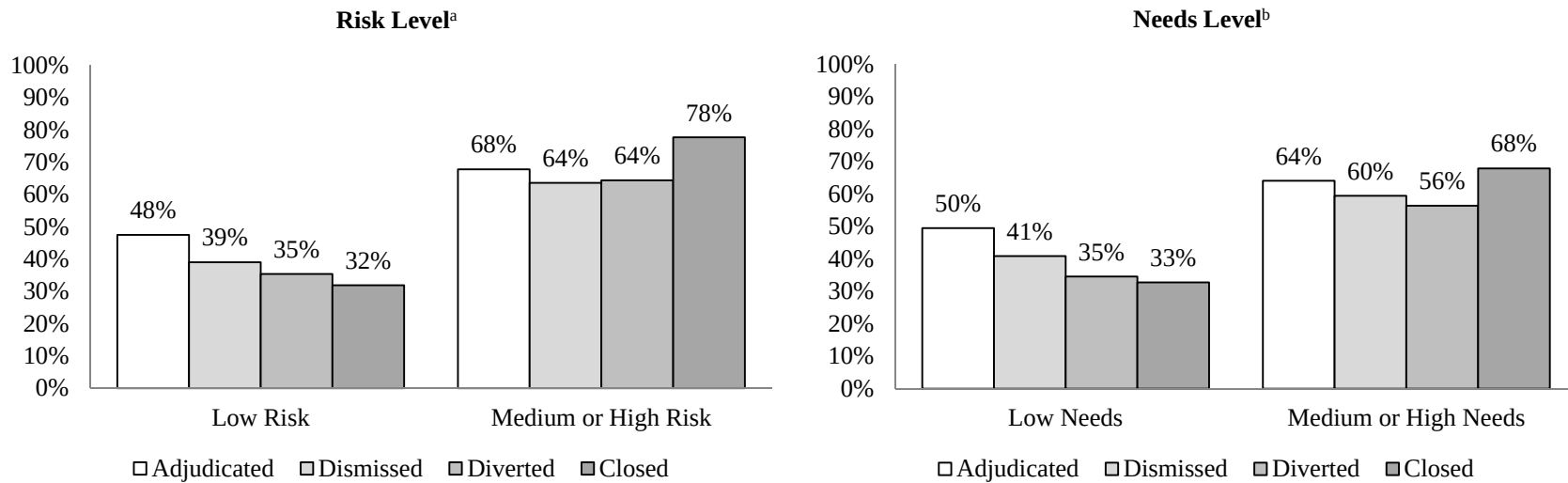
Table 3.9
Recidivism Rates by Combined Risk and Needs Indicators

Combined Risk and Needs Indicators	Recidivism Rates during the Three-Year Follow-Up	
Substance Use	N	%
None or little	10,835	41.8
Yes	4,035	57.5
Gang Affiliation	N	%
No	13,721	44.2
Yes	1,149	69.1
Peer Relationships	N	%
Positive	5,747	34.1
Negative	9,123	53.7
TOTAL	14,870	46.1

Note: Of the 17,660 juveniles in the sample, there were 2,790 with missing values for a Risk and/or Needs Assessment score.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Figure 3.3
Recidivism Rates by Risk/Needs Levels and Level of Involvement
during the Three-Year Follow-Up



^a Of the 14,548 juveniles with a risk assessment score, 72.8% (n=10,588) were low risk, 21.4% (n=3,110) were medium risk, and 5.8% (n=850) were high risk.

^b Of the 14,570 juveniles with a needs assessment score, 67.9% (n=9,893) were low needs, 28.4% (n=4,138) were medium needs, and 3.7% (n=539) were high needs.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Detention Center Admissions, YDC Commitments, and Juvenile Transfers to Superior Court

One of the more consistent research findings links juvenile confinement to an increased probability of adult criminality. To examine this assertion, information was collected for each juvenile on admission to a detention center and commitment to a YDC any time between the sample entry and the end of their follow-up period. Adult arrest rates are reported to provide recidivist activity for those juveniles confined in a DJJ facility compared to all juveniles in the sample during the follow-up period. In addition, the number of juveniles transferred to Superior Court during the three-year follow-up was identified and their subsequent criminal activity (*i.e.*, adult arrest) was determined.

Juvenile Detention Center Admission and Adult Arrests

Admission to a detention center can occur while a juvenile awaits adjudication and disposition, or as a condition of probation. Of the entire sample, 21.6% (n=3,814) had at least one admission to a detention center during the three-year follow-up. Adjudicated juveniles had the highest percentage (42.2%) with an admission to a detention center followed by the dismissed (16.8%), diverted (11.4%), and closed (9.2%) groups.

Table 3.10 provides adult arrest rates for those juveniles with at least one detention center admission during the three-year follow-up for the four groups. Overall, 39.1% of those juveniles with at least one juvenile detention center admission had one or more adult arrests. The dismissed group had the highest adult arrest rate at 45.2% followed by the adjudicated (40.0%), closed (37.4%), and diverted (32.0%) groups.

Table 3.10
Admission to a Detention Center or Commitment to a Youth Development Center
and Adult Arrests by Level of Involvement during the Three-Year Follow-Up

Level of Involvement	Detention Admission		YDC Commitment		Adult Arrests for Sample	
	Number of Juveniles	% with Adult Arrest	Number of Juveniles	% with Adult Arrest		
Adjudicated	2,458	40.0	518	36.3	5,167	32.4
Dismissed	356	45.2	58	40.7	1,811	29.8
Diverted	569	32.0	42	15.4	3,953	16.0
Closed	431	37.4	50	35.0	3,769	17.0
TOTAL	3,814	39.1	668	35.7	14,700	23.7

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Juvenile Commitment and Adult Arrests

Commitment to a YDC is the most severe sanction available for juveniles who are adjudicated delinquent while under juvenile jurisdiction. Of the juveniles in the sample, 3.8% (n=668) had one or more commitments to a YDC during the three-year follow-up. A YDC commitment is not necessarily linked to the sample event for the four groups and could have resulted either from a delinquent complaint prior to the follow-up period or from a delinquent complaint that occurred during the follow-up period. The adjudicated group had the highest rate of YDC commitments at 8.9%. The remaining groups had very few juveniles with a YDC commitment during the follow-up period – dismissed at 2.7%, diverted at 0.8%, and closed at 1.1%.

Table 3.10 compares adult arrest rates for the groups in the sample who had one or more YDC commitments. Overall, almost 36% of those with a YDC commitment had at least one subsequent adult arrest. Again, when looking at confinement in the juvenile justice system, the dismissed juveniles had the highest recidivism rate at 40.7% compared to the other three groups. The diverted juveniles had the lowest adult arrest rate at 15.4%.

Overall, juveniles experiencing either a detention center admission or a YDC commitment during their juvenile years were more likely to have a subsequent adult arrest.

Juvenile Transfers to Superior Court

As mentioned in Chapter One, juveniles alleged to be delinquent and charged with a felony may be transferred to the Superior Court for trial as adults. Of the 5,613 juveniles with any subsequent complaint, there were 34 juveniles who were transferred to adult court during the follow-up period. No information is available about findings of guilt or innocence, or dispositions, in those proceedings. However, 32.4% of the juveniles transferred to adult court had at least one or more adult arrest during follow-up compared to 23.7% of the juveniles who were *not* transferred to adult court during follow-up.

CHAPTER SUMMARY

The following list presents a summary of the major findings in Chapter Three:

- Three primary recidivism measures were used: subsequent delinquent juvenile complaint, adult arrest, and a combined measure of complaint and/or arrest (*i.e.*, overall recidivism) – with a fixed three-year follow-up period for each juvenile.
- The overall recidivism rate for the sample was 44.0%. The rate of subsequent delinquent complaint was 33.4%; the rate of adult arrest was 23.7%.
- A stair-step progression of recidivism was observed among the sample groups: the adjudicated group recidivated at the highest rate and the closed group recidivated at the lowest rate.

- Males were more likely to have a subsequent complaint and/or adult arrest than females. Blacks had higher recidivism rates than all other race categories. There was a complex relationship between juvenile age and rate of recidivism. Juveniles aged 6-9 had the lowest rate of recidivism; juveniles aged 10-12 showed a gradually increasing rate, with recidivism peaking at ages 12-13; and those aged 14-15 showed considerably decreasing rates.
- Juveniles who had prior juvenile justice contact (*i.e.*, delinquent complaint) before sample entry had higher recidivism rates (62.6%) compared to the recidivism rates of juveniles with no prior juvenile justice contact (35.0%). This finding held constant for all four groups.
- The type of sample offense (*i.e.*, felony or misdemeanor) was linked to both the rate of recidivism and the type of recidivistic offense.
- A stair-step progression of recidivism was observed when examining risk level and needs level – as the risk level or needs level increased in severity so did the recidivism rate. However, the greatest increase in the recidivism rates occurred from low risk/needs level to medium risk/needs level.
- Confinement as a juvenile – whether in a detention center or a YDC – increased the probability of having an adult arrest.

CHAPTER FOUR

SUMMARY AND CONCLUSIONS

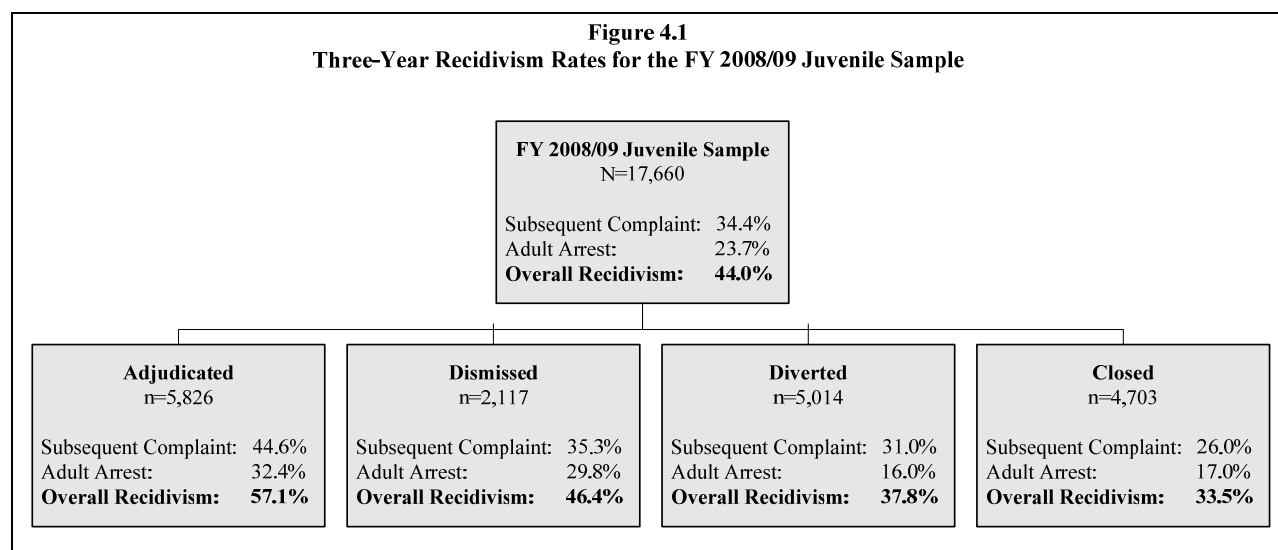
During the 2005 Session, the North Carolina General Assembly expanded the Sentencing and Policy Advisory Commission's mandate to include the preparation of biennial reports on statewide rates of juvenile recidivism. (Session Law 2005-276, Section 14.19.) This marks the fourth biennial report, submitted to the legislature on May 1, 2013. The study followed a sample of 17,660 juveniles who had a delinquent complaint processed in the juvenile justice system between July 1, 2008 and June 30, 2009 and tracked their subsequent contacts with the juvenile justice and criminal justice systems over the next three years. Juveniles with undisciplined complaints were excluded from the sample. Data on the sample were obtained from the automated databases of the DJJ and DOJ.

In line with the decisions made within the juvenile justice system, the 17,660 juveniles in the sample were categorized into one of four groups – juveniles with adjudicated (33%), dismissed (12%), diverted (28%), or closed (27%) cases. Altogether, the mean age of the sample was 13.6 years; the adjudicated juveniles were the oldest of the four groups. The sample was largely comprised of male juveniles (72%), and 51% of the juveniles were black. The events that brought the youths to the attention of the juvenile justice system in FY 2008/09 were largely misdemeanors (87%); less than 2% were charged with a violent delinquent act. Juveniles with felony or violent offense charges were predominantly in the adjudicated and dismissed groups. One-third of the sample juveniles had at least one prior delinquent complaint, and 8% percent of them were under some form of DJJ supervision at the time of their sample offense. Few of the juveniles were assessed as high risk or high needs; the majority of medium and high risk or needs juveniles were within the adjudicated group.

Three measures of juvenile recidivism were utilized in the study: subsequent juvenile delinquent complaints, adult arrests, and a combination measure that captured recidivism in both the juvenile and adult systems (*i.e.*, overall recidivism). A three-year follow-up period was calculated for each juvenile, to measure their recidivism in either the juvenile or adult systems. The rate of subsequent delinquent complaint for the entire sample was 34%, the rate of adult arrest was 24%, and the overall recidivism rate was 44%. (See Figure 4.1.) The highest rate of all three measures of recidivism was observed in the adjudicated group. Twenty-seven percent of the juveniles also had one or more juvenile adjudications or adult convictions within the follow-up period. The 7,773 sample juveniles with any subsequent recidivism accounted for a total of 18,962 offenses (or an average of 2.4 offenses) within the three-year follow-up: 11,608 juvenile complaints and 7,354 adult arrests.

When comparing the findings from this study of the FY 2008/09 sample to the Commission's two previous studies of the FY 2006/07 and FY 2004/05 samples (all with a three-year follow-up period), a stable recidivism rate of between 43-45% emerges for all three samples (see Table 4.1). The differences between the recidivism rates of juveniles by their level of involvement also remained stable over the three samples, with the highest rate for the adjudicated group, followed by the dismissed, diverted, and closed groups (see Table 4.2). Two additional findings of note in reviewing the trends are an overall drop of 13% in the number of

cases from FY 2006/07 to FY 2008/09, and an increase in the rate of recidivism for the FY 2008/09 group of adjudicated juveniles.



SOURCE: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

The findings from the overall sample indicated that juvenile recidivism was related to several factors. First, a clear relationship emerged between the level of involvement with the juvenile justice system and likelihood of recidivating. Level of involvement ranged from the least serious (a closed case) to the most serious (an adjudicated case), paralleled by recidivism rates ranging from 34% for juveniles with closed cases and 38% for juveniles diverted to 46% for juveniles dismissed and 57% for those adjudicated. In a number of ways, the data demonstrated that the deeper the involvement of the youth in the juvenile justice system, the more likely s/he was to have subsequent recidivism. Youth who received the most serious and restrictive sanctions in the juvenile system – detention in a detention center or commitment to a

Table 4.1
Juvenile Recidivism Trends
Three-Year Follow-Up

Juvenile Samples by Fiscal Year	Subsequent Complaints		Adult Arrests		Overall Recidivism	
	N	%	N	%	N	%
FY 2004/05	18,754	36.7	17,011	21.4	20,236	44.8
FY 2006/07	18,818	33.6	17,151	22.8	20,364	43.0
FY 2008/09	16,308	34.4	14,700	23.7	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2004/05, FY 2006/07, and FY 2008/09 Juvenile Recidivism Samples

YDC – were also considerably more likely to experience one or more arrests in the adult system. This finding does not necessarily imply a *causal* relationship between deeper involvement and recidivism, and needs to be interpreted with some caution. The level of involvement is also a systemic response to the complicated set of circumstances, risks and needs of the juvenile, a set that is correlated with future recidivism independent of the possible effect of the youth’s juvenile justice involvement.

Table 4.2
Juvenile Recidivism Trends by Level of Involvement
Three-Year Follow-Up

Level of Involvement	Juvenile Samples by Fiscal Year:					
	FY 2004/05		FY 2006/07		FY 2008/09	
	N	%	N	%	N	%
Adjudicated	7,012	55.7	6,639	53.3	5,826	57.1
Dismissed	2,409	48.0	2,413	45.7	2,117	46.4
Diverted	5,100	38.7	5,383	38.4	5,014	37.8
Closed	5,715	35.5	5,929	34.7	4,703	33.5
TOTAL	20,236	44.8	20,364	43.0	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2004/05, FY 2006/07, and FY 2008/09 Juvenile Recidivism Samples

A similar pattern was also found in the average amount of time to a first subsequent complaint or arrest. The adjudicated and dismissed groups had, on average, a shorter amount of time until their first recidivist event than the diverted and closed groups.

A second finding concerned the type of sample offense and its relationship with recidivist events in the three-year follow-up period. Juveniles whose original sample offense was a felony had a higher recidivism rate than those with a misdemeanor sample offense (50% and 43% respectively). Reviewing the severity of their new offenses, 45% percent of the recidivist juveniles were charged with at least one felony during the follow-up. Furthermore, those who entered the FY 2008/09 sample with a felony were also more likely to recidivate with a felony as their most serious new offense, while those who entered the sample with a misdemeanor were more likely to recidivate with a misdemeanor as their most serious new offense.

A third finding from these data demonstrated a complex relationship between age and recidivism for juveniles in the sample. Juveniles between the ages of six and nine had very low recidivism rates, those aged 10-11 showed gradually increasing rates with the highest recidivism observed for 12-13 year-olds, while ages 14-15 showed considerably decreasing rates. A possible explanation for this finding might be in the dynamic between a child’s age; school attendance

and discipline; delinquency history; and the capacity of the juvenile justice system to exercise discretion.

A direct relationship was also observed between the juveniles' assessed risk and needs and their recidivism. Generally, as risk and needs levels increased, so did the recidivism rates. Particularly large increases in recidivism rates were noted between the juveniles with low and medium levels of risk and needs. Further, juveniles' risk levels appeared to be driving differences in the recidivism rates more than their needs levels. A juvenile's prior delinquency, a component of risk, was also directly linked to the probability of recidivism.

In conclusion, the study's key finding that recidivism corresponded with the juvenile's level of involvement in the juvenile justice system could have a bearing on policy-related issues in this system. The analyses in this report revealed that recidivism was lower when the systemic response of the juvenile justice system was less invasive, either by processing and intervening with youths short of adjudication or, if adjudicated, providing dispositions short of the most restrictive option of confinement. It is important to recognize that there are several possible explanations for this finding – the relationship is a correlation and thus precludes any determination of causality. While the depth of the system's response may contribute to a juvenile's probability of re-offending, another possibility is that the system's increasingly invasive, restrictive response is elicited by the most troubled youths affected by family dynamics, psychological issues, and school problems. The explanation to recidivistic behavior, more likely, lies in some interaction of all of these factors.

Whatever the reason for the relationship between deeper involvement in the juvenile justice system and recidivism, the point remains that the most efficient investment of sufficient resources is in the community, at the front-end of the juvenile justice system. Community resources are more easily accessible to juveniles and their families and have a proven track record of successfully intervening with the complex issues associated with delinquent youth. Another finding, which indicated a relationship between recidivism and age, has a related message for policy makers. If appropriate resources were targeted at the age-group with the highest overall recidivism rate (juveniles aged 10-13), and at the earliest possible point of their contact with the juvenile justice system, it might affect their rate of re-offending.

While there will be youths for whom the juvenile system will have no recourse but the use of the most restrictive sanction of commitment to a YDC, the majority of the youth will need – and benefit from – rehabilitative resources of a less restrictive nature. Meeting this need for community-based and evidence-based alternatives is the challenge for policy makers, juvenile justice professionals, and youth services providers as they work together to reduce reoffending behavior.

APPENDIX A

**A.1: NORTH CAROLINA ASSESSMENT OF
JUVENILE RISK OF FUTURE
OFFENDING**

**A.2: NORTH CAROLINA ASSESSMENT OF
JUVENILE NEEDS**

**A.3: TABLE A.3-1 – NUMBER AND
PERCENTAGE OF JUVENILES WITH
RISK AND/OR NEEDS ASSESSMENTS
BY LEVEL OF INVOLVEMENT**

APPENDIX A.1

NORTH CAROLINA ASSESSMENT OF JUVENILE RISK OF FUTURE OFFENDING

Juvenile Name (F, M, L)		DOB:
SS#:	County of Residence:	
Juvenile Race: ☐ White ☐ Black ☐ Native American ☐ Latino ☐ Asian ☐ Multi-racial ☐ Other		
Juvenile Gender: ☐ Male ☐ Female		
Date Assessment Completed:		Completed by:

Instructions: Complete each assessment item R1 to R9 using the best available information. Check the numeric score associated with each item response and enter it on the line to the right of the item. Total the item scores to determine the level of risk and check the appropriate risk level in R10. Identify the most serious current offense in R11. Assessment items R1-R5 are historical in nature and should be answered based on the juvenile's lifetime. Items R6 and R7 should be evaluated over the 12 months prior to the assessment. R8-R9 should be evaluated as of the time of the assessment. Use the Comments section at the end as needed for additional information or clarification.

		Score	
R1.	Age when first delinquent offense alleged in a complaint: Check appropriate score and enter the actual age a. Age 12 or over or no delinquent complaint 0 ☐ b. Under age 12 2 ☐ Actual age: _____		_____
R2.	Number of undisciplined or delinquent referrals to Intake (Referrals are instances of complaints coming through the Intake process. A referral may include multiple complaints; for example, breaking or entering and larceny, or multiple larcenies or other offenses that occur at one time.) a. Current referral only 0 ☐ b. 1 Prior referral 1 ☐ c. 2-3 Prior referrals 2 ☐ d. 4+ Prior referrals 3 ☐		_____
R3.	Most serious prior adjudication(s). Enter the actual number of prior adjudications for each class of offense shown in b through e then check the score for <u>only</u> the most serious offense for which there has been a prior adjudication. The maximum possible score for this item is 4. a. No Prior Adjudications 0 ☐ b. Prior Undisciplined # of adjudications: 1 ☐ c. Prior Class 1-3 misdemeanors # of adjudications: 2 ☐ d. Prior Class F-I felonies or A1 misdemeanors # of adjudications: 3 ☐ e. Prior Class A-E felonies # of adjudications: 4 ☐		_____
R4.	Prior Assaults: "Assault" is defined as any assaultive behavior, whether physical or sexual, with or without a weapon as evidenced by a prior delinquent complaint. Record the number of complaints for each assault category shown. Then check the score for the assault category with the highest numerical score. The maximum possible score for this item is 5. a. No assaults 0 ☐ b. Involvement in an affray # of complaints: 1 ☐ c. Yes, without a weapon # of complaints: 2 ☐ d. Yes, without a weapon, inflicting serious injury # of complaints: 3 ☐ e. Yes, with a weapon # of complaints: 4 ☐ f. Yes, with a weapon inflicting serious injury # of complaints: 5 ☐		_____
R5.	Runaways (from home or placement): "Runaway" is defined as absconding from home or any placement and not voluntarily returning within twenty-four (24) hours as evidenced by a complaint, motion for review, or from reliable information. Check appropriate score. a. No 0 ☐ b. Yes 2 ☐ Actual number of runaway incidents: _____		_____
R6.	Known use of alcohol or illegal drugs during past 12 months: Do not include tobacco in scoring this item. Check appropriate score. a. No known substance use 0 ☐ b. Some substance use, need for further assessment 1 ☐ c. Substance abuse, assessment and/or treatment needed 3 ☐		_____

R7.	School behavior problems during the prior 12 months: Check appropriate score.	
a.	No problems (Enrolled, attending regularly)	0 ☐
b.	Minor problems (attending with problems handled by teacher/school personnel, or 1-3 unexcused absences/truancy)	1 ☐
c.	Moderate problems (4 to 10 unexcused absences /truancy, or 1 or more in-school suspensions or 1 short-term suspension – up to 10 days)	2 ☐
d.	Serious problems (more than 1 short-term suspension, or 1 or more long-term suspension, or more than 10 unexcused absences or expelled/dropped out.)	3 ☐
R8.	Peer relationships: Check appropriate score. Put check in the line following appropriate information	
a.	Peers usually provide good support and influence	0 ☐
b.	Youth is rejected by pro-social peers ☐ , or youth sometimes associates with others who have been involved in delinquent/criminal activity but is not primary peer group ☐	1 ☐
c.	Youth regularly associates with others who are involved in delinquent/criminal activity	3 ☐
d.	Youth is a gang member ☐ or associates with a gang ☐	5 ☐
R9.	Parental supervision: (Score the current responsible parental authority) Check appropriate score.	
a.	Parent, guardian or custodian willing and able to supervise	0 ☐
b.	Parent, guardian or custodian willing but unable to supervise	2 ☐
c.	Parent, guardian or custodian unwilling to supervise	3 ☐
R10.	TOTAL RISK SCORE	0

Check Risk Level: ☐ Low risk (0-7) ☐ Medium Risk (8-14) ☐ High Risk (15+)

R11. Completed before or after adjudication: (check) before ☐ after ☐
Most serious offense alleged /adjudicated in current complaint/petition:

Statute number: _____
Class offense: ☐ A-E Felony ☐ F-I Felony, A1 Misdemeanor ☐ Class 1-3 Misdemeanor
☐ Undisciplined

Note: Risk level is to be considered along with the current offense.

COMMENTS:

APPENDIX A.2

NORTH CAROLINA ASSESSMENT OF JUVENILE NEEDS

Juvenile Name (F, M, L)		DOB:
SS#:	County of Residence:	
Juvenile Race: ☐ White ☐ Black ☐ Native American ☐ Latino ☐ Asian ☐ Multi-racial ☐ Other		
Juvenile Gender: ☐ Male ☐ Female		
Date Assessment Completed:	Completed by:	

Instructions: Complete each needs assessment item using the best available information. Check the score associated with the most appropriate item choice and enter the number on the line to the left of the item. Items that are of a current nature should be considered as of the time of the assessment unless a time period for consideration is noted. Assessment items that are historical in nature (Y8 and F5) should be answered based on the juvenile or family member's lifetime. Total the points for all items to determine the total need score and then check the appropriate needs level (low, medium or high). Complete the information source checklist. Finally, identify at least three priority needs for constructing a case plan and appropriate service interventions. Give additional information as needed in the Comments section.

YOUTH NEEDS

Score

Y1. Peer Relationships

- 0 ☐ a. Peers usually provide good support and influence.
- 2 ☐ b. Youth is rejected by pro-social peers.
- 3 ☐ c. Youth sometimes associates with others who have been involved in delinquent/criminal activity but this is not a primary peer group.
- 4 ☐ d. Youth regularly associates with others who are involved in delinquent/criminal activity.
- 5 ☐ e. Youth is a gang member ☐ or associates with a gang ☐.

Name of gang _____

Y2. School Behavior/Adjustment

- 0 ☐ a. No problems. Youth is attending regularly ☐, graduated ☐, or has GED ☐.
- 1 ☐ b. Minor problems. Work effort ☐, or disciplinary problems ☐ that were handled by classroom teacher/school personnel or 1-3 unexcused absences/truancy ☐.
- 3 ☐ c. Moderate problems. Youth has 4 to 10 unexcused absences ☐, or received 1 or more in-school suspensions ☐, or 1 short-term suspension (i.e. less than 10 days) ☐.
- 4 ☐ d. Serious problems. Youth has dropped out of school ☐, or been expelled ☐, or received more than one short-term suspension ☐, or one long-term suspension (10 days or more) ☐, or has more than 10 unexcused absences ☐.

Y3. General Academic Functioning

- 0 ☐ a. Generally functioning above or at grade level ☐, or is placed in appropriate Exceptional Children's program ☐.
- 3 ☐ b. Generally functioning below grade level. Needs an educational evaluation ☐, or has identified Exceptional Children's needs that are unserved ☐.

Check Assessed Exceptional Children's needs: Autism ☐, Behaviorally Emotionally Disabled ☐, Deaf/Blind ☐, Gifted/Talented ☐, Hearing Impaired ☐, Mentally Disabled ☐, Multi-handicapped ☐, Orthopedically Impaired ☐, Other Health Impaired ☐, Pregnant Student ☐, Specific Learning Disabled ☐, Speech/Language Impaired ☐, Traumatic Brain Injury ☐, Visually Impaired ☐

Y4. Substance Abuse within past 12 months. Do not consider tobacco in this item.

- 0 ☐ a. No known substance use.
- 1 ☐ b. Some substance use, need for further assessment.
- 3 ☐ c. Substance abuse, assessment and/or treatment needed.

Check all that apply:

Unmet need for treatment ☐

Denial ☐

Refusal of treatment ☐

Prior treatment failures ☐

Currently in treatment ☐

Describe substance abuse noted above by type: (check all that apply, leave blank if none)

Cocaine ☐

Amphetamines ☐

Opiates ☐

Inhalants ☐

Alcohol ☐

Cannabinoids ☐

Other ☐

_____ **Y5. Juvenile Parent Status**

- 0 ☐ a. Juvenile is not a parent.
1 ☐ b. Juvenile is a parent, but does *not* have custody of child.
2 ☐ c. Juvenile is a parent ☐ or an expectant parent ☐ but has adequate childcare support.
4 ☐ d. Juvenile is a parent ☐ or an expectant parent ☐ but inadequate childcare support.
Number of children _____

_____ **Y6. History of Victimization by Caregiver Or Others**

- 0 ☐ a. No history or evidence of physical, sexual, or emotional abuse or neglect or other criminal victimization.
2 ☐ b. Victimization with appropriate support. History or evidence of physical, sexual, or emotional abuse or neglect or other criminal victimization with appropriate response to protect against subsequent victimization.
3 ☐ c. Victimization without support. One or more incidents of victimization; failure to protect against subsequent victimization.
Check all that apply to the youth: physical abuse ☐, sexual abuse ☐, emotional abuse ☐, neglect ☐, criminal victimization ☐, other _____

_____ **Y7. Sexual Behavior During Past 12 Months**

- 0 ☐ a. No apparent problem.
2 ☐ b. Behavior that needs further assessment such as use of pornography ☐, obscene phone calls ☐, voyeurism ☐, uses sexually explicit language or gestures ☐ or other _____.
3 ☐ c. Engages in sexual practices that are potentially dangerous to self or others ☐.
4 ☐ d. Youth's sexual adjustment/behavior results in victimization of others ☐. May use sexual expression/behavior to attain power and control over others ☐.

_____ **Y8. Mental Health**

- 0 ☐ a. No need for mental health care indicated.
1 ☐ b. Has mental health needs that are being addressed.
3 ☐ c. Behavior indicates a need for additional mental health assessment ☐ or treatment ☐.
- Check all behaviors that apply:
- | | | | |
|--|--|----------------------------------|------------------------------------|
| Withdrawn ☐ | Self mutilation ☐ | Sad ☐ | Runs away ☐ |
| Confused ☐ | Hallucinations ☐ | Anxious ☐ | Fights ☐ |
| Sleep problems ☐ | Eating problems ☐ | Angry ☐ | Restless ☐ |
| Risk-taking/impulsive ☐ | Other _____ | | |
- Diagnosis (from MH professional) _____

_____ **Y9. Basic Physical Needs/Independent Living**

- 0 ☐ a. Youth is living with parents, guardian or custodian. Basic needs for food, shelter and protection are met.
1 ☐ b. Youth is in temporary residential care or shelter ☐ or living independently with basic needs for food, shelter and protection being met ☐.2 ☐ c. Youth is living with parents, guardian or custodian. Basic needs are not being met. Food needs not met ☐, shelter needs not met ☐, protection needs not met ☐.3 ☐ d. Youth is living independently. Basic needs are not being met. Food needs not met ☐, shelter needs not met ☐, protection needs not met ☐.

_____ **Y10. Health & Hygiene (exclude Mental Health Conditions)**

- 0 ☐ a. No apparent problem.
1 ☐ b. Youth has medical ☐, dental ☐, health/ hygiene education ☐ needs which do not impair functioning. Youth uses tobacco products ☐.2 ☐ c. Youth has physical handicap ☐ or chronic illness ☐ that limits functioning and the condition is being treated.
3 ☐ d. Youth has physical handicap ☐ or chronic illness ☐ that limits functioning and the condition is not being treated. Youth does not comply with prescribed medication ☐ or has an unmet need for prescribed medication ☐.

Juvenile Name (F, M, L)	DOB:

FAMILY NEEDS: Answer the following questions about the juvenile's primary family. The primary family is the juvenile's natural family or the family unit that the juvenile is living with on a permanent basis. If the juvenile is placed away from home, the questions should be answered about the "family" to which the juvenile will be returning. Make any needed clarifying comments in the comment section.

F1. Conflict in the Home Within Past 12 Months

- 0 ☐ a. The home environment is relatively supportive; there are no problems that require outside intervention.
- 2 ☐ b. Marital or domestic discord resulting in emotional or physical conflict (without serious injury) with spouse, partner, and/or child(ren) ☐. Family members avoid contact with each other ☐.
- 4 ☐ c. Domestic violence resulting in injury or the involvement of law enforcement and/or domestic violence programs ☐. Restraining orders/criminal complaints ☐ substantiated abuse ☐.
- Check if there is a history of domestic discord ☐ or domestic violence ☐.

F2. Supervision Skills

- 0 ☐ a. Adequate skills. Parent makes rules for youth and generally enforces them; parent attempts to keep track of the child's activities and uses discipline when needed; youth respects parent for the most part.
- 2 ☐ b. Marginal skills. Parent may make rules, but has difficulty enforcing them ☐ or youth often engages in inappropriate activities without parent's knowledge ☐ or parent does not react with necessary sanctions when rules are broken ☐ or parents say they are having difficulty controlling the juvenile ☐.
- 4 ☐ c. Inadequate. Parent supports juvenile's delinquency/independence or excuses it ☐ or parent refuses responsibility for youth ☐ or abandons youth ☐.

F3. Disabilities of Parent, Guardian or Custodian

- 0 ☐ a. Parent, guardian or custodian has no known disabilities that interfere with parenting.
- 2 ☐ b. Parent, guardian or custodian's ability to provide for youth is impaired by serious mental health disorder ☐ or a serious health problem ☐ or other disability ☐.

F4. Substance Abuse Within the Past 3 Years By Household Members (Do not include juvenile.)

- 0 ☐ a. No evidence of alcohol or drug abuse.
- 3 ☐ b. One or more household members abuse alcohol or drugs.
- Indicate all that apply. Parent is abuser ☐ Sibling is abuser ☐
- Other household member is abuser ☐ Unmet need for treatment ☐ Denial ☐
- Refusal of treatment ☐ Prior treatment failures ☐ Job loss ☐
- DWI ☐ Other conflict with the law ☐ Abusive/destructive behavior ☐
- Describe substance use/abuse noted above by type (check all that apply, leave blank if none)
- Cocaine ☐ Amphetamines ☐ Opiates ☐
- Alcohol ☐ Cannabinoids ☐ Other ☐

F5. Family Criminality

- 0 ☐ a. No family member (including siblings) has been convicted/adjudicated for criminal acts.
- 1 ☐ b. Parents, guardian or custodian and/or siblings have record of convictions/adjudications.
- Parent, guardian or custodian conviction ☐ Sibling conviction/adjudication ☐
- 3 ☐ Parent, guardian or custodian and/or siblings are currently incarcerated, or are on probation or parole (give relationship and status) ☐ or are known gang members ☐.

0	Total Needs Score

Check Needs Level: ☐ Low (0-12) ☐ Medium (13-22) ☐ High (23+)

Sources of information: Check all that apply

Juvenile ☐ Mother ☐ Father ☐ Other Caregiver ☐

Sibling ☐ Other relative ☐ School ☐ Victim ☐

Neighbor ☐ Law Enforcement ☐ DSS ☐ Mental Health ☐

Others ☐

ASSESSMENT OF NEEDS COMMENTS:

**ASSESSMENT OF JUVENILE RISK OF FUTURE OFFENDING and
ASSESSMENT OF JUVENILE NEEDS**

SUMMARY AND RECOMMENDATION

Juvenile Name (F, M, L)	
SS#:	DOB:
Date of Assessment and Recommendation	

Total Risk Score _____ **Low Risk (0-7)** **Medium Risk (8-14)** **High Risk (15+)**
Total Needs Score _____ **Low Needs (0-12)** **Medium Needs (13-22)** **High Needs (23+)**

After completing each Needs Assessment item, review the findings and determine the youth's priority needs i.e., those behaviors which must be addressed by service interventions to deter future delinquent behavior. Then enter the priority needs in the boxes below (enter the priority needs item reference; i.e., Y1 , Y2 or F3, etc.) and briefly describe the service intervention recommended. The Needs Assessment plus the Risk Assessment provide the basic information for constructing the case plan.

Priority Needs	Services Recommended
1.	
2.	
3.	
Other:	

Comments:

APPENDIX A.3

Table A.3-1
Number and Percentage of Juveniles with Risk and/or Needs Assessments
by Level of Involvement

Level of Involvement	N	No Risk or Needs		Risk Only		Needs Only		Both Risk and Needs	
		N	%	N	%	N	%	N	%
Adjudicated	5,826	207	3.5	22	0.4	121	2.1	5,476	94.0
Dismissed	2,117	566	26.7	20	0.9	31	1.5	1,500	70.9
Diverted	5,014	583	11.6	168	3.4	96	1.9	4,167	83.1
Closed	4,703	1,434	30.5	90	1.9	74	1.6	3,105	66.0
TOTAL	17,660	2,790	15.8	300	1.7	322	1.8	14,248	80.7

Note: Risk and/or needs assessments were counted if the assessment was completed within a year of the date the complaint was received.

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

APPENDIX B

JUVENILE DISPOSITION CHART

JUVENILE DISPOSITION CHART

Offense Classification	Delinquency History Level		
	Low 0 – 1 points	Medium 2 – 3 points	High 4 or more points
Violent Class A – E felonies	Level 2 or 3	Level 3	Level 3
Serious Class F – I felonies Class A1 misdemeanors	Level 1 or 2	Level 2	Level 2 or 3
Minor Class 1 – 3 misdemeanors	Level 1	Level 1 or 2	Level 2

Offense Classification (G.S. 7B-2508)

Violent – Adjudication of a Class A through E felony offense.

Serious – Adjudication of a Class F through I felony offense or a Class A1 misdemeanor.

Minor – Adjudication of a Class 1, 2, or 3 misdemeanor.

Delinquency History Levels (G.S. 7B-2507(c))

Points

For each prior adjudication of a Class A through E felony offense, 4 points.

For each prior adjudication of a Class F through I felony offense or a Class A1 misdemeanor offense, 2 points.

For each prior adjudication of a Class 1, 2, or 3 misdemeanor, 1 point.

If the juvenile was on probation at the time of the offense, 2 points.

Levels

Low – No more than 1 point.

Medium – At least 2, but not more than 3 points.

High – At least 4 points.

APPENDIX C

DISPOSITIONAL OPTIONS

DISPOSITIONAL OPTIONS

Level 1 Community	Level 2 Intermediate	Level 3 Commitment
▪ intensive substance abuse treatment program ▪ excuse from school attendance ▪ residential treatment program ▪ in-home supervision ▪ community-based program ▪ custody ▪ restitution up to \$500 ▪ nonresidential treatment program ▪ not associate with specified persons ▪ community service up to 100 hours ▪ victim-offender reconciliation ▪ probation ▪ no driver's license ▪ intermittent confinement up to 5 days ▪ fine ▪ not be in specified places ▪ curfew ▪ wilderness program ▪ supervised day program	▪ intensive substance abuse treatment program ▪ residential treatment program ▪ intensive nonresidential treatment program ▪ wilderness program ▪ group home placement ▪ intensive probation ▪ supervised day program ▪ regimented training program ▪ house arrest with/without electronic monitoring ▪ suspension of more severe disposition w/conditions ▪ intermittent confinement up to 14 days ▪ multipurpose group home ▪ restitution over \$500 ▪ community service up to 200 hours	▪ 6 month minimum commitment ▪ minimum 90 day post-release supervision

APPENDIX D

JUVENILES ADJUDICATED AND DISPOSED

JUVENILES ADJUDICATED AND DISPOSED²⁸

Descriptive Information

Table D-1
Identifying Juveniles Adjudicated and Disposed

Total Number of Adjudicated Juveniles	Was a Disposition Imposed during FY 2008/09?			
	Yes		No	
	n	%	n	%
5,826	5,508	94.5	318	3.5

Note: In the juvenile justice system, the dispositional hearing often occurs at a later date than the adjudicatory hearing in order for a pre-disposition report to be completed. As a result, a disposition hearing may not have occurred during FY 2008/09 for the adjudicated juveniles in the sample.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Table D-2
Offense Classification of the Sample Offense by Adjudicated Offense
Juveniles Adjudicated and Disposed

Sample Offense Classification	N	Adjudicated Offense Classification			%
		% Violent n=138	% Serious n=1,355	% Minor n=4,015	
Violent	247	55.9	33.2	10.9	4.5
Serious	1,887	0.0	67.4	32.6	34.2
Minor	3,374	0.0	0.0	100.0	61.3
Total	5,508	2.5	24.6	72.9	100.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

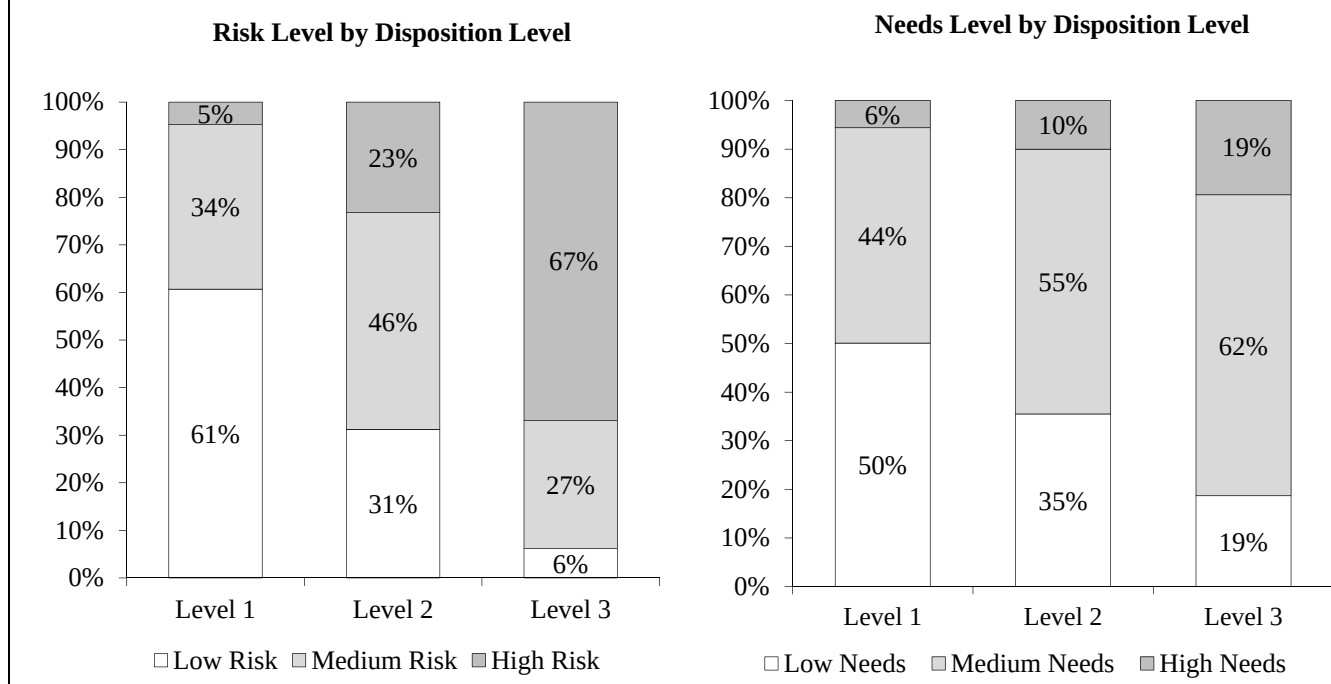
²⁸ For comparative purposes, see Chapter Three in the Sentencing Commission's juvenile recidivism studies published in 2009 and 2011.

Table D-3
Offense Classification of the Adjudicated Offense by Delinquency History Level
Juveniles Adjudicated and Disposed

Adjudicated Offense Classification	N	Delinquency History Level			% Total n=5,508
		% Low n=4,297	% Medium n=685	% High n=526	
Violent	138	71.0	13.1	15.9	2.5
Serious	1,355	71.2	16.0	12.8	24.6
Minor	4,015	80.6	11.2	8.2	72.9
Total	5,508	78.0	12.4	9.6	100.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Figure D-1
Risk Level and Needs Level by Disposition Level
Juveniles Adjudicated and Disposed



Note: Of the 5,508 juveniles adjudicated and disposed, there were 272 cases with missing values for risk level and 176 cases with missing values for needs level.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Table D-4
Disposition Levels by Offense Classification and Delinquency History Level
Juveniles Adjudicated and Disposed

Offense Classification	Delinquency History Level			TOTAL
	Low 0 – 1 Point	Medium 2 – 3 Points	High 4+ Points	
Violent (Class A – Class E)	<u>Level 2/Level 3</u> Level 1: 2 (2.0%) Level 2: 77 (78.6%) Level 3: 19 (19.4%) n = 98	<u>Level 3</u> Level 1: 0 (0.0%) Level 2: 10 (55.6%) Level 3: 8 (44.4%) n = 18	<u>Level 3</u> Level 1: 0 (0.0%) Level 2: 8 (36.4%) Level 3: 14 (63.6%) n = 22	Level 1: 2 (1.5%) Level 2: 95 (68.8%) Level 3: 41 (29.7%) n = 138
Serious (Class F – Class A1)	<u>Level 1/Level 2</u> Level 1: 439 (45.5%) Level 2: 522 (54.2%) Level 3: 3 (0.3%) n = 964	<u>Level 2</u> Level 1: 33 (15.2%) Level 2: 180 (83.0%) Level 3: 4 (1.8%) n = 217	<u>Level 2/Level 3</u> Level 1: 2 (1.2%) Level 2: 122 (70.1%) Level 3: 50 (28.7%) n = 174	Level 1: 474 (35.0%) Level 2: 824 (60.8%) Level 3: 57 (4.2%) n = 1,355
Minor (Class 1 – Class 3)	<u>Level 1</u> Level 1: 3,104 (96.0%) Level 2: 130 (4.0%) Level 3: 1 (0.0%) n = 3,235	<u>Level 1/Level 2</u> Level 1: 117 (26.0%) Level 2: 330 (73.3%) Level 3: 3 (0.7%) n = 450	<u>Level 2</u> Level 1: 16 (4.9%) Level 2: 274 (83.0%) Level 3: 40 (12.1%) n = 330	Level 1: 3,237 (80.6%) Level 2: 734 (18.3%) Level 3: 44 (1.1%) n = 4,015
TOTAL	Level 1: 3,545 (82.5%) Level 2: 729 (17.0%) Level 3: 23 (0.5%) n = 4,297	Level 1: 150 (21.9%) Level 2: 520 (75.9%) Level 3: 15 (2.2%) n = 685	Level 1: 18 (3.4%) Level 2: 404 (76.8%) Level 3: 104 (19.8%) n = 526	Level 1: 3,713 (67.4%) Level 2: 1,653 (30.0%) Level 3: 142 (2.6%) n = 5,508

Note: In FY 2008/09, there were 252 juveniles (or 4.6%) involving a disposition not specified by the dispositional chart. However, it must be noted that certain provisions of the juvenile code allow a judge to impose a disposition other than those specified by the chart. Under G.S. 7B-2508(e), judges may find “extraordinary needs” and impose a lower level disposition. Under G.S. 7B-2508(g), juveniles adjudicated delinquent for a minor offense with four or more prior adjudications may be committed to a YDC. Finally, under G.S. 7B-2508(d), juveniles adjudicated for a minor offense with a previous Level 3 disposition may be committed to a YDC.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Recidivism Results

Table D-5
Recidivism Rates by Individual Components of the Juvenile Disposition Chart
during the Three-Year Follow-Up
Juveniles Adjudicated and Disposed

Individual Components of the Juvenile Disposition Chart	Subsequent Complaints		Adult Arrests		Overall Recidivism	
Adjudicated Offense Classification	n	%	n	%	N	%
Violent (Class A – Class E)	106	23.6	127	22.8	138	37.7
Serious (Class F – Class A1)	1,185	43.5	1,206	32.3	1,355	55.1
Minor (Class 1 – Class 3)	3,628	46.7	3,569	33.1	4,015	59.5
Delinquency History Level	n	%	n	%	N	%
Low (0 – 1 point)	3,861	44.2	3,762	29.0	4,297	54.6
Medium (2 – 3 points)	606	50.8	634	40.5	685	67.5
High (4 or more points)	452	48.7	506	49.4	526	72.43
Disposition Level	n	%	n	%	N	%
Level 1 (Community)	3,365	44.5	3,238	29.3	3,713	55.2
Level 2 (Intermediate)	1,447	48.9	1,527	38.4	1,653	63.7
Level 3 (YDC Commitment)	107	29.0	137	47.5	142	59.9
Adjudicated and Disposed	4,919	45.4	4,902	32.6	5,508	57.9
SAMPLE TOTAL	16,308	34.4	14,700	23.7	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

APPENDIX E

JUVENILES DIVERTED

JUVENILES DIVERTED²⁹

Descriptive Information

Table E-1
Completion Rates by Type of Diversion Plan
Juveniles Diverted

Type of Diversion Plan	N	% Successful n=3,909	% Unsuccessful n=811	% Other n=294
Contract	2,356	75.9	18.6	5.5
Plan	2,658	79.8	14.0	6.2
Diverted	5,014	78.0	16.2	5.8

Note: The “Unsuccessful” category applies to juveniles who were referred to a program and they did not go or they failed to cooperate with the program placement. These juveniles may have received another delinquent complaint while under the diversion plan in this category. Generally, the juveniles in this category are approved for court. The “Other” category applies to juveniles who do not complete their diversion program, but their non-completion may not be due to any fault of their own (*i.e.*, family moved and closure is appropriate, complainant does not want to pursue program completion, medical/mental health issues prevent completion). Generally, the juveniles in this category are not approved for court.

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

Recidivism Results

Table E-2
Recidivism Rates by Court Status during the Three-Year Follow-Up
Juveniles Diverted

Court Status of Juveniles Diverted	Subsequent Complaints		Adult Arrests		Overall Recidivism	
	n	%	n	%	n	%
Approved for Court	611	63.2	504	23.4	618	68.9
Not Approved for Court	4,266	26.4	3,449	15.0	4,396	33.4
Diverted	4,877	31.0	3,953	16.0	5,014	37.8
SAMPLE TOTAL	16,308	34.4	14,700	23.7	17,660	44.0

Source: NC Sentencing and Policy Advisory Commission, FY 2008/09 Juvenile Recidivism Sample

²⁹ For comparative purposes, see Chapter Two in the Sentencing Commission’s juvenile recidivism studies published in 2009 and 2011.

Staying Abreast: Case Law and Legislative Update

August 2013

2013 Juvenile Defender Conference
Chapel Hill, NC

August 16, 2013

JUVENILE DELINQUENCY LAW UPDATE

Cases Filed from October 2, 2012, through July 16, 2013

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Delinquent Juveniles: North Carolina Appellate Court Decisions

Juvenile *Miranda* Rights

- Juvenile who made a statement to an officer at the scene of an automobile accident was not in custody.
- Evidence was insufficient to support two of three adjudications for motor vehicle offenses.

***In re A.N.C.*, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 5, 2013).**

Facts: An officer saw the juvenile and two others leaving the scene of an accident involving a car that crashed into a utility pole. The officer stopped the boys and after several minutes of conversation the juvenile, age 13, admitted that he had been driving the car, which belonged to his mother. The juvenile was adjudicated delinquent for unauthorized use of a motor vehicle, operating a motor vehicle without being properly licensed, and operating a motor vehicle in a reckless manner. He was placed on probation. On appeal the juvenile argued that his *Miranda* rights had been violated, that his statement to the officer was involuntary, and that the trial court erred by denying his motions to dismiss for lack of sufficient evidence.

Held: Affirmed in part; reversed in part; and remanded.

1. The court rejected the juvenile's arguments that he was in custody for purposes of G.S. 7B-2101 and *Miranda* and that his statement was involuntary. The fact that he was legally required to remain at the scene of an accident and provide identifying information did not mean that he was in custody or that his 5th Amendments rights were violated. There was no indication of coercive conduct by the officer.
2. The trial court erred by failing to dismiss two of the petitions for insufficient evidence, because there was no evidence
 - a. that his use of his mother's vehicle was unauthorized, or
 - b. that he was driving in a reckless manner.
3. There was sufficient evidence to support the adjudication for driving without a license.
4. Court remanded for any needed additional proceedings and entry of a new disposition order.

- The fact that a juvenile is a suspect does not render all law enforcement questioning of the juvenile custodial interrogation.

***In re D.A.C.*, ___ N.C. App. ___, 741 S.E.2d 378 (Feb. 19, 2013).**

Facts: Law enforcement officers saw the juvenile at the home from which they thought shots had been fired at another home. When asked, the juvenile denied shooting at the house. Officers spoke with the juvenile's parents and then asked the juvenile if he would speak with them. A plain-clothes detective and uniformed officer spoke with the juvenile outside his house for about five minutes. The parents were invited to join them but stayed in the house and told the juvenile to talk to the officers and "tell the truth." The juvenile admitted shooting at the house. The officers did not give the juvenile a *Miranda* warning. The juvenile was charged with damaging both personal and real property. The trial court denied the juvenile's motion to suppress his oral statements, and he was adjudicated delinquent and placed on probation for six months.

Held: Affirmed.

1. The trial court made sufficient findings, which for the most part were not challenged by the juvenile, and the findings supported the conclusion that the juvenile was not in custody when he made the statements.

2. Facts the court considered included that the juvenile was 14; the officers asked whether he would talk with them and did not say he had to; the questioning occurred outdoors at the juvenile's home during the day; the juvenile's parents were nearby and could have gone outside with the juvenile; the officers talked with the juvenile for only about five minutes; the officers stood arms length from the juvenile and made no move to touch him; and there was no physical restraint or indication of coercion.
3. Facts that did not suffice to render the juvenile "in custody" included that: the juvenile was very much a suspect in the shooting; his parents told him to talk to the officers and "tell the truth"; and the officers were armed and one was in uniform.

Search and Seizure

- **Validity of school-wide search for drugs requiring "bra-lift" still undecided.**
- The Supreme Court vacated the Court of Appeals decision that the trial court erred when it denied the juvenile's motion to suppress evidence of drugs, and remanded for additional findings of fact by the trial court.

***In re T.A.S.*, 366 N.C. 269, 732 S.E.2d 575 (Oct. 5, 2012).**

Court of Appeals: In July, 2011, the court of appeals reversed the delinquency adjudication of a juvenile on whom drugs were found in the course of a school-wide search at an alternative school. [*In re T.A.S.*, ___ N.C. App. ___, 713 S.E.2d 211 (July 19, 2011).] The court held that requiring all female students to do a "bra-lift" as part of a school-wide search for drugs was constitutionally unreasonable where there was no individualized suspicion and no indication of imminent danger. One judge dissented on the bases that (i) attendance at an alternative school results in a diminished privacy interest; (ii) the search involved minimal intrusion; (iii) the governmental interest was important and immediate; and (iv) the search was an effective means of addressing the government's concern.

Supreme Court: In its October 5, 2012, decision, the supreme court vacated the opinion of the court of appeals and remanded to that court for further remand to the trial court. The court ordered the trial court to make additional findings that include:

1. the names, occupations, genders, and involvement of everyone who was physically present at the "bra lift" search of the juvenile;
2. whether the juvenile was advised before the search of the school's "no penalty" policy; and
3. whether the "bra lift" search of the juvenile qualified as a "more intrusive" search under the school's Safe School Plan.

The court also instructed counsel, in the event of an appeal from the trial court's new or amended order, to ensure that a copy of the school's Safe School Plan be included in the record on appeal, noting that the plan was discussed at the suppression hearing and apparently introduced into evidence.

- Reasonable suspicion requires only a minimal level of objective justification; not definitive proof of a statutory violation.
- While merely stating an obscenity at a person may be protected speech, a police officer is not precluded from approaching any individual who yells obscenities in public, as such actions might lead to a breach of the peace.
- Directing an individual to empty her pockets constitutes a search even though the officer did not conduct it physically.

***In re V.C.R.*, ___ N.C. App. ___, 742 S.E.2d 566 (May 7, 2013).**

Facts: A Raleigh police officer was patrolling a residential community at night when he spotted a group of juveniles walking down the sidewalk. One of them, V.C.R., was smoking a cigarette and the officer stopped and asked her how old she was. When V.C.R. responded that she was 15 years old, the officer asked her to put out her cigarette and give him the pack of cigarettes she was holding. After she complied, the officer began to drive away, but stopped again when he heard V.C.R. yell “What the f---, man.” The officer exited his patrol car, approached V.C.R., and told the other juveniles to keep walking. He then asked V.C.R. for identification and engaged her in conversation, during which she raised her arms and revealed a “round bulge” in her front pants pocket. The officer instructed her to empty her pockets, and she complied, revealing a small bag of marijuana. The juvenile moved to suppress the evidence as the product of two seizures and a search that each violated the federal and state constitutions. The trial court denied the motion to suppress, and the juvenile was adjudicated delinquent for simple possession of marijuana.

Held: Reversed.

1. The court held that both seizures (*e.g.*, the “cigarette stop” and “marijuana stop”) were supported by reasonable suspicion, but the search was unconstitutional.
2. The cigarette stop was reasonable because:
 - Under G.S. 14-313(c), it is unlawful for a minor to purchase or “accept receipt” of cigarettes. Even if the officer had acted on an assumption that possession of cigarettes by a minor was an offense, our Supreme Court held in *State v. Heien*, ___ N.C. App. ___, 737 S.E.2d 351 (Dec. 14, 2012), that an officer’s mistake of law does not always result in the lack of reasonable suspicion.
 - Thus, a reasonable person would find it more likely than not that a person in possession of cigarettes had “accepted receipt” of those items.
3. The marijuana stop was reasonable because:
 - While merely stating an obscenity to another individual may be protected speech, the right of free speech is not unlimited.
 - G.S. 14-288.4(a)(2) prohibits disorderly conduct in the form of using “abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.”
 - Thus, the officer’s second encounter with the juvenile, which can be viewed as an extension of the first, was reasonable given the juvenile’s behavior.
4. However, by directing the juvenile to empty her pockets, the officer conducted a search vicariously and without probable cause. The search was not incident to arrest, as the juvenile was not actually arrested, and the officer was not attempting to take the juvenile into custody pursuant to G.S. 7B-1900 or G.S. 7B-1901.
5. The court rejected the trial court’s finding that the search was consensual, because the juvenile’s production of the contraband was in response to the officer’s command and not a voluntary action.

Concurring Opinion: The concurring judge would have also concluded that the second encounter (“marijuana stop”) was unconstitutional based on the lack of record evidence that the officer had reasonable suspicion to stop the juvenile for disorderly conduct.

Juvenile Court Orders: Required Findings

- An adjudication order must, at a minimum, include the date of offense, the classification of the offense, the date of the adjudication, and a statement that the allegations were proven beyond a reasonable doubt.
- A disposition order must include findings demonstrating that the court considered all of the factors listed in G.S. 7B-2501(c).

***In re K.C.*, ___ N.C. App. ___, 742 S.E.2d 239 (April 16, 2013).**

Facts: The juvenile was alleged to be delinquent for simple assault and sexual battery. At adjudication, a female classmate of the male juvenile testified that the juvenile “grabbed and squeezed her butt” in class when she went to shelve a book. The juvenile testified that he accidentally touched her butt, when picking up a pencil, but did not squeeze it. The court denied the juvenile’s motion to dismiss at the close of the state’s evidence, and the juvenile did not renew the motion at the end of all the evidence. The court adjudicated the juvenile delinquent for both offenses, placed him on nine months’ probation, and ordered him to submit to a sex offender evaluation and follow any treatment recommendations.

Held: Vacated in part; affirmed in part; remanded in part; and dismissed in part.

The court of appeals considered the juvenile’s claim of insufficiency of the evidence pursuant to Appellate Rule 2, despite the juvenile’s failure to move to dismiss at the close of the evidence.

1. Sexual battery. The court vacated the adjudication for sexual battery, for insufficient evidence. Because the juvenile admitted touching the girl’s buttocks, there was sufficient evidence of sexual contact, the court said. However, evidence that the juvenile had made a possibly sexually suggestive statement to her months before was not sufficient to prove sexual purpose, a necessary element, beyond a reasonable doubt. When children are involved, the purpose cannot be inferred from the act itself. There must be “evidence of the child’s maturity, intent, experience, or other factor indicating his purpose in acting.”
2. Simple assault. The court affirmed the adjudication for simple assault, based on the juvenile’s having touched the classmate without her consent.
3. Adjudication order. The order was sufficient when it included the date of the offense, the fact that the assault was a class 2 misdemeanor, the date of the adjudication, and a statement that proof was beyond a reasonable doubt – the minimum required by G.S. 7B-2411.
4. Disposition. The court remanded the disposition order for additional findings of fact, holding that the trial court’s findings were not sufficient to show that it considered all of the factors listed in G.S. 7B-2501(c).
5. Ineffective assistance. The court dismissed without prejudice the juvenile’s claim that he received ineffective assistance of counsel, indicating that the juvenile could pursue that claim by filing a motion in the cause.

- A disposition order must either show that the court “received and considered” the risk and needs assessments or contain a written finding that these reports were not needed.

***In re E.K.H.*, ___ N.C. App. ___, 739 S.E.2d 613 (April 16, 2013).**

Facts: After adjudicating the juvenile delinquent for common law robbery and conducting a dispositional hearing, the trial court ordered a Level 3 disposition. On appeal the juvenile’s only argument was that the trial court erred by entering a disposition order without either (1) receiving and considering a risk and needs assessment or (2) making a written finding that it was not needed.

Held: Affirmed.

The court of appeals held that the trial court erred by failing to do either of those things, as required by G.S. 7B-2413, but that the error was harmless. The court reviewed the evidence that was considered by the trial court, and noted that the juvenile did not object at the hearing to the absence of the assessment and did not indicate in his brief any prejudice resulting from the court’s error.

Ineffective Assistance of Counsel

- Counsel’s failure to present a closing argument in a nonjury juvenile delinquency hearing is not, standing alone, a *per se* violation of the Sixth Amendment right to counsel.

***In re C.W.N., Jr.*, ___ N.C. App. ___, 742 S.E.2d 583 (May 7, 2013).**

Facts: The juvenile, who was 15 years old, and three other boys were engaged in horseplay in the boys’ bathroom at their school when the 13-year-old victim entered the bathroom and entered a stall. When the victim exited the bathroom stall, the juvenile approached him and said, “watch this,” swung his arm, and struck the victim in the groin area. The victim fell to the ground. Following the presentation of evidence at the adjudication hearing, the juvenile’s counsel declined to give a closing argument, although the prosecutor did give one. The trial court adjudicated the juvenile delinquent for misdemeanor assault.

Held: Affirmed.

1. To successfully raise a claim of ineffective assistance of counsel, a juvenile must show that his counsel’s conduct fell below an objective standard of reasonableness by establishing both: (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the juvenile.
2. The court declined to hold that counsel’s failure to speak during closing arguments in a nonjury juvenile delinquency hearing is *per se* ineffective assistance of counsel because to do so would create a presumption that silence is always prejudicial.
3. The court also held that counsel was not ineffective by failing to argue in closing that the incident was an accident resulting from horseplay.
 - Counsel’s representation was not deficient because counsel’s cross-examination of the State’s witnesses clarified evidence that was favorable to the juvenile and revealed inconsistencies between a witness’s trial testimony and prior statement to law enforcement; and on direct examination, counsel presented evidence through the juvenile that the incident was an accident.
 - The juvenile also failed to establish a reasonable probability that, had counsel asserted on closing argument that the assault was accidental, the result of the proceeding would have been different, because three witnesses testified that the assault was not an accident.

Indictments; Sufficiency of Evidence

- An indictment is sufficient if the offense is charged in the language of the statute.
- Errors in the caption of an indictment are not fatal defects.
- The trial court may not instruct the jury on a theory of guilt not alleged in the indictment.

***State v. Stevens*, __ N.C. App. __, __ S.E.2d __ (July 16, 2013).**

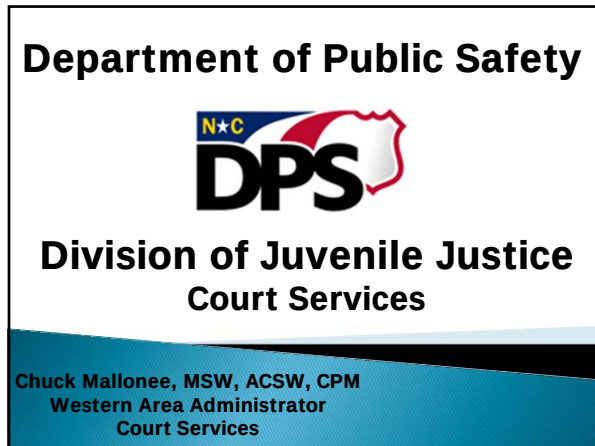
Facts: During a bike ride with the juvenile, defendant took the juvenile away from his neighborhood, later caused an eye injury to the juvenile, did not seek treatment of that injury, and abandoned the juvenile when the juvenile was sleeping in a parking lot, leaving the juvenile without the proper supervision of his parents.

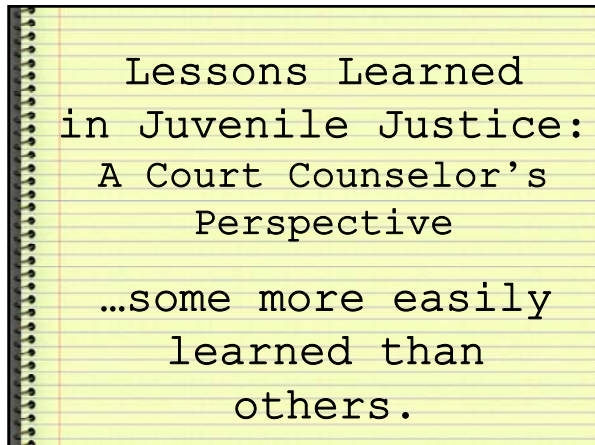
Held: No error in part; Reversed in part.

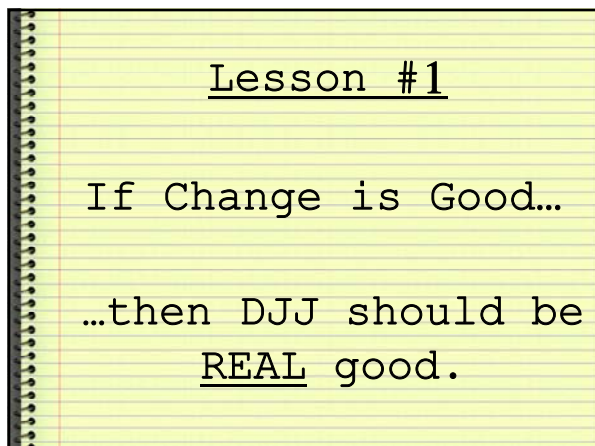
1. The indictment for contributing to the delinquency and neglect of a minor was sufficient because it tracked the language of the statute; no additional evidentiary allegations were required, and an error in the caption was not fatally defective.
2. The court of appeals upheld defendant's conviction for contributing to the delinquency and neglect of a minor, a Class 1 misdemeanor. Defendant was at least 16, and defendant caused the minor to be in a place or condition where the minor could be adjudicated neglected as defined by G.S. 7B-101.
3. The court of appeals reversed defendant's conviction for assault on a child under 12. The jury instructions allowed defendant to be convicted on a theory of criminal negligence, which was not alleged in the indictment.

Understanding the System: The Division of Juvenile Justice, Court Services

August 2013









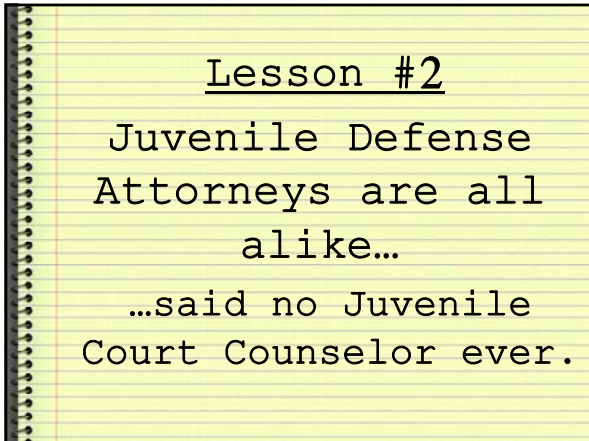
The road we've traveled...

- ▶ 1974–1999: Juvenile Services Division
- ▶ 1999–2000: Office of Juvenile Justice and Delinquency Prevention
- ▶ 2000–2012: Department of Juvenile Justice and Delinquency Prevention
- ▶ 2012–? Department of Public Safety – Division of Juvenile Justice



Org Chart (Today)

- ▶ Commissioner J. R. Gorham
 - Facility Services (YDC's and Detention)
 - Community Programming (JCPC's, other programs)
 - Center for Safer Schools
 - **Court Services**
 - Mike Rieder, Director
 - Four Area Administrators
 - 30 Chief Court Counselors
 - Over 500 Juvenile Court Counselors, Supervisors and Office Assistants



Lesson #2

Juvenile Defense
Attorneys are all
alike...

...said no Juvenile
Court Counselor ever.



The Many Faces of a JDA

- ▶ Minimizes the JDA role. Meets juvenile on court day. Relies exclusively on the Court Counselor. In and out.
- ▶ Legally adversarial and challenging. Focused on ensuring every legal threshold has been met. Seeking the least intervention possible.
- ▶ A mix of the two. Holds the system accountable, yet knows the juvenile/family and strives for a balance of legal/social best interests for juvenile.



Lesson #3

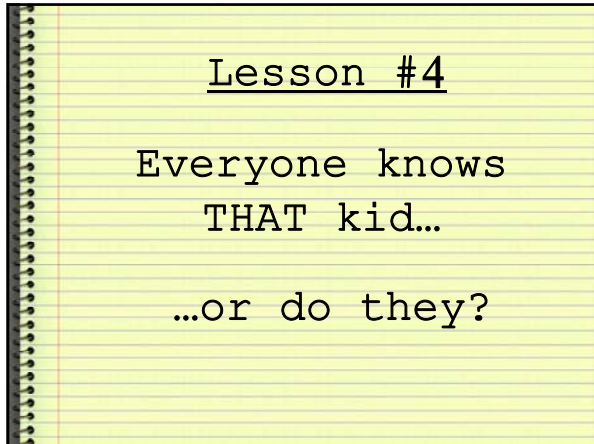
Juvenile Court Counselors are all alike...

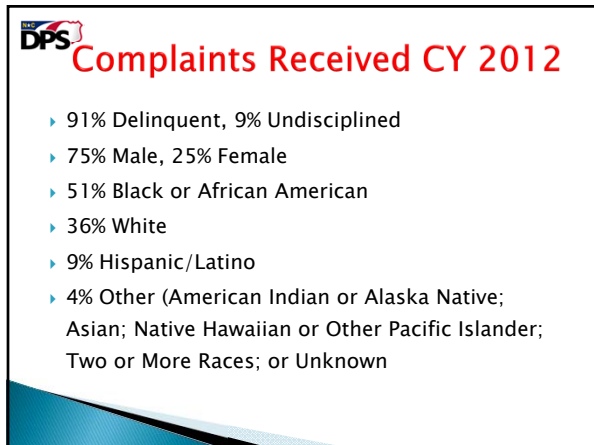
...said no Juvenile Defense Attorney ever.

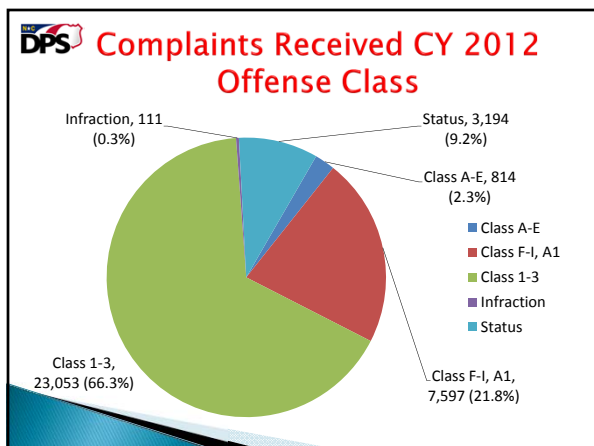


The Many Faces of a JCC

- ▶ "Corrections" versus "Therapeutic". "Social worker" versus "probation officer".
- ▶ Recognizes the importance of the adversarial system versus taking it "personally".
- ▶ Changes in recruitment
- ▶ Training, Structured Decision-Making and Tools for Consistency.









Complaints Received CY 2012 Age

Age at Offense	CY 2012	% of Total
6	102	0.30%
7	220	0.70%
8	310	1.00%
9	421	1.30%
10	606	1.90%
11	1,537	4.90%
12	2,911	9.20%
13	5,161	16.30%
14	8,555	27.10%
15	11,747	37.20%
Total	31,570	100.00%



Risk Assessment Data – CY 2012

- ▶ **25%** have 2 or more prior referrals
- ▶ **15%** have run away for 24 hrs. or more
- ▶ **16%** have Substance Abuse concerns needing further assessment/treatment
- ▶ **23%** have parents willing but unable to supervise
- ▶ **50%** have Serious School Problems
- ▶ **7%** Identify as a gang member/associate

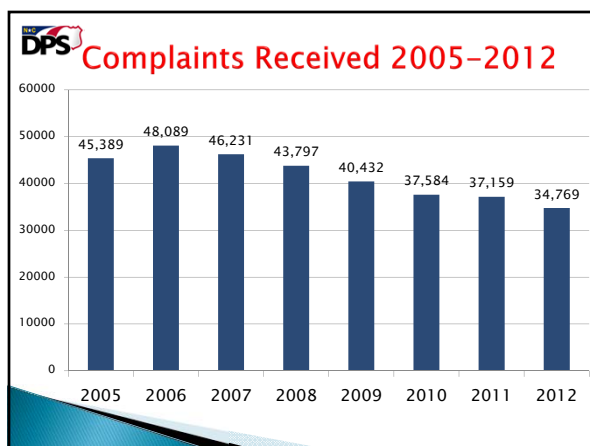
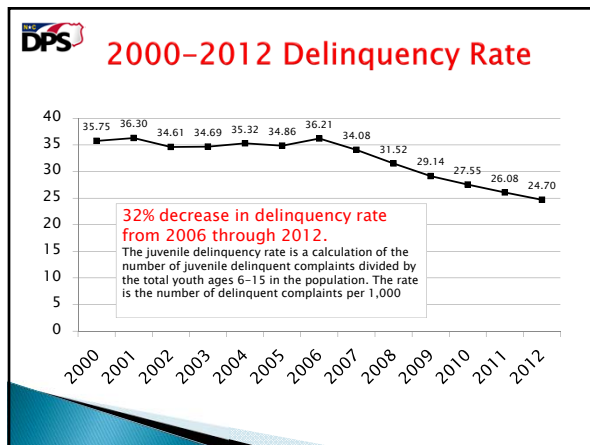


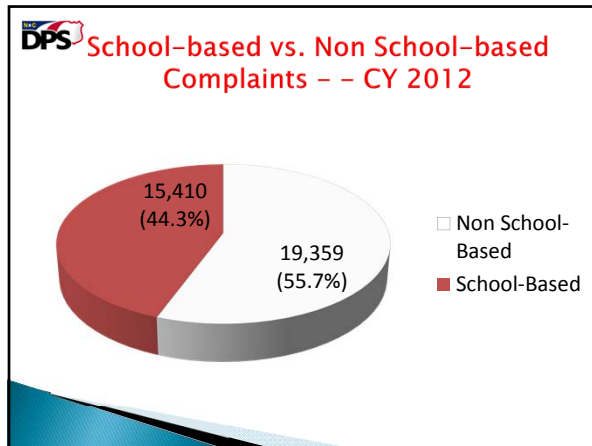
Needs Assessment Data – CY 2012

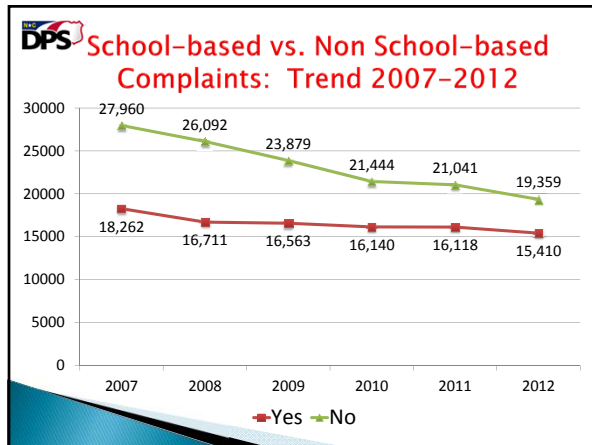
- ▶ **18%** have been victimized
- ▶ **39%** need additional mental health assessment
- ▶ **22%** in families with Marital or Domestic Discord in previous 12 months.
- ▶ **61%** have parents with "marginal" supervision skills.
- ▶ **33%** have family members with convictions/adjudications

Lesson #5

Trends in Juvenile
Justice data are
important...
...although a little
dry







DPS Complaints Received CY 2005 & 2012 Getting Younger?

Age at Offense	CY 2005	% of Total	CY 2012	% of Total
6	46	0.10%	102	0.30%
7	100	0.20%	220	0.70%
8	221	0.50%	310	1.00%
9	425	1.00%	421	1.30%
10	643	1.60%	606	1.90%
11	1,555	3.80%	1,537	4.90%
12	3,461	8.50%	2,911	9.20%
13	6,980	17.20%	5,161	16.30%
14	11,311	27.90%	8,555	27.10%
15	15,850	39.00%	11,747	37.20%
Total	40,592	100.00%	31,570	100.00%



Complaints Received CY 2005 & 2012 Getting Younger?

- Increase in ages 6–8
- No significant increase ages 9–13
- Expected decrease in ages 14–15
- Mean Average Age at time of Offense:
 - CY 2005: 14.3
 - CY 2012: 14.1



Complaints Received CY 2008 – 2012 Getting More Violent?

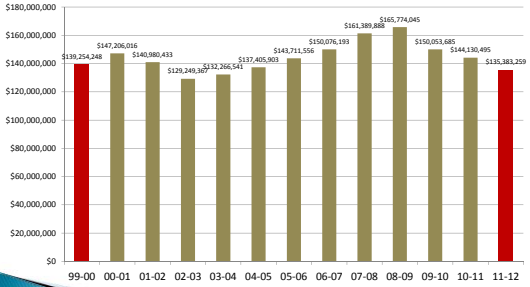
Year	A-E Felonies	Ages 6-15 State Population	Rate of A-E per 1,000 youth statewide age 6-15
CY 2008	1,040	1,234,241	0.84
CY 2009	766	1,228,572	0.62
CY 2010	888	1,269,984	0.70
CY 2011	844	1,276,764	0.66
CY 2012	800	1,289,624	0.62



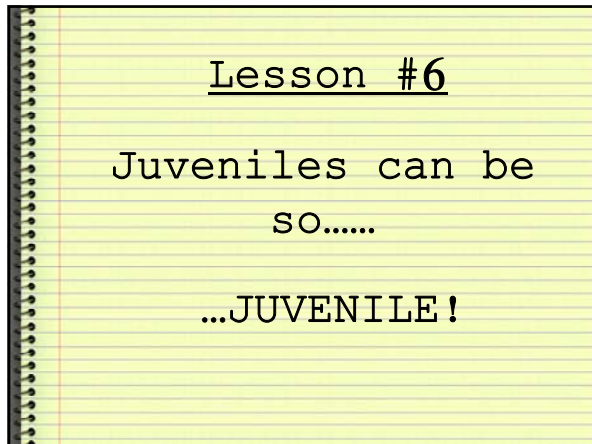
A Painful Trend

State Budget Amounts Spent by the Division of Juvenile Justice

Budget totals are year-end amounts spent for each fiscal year
Source: DJJDP Budget Operations Office, Accessed 2-19-13



Fiscal Year	Amount Spent
99-00	\$129,224,248
00-01	\$147,206,016
01-02	\$140,980,033
02-03	\$129,240,367
03-04	\$132,266,541
04-05	\$137,405,903
05-06	\$143,711,556
06-07	\$150,076,189
07-08	\$161,389,888
08-09	\$165,774,045
09-10	\$150,053,680
10-11	\$144,130,495
11-12	\$135,383,229



DPS When a juvenile enters the justice system, we cannot forget:

- Juveniles are NOT just little adults
- The concept of "Time"
- The influence on juvenile behavior of family systems, personality/temperament factors, peer and environmental influences, risk and pro-social factors.
- Adolescent brain development

DPS © Cartoonbank.com

"Young man, go to your room and stay there until your cerebral cortex matures."

Laurence Steinberg, PhD,
Presentation: "Why Adolescents
Make Risky Decisions"



Adolescent Brain Development

- ▶ Adolescent propensity for risk-taking due to maturational imbalance between competing brain systems
 - The excitation of the reward system occurs early in adolescence, around puberty
 - The maturation of the regulatory system occurs gradually over a long period
- ▶ Imbalance particularly great in middle adolescence
- ▶ Heightened reward value of peers during adolescence increases reward sensitivity, which accentuates the imbalance between systems

Laurence Steinberg, PhD.
Presentation: "Why Adolescents Make Risky Decisions"



Adolescent Brain Development

- ▶ Adolescent risk-taking usually occurs in groups.
- ▶ Most experimentation with alcohol and illicit drugs occurs with peers.
- ▶ Risk of a serious automobile accident significantly increases with presence of same-aged passengers
- ▶ Adolescents are relatively more likely than adults to commit crimes in groups than by themselves

Laurence Steinberg, PhD.
Presentation: "Why Adolescents Make Risky Decisions"



Lesson #7

Welcome to the JJ system...

...but are we SURE you need to be here?



The Intake Process

- ▶ INTAKE: The unique, but critical point of “no return”.
- ▶ The “default” system for services.
- ▶ Critically important to not only decide what to do....

But...

- ▶ To also decide what NOT to do.



The Danger of “Over-penetration”

- ▶ Low risk juveniles being over-supervised and over-treated
 - at BEST no reductions in recidivism
 - at WORST causing harm
- ▶ The Dangers of Mixing Low and High-risk youth
 - In the JJ system and in Interventions
- ▶ Why? Can disrupt the very factors that make the youth low risk



The Intake Process: Making Good Decisions

- ▶ The important element of structured decision-making in Intake
 - Risk and Needs Assessments
 - GAIN-SS (Global Appraisal of Individual Needs – Short Screener)



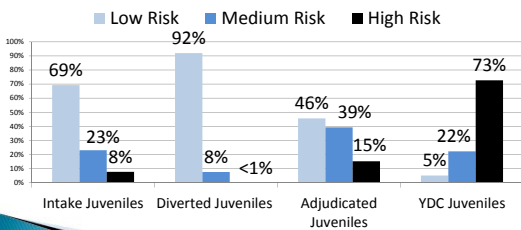
Making Good Decisions: So How Are We Doing?

- ▶ Of all complaints received in CY 2012, the first intake decision is as follows:
 - **60%** Approved for Court
 - **17%** Diverted/Closed
 - **23%** Diverted w/ plan or contract
 - **69%** of complaints diverted were Class 1 or 2 misdemeanors



The Intake Process: So How Are We Doing?

Risk Level of Diverted Intake, Adjudicated and YDC Juveniles: CY 2012

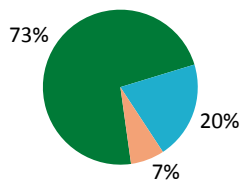




The Intake Process: So How Are We Doing?

Outcome of Diversion Plan/Contract Youth: CYs 2008-2011

■ Successful ■ Unsuccessful ■ Other



Lesson #8

To Detain or not
to detain?

...Hardly a
Shakespearean
question.

 **Nationally: Children in Detention**

- Nationally, each year more than 2 million arrests are made of youth, resulting in approximately 300,000 to 600,000 admissions to secure detention
- Of those detained, two thirds are racial or ethnic minorities who are arrested at rates that are out of proportion to the rate of their unlawful behavior
- Roughly a quarter of children detained are acutely mentally ill
- Eighty percent of girls detained report physical abuse and 50 percent report sexual abuse

 **Detaining Juveniles**

We must carefully consider **WHY** we choose to detain a juvenile:

- Necessity
- Effectiveness
- Cost

"Why?" begins with an important distinction between "Intervention" and "Detention".



Using a National Model to look closer.....

Juvenile Detention Alternatives Initiative (JDAI)

A Model for Detention Reform and a Vision of the Annie E. Casey Foundation

"All children in the juvenile justice system should have the opportunity to grow into healthy, productive adults"



Intervention Vs. Detention

Intervention Treatment of an underlying problem or issue to effect a positive change in behavior	VERSUS	Detention Supervision of a juvenile pending adjudication for one of two reasons: ▶ Public Safety ▶ Ensure Court Appearance

Annie E. Casey - Juvenile Detention Alternatives Initiative



JDAI and Research Clearly Say...

"Detention" has NOT proven to be a successful "Intervention"

.....it does NOT change behaviors



North Carolina Detention Costs

State Operated Detention Facilities Cost			
	FY 08-09	FY 09-10	FY 10-11
Total Cost	\$16,532,528	\$15,528,954	\$15,577,956
County Reimbursement	\$5,312,876	\$4,626,141	\$4,412,488
County Operated Detention Facilities Cost			
County Cost	\$2,420,088	\$1,715,119	\$1,693,136



Detention Assessment Tool

Screening tool initiative by DJJ Court Services, based on JDAI principles

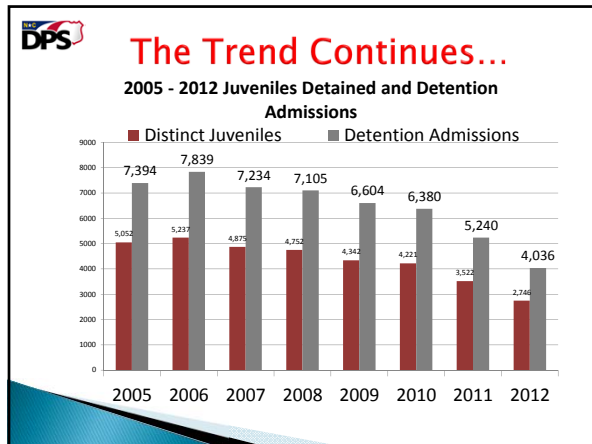
Designed to:

- Make detention decisions less arbitrary and more consistent;
- Promote public safety;
- Save taxpayer dollars on unnecessary detention stays



Detention Assessment Tool

- Piloted in 4 Districts (D8, D12, D18, D27) from February 2012 through June 2012
- During the pilot period, detention admissions decreased 22% compared to the same 6 month period of the previous year including one county which had a 33% decrease!
- Implemented state-wide, July 1st, 2012
- FY 2012-13: Nearly 3,000 DAT's completed
- Incredible support from Judges and DA's
- Only 51 (4.3%) Overrides by DJJ



Lesson #9

DO THE CRIME, DO THE...

Appropriate, most-effective, best-practice, evidence-based, research-supported, fiscally-responsible, outcome-directed

TIME !

DPS

Principles of Effective Intervention

- Assessment is the engine that drives effective behavioral change
 - Know who and what to target
 - Match levels of intervention to levels of risk
- Design programs around empirical research
 - Helps you know how to target change
- Program integrity makes a difference
 - Service delivery, disruption of criminal networks training/supervision of staff, support for program, QA, evaluation

Jean Steinberg, PhD Presentation: "What Works with Juvenile Offenders"



Treatment Principles

- ☐ Supervision alone is not sufficient to change behaviors for certain types of juveniles.
- ☐ Punishment-based programs (criminal sanctions) are not sufficient to change behavior.
- ☐ Services must be behavioral in approach
- ☐ The emergence of trauma-based assessments and treatments

Jean Steinberg, PhD Presentation:
"What Works with Juvenile Offenders"



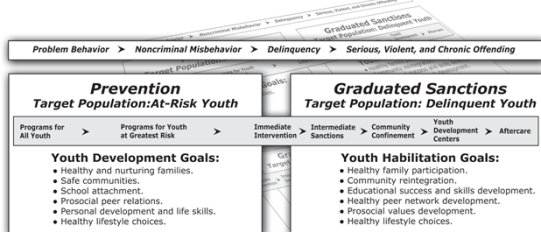
Effective Programs Provide Services & Treatment

- ☐ Vary based on risk and need of offender
- ☐ Intensive & sufficient length
- ☐ Have detailed curriculums and manuals
- ☐ System of rewards and consequences
- ☐ Completion criteria are based on acquisition of prosocial skills
- ☐ Youth are referred to other services
- ☐ Family members are trained to provide support

Jean Steinberg, PhD Presentation:
"What Works with Juvenile Offenders"



Our Foundation: The Comprehensive Strategy for Juvenile Justice



DPS **Most Successful Types of Treatment Models**

- ❑ Social learning – anti-criminal modeling, skills development
- ❑ Cognitive behavioral – cognitive theory, problem solving
- ❑ Radical behavioral – token economies, contingency management
- ❑ Family based therapies – Multi-systemic (MST) & Functional Family therapy (FFT)
- ❑ Targeting specific criminogenic needs – sex offender, violence, mentally disordered

Jean Steinberg, PhD Presentation: "What Works with Juvenile Offenders"

Recidivism Rates for Different Types of Interventions

Intervention Type	Recidiv Rate	Intervention Type	Recidiv Rate
RESTORATIVE		SKILL-BUILDING	
Restitution	46%	Behavioral	39%
Mediation	44%	Cognitive-behav'l	37%
COUNSELING		Social Skills	43%
Individual	48%	Challenge	44%
Mentoring	39%	Academic	45%
Family	44%	Job-related	47%
Family Crisis	44%	MULT. COORD. SVCS	
Group	39%	Case Management	40%
Peer	48%	Service broker	45%
Mixed	42%	Multimodal regimen	49%
Mixes w/ referral	46%		

(Compared to no-treatment control group w/ 12-month recidivism rate of 50%)

Lipsey, M. (2009). The primary factors that characterize effective interventions with juvenile offenders: A meta-analytic overview. Vol 4: 124-147. Victims and Offenders

Lesson #10

The 7 P's:

Proper Prior Planning Prevents...

...you know the rest.



Planning for Success: The "Service Plan" Initiative

- ▶ DJJ Court Services Initiative
- ▶ A carefully crafted plan of intervention, treatment and supervision that covers the following domains:
 - **Safety**
 - Responses
 - **Personal Accountability**
 - Reparation of harm
 - Personal responsibility
 - **Family Functioning**
 - Home environment
 - Family management
 - Stability of youth's environment



Planning for Success: The "Service Plan" Initiative

- **Health**
 - Substance use
 - Mental health
 - Risky behavior & aggression
 - Physical health
- **Education/Vocation**
 - School Behavior
 - School participation
 - Vocational development



Planning for Success: The "Service Plan" Initiative

- **Social Competency**
 - Interpersonal skills
 - Independent Living Skills
- **Support Network**
 - Peer relationships
 - Adult relationships and/or community ties
 - Use of free time



Planning for Success: The "Service Plan" Initiative

- The plan will continuously develop based on additional information or change in level of involvement with DJJ;
- Strengths & needs will be assessed for each domain, with 2-3 being prioritized for intervention;
- Goals will be developed for each domain prioritized;
- Strength-based strategies will be employed including clear lines of responsibility and timelines;
- Progress will be continuously evaluated and changes made as needed;
- Currently being piloted in four districts across the state.



Lesson #11

Planning is
important...

...but resources are
where it's at!



DJJ Mental Health & Substance Abuse Initiatives

3 Major Initiatives

- Juvenile Justice Mental Health Substance Abuse Partnership (JJSAMHP)
- Reclaiming Futures (RF)
- Juvenile Justice Treatment Continuum (JJTC)



Juvenile Justice Substance Abuse Mental Health Partnership (JJSAMHP)

The Juvenile Justice Substance Abuse Mental Health Partnerships (JJSAMHP) are local teams across NC working together to deliver effective, family-centered services and supports for juvenile justice-involved youth with substance use, mental health challenges or facing issues in both areas. These partnerships require an organized person-centered system that operates under the System of Care principles.



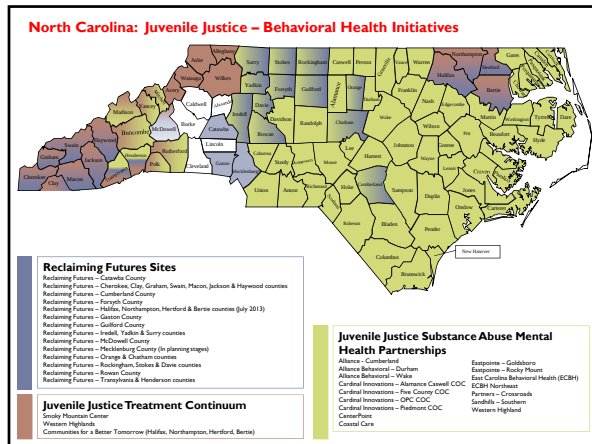
Reclaiming Futures

The Reclaiming Futures six-step model unites juvenile courts, probation, adolescent substance abuse and mental health treatment, and the community to reclaim youth. Together, they work to improve treatment services for mental health and drug and alcohol treatment and connect youth to positive activities and caring adults.



Juvenile Justice Treatment Continuum (JJTC)

The Juvenile Justice Treatment Continuum (JJTC) is a comprehensive intervention strategy for court referred youth specifically designed to treat co-occurring mental health and substance abuse disorders. All referred youth participate in an individualized blend of intervention services that is partnered with restorative justice services. Staff are co-trained in strengths based service delivery and Motivational Interviewing as a common language and philosophy of service delivery. The JJTC model includes collaboration between the youth, his/her family, the court counselor, and all members of the Child & Family team.





DJJ Disposition Alternatives

- JCPC Programs
- Multipurpose Juvenile Group Homes
- Statewide Residential Level II Programs
- Statewide Dispositional Alternatives Community-Based Level II Programs
- JCPC Level II Programs
- Alternative to Commitment Programs
- Special Initiatives

Lesson #12

There is no "I" in



(Ok. Maybe there is)



Working together...

- ▶ Sharing resources and developing partnerships to enhance effectiveness
 - Community Collaboratives
- ▶ Modeling the very behaviors we ask of the families and children we serve
 - System of Care
 - Strength-based approaches
- ▶ Respecting the family's time and resources by working together
- ▶ Collective knowledge is a sum greater than its parts
- ▶ Community ownership



Lesson #13

You caught me
being "bad"...

...Now catch me being
"good".



Graduated Responses

Based on what we know.....

- ▶ To effectively change behavior, sanctions and incentives must be used together, and must be:
 - Certain
 - Immediate
 - Fair
 - Of the Appropriate Intensity
- ▶ At the same time, they must be tailored to be effective for individual youth
- ▶ ...Thus, the development of the Court Services Initiative of Graduated Responses



Graduated Responses & Rewards

- ▶ **Research-Based Strategy**
 - Shown to increase success rates and reduce recidivism
 - Increase effectiveness by ensuring sanctions and incentives are certain, immediate, fair, of the appropriate intensity, and individualized to the youth
- ▶ **Rewards Grids**
 - Developed by local districts to reinforce positive short-term and long-term behaviors in domains related to positive youth development (i.e. education/vocation, personal accountability, social competency, etc.)
 - Includes opportunities for youth to earn recognition, incentives, such as scholarships for pro-social activities, or specialized learning opportunities upon achieving goals in their service plan.
- ▶ **Responses Grids**
 - Provide a wide array of responses to non-compliance with the terms of probation depending on the level of violation and the risk level of the youth.
 - Ensures youth has an immediate response or consequence to non-compliance.



Lesson #14

Who is watching...

...those who are "watching"?



District Peer Review Process

Court Services Initiative focused on:

- ▶ **Quality Assurance Using Peers-Reviewing-Peers**
 - Using 10% random case sampling of all types.
 - Electronic and paper file review
 - Beginning 4th round of reviews
- ▶ **Focus on Policy and Statutory Compliance**
- ▶ **Compile District Best Practices/Stengths/Needs**
- ▶ **Next: Quality of product, not just compliance**

Lesson #15

"But the blueprint
shows it HAS to
work!"

...said the architect
to the builder

**Building a Successful Initiative**

► **Court Services Initiatives have:**

- Been built from the "ground up"
- Included all levels of staff in the planning process (architects AND builders)
- Used Pilot Sites and not just to solicit feedback, but to actually change the design as needed (DAT, Service Plans, Peer Reviews)
- Used Community Forums (DAT, Graduated Sanctions) to educate and build support prior to implementation

Lesson #16

"So, what can I do
in my role to
help?"...

I know you've been
anxiously waiting
to ask



Again, Working "Together"...

- ▶ National Juvenile Defense Standards
 - Guiding principles
 - Same goal, different role

VERY simply put....

- ▶ Know the child and family
- ▶ Know the resources and the research
- ▶ Know the Court Counselor
- ▶ Ask the questions
- ▶ Be sensitive to "time"



Questions?

Catch me during
lunch, or contact
me at:



Contact Information

Chuck Mallonee
 Western Area Administrator
 2090 US Highway 70
 Swannanoa, NC 28778

(828) 296-4747
chuck.mallonee@ncdps.gov

Client Centered Advocacy: Special Education Issues

August 2013

Client Centered Advocacy: Special Education Issues

2013 Juvenile Defender Conference

UNC School of Government • August 16, 2013

I. Overview of the School-to-Prison Pipeline

- a. The school-to-prison pipeline is a system of laws, policies, and practices that pushes students out of schools and into the juvenile and criminal systems.
- b. The negative effects of the pipeline are extensive. Namely, the pipeline:
 - i. Disproportionately impacts students of color, poor students, and students with disabilities;ⁱ compromises public safety;ⁱⁱ and is expensive.ⁱⁱⁱ

II. Your Role in Stopping the Pipeline

- a. **Why** should juvenile defenders provide education advocacy to help stop the pipeline?
 - i. Because it is best practice.^{iv}
 - ii. Because it is your ethical duty.^v
 - iii. Because it increases the chances of a good outcome for client.
- b. **How** can juvenile defenders incorporate education advocacy into their practice?
 - i. **Step 1: Learn Education Law**
 1. You can learn relevant education law by 1) attending CLEs and other trainings;^{vi} 2) reading publications; and 3) reviewing online resources.
 2. Relevant Rights Include (*See PowerPoint for more information*):
 - a. Rights of “At-Risk” Students^{vii}
 - b. Rights of Suspended Students^{viii}
 - c. Rights of Disabled Students^{ix}
 - d. Rights of Court Involved & Incarcerated Students^x
 - ii. **Step 2: Obtain Client’s Education Records**
 1. You can request records on behalf of client’s parent/guardian under Family Educational Rights and Privacy Act (FERPA).^{xi}
 2. **To get records, all you have to do is:**
 - a. Get signed authorization from client’s parent.
 - i. *See Handouts for sample education records release.*
 - b. Send authorization and request for records to principal.
 - i. *See Handouts for sample education records request.*
 - c. Follow-up and, if school fails to provide, file complaint with U.S. Dep’t of Education’s Family Policy Compliance Office.^{xii}
 - iii. **Step 3: Use Education Information**^{xiii}
 1. The information you get from education records can be helpful at various stages of delinquency representation.
 2. **Pre-Trial:** 1) Client Interviewing; 2) Competency; 3) Detention Hearings; 4) Suppression; 5) Transfer Hearing; and 6) Negotiations.
 3. **Trial:** 1) Support a defense; 2) Subpoena and cross-examine school officials; 3) Intent; 4) Insanity; 5) Dismissal in interest of justice; and 6) Unclean hands for school-based complaint.
 4. **Post-Trial:** 1) Supplement pre-disposition report; 2) Identify character witnesses; 3) Avoid confinement; 4) Avoid unrealistic probation terms; and 5) Mitigate or prevent MTR for probation violation.
 - iv. **Step 4: Provide Education Advocacy**^{xiv}

1. Once you have the education records and know the law, there are various ways you can provide direct help to your client on education issues.
2. First: Issue spot by reviewing the education records and talking with your client and his or her parent/guardian about what is going on at school.
 - a. *See Handouts for sample interview form.*
3. Second: If you see an issue, but do not have the time or expertise to provide direct advice or representation, make a referral.
 - a. *See PowerPoint and “Know Your Rights, Remedies, & Resources” in Handouts for referral resources (p. 26).*
4. Third: If there are steps the parents/guardians can take themselves, provide advice on the best course of action.
 - a. *See PowerPoint and “Know Your Rights, Remedies, & Resources” in Handouts for information and templates to give parents.*
5. Finally: In many cases, parent advocacy will not be enough and legal representation is needed to get things remedied quickly. Since you are already familiar with the client, their background, and their school situation, it can be relatively easy for you to draft a demand letter or appeal for the client or represent the client at a school-based hearing.
 - a. *See PowerPoint and “Know Your Rights, Remedies, & Resources” in Handouts for templates you can adapt for use in representation.*

ⁱ The North Carolina Department of Public Instruction, *Annual Report of Suspensions and Expulsions* (2013), at <http://www.ncpublicschools.org/docs/research/discipline/reports/consolidated/2011-12/consolidated-report.pdf>.

ⁱⁱ Barbara Fedders, Jason Langberg, & Jennifer Story, *School Safety in North Carolina: Realities, Recommendations & Resources* p. 5-7 (May 2013), at <http://goo.gl/tDRVr9>.

ⁱⁱⁱ Jason Langberg, Barbara Fedders, & Drew Kukorowski, *Law Enforcement Officers In Wake County Schools: The Human, Educational, and Financial Costs*, Advocates for Children’s Services (Feb. 2011), at <http://www.dignityinschools.org/sites/default/files/SRO%20Report.pdf>.

^{iv} ROBIN WALKER STERLING, NATIONAL JUVENILE DEFENDER CENTER, *ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT* 5, 21 (2009), at http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf.

^v MODEL RULES OF PROF’L CONDUCT R.1 (2013).

^{vi} There will be an “Introduction to Education Law” webinar on September 5th, 2013 from 9am-12:45pm. For more information, contact Jason Langberg at 919-226-5901 or jasonl@legalaidnc.org.

^{vii} N.C. GEN. STAT. §115C-105.41 (2013) (PEP). *See also* Gregory Malhoit, *A Parent’s Guide to a Personal Education Plan (PEP) for your Child* (August 2012), at http://law.duke.edu/childedlaw/docs/PEP_guide.pdf.

^{viii} N.C. GEN. STAT. § 115C-390.1 et. seq. (2013) (school discipline). *See also* Duke Children’s Law Clinic, *School Discipline: Suspensions and Expulsions - Information for Attorneys*, at <http://law.duke.edu/childedlaw/schooldiscipline/attorneys/>.

^{ix} 20 U.S.C. § 1400 et. seq. (Individuals with Disabilities Education Act); N.C. GEN. STAT. § 115C-106.1 et. seq. (Education of Children with Disabilities); *Policies Governing Services for Children with Disabilities*, State Board of Education (June 2010) at <http://goo.gl/oguQb0>.

^x N.C. GEN. STAT. § 115C-366(a5) (2013) (allowing a student who has been convicted of a felony to request readmission to school).

^{xi} 20 U.S.C. § 1232(g) (2013); 34 C.F.R. Part 99.

^{xii} *See* U.S. Department of Education, Family Policy Compliance Office, <http://www2.ed.gov/policy/gen/guid/fpco/index.html>.

^{xiii} Barbara Fedders and Jason Langberg, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients’ Education Histories and Records in Delinquency Representation*, JOURNAL OF LAW AND EDUCATION (forthcoming 2013).

^{xiv} In addition to reviewing the federal and state laws and policies cited above, always review local Board of Education policies for district-specific rights and procedures.

Forms for Obtaining Client Education Records & Information

Sample Education Records Release

Client's/Student's Name: _____

Social Security Number: _____ Date of Birth: _____

I request and authorize _____ and _____
(name of school) (name of school system)

to provide _____'s education records to _____
(client's name) (attorney's name)

or his/her staff.

Need for Disclosure: _____

(e.g., investigation, representation)

I understand that:

- this authorization expires in one calendar year;
- this authorization may be revoked at any time, except to the extent that the holder of the information/records has already taken substantial action in reliance on the authorization;
- any further disclosure may be made only as provided by law;
- a photocopy of this form is as valid as the original;
- the information and records to be released are protected under Family Educational Rights and Privacy Act (FERPA); and
- my signature below authorizes release of all education records and information.

Printed Name of Client

Signature of Client

Date

Relationship of Representative to Client (e.g., Mother, Father, Legal Guardian)

Printed Name of Representative

Signature of Client's Representative

Date

Sample Education Records Request

[Date]

Via facsimile ([Fax Number of School]) and email ([Principal's Email Address])

[Name of Principal]

Principal

[Name of School]

[Address of School]

[City, State Zip]

Re: [Name of Client]

Dear Principal [Last Name of Principal],

I am an attorney and represent [Name of Client], a [Number] grade student at your school. I would like to review [Name of Client]'s cumulative file. In particular, I would like copies of any of the following that the school or school district has in its possession that relate to [Name of Student]:

- a complete academic transcript;
- level of achievement on all standardized tests, including all end-of-grade and end-of-course exams and State writing assessments, and any nationally-normed test the student has taken;
- attendance data;
- teacher or counselor ratings and observations;
- progress reports;
- records or reports of behavioral incidents, including referral forms, notices of in-school or out-of-school suspensions, or records from disciplinary proceedings;
- results of any benchmark tests the student has taken in current or already completed courses or grade levels;
- the results and raw data from any writing test the student has taken;
- any current or former Personal Education Plan;
- records of the student's involvement in any school-sponsored tutoring, drop-out prevention, or other enrichment program;
- any writing portfolio the student has completed or a teacher has maintained; and
- the coursework, graded assignments, and grade histories for core academic classes (Language and Math for grades 1 through 8, and English I, U.S. History, Algebra I, Civics/Economics, and Biology) the student has taken.

I also would like a copy of [Name of Client]'s confidential psychological file, if one exists, including:

- information regarding any special education services and testing, including any IEPs or student assistance plans, that have been in place for the student;
- documents pertaining to any home/hospital ("homebound") services that have been provided;
- the results of any testing or evaluations; and
- minutes of IEP meetings.

Finally, I would like a copy of [Name of Client]'s complete discipline records.

Enclosed is an authorization to release education records, signed by [Client's Name, if the juvenile is age 18 or older, or Mother/Father/Legal Guardian, if the juvenile is under age 18]. The authorization allows me to inspect and copy [Name of Client]'s records. [Mr. or Ms.] [Last Name of Mother/Father/Legal Guardian, if the juvenile is under age 18, or Last Name of Juvenile, if the juvenile is age 18 or older] is entitled to review these records pursuant to the Family Education Rights Privacy in Education Act (FERPA).

Feel free to fax the records to my office ([Fax Number]) or email me ([Email Address]) a scanned copy. I am also happy to come to the school to pick up copies of the records. If you have any questions or need additional information, please do not hesitate to call ([Phone Number]) or email ([Email]) me.

Sincerely,

[Your Name], Esq.

Sample Interview Form

Current school: _____ Current grade: _____

Current class schedule:

Class	Teacher	Days	Time

School staff who would be supportive of client:

School guidance counselor: _____

School social worker: _____

Mental health professionals:

	Name	Agency
Therapist		
Psychologist		
Psychiatrist		

Disability/Disabilities: _____

Medications: _____

Individualized Education Program (IEP): Yes No

If yes:

Primary area of eligibility: _____

Secondary area of eligibility (if applicable): _____

Date by which next annual review due: _____

Date by which next evaluation due: _____

If no, has the student ever been evaluated to determine eligibility? Yes No

If yes, suspected disability: _____

If yes, date: _____

Behavior Intervention Plan (BIP): Yes No

Section 504 Plan: Yes No

Extra services at school (e.g., tutoring, counseling, special classes)

_____	_____
_____	_____

Extracurricular activities (e.g., sports, clubs, student government)

_____	_____
_____	_____

Schools:

Grade	School	Grade	School
1		7	
2		8	
3		9	
4		10	
5		11	
6		12	

Retention(s):

Grade	Reason(s)

Typical grades

Circle one: All As As & Bs Bs & Cs Cs & Ds Ds & Fs All Fs

Typical standardized testing scores: _____

Suspension(s)/Expulsion(s):

[illegible]

Unexcused absences during current school year (or previous school year, if summer): _____

Average absences per school year over last three full school years?

0-10	11-20	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	>100

Other notes:

Know Your Rights, Remedies, & Resources

A Handbook for
Parents/Guardians and Students
in North Carolina Public Schools

a publication of
Advocates for Children's Services
a statewide project of Legal Aid of North Carolina

ADVOCATES FOR CHILDREN'S SERVICES

Advocates for Children's Services (ACS) is a statewide project of Legal Aid of North Carolina. The focus of ACS' work is dismantling the school-to-prison pipeline through:

- High-quality legal advice and representation for children from low-income families who are being pushed out of public school systems through suspensions, expulsions, school-based court referrals, mistreatment by school resource officers, discrimination, unmet educational needs, including special education, and other factors;
- Community education in the form of trainings, presentations, publications, and media outreach; and
- Collaboration with and technical assistance for individuals and organizations working for education justice.

For more information about ACS, visit www.legalaidnc.org/acs, call 919-226-0052, or email acsinfo@legalaidnc.org.



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Thank you to Equal Justice Works for its financial support.**Dedication:**

To the generations of advocates who have fought for education justice and the rights of students and parents/guardians. We honor, pay tribute to, and carry on their struggles.

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INTRODUCTION

This handbook provides an overview of students' and parents'/guardians' rights, what remedies are available when those rights are violated, tips and tools for self-advocacy, and support resources.

This handbook was written for three main reasons:

- 1) Students and parents/guardians are expected to follow laws and policies.
- 2) Students and parents/guardians often either do not know their rights or do not know what to do when their rights are violated. Additionally, there are not enough student and parent/guardian advocates to fulfill the need for assistance in enforcing rights and remedies. Therefore, students and parents/guardians must be equipped with the information and tools necessary to advocate for themselves.
- 3) Students have a greater chance of doing well in school, graduating, and becoming responsible, active citizens if their rights are respected.



DISCLAIMERS



This handbook is for informational purposes only. It is not legal advice.

This handbook provides only an overview of students' and parents'/guardians' rights. It does not cover all rights, remedies, and resources, and does not address every possible situation.

Laws and policies change over time. The information in this booklet is current as of April 2012.

This booklet is only about K-12 public schools in North Carolina. It is not intended to be used by students and parents/guardians in charter schools (although many of the same rights apply in charter schools), private schools, post-secondary schools, or schools outside of North Carolina.

This booklet does not include local policies and rules. It is very important for students and parents/guardians to read their local school board policies and school rules. A copy of local policies can usually be found on the school district's website, at the school district's central office, and/or at individual schools.

Laws and policies, and the remedies for violations of them, can be very complicated. It is strongly recommended that students and parents/guardians contact one of the organizations listed in the resources section of this handbook if they have questions or if their rights are violated.

Please direct corrections and suggestions for improving this handbook to Jason Langberg, 919-226-0051 ext. 438, jasonl@legalaiddnc.org.

STUDENTS' AND PARENTS'/GUARDIANS' RIGHTS

Sound Basic Education

Every child has the right to an opportunity to receive a sound basic education. A sound basic education is one that provides a student with:

- the ability to read, write, and speak English;
- sufficient knowledge of math and science in order to function in a complex and changing society;
- sufficient knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices that affect the student personally or affect the student's community, state, and nation;
- sufficient academic and work skills to enable the student to successfully go on to college or vocational school after graduation;
- sufficient academic and work skills to allow the student to compete for further education or employment;
- a competent, certified, well-trained teacher;
- a well-trained, competent principal; and
- a school that has enough resources to support an effective instructional program.

Enrollment

A student has the right to enroll in a public school if s/he:

- is between the ages of five and 21;
- tries to enroll during the first 120 days of a school year;
- lives with a parent or legal guardian in that school's school district;
- is not currently suspended or expelled from that school or another public school; and
- has not been convicted of a felony in adult criminal court.

Though local school districts may ask for additional information, they **MUST** enroll the student while waiting to receive the information.

Students Who Have Been Suspended, Expelled, or Convicted of a Felony

School districts can choose to enroll students who are suspended or expelled from another school district and students who have been convicted of a felony in adult criminal court. A student who has an Individualized Education Program (IEP) **MUST** receive a free and appropriate public education (FAPE), even if the student is suspended or expelled from another school district or has been convicted of a felony. See below for more information about IEPs and FAPE.

Living with a Non-Guardian

A student who is living with an adult, other than his/her parent/guardian, may attend school where the non-guardian adult lives if the student:

- is not under suspension or expulsion from another school district;
- has not been convicted of a felony;
- is living with an adult who lives in the school district; and
- lives with the adult for at least one of the following reasons:
 - the death, serious illness, or incarceration of a parent/guardian;
 - the parent/guardian has completely abandoned control of the student;
 - abuse or neglect by the parent/guardian;
 - the parent/guardian has a physical or mental condition that prevents him/her from providing adequate care and supervision of the student;
 - the student's home may not be inhabited because of a natural disaster; or
 - the parent/guardian is on active military duty and deployed.

Group Homes and Foster Homes

A student living in a group home or foster home has the right to enroll in the school district where the group home or foster home is located.

Students Who Are Homeless

See below for more information about the enrollment rights of students who are homeless.

School Transfer

A parent/guardian may request that his/her student be transferred to another school as long as the request is made:

- in writing to the local board of education;
- within 10 days after the parent/guardian is notified of his/her student's school assignment;
- on the forms required by the local board of education; and
- following the rules and regulations of the local board of education.

If the local board of education denies the transfer request, the board **MUST** send a letter by registered or certified mail to inform the parent/guardian of the decision. The parent/guardian who applied for the transfer has a right to appeal the board's decision. If an appeal is requested, the parent/guardian **MUST** be given a timely and fair hearing in front of the board. In deciding the appeal, the board **MUST** consider:

- what is best for the student;
- the orderly and efficient administration of the public schools;
- what is best for the school to which the student is seeking to be reassigned; and
- the instruction, health, and safety of the students at the school to which the student is seeking to be reassigned.

The board **MUST** make a timely decision after the hearing and give the parent/guardian notice of the decision. If the parent/guardian wants to further appeal the decision of the board, s/he can file a petition in the superior court that is in the county where the school board is located.

Schools Not Making Adequate Yearly Progress

A Title I school is a school that receives Title I money from the federal government. The money is given to schools with higher percentages of low-income families. Adequate Yearly Progress (AYP) is the measure by which schools, districts, and states are held accountable for student performance under the No Child Left Behind Act (NCLB). To find a list of Title I schools, visit www.dpi.state.nc.us/nclb/title/schools/. To find out which schools made AYP, visit www.ncpublicschools.org/nclb/abcayp/ayp/.

If a Title I school does not make AYP in the same subject for two consecutive years, parents/guardians **MUST** be given transfer options. Parents/guardians **MUST** be notified by the school district that their child is eligible for public school choice no later than 14 calendar days before the start of the school year for which the choice is being offered. The notification **MUST** be understandable and, to the extent practical, in a language that parents/guardians can understand. The notification **MUST** at least:

- inform parents that their child is eligible to attend another public school and may receive transportation to the school;
- identify each public school, which may include charter schools, that parents may select; and
- include information on the academic achievement of the schools that parents may select.

Additionally, the school district should describe the procedures and timelines that parents must follow in selecting a school for their child. Students who transfer **MUST** receive free transportation to and from their new schools.

Free and Reduced-Priced Lunch

A student is entitled to free lunch at school if that student's family's income is at or below 130% of the federal poverty level for that year. Students whose families have incomes between 130% and 185% of the poverty level are entitled to reduced-price lunches. A student who pays for reduced-price meals may not be charged more than 40 cents for a meal. Current federal poverty guidelines can usually be found on this website: <http://aspe.hhs.gov/poverty>.

Education Records

Privacy

Schools may not release private information from a student's education records to anyone outside the school system unless the school has written permission from an "eligible student" (i.e., a student who is age 18 or older) or from the student's parent/guardian, if the student is under age 18. However, there are certain exceptions that allow a school to release a student's records without first getting permission from an eligible student or parent/guardian. Examples of exceptions include:

- directory information, such as name, address, phone number, and email address;
- a public health emergency (e.g., a meningitis scare); and
- when a judge issues a lawful order for the information.

Access

Eligible students or parents/guardians have the right to review the student's education records maintained by the school. Education records are those records that are:

- directly related to a student; and
- maintained by an educational agency or institution (i.e., a school) or by a party acting for the agency or institution.

A student's official record **MUST** contain, at a minimum:

- adequate identification data, including date of birth, attendance data, and grading and promotion data; and
- notice of any suspension for a period of more than 10 school days or of any expulsion, and a description of the conduct for which the student was suspended or expelled.

Local boards of education may also require schools to maintain other information. Student records often include additional information, such as a student's Social Security number, grades, standardized test scores, attendance records, medical information, teacher reports, disciplinary records, and special education records.

Education records do not include records of law enforcement agencies (e.g., police departments and sheriff's departments). So, law enforcement agencies may refuse to provide eligible students or parents/guardians with the agencies' records. Records of law enforcement agencies do not include: 1) records created by a law enforcement agency but maintained by a school or school district; or 2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a school disciplinary action or a proceeding conducted by the school or school district (e.g., a suspension hearing). Therefore, eligible students or parents/guardians have a right to view these records.

A school **MUST** comply with a request for records within a reasonable period of time, but not more than 45 days after it received the request. Schools are not required to provide eligible students or parents/guardians with copies of records unless, for reasons such as the family living a great distance from the school, it is impossible for parents/guardians or eligible students to review the records. Any charge for copies **MUST** be reasonable and may not prevent the eligible students or parents/guardians from getting the records.

Revisions

Eligible students or parents/guardians have the right to request that inaccurate or misleading information in education records be changed. Schools **MUST** consider such requests. If the school does not change a record, the school **MUST** inform the eligible student or parent/guardian of his/her right to a hearing on the matter. If, after the hearing, the school still does not agree to change the record, the eligible student or parent/guardian has the right to insert a statement in the record setting forth his/her own views. That statement **MUST** remain in the student's record for as long as the record is maintained.

This right may not be used to challenge a grade or an individual's opinion, or a substantive decision made by a school about a student (e.g., a suspension ruling or test score).

Discipline

Short-Term Suspension

A student facing a short-term suspension (i.e., a suspension for 10 school days or fewer) has the right to:

- receive notice (i.e., an explanation from the school as to why s/he is being suspended) that includes:
 - what rule the student broke; and
 - the evidence against him/her (i.e., a description of the incident)
- tell his/her side of the story to a school administrator (this can be an informal conversation); and
- take textbooks home, get missed assignments, and make up exams.

The notice **MUST** be given by the end of the workday during which the suspension is imposed when reasonably possible, but never more than two days after the suspension is imposed. The notice **MUST** be given by certified mail, telephone, fax, e-mail, or any other method reasonably designed to achieve actual notice to the parent/guardian. If English is the second language of the parent/guardian, the notice **MUST** be provided in both English and the parent's/guardian's primary language, when the appropriate foreign language resources are readily available. Both versions **MUST** be in plain language and easily understandable.

Long-Term Suspension and Expulsion

A student facing a long-term suspension (i.e., a suspension lasting more than 10 school days), 365-day suspension (i.e., a suspension lasting one calendar year), or expulsion (i.e., indefinite removal from the school system) has the right to:

- receive written notice that **MUST** include:
 - a description of the incident that led to the proposed suspension or expulsion;
 - the specific policies from the student code of conduct that s/he is charged with violating;
 - the specific process to request a hearing to challenge the suspension or expulsion, including how many days a parent has to request it;
 - a description of the format of the hearing;
 - notice that the parent/guardian is permitted to have an attorney (or an advocate, if local board policy allows it) to represent the student in the hearing process; and
 - notice that the parent/guardian has the right to review and obtain copies of the student's educational records before the hearing.
- take textbooks home, get homework, and make up tests during the first 10 days of the suspension and during the appeals process;
- review, before the hearing, any audio or video recordings of the incident and the information supporting the suspension that may be presented as evidence at the hearing, including statements made by witnesses;
- have an informal hearing before an unbiased decision-maker where the student **MUST** be able to:
 - bring an attorney;
 - present evidence in his/her defense;
 - bring witnesses to testify on his/her behalf;

- question ("cross-examine") the witnesses, evidence, or statements used against him/her by the school; and
 - make a recording of the hearing.
- a hearing decision that is written, based on "substantial evidence," and includes:
 - the basis for the decision, including a reference to any policy or rule that the student is determined to have violated;
 - notice of what information will be included in the student's official record; and
 - the student's right to appeal the decision and notice of the procedures for the appeal.
- appeal the hearing decision to the local board of education; and
- appeal the local board of education's decision to the local superior court.
 - See the appendix for more information about appeals to superior court and a sample petition for judicial review.

Written notice may be provided by certified mail, fax, e-mail, or any other written method reasonably designed to achieve actual notice of the recommendation for long-term suspension or expulsion. When school personnel are aware that English is not the primary language of the parent/guardian, the notice **MUST** be written in both English and in the primary language of the parent/guardian when the appropriate foreign language resources are readily available.

If a hearing is requested in a timely manner, it **MUST** be held before the long-term suspension starts (i.e., before the end of the tenth school day of the suspension). If the student does not request a hearing, the superintendent reviews the circumstances and then:

- imposes the suspension
- imposes another appropriate penalty; or
- declines to impose any penalty.

Alternative School

Students who are long-term suspended or expelled **MUST** be offered alternative education services, unless the superintendent provides a significant or important reason for declining to offer such services.

The following may be significant or important reasons:

- the student exhibits violent behavior;
- the student poses a threat to staff or other students;
- the student substantially disrupts the learning process (e.g., setting a fire at school); and
- the student failed to comply with reasonable conditions for admittance into an alternative education program.

The superintendent also **MUST** make sure that the student's education is not taken away more than necessary to protect safety and order in the school. For example, it may not be necessary to suspend a student for the remainder of the school year if s/he was in a minor fight at the beginning of the year, or it may not be necessary to deprive a student of all education, if the student could take classes on a, computer.

Readmission

All students suspended for 365 days or expelled may, after 180 calendar days from the date of the beginning of the suspension or expulsion, request in writing to be readmitted to the school district.

A student who is suspended for 365 days and then requests readmission has the right to:

- an in-person meeting with the local superintendent or board of education;
- be readmitted if the student demonstrates that the student's presence in school no longer constitutes a threat to the safety of other students or staff;
- a decision within 30 days of the request; and
- appeal to the board of education, if the superintendent is designated to make the initial decision.

A student who is expelled and then requests readmission has the right to:

- a ruling from the local board of education;
- be readmitted if the student demonstrates that the student's presence in school no longer constitutes a threat to the safety of other students or staff;
- a decision within 30 days of the request; and
- request readmission again every six months, if s/he is denied.

If a student is readmitted, the local superintendent and board of education have the right to assign the student to any program within the school system and to place reasonable conditions on the readmission.

Corporal Punishment

Corporal punishment is the intentional infliction of physical pain upon the body of a student as a disciplinary measure. Each local board of education determines whether corporal punishment is allowed in the district.

If corporal punishment is allowed:

- it may not be administered in a classroom with other students present;
- only a teacher, principal, or assistant principal may administer corporal punishment;
- there **MUST** be a second teacher, principal, or assistant principal present;
- a school staff member **MUST** provide the student's parent/guardian with notification that corporal punishment was used;
- the person who used the corporal punishment **MUST** provide the student's parent with a written explanation of the reasons for the punishment and the name of the second person who was present;
- the school **MUST** maintain records of each use of corporal punishment and the reasons for its use;
- excessive force may not be used, such as force that results in injury to the child that requires medical attention beyond simple first aid; and
- it may not be used on a student whose parent/guardian has stated in writing that corporal punishment shall not be used on that student (parents/guardians **MUST** be given a form to make such a decision at the beginning of the school year or when the student first enters the school during the year).

Students Who Are at Risk of Academic Failure

A student who is failing or at risk of academic failure has the right to a free Personal Education Plan (PEP). A PEP should help guide the student, parent/guardian, and teachers in bringing the student up to grade level in all subjects. Schools **MUST** provide effective PEPs for all eligible students. A lack of funding is not a valid excuse!

A student is at risk of academic failure if the student:

- scored a I and/or II on an end-of-grade (EOG) or end-of-course (EOC) exam; and/or
- has other factors that could cause academic failure, such as failing grades, excessive absences, and/or suspensions.

The school **MUST** create the PEP by the end of the first grading period or after a teacher has had a student in class for nine weeks. Schools do not need to wait for the results of EOG or EOC exams before creating a PEP. If the school fails to provide a PEP to an eligible student, the student's parent/guardian may request one.

PEPs **MUST** include:

- an evaluation to determine the student's specific academic needs and which interventions are best for the student;

- intervention strategies (e.g., coaching, mentoring, tutoring, summer school, Saturday school, extended school days, special homework, and smaller classes) that will help the student improve to grade-level proficiency; and
- monitoring strategies (e.g., assessments and evaluations) to make sure that the PEP is being implemented and is working.

The school should involve students' parents/guardians in the implementation and ongoing review of the PEP, and **MUST** provide students' parents/guardians with a copy of the PEP.

A PEP is different than an Individualized Education Program (IEP). Students at risk of academic failure are entitled to a PEP. A student with a diagnosed disability that requires specialized instruction is generally entitled to an IEP. See below for more information about IEPs. See the appendix for more information about PEPs, a sample PEP request form, and a sample request to revise a PEP.

Students Who Have a Disability

Evaluation

If a parent/guardian thinks his/her student has a disability and needs special education services, the parent/guardian has the right to have the student evaluated by the school system for free. The parent/guardian should request an evaluation in writing. See the appendix of this guide for a form to use to request an evaluation. If the school staff believes the student may have a disability, the school **MUST** inform the parents/guardian of the suspicion and ask for permission to conduct an evaluation.

The school **MUST** get the parent's/guardian's permission before conducting the evaluation. The evaluation **MUST** assess the student in all areas related to the child's suspected disability.

If a school thinks a student has a disability, it will sometimes try intervention strategies in the classroom before or during the evaluation process. Sometimes the interventions are implemented by what is called a "student support team" (SST), by using what is called a "student assistance plan" (SAP), or through a four-tiered program called "responsiveness to instruction" (RTI). While SSTs, SAPs, and RTIs can be useful to avoid unnecessarily or wrongly identifying students as disabled and in need of special education services, schools **MUST** still provide an evaluation if the parent/guardian requests one or if interventions have failed and school staff still suspect the student has a disability.

Examples of disabilities that may make a student eligible for special education services include:

▪ Autism	▪ Serious emotional disturbance
▪ Hearing impairment	▪ Specific learning disability
▪ Intellectual disability	▪ Speech or language impairment
▪ Orthopedic impairment	▪ Traumatic brain injury
▪ Other health impairment (such as attention deficit hyperactivity disorder or ADHD)	▪ Visual impairment

After the evaluation is completed, a group of qualified professionals and the parent/guardian will meet to decide whether the child is eligible for special education services. In order to be eligible, the student must be "a child with a disability," which means:

- the child must have one of the recognized disabilities
- the child's disability must have a negative impact on his/her educational performance; and
- the child must need specially designed instruction.

A student can have multiple areas of eligibility, if the student has more than one disability.

If a parent/guardian disagrees with the results of the evaluation conducted by the school system, the parent/guardian has a right to an independent educational evaluation (i.e. an evaluation conducted by a qualified examiner who is not employed by the school system), that is paid for by the school system.

Individualized Education Program (IEP) Team

If the child is eligible for special education services, a group called the Individualized Education Program (IEP) Team must meet to create an IEP. The Team **MUST** consist of:

- the student (when appropriate);
- the student's parent/guardian;
- at least one regular education teacher;
- at least one special education teacher;
- a representative of the school district who is qualified to provide or supervise special education instruction and who is knowledgeable about the general education curriculum; and
- an individual who can interpret the evaluation results.

Other individuals who have knowledge or special expertise regarding the student can also be included (e.g., the student's therapist, social worker, or doctor). Parents may bring an advocate or someone to take notes with them.

The first two meetings—the meeting to decide whether the student is eligible and the IEP Team meeting to develop the IEP—often happen at one time.

The evaluation, the eligibility determination, and the creation of the IEP (if the student is eligible), must take place within 90 days of the school receiving the referral (e.g., the request from the parent or school staff member). SSTs, SAPs, and RTIs do not change or extend this requirement.

Before each Team meeting, the school **MUST**:

- contact the parent/guardian early enough to make sure s/he has an opportunity to attend;
- schedule the meeting at a time and place agreeable to the parent/guardian; and
- tell the parent/guardian:
 - the purpose, time, and location of the meeting;
 - who will be attending the meeting; and
 - that s/he may invite people to the meeting who have knowledge or special expertise about the student.

Individualized Education Program (IEP)

An IEP is a plan to meet the student's unique educational needs. The IEP **MUST** be a truly individualized document. Schools may not deny a service to a student with a disability if that student truly needs the service to fulfill his/her educational needs. A lack of funding is not a valid excuse! The IEP **MUST** include:

- The student's current performance in school. This information usually comes from tests, assignments, evaluations, and observations. The statement about "current performance" must include how the child's disability affects his/her involvement and progress in the general curriculum.
- Goals that the student can reasonably accomplish in a year. Goals may be academic, address social or behavioral needs, relate to physical needs, or address other educational needs. The goals **MUST** be measurable—it **MUST** be possible to measure whether the student has achieved the goals.
- The special education and related services to be provided to the child or on behalf of the child. This includes supplementary aids and services that the child needs to learn in the regular classroom to the maximum extent appropriate. Related services can include, but are not limited to: audiology services, counseling services, medical services, occupational therapy, mobility services, parent counseling and training, physical therapy, psychological services, recreation, rehabilitation counseling services, social work services, speech-language pathology services, and transportation. It can also include supports for school personnel, such as training or professional development.
- The extent to which the student will not participate with nondisabled children in the regular class and other school activities (i.e., what percentage of time the student will be out of the regular class in order to receive special education services).

- What modifications in the administration of tests the child will need.
- When services will begin, how often they will be provided, where they will be provided, and how long they will last.
- How the student's progress will be measured (e.g., observations, data collection, tests and assessments, interviews, work samples and portfolios, and reviewing class work and homework assignments) and how the parent/guardian will be informed of that progress.

Beginning when the student is 14 years old, the IEP MUST include the courses s/he needs to take to reach his/her post-school goals.

Beginning when the student is 16 years old, the IEP MUST include what transition services are needed to help the child prepare for leaving school. The transition services MUST address post-secondary goals related to training, education, employment, and where appropriate, independent living skills. The services MUST also take into account the student's individual needs, strengths, skills, preferences, and interests. Examples of transition services include guidance counseling, independent living skills instruction, and help obtaining a driver's license, opening a bank account, becoming employed, completing college applications, and acquiring assistive technology devices and services.

Beginning at least one year before the child turns 18 years old, the IEP MUST include a statement that the student has been told of any rights that will transfer to him/her at the age of majority (i.e., age 18). IEPs can remain in effect until age 21.

An IEP travels with the student. In other words, if a student changes schools or school districts, the student still has a right to have the IEP remain in effect.

Free, Appropriate Public Education (FAPE)

A student with a disability has the right to a "free, appropriate public education" (FAPE). A FAPE means that a student MUST, for free, have his/her unique academic and functional needs met and have access to the general curriculum. Students with a disability who are long-term suspended or expelled have a right to continue receiving a FAPE that will enable them to continue to participate in the general education curriculum and progress toward meeting the goals set out in their IEP.

Least Restrictive Environment (LRE)

Students with disabilities have the right to receive their education in the "least restrictive environment" (LRE). This means that schools MUST educate students with disabilities in regular classrooms with their nondisabled peers, in the school they would attend if not disabled, to the maximum extent appropriate.

Annual Review

The student's IEP MUST be reviewed by the Team at least once each calendar year (i.e., at least once every 365 days). The parent/guardian can request interim (i.e., more frequent) reviews if s/he believes the IEP needs to be changed. The IEP MUST be revised as necessary during each annual review meeting.

Reevaluation

The student has the right to be reevaluated at least every three years. The purpose of the reevaluation is to assess if the student continues to have a disability and the student's educational needs. A parent/guardian can request interim evaluations (i.e., a parent/guardian can ask for a new evaluation before three years has passed, if s/he believes the area of eligibility (i.e., the disability) is incorrect or that there should be an additional area of eligibility). The parent/guardian can also waive the reevaluation requirement.

Manifestation Determination Review (MDR)

A student with an IEP has the right to a manifestation determination review (MDR) within 10 school days of any decision to change the student's placement, such as a transfer to an alternative school, long-term suspension, or expulsion. Any time a child is denied access to any part of the educational services, regardless of the time of day, it is counted as one day of a change in placement (e.g., being suspended for part of the day or going to day treatment for part of the day).

Even if the student does not have an IEP, a MDR may still be required if the school knew that the student is a child with a disability. A school is deemed to have knowledge that a student is a child with a disability if, before the behavior that led to the suspension:

- the child's parent/guardian expressed concern in writing to a teacher or administrator that the child is in need of special education and related services;
- the child's parent/guardian requested an evaluation of the child;
- the child's teacher, or another staff member in the district, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the district or to other supervisory personnel in the district; or
- the child's behavior and educational performance clearly showed the need for special education.

The purpose of the MDR is for the Team to answer two questions:

- Was the student's conduct caused by, or did it have a direct and substantial relationship to, the student's disability?; and
- Was the student's conduct the direct result of the school's failure to implement the IEP?

If the answer to either of the questions above is yes, then the student's placement generally may not be changed and the student **MUST** return to the placement from which s/he was removed. However, if the conduct involved a weapon, drugs, or serious bodily injury, then the student can be suspended for up to 45 school days regardless of whether the answer to one or both questions is yes. Also, if the conduct was a manifestation of the student's disability, then the Team **MUST** conduct a functional behavioral assessment (FBA) and create a behavioral intervention plan (BIP), or review and modify (if appropriate) the BIP, if one already exists. See below for more information about FBAs and BIPs.

If the answer to both of the questions above is no, then the student's placement can, generally, be changed (i.e., the student can be suspended or transferred to an alternative school or program). The student can still appeal the suspension and **MUST** still receive a FAPE. See above for more information about suspension appeals and FAPE.

Functional Behavioral Assessment (FBA)

A functional behavioral assessment (FBA) is used to help the Team figure out why the student's behaviors are happening and what interventions will address the behaviors. A FBA should inform the creation of a behavioral intervention plan (BIP). See below for more information about BIPs.

The FBA should include observations, interviews, and information review, such as previous discipline referrals and teacher behavior logs. The Team should consider questions such as:

- In what settings does the behavior occur?
- Are there any settings where the behavior does not occur?
- Who is present when the behavior occurs?
- What activities or interactions take place just prior to the behavior?
- What usually happens immediately after the behavior?
- Is the student trying to gain attention or approval of a classmate, avoid instruction and difficult assignments, avoid a low-interest subject, or achieve some other goal?

A FBA **MUST** be created if the student's behavior is a manifestation of his/her disability. See above for more information about manifestation determination reviews (MDRs). However, parents/guardians can also request a FBA at any time.

Behavioral Intervention Plan (BIP)

A behavioral intervention plan (BIP) is a roadmap the student and school should use to target and change certain negative behaviors. The BIP is created using the information obtained in the functional behavioral assessment (FBA). See above for more information about FBAs.

Effective BIPs are not punishment; instead, they should:

- have multiple interventions or support strategies;
- focus on the whole child;
- teach the child coping strategies;
- be proactive and strength-based;
- teach the child self-management skills;
- identify supports or strategies that will improve behavior (e.g., teachers stating clear expectations, modifying seating arrangements, adapting the pace of instruction, avoiding exposing the student to long delays, providing a choice of activities, and allowing the student to take breaks);
- establish steps to be taken when misconduct happens; and
- identify a caring adult to give the student positive time at school.

The BIP should include a description of:

- previously tried interventions and how well they did or did not work in changing the behavior;
- the behavior being targeted;
- the interventions that will be used, including who will be involved in implementing the interventions;
- specific procedures that will be followed when misbehavior occurs;
- how data about the student's behavior will be collected;
- the expected behavior changes;
- how the success of the interventions will be measured;
- a schedule for when/how often the plan will be reviewed to determine its effectiveness;
- when and how information will be shared between home and school; and
- how the student's behavior will be handled should it reach crisis proportions.

A BIP should also include:

- a list of the student's strengths and abilities;
- important information about the student that could impact the plan;
- a statement describing the function or purpose of the targeted behavior; and
- a description of the behavior that will replace the inappropriate behavior.

Parents/guardians can request a BIP at any time, even if the student's behavior was not a manifestation of his/her disability. See above for more information about manifestation determination reviews (MDRs). See the appendix for a sample form to request a FBA and BIP.

504 Plans (Section 504 of the Rehabilitation Act of 1973)

An Individualized Education Program (IEP) is for a student with a disability who needs specialized instruction. A 504 Plan is for a student with a disability who does not require specialized instruction but needs the assurance that they will receive equal access to public education and services. See above for more information about IEPs. There are more procedural protections for students with IEPs than there are for students with 504 Plans.

504 Plans are designed to ensure that students with a disability are not discriminated against and have their needs adequately met. 504 Plans are generally for students who have a disability that "substantially limits one or more major life activities." Examples of such disabilities include, but are not limited to: diabetes, epilepsy, allergies, poor vision, poor hearing, heart disease, depression, digestive disorders, or chronic illness. Major life activities include, but are not limited to: self-care, walking, seeing, speaking, sitting, thinking, learning, breathing, concentrating, interacting with others, and working. 504 Plans can

also be used when a student has a temporary disability, like a broken arm, that may affect their ability to function at school.

504 Plans are generally created by a committee at the student's school. The committee should consider grades over the past several years, teachers' reports, information from parents and other agencies, test scores, observations, discipline reports, attendance records, and health records.

A parent/guardian **MUST** be given notice before his/her child is evaluated and/or placed on a 504 Plan. Parents/guardians **MUST** also be given a copy of the 504 Plan. Parents/guardians also have a right to:

- request an impartial hearing about the school district's actions regarding the identification, evaluation, or placement of the student; and
- file a complaint with the school district Section 504 Coordinator.

Examples of accommodations that may be part of a 504 Plan include, but are not limited to:

▪ Highlighted textbooks	▪ Behavioral intervention plans
▪ Extended time on tests or assignments	▪ Rearranging class schedules
▪ Peer assistance with note taking	▪ Visual aids
▪ Frequent feedback	▪ Preferred seating assignments
▪ Extra set of textbooks for home use	▪ Taping lectures
▪ Computer-aided instruction	▪ Oral tests
▪ Enlarged print	▪ Individual contracts
▪ Positive reinforcements	▪ Allowing the student to eat in class

The 504 Plan should be updated annually.

Translation

At a minimum, the following **MUST** be in the parent's/guardian's native language, unless it is clearly not feasible to do so:

- a copy of procedural safeguards;
- the consent for an evaluation; and
- notices (e.g., plans to evaluate or re-evaluate, Team meetings, and changes in services).

See below for more information about services for students who have limited English proficiency.

Disability Discrimination

Schools and school districts may not discriminate against students with disabilities. Examples of discrimination include:

- denial of access to educational programs and facilities (e.g., a student in a wheelchair cannot get into a classroom because there is not a ramp); and
- denial of a free, appropriate public education (FAPE) (see above for more information about FAPE).

If a school official is aware that a student with a disability is being bullied because of that disability, but the school official does not act to stop the bullying, the school could be considered to have discriminated against the student.

Students Who Have Limited English Proficiency or Who Are English Language Learners

Schools **MUST**:

- identify students who are not fluent in English and evaluate their academic achievement and language skills; and
- take affirmative steps to provide English language instruction to non-English speaking students so that students can participate meaningfully in school.

Failure of a school district to teach English to non-English speaking students is illegal discrimination.

English Language Learner (ELL) programs MUST be:

- based on a sound educational theory;
- supported with adequate and effective staff and resources; and
- periodically evaluated and, if necessary, revised.

Schools MUST provide language support for students with limited English proficiency (LEP) and students who are English language learners until those students develop the English language skills necessary to participate meaningfully in the regular course of study.

Speaking a different language is not a disability. Schools may not label students with limited English proficiency as needing special education services just because they are learning English.

Students Who Are Immigrants to the United States

All children living in the United States, whether or not they are United States citizens, have the right to attend school. Schools may not exclude children because they are undocumented or have undocumented parents/guardians.

Students Who Identify as Lesbian, Gay, Bisexual, Transgender, or Queer (LGBTQ)

Public schools MUST remedy the abuse of LGBTQ students, such as harassment, bullying, threats, name-calling, and physical harm.

If a school allows non-curricular clubs to form at the school, then the school MUST allow students to form a LGBTQ or Gay/Straight Alliance (GSA) club. A non-curricular club is one that is not directly related to a school class or activity. For example, if a school allows a Bible study group or community service organization to form, the school MUST also allow students to organize an LGBTQ or GSA club. However, if a school only allows clubs related to class subjects (i.e., curricular clubs), such as math club, the school can prevent students from forming a LGBTQ club or GSA.

School employees may not tell anyone that a student identifies as LGBTQ without the student's permission.

Schools may not prevent students from:

- bringing same-sex dates to prom;
- openly discussing their sexual orientation;
- being "out of the closet" and open about sexual orientation; or
- wearing clothing with a rainbow or references to gay pride.

However, schools can prohibit lewd, vulgar, indecent, and clearly offensive speech (including clothing), as well as speech contrary to the school's educational mission. See below for more information about freedom of speech in schools.

Students Who Are Pregnant or Parenting

Generally, schools MUST treat pregnant or parenting students the same way they treat other students. Schools may not discriminate against students because of pregnancy or any conditions relating to pregnancy, including childbirth, terminating a pregnancy, or false pregnancy. In fact, schools MUST create policies to provide assistance and support to encourage pregnant and parenting students to remain enrolled in school and graduate.

Pregnant and parenting students have the right to participate in school events and extracurricular activities like any other student. The school may not ask for a doctor's note to participate in a school

activity, unless the school requires a doctor's note from every student with a condition requiring medical treatment from a doctor.

Schools are required to give pregnant students the same special services given to temporarily disabled students. For example, if temporarily disabled students receive at-home tutoring or online classes, those services **MUST** be made available to pregnant students who must miss school because of the pregnancy.

Schools may not force pregnant or parenting students to attend any programs designed specifically for pregnant or parenting students (e.g., parenting classes or alternative schools). The coursework and classroom activities in programs designed specifically for pregnant or parenting students **MUST** be just as good as (i.e., of the same quality as) the course work and classroom activities in the regular program at the school.

If a pregnant or parenting student has to miss school due to pregnancy or related conditions or due to the illness or medical appointments of her child, the school **MUST** excuse the absence for as long as a doctor says it was necessary. Schools **MUST** also allow the student to make up work, tests, and projects, and, if necessary, assign a homebound teacher to the student.

Students Who Are Homeless

A student is considered homeless if s/he does not have a fixed, regular, and adequate nighttime residence. For example, a student may be considered homeless if s/he is:

- living in another person's house after losing housing;
- living in a hotel, motel, trailer park, or campground because s/he has nowhere else to live;
- living in a shelter;
- abandoned in a hospital;
- awaiting foster care placement without a permanent place to stay; or
- living in a car, park, public space, abandoned building, substandard housing, bus or train station, or something similar.

Students who are homeless have the right to go to school with other students, and may not be discriminated against or separated from other students based on their living situations.

Schools **MUST** immediately enroll students who are homeless, even if the students do not have all of their enrollment paperwork (including medical records, former school records, proof of residency, and/or immunization records), and even if there is a disagreement about where the child should be enrolled.

Students who are homeless are allowed to stay in the school they attended before they became homeless (called the "school of origin") for the entire time the student is homeless. Schools **MUST** provide students who are homeless with transportation to and from the student's school of origin.

Every school district **MUST** have a staff member designated as a contact or liaison to children and families that are homeless. This person is responsible for making sure that children who are homeless living in the area are enrolled and attending school. Every state **MUST** have a coordinator of education services for students who are homeless. To find the liaison, visit <http://center.serve.org/hepnc/>.

Freedom of Speech

Students have a right to freedom of speech in school, which includes:

- speech on controversial topics (i.e., schools may not punish students for saying something just because it is controversial, such as discussing topics like school segregation, teen pregnancy, gay rights, war, and politics);
- symbolic speech, such as t-shirts, arm bands, buttons, flags, decals, and other badges; and
- peaceful demonstrations, such as picketing or marching, as long as the activities are not disrupting school.

Schools can limit free speech and punish students for speech that:

- is vulgar, lewd, or disruptive;
- is a true threat (i.e., that gives a person a reasonable fear for his/her safety);
- is defamatory (i.e., that is not true and harms someone's reputation);
- is obscene (i.e., that is blatantly offensive or appeals to the shameful interest of minors);
- encourages others to commit acts of violence;
- promotes illegal activities; or
- seriously interferes with appropriate discipline in the school.

Flyers and Written Materials

Students have a right to bring flyers and other written materials to school and distribute the materials at school. They do not need permission. However, schools can limit when, where, and how students distribute materials. If flyers and written material contain speech that would get a student in trouble if the speech was spoken out loud (see the examples above), then students can get in trouble for distributing those materials.

Newspapers and Publications

If a school sponsors a student newspaper, the school can control certain aspects of what is published in the newspaper. If a student newspaper is underground or independent (i.e., not sponsored by the school), then students have a right to complete control over the material in the newspaper. For newspapers that are underground or independent, students do not need to ask for permission to bring the paper to school and they do not have to get prior approval of the material. However, schools can punish students if the underground or independent newspaper that is distributed at school has language that is on the prohibited list above.

Access to Information

School boards may not remove school library books just because the board disagrees with the political philosophies, religious ideas, or opinions expressed in the books. Schools are allowed to have certain filters on the internet while students are using computers at school.

Internet Speech

Students have the right to free speech when emailing, blogging, creating a website, or posting information on a website. However, students **MUST** follow school rules when using school computers on campus and students can sometimes be punished for speech that is on the list above of language that cannot be used. Students can also be punished (e.g., suspended) for off-campus internet "speech" (e.g., a Facebook post) that has a direct and immediate impact on the safety or orderly operation of the school.

Flag Salute and Pledge of Allegiance

Students do not have to stand for or say the Pledge of Allegiance. The school may not force students to say the Pledge of Allegiance and may not punish students for refusing to do so. Schools also may not require students to explain why they do not want to salute the flag or say the Pledge of Allegiance.

Freedom of Religion

Every student has the right to practice any religion s/he chooses or no religion. Students have the right to pray and express their individual religious beliefs at school.

Schools **MUST** maintain religious neutrality, so that all students enjoy the freedom to practice any religion. Schools may not endorse, sponsor, or require participation in any particular religion or religious activities.

Schools **MUST** not favor any religion (e.g., teach that one religion is better than another religion) or insult any religion. Schools **MUST** not organize or lead prayers (even "non-denominational prayers"), Bible discussions, or Bible readings. Schools are allowed to have classes that teach the history, literature, and culture of various religions.

Schools are allowed to put up displays and have holiday celebrations about various religious holidays. However, schools may not promote any one religion over others or promote being religious in general.

Freedom of Assembly

Students have the right to peacefully assemble and freely associate with others, including:

- starting a student organization;
- conducting meetings and activities at school, if other non-curriculum-related groups (e.g., church bible study or community service organizations) can use the same school facilities; and
- conducting peaceful rallies and demonstrations at school, as long as the gathering does not disrupt classes or school activities.

Freedom from Racial and National Origin Discrimination

Schools may not discriminate against students or parents/guardians based on race, color, or national origin. Examples of discrimination include:

- racial harassment;
- school segregation; and
- denial of language services to national-origin-minority students who are limited in their English.

See the appendix for more information about filing federal civil rights complaints about racial and national origin discrimination.

Freedom from Gender Discrimination and Sexual Harassment

Schools may not discriminate against students or parents/guardians based on gender.

Schools **MUST** protect students from sexual harassment. Sexual harassment is any unwelcome verbal or physical conduct based on sex that makes a student feel uncomfortable and/or prevents a student from learning. Examples include:

- insults, name-calling, and offensive jokes based on sex;
- intimidation by words or actions;
- unwelcome or inappropriate sexual touching;
- pressure for sexual activity or dating; and
- sexual assault and rape.

See the section above about pregnant and parenting students. See the appendix for more information about filing federal civil rights complaints about gender discrimination.

Freedom from Bullying

Every school district **MUST** have policies and procedures to prevent, intervene, investigate, document, and report all forms of harassment, bullying, and discrimination. See above for more information about bullying of students with disabilities and students who identify as LGBTQ.

Freedom from Unreasonable Search and Seizure

Students have a right to be free from unreasonable searches of their persons and seizures of their belongings.

School Officials

School officials (e.g., teachers and principals) and school resource officers (i.e., law enforcement officers assigned full-time to schools) may only search a student or a student's belongings if they have "reasonable suspicion" to believe that the student has something illegal or something that is not allowed at school. Reasonable suspicion **MUST** be based on specific, individualized facts that there is a "moderate chance" the student has something illegal or unauthorized. It may not be based on a guess, hunch, or generalized suspicion.

School officials can search lockers, school computers, and other school property for any reason (i.e., they do not need reasonable suspicion).

Outside Law Enforcement

When an outside law enforcement officer (i.e., one who does not work full-time in schools) conducts a search or when an outside officer requests a school official to conduct a search, the search is only legal if there is "probable cause." Probable cause means that the law enforcement officer has specific evidence that there is a "substantial chance" that the student has something unauthorized or illegal. If there is no probable cause and the student does not give consent for the search (see below for more information about consent), the search is illegal.

Consent

Students have a right to say no to school officials and law enforcement officers who ask for permission to conduct a search of the student or the student's belongings. If a student says "no," the search **MUST** not happen unless there is reasonable suspicion or probable cause for the search.

Scope

Searches of students **MUST** be reasonable in scope. In other words, school officials **MUST** conduct searches in a reasonable manner. This means that the way the search is conducted **MUST** be related to the objectives of the search. The following factors are relevant when determining whether searches are conducted reasonably:

- age of the student;
- steps taken by school officials or law enforcement officers before the search;
- how intrusive the search was (e.g., a pat down or a strip search); and
- the school's interest in finding something illegal or unauthorized (i.e., how serious was the suspected illegal activity or rule violation).

Seizure

If, during a search, a school official or law enforcement officer finds something that is illegal or against school rules, s/he can take (or "seize") it from the student. Any evidence that is seized can be used against students in a delinquency or criminal proceeding and in a school disciplinary hearing (e.g., a suspension appeal).

Freedom from Self-Incrimination (Interrogations)

Students have a right to be free from self-incrimination. In other words, they do not have to tell on themselves when they are suspected of committing a crime or when they are charged with a crime.

Miranda Warnings

Any student under the age of 18 who is "in custody" with a law enforcement officer (including a school resource officer or "SRO") **MUST** be given, before questioning, his/her *Miranda* warnings—i.e., that:

- s/he has the right to remain silent;

- any statement made by him/her can be and may be used against him/her;
- s/he has the right to have a parent, guardian, or custodian, as well as an attorney, present during questioning;
- s/he may consult with an attorney; and
- an attorney will be appointed for the student, if the student is not represented and wants one.

Any student age 18 or older who is "in custody" MUST be given, before questioning, his/her *Miranda* warnings—i.e., that:

- s/he has the right to remain silent;
- any statement made by him/her can be and may be used against him/her;
- s/he may consult with an attorney; and
- an attorney will be appointed for the student, if the student is not represented and wants representation.

If a student is age 13 or younger, no "in custody" admission or confession can be used against the student in court unless the confession or admission was made in the presence of the student's parent, guardian, custodian, or attorney. In other words, a student who is age 13 or younger may not waive (i.e., give up) the requirement of having a parent, guardian, or custodian present.

For a student age 14 or older, there is no legal requirement for a parent, guardian, or custodian to be present if the juvenile chooses to make an "in custody" statement, as long as the student was informed that s/he had a right to have a parent, guardian, or custodian, as well as an attorney, present.

Regardless of age, "in custody" interrogations by law enforcement officers MUST stop if the student indicates that s/he does not want to be questioned any more.

"In Custody"

For a student to be considered "in custody," the questioning MUST be:

- by a law enforcement officer;
- in the presence of a law enforcement officer; and/or
- at the direction of a law enforcement officer (e.g., a police officer tells a principal to interrogate a student and share the answers).

There is no set definition of "in custody." Whether a student is considered "in custody" depends on all of the circumstances surrounding the questioning. A student is "in custody" if s/he has been arrested or if his/her freedom has been restricted in a significant way. Whether a student is "in custody" depends on factors that may include:

- the student's age;
- who is asking the questions (e.g., a school administrator or law enforcement officer);
- the amount of time the student was questioned;
- the location of the questioning (e.g., in a room with a closed and locked door);
- whether the student was handcuffed or restrained in any way; and
- whether the student was told that s/he could leave.

Freedom from Excessive Force

Students have a right to be free from excessive force. There is no exact definition of excessive force. It is generally considered force that is more than the minimum amount needed to achieve a legitimate purpose.

School personnel (e.g., teachers and administrators) may use reasonable force on students when it is necessary under the circumstances, such as:

- to stop a disturbance that threatens to injure others;
- to obtain possession of a weapon; and
- for self-defense.

REMEDIES

School districts and schools will not always follow laws and policies. It is important for students and parents to assert their rights, if the school is not following the law. The following are some of the ways that students and parents/guardians can remedy violations of their rights. Students and parents should contact a lawyer when they need assistance. See below for a list of free legal resources.

Meeting with Principal and Teachers

If a student's or parent's/guardian's right has been violated, a good first step is to meet in-person with the student's principal in order to resolve the issue quickly and cordially. See the appendix for a sample meeting request letter.

Meeting with School Board Member

All citizens in North Carolina are represented by at least one elected local school board member. Students and parents/guardians can request to meet with their school board member(s) in order to discuss their concerns and ask for assistance. Usually school board members and their contact information can be found on the school district website.

Grievance

Every school district in North Carolina MUST have a grievance policy. Grievances can be filed by students and parents/guardians for any violation of a law or policy by a school district employee. See the appendix for more information about grievances and sample forms.

Internal Affairs Complaint

A student who is mistreated by a law enforcement officer can file a complaint with the law enforcement officer's employer (i.e., the sheriff's department or police department). Law enforcement agencies generally have internal affairs departments that investigate incidents of lawbreaking and professional misconduct by officers. See the appendix for an internal affairs complaint form.

Office of Administrative Hearings Petition

Decisions and actions related to special education laws and policies can be appealed by filing a petition (sometimes called a "due process petition") in the Office of Administrative Hearings (OAH). OAH is an independent, quasi-judicial agency that was established to provide a source of independent Administrative Law Judges (ALJs) to preside in administrative law contested cases. See the appendix for more information about OAH petitions and a petition form.

Office for Civil Rights Complaint

Students discriminated against on the basis of sex, race, national origin, age, or disability can file complaints with the Office for Civil Rights (OCR) of the U.S. Department of Education. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. All school districts in North Carolina receive such assistance. See the appendix for more information about complaints to OCR and a sample complaint form.

Complaint to the Department of Public Instruction

A student with a disability whose rights have been violated can file a complaint with the North Carolina Department of Public Instruction (DPI), Exceptional Children Division. See the appendix for more information about complaints to DPI and a sample complaint form.

Petition for Judicial Review

The judicial branch of government has the authority and the duty to protect students' legal rights. Students and parents/guardians can file petitions for judicial review in their local superior court or in the federal court for their region of the state, depending on the case. For example, students who are long-term suspended from school can appeal the school board's decision to uphold the suspension by filing a petition for judicial review in the local superior court. See the appendix for more information about petitions for judicial review and a sample petition form for use in suspension and expulsion appeals.

Contact the Media

Students and parents/guardians can try to express their concerns publicly by contacting the media (e.g., television stations, radio stations, and newspapers) through letters to the editor, op-eds, and contacting a reporter and requesting that a story be written. They can also share their stories using social media, such as blogs, Twitter, Facebook, and YouTube.

TIPS

Read this entire handbook. Know your rights, remedies, and resources!

Carefully read local policies, including the school board's policies and your school's policies. Keep a copy for future reference.

Document everything in writing. For example, if you make a request (e.g., for a meeting, services, or records), do it in writing, date it, and keep a copy of the letter for your records.

Ask a lot of questions and take good notes during meetings and conversations with teachers and administrators. Write down the date and time of each conversation, and the name of the person with whom you spoke. If possible, send a letter to the school confirming what was discussed.

Keep good records. Get a binder, file folder, or box, and keep in one place all records (e.g., report cards, letters from school, student handbooks, and evaluations), copies of documents you have given the school, and all of your notes from meetings and phone calls.

Be a good listener.

Be part of the solution. Help teachers, counselors, and administrators come up with ways to solve problems and ensure student success.

Give respect to get respect. Make the school takes you seriously by being on time, polite, and firm.

Try to control your emotions. If you are upset or angry during a meeting at school, ask to take a break to walk around or call a friend. If you are crying or yelling at school employees, they are less likely to really hear and understand what you are trying to say.

Request and review all of the student's education records each year.

Do not be afraid to ask for help. Take someone with you to meetings at the school. Very often there are people in the community who help parents/guardians in dealing with schools. Tell the school in advance that you will be bringing the person. At most meetings, there will be several school employees present, so it may help you feel more comfortable to not be alone. Also, there will be someone to witness what happened in case later there is a dispute about what took place at the meeting. If the person is a trained education advocate who knows the school rules, s/he can offer suggestions at the meeting or point out if the school is not doing what it should. Finally, having a third party often helps keep the meeting focused and productive. See below for support resources. See below for organizations that provide advocates.

Visit classes and meet your student's teachers, administrators, and support staff early in the school year. Let the school know you care and will be involved. Get the teachers' phone numbers and email addresses, and give them your contact information. Attend parent-teacher conferences, open houses, and other school events.

Keep up to date on assignments and progress.

RESOURCES TO LEARN MORE ABOUT STUDENTS' RIGHTS

State	National
Advocates for Children's Services www.legalaidnc.org/acs	American Civil Liberties Union www.aclu.org
American Civil Liberties Union of NC www.acluofnorthcarolina.org	Dignity in Schools www.dignityinschools.org
Council for Children's Rights www.cfcrights.org	Lambda Legal www.lambdalegal.org
Disability Rights NC www.disabilityrightsn.org	National Dissemination Center for Children with Disabilities http://nichcy.org
Duke Children's Law Clinic www.law.duke.edu/childedlaw	National Juvenile Defender Center www.njdc.info
Exceptional Children's Assistance Center www.ecac-parentcenter.org	National Women's Law Center www.nwlc.org
NC Department of Public Instruction www.ncpublicschools.org	U.S. Department of Education www.ed.gov
NC Juvenile Defender www.ncids.org/JuvenileDefender	Wrightslaw www.wrightslaw.com

RESOURCES FOR ASSISTANCE

Legal

Advocates for Children's Services
919-226-0052
acsinfo@legalaidnc.org
www.legalaidnc.org/acs
Statewide

ACLU of NC
919-834-3390
aclu@nc.rr.com
www.acluofnorthcarolina.org
Statewide

Council for Children's Rights
704-372-7961
info@cfcrights.org
www.cfcrights.org
Charlotte-Mecklenburg

Disability Rights NC
919-856-2195
info@disabilityrightsncc.org
www.disabilityrightsncc.org
Statewide

Duke Children's Law Clinic
919-613-7169
www.law.duke.edu/childedlaw
Triangle

Legal Aid of North Carolina
1-866-219-5262
www.legalaidnc.org
Statewide

NC Central University, Juvenile Law Clinic
919-530-5245
nmpare@nccu.edu
<http://law.nccu.edu/clinics/juvenile-law/>
Triangle

NC Justice Center
919-856-2570
contact@ncjustice.org
www.ncjustice.org
Statewide

Pisgah Legal Services
828-253-0406
info@pisgahlegal.org
www.pisgahlegal.org
Western North Carolina

UNC Center for Civil Rights
919-843-3921
civilrights@unc.edu
www.law.unc.edu/centers/civilrights
Statewide

Other

Action for Children NC
919-834-6623
admin@ncchild.org
www.ncchild.org
Statewide

Coalition of Concerned Citizens for African
American Children
ccaac_aacca@yahoo.com
www.cccaac.com
Wake County

Exceptional Children's Assistance Center
1-800-962-6817
ecac@ecacmail.org
www.ecac-parentcenter.org
Statewide

NC NAACP
919-682-4700
execdirnaacpnc@gmail.com
www.naacpnc.org
Statewide

Parents Supporting Parents
336-210-5608
psp.org@triad.rr.com
www.parents-supporting-parents.org
Guilford County

APPENDIX

Form: Letter to Meet with Principal

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Dear Principal:

I would like to meet with you to discuss:

Please contact me at your earliest convenience to arrange a date, time, and location to meet with me.

Thank you,

Signature of Parent/Guardian

Date Submitted to the Principal

Background: Grievances

What is a grievance?

A grievance is a written complaint about the actions of a school district employee. Grievances may be filed by students and parents/guardians. Every school district in North Carolina **MUST** have a grievance policy. Students and parents/guardians should make sure to carefully read their local grievance policies.

When may a grievance be filed?

If a student or parent/guardian believes that a school district employee has violated, misapplied, or misinterpreted a law or policy, s/he may file a grievance. Many complaints may be resolved informally by talking directly with the teacher or principal, but when those efforts do not work, the formal grievance process described below is available.

Grievances are not the appropriate way to “grieve” a long-term suspension or expulsion, which should be appealed using the rights described above and the process in the local school board policy.

What information **MUST be in the grievance?**

- the name of the school system employee(s) whose decision or action caused the complaint;
- the specific decision(s) or action(s) by that individual that led to the complaint;
- any school board policy, state or federal law, state or federal regulation, or State Board of Education policy or procedure that the student and/or parent/guardian believes has been misapplied, misinterpreted or violated; and
- the specific resolution or corrective action desired (i.e., what the student and/or parent/guardian wants to happen as a result of the employee's actions).

What is generally the grievance process? (Note: The process may differ from district-to-district.)

- **Filing:** A grievance should be filed as soon as possible after the incident, and **MUST** be filed within 30 days after the incident that is the subject of the complaint. If the grievance is filed after 30 days have passed, the school can, but is not required to, take any further action.
- **Conference:** After receiving the grievance, the principal **MUST** schedule, within five school days, a meeting with the person who filed the grievance.
- **Principal's Decision:** After the conference, the principal **MUST** give his/her decision on the matter in writing to the student or parent/guardian within five school days.
- **Appeal to the Superintendent:** If the student or parent/guardian is not satisfied with the decision, s/he may appeal to the superintendent. The appeal **MUST** be made within five school days after receiving the principal's written response.
- **Superintendent's Decision:** Once the superintendent receives the appeal, s/he **MUST** review it within five school days. However, if the superintendent determines that more investigation is needed, s/he may have 15 additional days to investigate. After the review is completed, the superintendent **MUST** give the student or parent/guardian a decision in writing within 10 school days.
- **Appeal to the Board of Education:** If the grievance is not resolved by the superintendent, it may be appealed in writing to the board of education. This written appeal **MUST** be made within 10 school days following the written response from the superintendent.
- **Board's Decision:** A Board's consideration of a grievance appeal takes place in a closed session and is limited to the written record (i.e., the appeal to the principal and the superintendent, their responses, and other documents related to the suspension), unless the board determines that additional information is necessary. There is generally no hearing or in-person meeting. The board may affirm, reverse, or modify the decision of the superintendent. The board **MUST** give the student or parent/guardian a final, written decision within 30 days of the session.

If the school system fails to comply with the time periods or other procedures, the parent/guardian may advance the grievance to the next level. For example, if a parent/guardian files a grievance with a principal and the principal does not respond within five school days, the parent/guardian can immediately file an appeal with the superintendent.

Form: Grievance to Principal

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Date of Incident	
Location of Incident	
Name of Employee(s) Who Committed Violation(s)	
Laws and/or Policies Violated	

Detailed Description of Incident:

Requested Corrective Action:

I request a conference with you to discuss this grievance and seek a resolution to the problem. Please contact me with a date, time, and location for a conference to be held within the next five school days. Thank you.

Signature of Student or Parent/Guardian

Date Submitted to the Principal

Form: Grievance Appeal to Superintendent

* ATTACH A COPY OF THE ORIGINAL GRIEVANCE TO THE PRINCIPAL AND THE PRINCIPAL'S WRITTEN RESPONSE.

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Date of Incident	
Date Grievance Filed	
Date of Conference	
Date of Principal's Response	

I am not satisfied with the principal's response to my grievance because:

Please review this grievance appeal within five school days and send me a written response within 10 school days after completing the review. Thank you.

Signature of Student or Parent/Guardian

Date Submitted to the Superintendent

Form: Grievance Appeal to Board of Education

* ATTACH A COPY OF THE ORIGINAL GRIEVANCE TO THE PRINCIPAL, THE PRINCIPAL'S WRITTEN RESPONSE, THE APPEAL TO THE SUPERINTENDENT, AND THE SUPERINTENDENT'S WRITTEN RESPONSE.

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Date of Incident	
Date Grievance Filed	
Date of Conference	
Date of Principal's Response	
Date of Appeal to Superintendent	
Date of Superintendent's Response	

I am not satisfied with the superintendent's response to my grievance because:

Please review this grievance appeal within five school days and send me a written response within 30 days. Thank you.

Signature of Student or Parent/Guardian

Date Submitted to the Board of Education

Form: Internal Affairs Complaint to Local Police Department of Sheriff's Department

* SUBMIT A COPY OF THIS FORM TO YOUR LOCAL INTERNAL AFFAIRS DEPARTMENT.

Student:

Full Name	
School	
Age	
Grade	

Parent/Guardian:

Full Name	
Address	
Phone	
Email	

Law Enforcement Officer:

Name	
Agency	
Badge #	

Incident Prompting Law Enforcement Involvement:

Date	
Time	
Location	

Attach additional pages if necessary.

Witness 1:

Full Name	
Address	
Phone	
Email	

Witness 2:

Full Name	
Address	
Phone	
Email	

Attach additional pages with names and contact information for witnesses if necessary.

The law enforcement officer violated my right or my student's right to be free from: (Check all that apply.)

- ☐ Unreasonable search and seizure
- ☐ Self-incrimination
- ☐ Bullying
- ☐ Sexual harassment
- ☐ Excessive force (e.g., use of TASERS, physical injury)
- ☐ Discrimination

Describe any other violations or misconduct:

Provide a detailed description of the incident(s):

Attach or enclose any evidence of misconduct, such as video footage, photographs, and witness statements.

Signature of Student

Date Submitted to Internal Affairs

Signature of Parent/Guardian

Background: Personal Education Plans (PEPs)

What is a Personal Education Plan (PEP)?

An individualized plan designed to improve a student's performance to grade-level proficiency.

How do I know if my student should have a PEP?

PEPs are for students who are at risk for academic failure. Schools MUST create a PEP when a student:

- scores a level I and/or II on an end-of-grade (EOG) or end-of-course (EOC) exam; and/or
- is at risk of academic failure based on other factors like failing grades, excessive absences, and suspensions.

What is the timeline for creating a PEP?

PEPs MUST be created or updated each year by the end of the first grading period, or after a teacher has had a student in class for nine weeks. Schools do not need to wait for the results of EOG or EOC exams before creating a PEP.

What goes into a PEP?

- a diagnostic evaluation to see what difficulties the student has and what interventions will best help the student;
- intervention strategies such as coaching, mentoring, tutoring, summer school, Saturday school, extended school days, special homework, smaller classes, and modified instructional programs; and
- monitoring strategies to make sure that the student's PEP is being implemented and is working.

What if the school does not respond to my letter, refuses to give my student a PEP, or doesn't implement the PEP?

File a grievance. See above for more information about grievances.

What else should I know about PEPs?

- PEPs are free (i.e., provided at no cost to students and parents/guardians).
- Parents/guardians should be included in the implementation and ongoing review of PEPs.
- Schools MUST provide free transportation to all students who need it to access interventions in PEPs.
- Schools MUST provide parents/guardians with copies of PEPs.
- A student with a disability should have Individualized Education Program (IEP).

Form: Personal Education Plan (PEP) Creation Request

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

I am concerned that my student is at risk of academic failure because s/he: (check all that apply)

- ☐ Failed his/her most recent end-of-grade or end-of-course exam
- ☐ Has received failing grades on assignments, quizzes, tests, and/or assessments
- ☐ Has excessive absences
- ☐ Has been repeatedly short-term suspended, or long-term suspended or expelled

Additional Information:

Please conduct a diagnostic evaluation of my student and then create a personal education plan (PEP) that includes focused educational interventions and monitoring strategies. Please contact me within 10 school days to schedule a time to meet with the team that will be conducting the diagnostic evaluation and for me to sign any necessary paperwork so that my child's needs can be addressed as soon as possible. I wish to exercise my right to be included in the implementation and ongoing review of my student's PEP.

Thank you.

Signature of Parent/Guardian

Date Submitted to the Principal

Form: Personal Education Plan (PEP) Revision Request

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

My student has had a PEP for at least two full grading periods; however, s/he is not making adequate academic progress and is still at risk for academic failure.

Additional Information:

Please contact me within 10 school days to schedule a time to meet with the team that will revise my student's PEP.

Thank you.

Signature of Student or Parent/Guardian

Date Submitted to the School

Form: Request for an Evaluation to Determine Eligibility for Special Education Services

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Dear Principal:

I request that my student be evaluated to determine if s/he is a child with a disability who is eligible for special education services. I believe my student may eligible because s/he:

Please contact me within 10 school days to schedule a time to meet with you to discuss the process and for me to sign any necessary paperwork so that my child's needs can be addressed as soon as possible. Also, please accept this request as written consent to evaluate my child.

Thank you.

Signature of Parent/Guardian

Date Submitted to the Principal

Form: Request for an Individualized Education Program (IEP) Team Meeting

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Dear Principal:

I would like to meet with my student's Individualized Education Program (IEP) Team to discuss my student's: (Check all that apply.)

- ☐ Behavioral issues
- ☐ Academic issues
- ☐ Area of eligibility/disability
- ☐ Teacher(s)
- ☐ Special education services
- ☐ Related services
- ☐ Accommodations
- ☐ Other: _____

Additional information:

Please have someone contact me within 10 school days with a possible date, time, and location for an IEP Team meeting.

Thank you,

Signature of Parent/Guardian

Date Submitted to the Principal

Form: Request for a Functional Behavioral Assessment (FBA) and Behavioral Intervention Plan (BIP)

Student Name	
Student School	
Parent/Guardian Name	
Parent/Guardian Address	
Parent/Guardian Phone	
Parent/Guardian Email	

Dear Principal:

I would like for my student's IEP Team to conduct a functional behavioral assessment (FBA) and then create a behavioral intervention plan (BIP). I believe my student needs a FBA and BIP because s/he has received: (Check all that apply)

- _____ Multiple write-ups and/or office referrals
- _____ Multiple detentions
- _____ Multiple placements in in-school suspension (ISS)
- _____ Multiple bus suspensions
- _____ Multiple short-term suspensions
- _____ A long-term suspension or 365-day suspension
- _____ Other: _____

Additional information:

Please have someone contact me within 10 school days with a possible date, time, and location for an IEP Team meeting.

Thank you,

Signature of Parent/Guardian

Date Submitted to the Principal

Background: Office of Administrative Hearings Petitions

What is the Office of Administrative Hearings (OAH)?

OAH is an independent, quasi-judicial agency that provides Administrative Law Judges (ALJs) to preside in State administrative law proceedings. In other words, ALJs provide an impartial review of state agency decisions, including the decisions of IEP Teams. For more information, visit www.ncoah.com.

Why would I file a petition in OAH?

Decisions of a student's Individualized Educational Program (IEP) Team can be appealed by filing a petition in OAH (often called a "due process petition"). Examples of matters that could result in a petition include when a parent disagrees with:

- the results of an evaluation to determine eligibility for special education services;
- the educational placement of a student in special education or related services;
- whether the student is receiving a free, appropriate public education; and/or
- a manifestation determination review outcome.

When MUST I file a petition in OAH?

The petition MUST be filed within one year after the parent/guardian learns of the violation or actions giving rise to the complaint. However, the one-year restriction does not apply if the parent/guardian was unable to meet that deadline because the school or IEP Team has not met its obligations, or when the school or IEP Team failed to provide the parent/guardian with information that it was legally required to disclose.

How do I file a petition?

- Complete the petition below.
- Make four copies of the petition, in addition to the original.
- Mail the original petition and one copy to:

Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
- Keep one copy for your personal records.
- Mail or hand-deliver one copy to the local superintendent.
- Fax (919-807-3243) or mail one copy to:

N.C. Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-6356

What happens after I file a petition?

The school district has 15 days after receiving the petition to meet (often called a "resolution meeting") with you to discuss the issues raised in the petition and to try to resolve the dispute. At the meeting, relevant members of the IEP Team should be present, along with someone from the local board of education who has decision-making authority on behalf of the board. The board may not be represented by an attorney unless you are also represented by an attorney. You and the school system can agree in writing not to have a "resolution meeting." If a resolution is not reached within 30 days of the local superintendent receiving the petition, a hearing will be held (often called a "contested case hearing").

What if my child has been suspended or expelled?

If you are appealing a manifestation determination review (MDR) decision, then the process moves much more quickly. The OAH hearing must be held within 20 days from the day the school receives the petition from the parent/guardian, and the hearing officer must reach a decision within 10 days after the hearing. The resolution meeting discussed above must be held within seven days of the school receiving the petition.

What if my child's placement has been changed?

If you are appealing a change in placement (e.g., your child was moved from a resource classroom to a regular education classroom), you have the right for your child to "stay put" in his/her current educational placement while you appeal to OAH.

Where will my hearing be held?

The hearing **MUST** be held in the county where the child is enrolled, unless both parties agree to a different venue.

What happens at the hearing?

The hearing is very similar to a trial in court, but with no jury. At the hearing, the student and parent/guardian have the right to:

- present evidence on any relevant issues;
- be represented by a lawyer;
- subpoena witnesses and documentary evidence (i.e., ask the judge to order that certain witnesses and documents be presented in court); and
- cross-examine witnesses.

What will happen after the hearing?

The judge has 45 days to issue a written decision that addresses all of the issues raised in the petition (except in MDR appeals, when the judge has 10 days to decide). All of the parties will receive a copy of the decision, along with a notice of the availability of an appeal.

What can I do if I do not agree with the judge's decision?

A judge's decision can be appealed within 30 days by filing a written appeal to the State Board of Education. The State Board will appoint a Review Officer to review the case, and a copy of his/her decision will be served on all parties.

(9) Describe the problem and the facts that support your Petition: (Attach additional pages if necessary.)

(10) Describe the resolution or remedy you are seeking: (Attach additional pages if necessary.)

(11) Date: _____

(12) Your Phone Number: _____

(13) Your Address: _____
(Street Address/P.O. Box) (City) (State) (Zip) (County)

(14) Your Name: _____

(15) Your Signature: _____

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the Local or County Superintendent of Schools named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed or by hand-delivering it to the named superintendent.

(16) _____
(Name of Superintendent Served)

(17) _____
(School Board Listed for Number 3 Above)

(18) _____
(Street Address/P.O. Box) (City) (State) (Zip)

(19) _____
(Your Signature)

(20) _____
(Date)

(10) Describe the resolution or remedy you are seeking: (Attach additional pages if necessary.)

(11) Date: _____

(12) Your Phone Number: _____

(13) Your Address: _____
(Street Address/P.O. Box) (City) (State) (Zip) (County)

(14) Your Name: _____

(15) Your Signature: _____

CERTIFICATE OF SERVICE

I certify that this Petition has been served on the Local or County Superintendent of Schools named below by depositing a copy of it with the United States Postal Service with sufficient postage affixed or by hand-delivering it to the named superintendent.

(16) _____
(Name of Superintendent Served)

(17) _____
(School Board Listed for Number 3 Above)

(18) _____
(Street Address/P.O. Box) (City) (State) (Zip)

(19) _____
(Your Signature)

(20) _____
(Date)

Background: Complaints to the Office for Civil Rights (OCR)

What is the Office for Civil Rights (OCR) of the U.S. Department of Education?

OCR enforces federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the U.S. Department of Education. All school districts in North Carolina receive federal money.

Who can file a complaint?

Anyone who believes that a school or school district has discriminated against someone on the basis of race, color, national origin, sex, disability, or age can file a complaint. The person or organization filing the complaint (called a "complainant") does not have to be a victim of the alleged discrimination but may complain on behalf of another person or group.

When MUST the complaint be filed?

A complaint MUST be filed within 180 calendar days of the date of the alleged discrimination, unless the time for filing is extended by OCR for good cause shown under certain circumstances.

MUST a grievance be filed before filing a complaint with the OCR?

No. A complaint may be filed with OCR before filing a grievance with the local board of education. Or, a complainant may file a grievance and file a complaint with the OCR, as long as the complaint is filed with OCR within 60 days after the grievance process is completed.

How can I file a complaint?

Fill out the form below and submit it any of the following ways:

- Mail: Office for Civil Rights
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-1475
- Email: ocr@ed.gov
- Online: www.ed.gov/about/offices/list/ocr/complaintintro.html

What happens after the complaint is filed?

- OCR evaluates the complaint;
- OCR decides whether to open an investigation or to dismiss the complaint; and
- OCR sends a letter to the person who filed the complaint and the institution accused of discrimination.

What happens during an OCR investigation?

OCR may review documents submitted by both parties, conduct interviews, and/or visit the school district. At the end of the investigation, OCR decides whether there is enough evidence to conclude that the institution committed discrimination and violated the law. OCR will send both parties a letter stating their conclusions.

What happens if OCR finds that discrimination occurred?

OCR will contact the recipient of federal funds to attempt to voluntarily resolve the violation. If the recipient agrees, it will sign a written resolution agreement that explains the steps it will take to address the problems. OCR will monitor the recipient to make sure it follows through with the agreement. If, however, the recipient refuses to negotiate a voluntary resolution agreement, OCR will continue to take all the necessary legal steps to compel the recipient to remedy the violation. Failure to remedy the violation may result in the recipient losing their federal financial assistance.

What happens if OCR does not open an investigation or finds that discrimination did not occur?

The person who filed the complaint may send a written request for reconsideration to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's dismissal, findings, or administrative closure letter. Requests for reconsideration and appeals should be sent to:

Deputy Assistant Secretary for Enforcement
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-1100.

The letter **MUST** explain why the complainant believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, and how the mistake(s) would change OCR's decision in the case.

For more information, visit www2.ed.gov/ocr.

Form: Complaint to the Office for Civil Rights (OCR)

1) Person Filing Complaint:

Full Name	
Mailing Address	
Email Address	
Home Phone	
Cell Phone	
Work Phone	

2) Person Discriminated Against:

Full Name	
Mailing Address	
Email Address	
Home Phone	
Cell Phone	

Attached additional pages for additional person(s) discriminated against.

3) School or School District that Engaged in Discrimination:

Full Name	
Mailing Address	

4) Discrimination was based on: (Check all that apply.)

- ☐ Race
☐ National origin
☐ Sex
☐ Disability
☐ Age

5) Discriminatory Act:

Date of Discriminatory Act	
Name(s) of Each Person(s) Involved	
Name(s) of Witness(es)	

Detailed description of discriminatory act(s), including why it was discrimination (the focus must be on discrimination based on sex, race, national origin, disability, or age):

Attached additional pages if necessary.

6) What was the most recent date of discrimination? _____

7) Have you attempted to resolve these allegations with the institution through its internal grievance procedure, appeal, or due process hearing? (Circle One.) Yes No

If yes:

Type (Circle One)	Grievance Appeal Due Process Hearing
Allegation(s)	
Date You Filed	
Status (Circle One)	Pending Completed
Outcome	

If possible, attach a copy of your grievance, appeal, or due process request, and, if completed, the decision in the matter.

8) Have the allegations contained in this complaint been filed with any other federal, state, or local civil rights agency, or any federal or state court? (Circle One.) Yes No

If yes:

Agency or Court	
Date You Filed	
Case or Reference #	
Results of Findings by Agency or Court	

If possible, attach a copy of your complaint.

9) What remedies or solutions are you seeking (e.g., what do you want for the person(s) discriminated against and what you want to happen to prevent future discrimination)?

Signature of Person Filing Complaint

Date

Signature of Person Discriminated Against

Date

Signature of Parent/Guardian of Person Discriminated Against
(if Person Discriminated Against is under 18)

Date

Background: Complaints to the Department of Public Instruction, Exceptional Children Division

Who can file a complaint?

A complaint to the Department of Public Instruction (DPI) (often called a "formal state complaint") can be brought by an organization or person who believes that a school or school district violated a student's special education rights.

What are examples of a student's special education rights being violated?

Examples of violations of special education rights that could warrant a complaint filing include:

- improper identification or evaluation procedures (e.g., taking more than 90 days to evaluate the student, determine eligibility, and create an IEP, if the child is eligible);
- failure to provide related services;
- failure to give a parent/guardian access to his/her child's records;
- failure to provide the services in the child's IEP; and/or
- failure to follow proper disciplinary procedures.

The complaint process may not be used to challenge official Individualized Education Program (IEP) Team decisions, such as a decision about placement or a decision to exit a student from special education.

When MUST the complaint be filed?

Complaints MUST be filed within one year of the violation of the law.

What if I file a petition in the Office of Administrative Hearings (OAH) and a state complaint?

DPI will set aside any part of the complaint that is being addressed in OAH and the complaint timeline will stop. When the OAH case is closed, DPI will review the outcome of the OAH case and then either close the complaint or proceed with the investigation.

How can I file a complaint?

Fill out the form below and mail it to:

Director, Exceptional Children Division
Department of Public Instruction
6356 Mail Service Center
Raleigh, NC 27699-3656

You MUST also send a copy of the complaint to the superintendent of the school district named in the complaint, or if a public charter school is named in the complaint, its administrator.

What happens after the complaint is filed?

- DPI will review the complaint and decide whether to open an investigation. If the complaint is incomplete or about something that may not be addressed by DPI, someone from DPI will contact the complainant and explain what needs to be done to make the complaint acceptable.
- If the complaint is opened for investigation, DPI will give a copy of the complaint to the school system involved.
- The school system has 30 days to investigate the complaint and report back to DPI.
- During the course of the investigation, the DPI investigator may request additional documentation, conduct interviews, and/or conduct an on-site visit.
- DPI should issue a written report to the complainant and the school system within 60 days after the complaint is submitted. The report will outline the facts that DPI has discovered and whether those facts show that the school violated the law. If a violation is found, the report will also contain a Corrective Action Plan (what the school MUST do to fix the violation).

What happens if I disagree with DPI's decision?

The decision of DPI is final. If you disagree with the decision, consider filing a petition in the Office of Administrative Hearings (OAH). See above for more information about OAH.

Form: Complaint to the Department of Public Instruction, Exceptional Children Division

Complainant:

Full Name	
Relationship to Student	
Address	
Email	
Phone	
Fax	

Student:

Full Name	
Age	
Grade	
Area of Disability	

Parent/Guardian:

Full Name	
Address	
Email	
Phone	

Current School:

Full Name	
District	

School Student Attended When Violation Occurred:

Full Name	
District	

Describe in detail how the school or school district violated special education law(s) and/or regulation(s). Include all relevant information, including important dates, names, and statute and regulation numbers.

Description Continued from Previous Page:

Proposed Solution(s):

Attach any other relevant information and supporting documents, such as a copy of the student's current Individualized Education Program (IEP) and most recent evaluation report, and relevant minutes from IEP Team meetings.

Signature of Person Filing Complaint

Date

Signature of Parent/Guardian*
(If not the person filing the complaint)

Date

** I give permission to DPI to send the investigation report to the complainant.*

Background: Petitions for Judicial Review of Suspensions and Expulsions

What is a petition for judicial review?

The final decision of a local board of education regarding long-term suspensions, 365-day suspensions, and expulsions (not short-term suspensions) can be reviewed by a local superior court. A petition for judicial review is when a citizen, such as a parent/guardian, asks the court to review the legality of the board's decision.

When do I have to file the petition for judicial review?

A petition for judicial review generally may not be filed until after all of the other levels of appeal (e.g., school-based due process hearing, appeal to the superintendent, and appeal to the local board of education) have taken place (called "exhaustion of administrative remedies"). A petition for judicial review **MUST** be filed on behalf of the student within 30 days of service of the written copy of the final decision of the school board. However, the court can accept the petition after 30 days if there was a good reason for the delay.

Why would I file a petition for judicial review?

There are six grounds for appealing the decision of the board of education. Parents/guardians who file a petition **MUST** claim that the board decision was at least one of the following:

- in violation of constitutional provisions;
- in excess of the statutory authority or jurisdiction of the agency;
- made upon unlawful procedure;
- affected by other error of law;
- unsupported by substantial evidence; and/or
- arbitrary, capricious, or an abuse of discretion.

How do I file a petition for judicial review?

The petition **MUST** be filed with the clerk of superior court in the county where the local board of education is located. The filing can be complicated and the advice of a lawyer may be needed.

What happens after I file a petition for judicial review?

Following receipt of a petition for judicial review, the local board **MUST** produce the record of its proceedings for the person who filed the complaint and for the court. This usually includes recordings of the appeal hearing and any documents that were considered by the board of education. Generally, new evidence is not admitted, but a court may allow new evidence if it is shown that the new evidence is material (i.e., relevant), not cumulative (i.e., provides new information), and could not reasonably have been presented at the earlier proceeding (i.e., there is no way that the evidence could have been part of the previous hearings).

What happens in court?

Petitions for judicial review are heard without a jury (i.e., the judge hears the evidence and makes a decision). Each side may present a brief (i.e., a written document that argues why that side should win), as well as an oral argument. (Note: the deadline for filing a brief depends on the local court—check the local rules.). The judge will read the briefs, listen to oral arguments, and review the evidence originally presented to the school board. The judge does not decide whether the student is guilty or not guilty. Instead, the judge basically decides whether the board followed the law and whether its decision was legal. The judge **MUST** assume that the board's decision was correct. Therefore, the student has the burden of proof (i.e., the student has to prove that the school board's decision falls into one of the six categories above; the school board does not have to prove or dispute anything until after the student does so).

Form: Petition for Judicial Review of Long-Term Suspension or Expulsions

STATE OF NORTH CAROLINA
COUNTY: _____

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT DIVISION

STUDENT: _____,)
a minor, by and through his parent,)
Parent: _____,)
Petitioner)
vs.)
COUNTY: _____)
BOARD OF EDUCATION,)
Respondent)

PETITION FOR JUDICIAL REVIEW

NOW COMES Petitioner _____ by and through his parent/guardian,
(Student's Full Name)
_____, pursuant to N.C.G.S. § 115C-390.8(i) and N.C.G.S. § 150B-43.
(Parent/Guardian Full Name)
_____ petitions the Court for judicial review of the final decision rendered
(Student Full Name)
by Respondent _____ County Board of Education to (check one):
(Name of County)

____ Long-term suspend the Petitioner
____ Suspend the Petitioner for 365 days
____ Expel the Petitioner

JURISDICTION

1) The Petitioner is a citizen and resident of North Carolina, County of _____,
(Name of County)

and has been so for more than six months prior to the commencement of this proceeding.

2) Respondent _____ County Board of Education is a local Board of Education
(Name of County)
established pursuant to Chapter 115C, Article Five, of the North Carolina General Statutes.

3) N.C.G.S. § 115C-390.8(i) provides: "A decision of the local board to uphold the long-term suspension of a student is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes."

4) The Petitioner has exhausted all administrative remedies made available to him by statute or agency rule.

5) The Petitioner filed this petition within 30 days of receiving a written copy of the Board's final decision.

6) Petitioner contends that Respondent's final decision was: (Check all that apply.)

- ☐ In violation of constitutional provisions
- ☐ In excess of the statutory authority or jurisdiction of the agency
- ☐ Made upon unlawful procedure
- ☐ Affected by other error of law
- ☐ Unsupported by substantial evidence
- ☐ Arbitrary, capricious, or an abuse of discretion

FACTUAL BACKGROUND

Provide a detailed description of the facts, including:

- *the student's age, grade, and school;*
- *positive information about the student (e.g., good grades, good attendance, no or little history of discipline issues, extracurricular and volunteer activities, the student's future aspirations); and*
- *dates and information about the suspension or expulsion (e.g., the incident that led to the disciplinary action, the appeal hearings, and the student's current educational placement.*

Attach additional pages if necessary.

CLAIMS FOR RELIEF

Describe why you think the board's decision should be reversed. Make sure that you address at least one of the possible reasons for reversal listed in #6 above. Attach additional pages if necessary.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner respectfully prays that the court:

- 1) Reverse the Board's decision and immediately order that the Petitioner be allowed to return to school. In the alternative, order that the Petitioner be placed at an alternative school or program that provides opportunities sufficient to enable the Petitioner to keep up with course work and remain on track for graduation.
- 2) Order that the Petitioner be provided with the necessary support and opportunities to complete assignments and credits necessary for graduation, which the Petitioner lost during the period of time the Petitioner has been unconstitutionally denied access to adequate educational services.
- 3) Order that the Petitioner's disciplinary record be expunged of all references to this matter.
- 4) Order such other relief as the Court deems just, fit, and proper.

This the _____ day of _____, _____.

(Date) (Month) (Year)

By:

Name of Person Who Filed: _____

Mailing Address: _____

Phone Number: _____

Email Address: _____

*How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline:
A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records
into Delinquency Representation*

Jason B. Langberg* and Barbara A. Fedders**

I. INTRODUCTION

The school-to-prison pipeline is a collection of punitive laws, policies, and practices that push young people—particularly African-American students, male students, students with disabilities, and students from low-wealth communities—out of school and into the juvenile and criminal systems.¹ By understanding and asserting their clients' educational rights and incorporating their clients' education histories and records into their delinquency representation, juvenile defenders can help dismantle the pipeline. Specifically, incorporation of their clients' education histories and knowledge of education law can assist a defender in making arguments for diversion from the juvenile system: improving negotiation, litigating pretrial motions, arguing defenses related to capacity and intent, making creative dispositional arguments, and obtaining essential educational services for the client, all of which can reduce the client's chances of further juvenile and criminal system involvement.

This Article proceeds as follows: in Part II, we provide a brief history of the increased imposition of excessively punitive discipline and law enforcement imperatives on public education. This history includes reference to data showing that excessive discipline and

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¹ See *What is The School-to-Prison Pipeline?*, ACLU.ORG, <http://www.aclu.org/racial-justice/what-school-prison-pipeline> (last visited Nov. 26, 2012).

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heightened law enforcement presence fail to make schools safer. We discuss the consequences of harsh disciplinary policies, including increased referrals to juvenile and criminal systems and exclusion of ever growing numbers of students from the education system—the school-to-prison pipeline. Part III sets forth the ethical backdrop for the argument that defenders have a role to play in helping dismantle the pipeline. Part IV makes specific practice recommendations for defenders in their delinquency representation as well as advocacy suggestions for advancing educational rights.

II. EDUCATION ON LOCKDOWN

A. A Brief History of Punitive and Criminalized School Discipline

Following the “get tough on crime” movement (including the “War on Drugs,” mandatory sentencing laws, “three strikes” laws, and “broken windows” policing); a handful of high-profile school shootings; and media-driven, irrational fears about juvenile crime and “super-predators,”² schools in the 1980s and 1990s became consumed by a “law and order” approach to managing behavior.³ Law enforcement officers, metal detectors, surveillance cameras, and narcotics dogs rapidly became commonplace in schools across the nation. Additionally, on the heels of the Gun-Free Schools Act of 1994, which required local school districts to expel any

² See Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 114, 124 (William Ayers et al. eds., 2011).

³ See ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW “ZERO TOLERANCE” AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 3, 10 (2010), available at http://b3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf [hereinafter ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT].

student who brings a firearm to school for a minimum of one year,⁴ school district leaders and state lawmakers across the country enacted “zero tolerance” disciplinary laws and policies that required automatic and often highly severe punishments such as long-term suspension or expulsion for offenses involving possession of any weapon and assaults against other students.⁵

Zero tolerance policies significantly increased the numbers of suspensions and expulsions in schools.⁶ Proponents of the policies touted them both as an effective mechanism for maintaining safety and order in schools through deterrence and removal of disruptive students, and as a method for ensuring that disciplinary measures were meted out on a fair and even-handed basis.⁷ However, recent research belies these claims. Zero tolerance punishments do not deter disruptive behavior,⁸ and do not improve student behavior or school safety.⁹

⁴ See 20 U.S.C. §§ 8921-23 (repealed 2002); Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

⁵ See CHRISTOPHER G. ROBBINS, *EXPELLING HOPE: THE ASSAULT ON YOUTH AND THE MILITARIZATION OF SCHOOLING* 21 (2008); Advancement Project & The Civil Rights Project, *Opportunities Suspended*, *infra* note 27.

⁶ NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, *ZERO TOLERANCE AND ALTERNATIVE STRATEGIES: A FACT SHEET FOR EDUCATORS AND POLICYMAKERS* (2008), *available at* http://www.nasponline.org/educators/zero_alternative.pdf; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE* 3-6 (2000), *available at* <http://advancementproject.org/sites/default/files/publications/opsusp.pdf> [hereinafter ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, *OPPORTUNITIES SUSPENDED*]; Russell J. Skiba and R. L. Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN, no. 5, 1999, at 372-76, 381-82.

⁷ See CHRISTOPHER BOCCANFUSO & MEGAN KUHFIELD, *CHILD TRENDS, MULTIPLE RESPONSES, PROMISING RESULTS: EVIDENCE-BASED, NONPUNITIVE ALTERNATIVES TO ZERO TOLERANCE* 1-2 (2011), *available at* http://www.childtrends.org/wp-content/uploads/2011/03/Child_Trends-2011_03_01_RB_AltToZeroTolerance.pdf; REECE L. PETERSON & BRIAN SCHOONOVER, *CONSORTIUM TO PREVENT SCHOOL VIOLENCE, FACT SHEET #3: ZERO TOLERANCE POLICIES IN SCHOOLS* (2008), *available at* http://www.fairfaxzerotolerancereform.org/images/Report_CPSV%20ConstrtmPrevSchViolence_FactsheetZT_2008.pdf.

⁸ See Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE, NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 31 (Johanna Wald & Daniel J. Losen eds., 2003); Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practices*, in *ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?*, *NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 13 (Russell J. Skiba & Gil G. Noam eds., 2001).

⁹ Raffaele Mendez, *supra* note 8, at 31.

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Further, at the same time as zero-tolerance policies were being enacted, policymakers did not curtail the use of out-of-school suspension for discretionary (i.e., non-mandatory zero tolerance) infractions, including offenses such as fighting and criminal mischief.¹⁰ These discretionary offenses now comprise the bulk of the offenses for which students are suspended.¹¹

B. The Serious Consequences for Students of Enhanced School Security

Armed police officers now can be found in public schools around the country in drastically increased numbers. According to the most recent national estimates, 17,000 law enforcement officers—often termed “school resource officers” (SROs)—are assigned permanently to schools.¹² In 2005, more than two-thirds of students around the country between the ages of twelve and fifteen had security guards or police officers in their schools—an increase of 54% from 1999.¹³ Data from three states exemplify this trend. During the 2008-09 school year in North Carolina, 849 SROs were assigned to patrol public schools on a full-time basis—over a 249% increase from 1996.¹⁴ As of 2008, the New York City Police Department employed more than 5,000 school safety agents in the public school system—1,600 more than ten years

¹⁰ See, e.g., TONY FABELO, ET AL., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 37 (2011), available at <http://csgjusticecenter.org/youth/breaking-schools-rules-report/>. Competent teachers still handle children in their classrooms without sending them to the principal, and competent principals still handle children in their schools without relying on law enforcement. See ANNENBERG INSTITUTE FOR SCHOOL REFORM, NYCLU & MAKE THE ROAD NEW YORK, *SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS* (2009), available at http://www.nyclu.org/files/publications/nyclu_pub_safety_with_dignity.pdf.

¹¹ TONY FABELO, ET AL., *supra* note 12, at 37.

¹² See JOHANNA WALD & LISA THURAU, *FIRST, DO NO HARM: HOW EDUCATORS AND POLICE CAN WORK TOGETHER MORE EFFECTIVELY TO PRESERVE SCHOOL SAFETY AND PROTECT VULNERABLE STUDENTS* 1 (Charles Hamilton Houston Institute for Race and Justice ed., 2010).

¹³ See ADVANCEMENT PROJECT, *TEST, PUNISH, AND PUSH OUT*, *supra* note 5, at 15.

¹⁴ See NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION - CENTER FOR THE PREVENTION OF SCHOOL VIOLENCE, *ANNUAL SCHOOL RESOURCE OFFICER CENSUS 2008-2009*, at 7 (2009), available at http://www.ncdjjdp.org/cpsv/pdf_files/SRO_Census_08_09.pdf.

earlier—and supplied an additional 200 armed police officers to patrol schools.¹⁵ The Los Angeles Unified School District maintains its own police department, which deploys 350 sworn officers and employs an additional 126 school safety officers and 34 “non-sworn” personnel.¹⁶

This heightened police presence in schools indicates that policymakers, educational leaders, and school administrators believe that an increase in full-time law enforcement officers correlates to increased school safety.¹⁷ Yet nationwide data and research indicate an inconclusive correlation. In actuality, incidents of violence and property crimes in schools are relatively rare, particularly when compared with the danger, risk of victimization, and resulting harm that children experience out of school.¹⁸ During this time of nationwide recession and nearly unprecedented levels of poverty and economic inequality, in which legislatures around the country have slashed essential social programs, school security budgets have remained high or have increased.¹⁹

C. Impact on Students

¹⁵ See ADVANCEMENT PROJECT, *TEST, PUNISH, AND PUSH OUT*, *supra* note 5, at 16.

¹⁶ See *What is the LASPD About . . .*, LOS ANGELES SCHOOL POLICE DEPARTMENT, <http://www.laspd.com/about.html> (last visited July 21, 2013).

¹⁷ See *id.*

¹⁸ See JUSTICE POLICY INSTITUTE, *EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS* (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf.

¹⁹ See JASON LANGBERG ET AL., ADVOCATES FOR CHILDREN’S SERVICES, *LAW ENFORCEMENT OFFICERS IN WAKE COUNTY SCHOOLS: THE HUMAN, EDUCATIONAL, AND FINANCIAL COSTS* 1 (2011), available at http://www.legalaidnc.org/public/ACS/IssueBrief_Feb-11_SROs_Rev.pdf.

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Not surprisingly, one immediate consequence of placing education “on lockdown”²⁰ is that law enforcement intervenes in minor incidents formerly viewed as typical childish behavior and “teachable moments” from which students might grow without suffering from the permanent, negative, and long-term consequences of police involvement.²¹ For example, schools with SROs have considerably more arrests for the minor offense of disorderly.²² What is more, in many states a large portion of delinquency complaints originate in schools.²³ For example:

- In 2011, 43% of all delinquency complaints in North Carolina were school-based,²⁴ and the fourth most common delinquency complaint was “disorderly conduct at school.”²⁵
- In Florida, during fiscal year (FY) 2010-11, the 16,377 school-related delinquency referrals accounted for 15% of all the cases handled by the Department of Juvenile Justice.²⁶
- In Clayton County, Georgia, the number of school-based referrals to the juvenile justice system increased dramatically, from less than 100 per year in the 1990s to 1,400 per year in 2004.²⁷

²⁰ ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK* (2005), available at <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf> [hereinafter ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN*].

²¹ See Bernardine Dohrn, “Look Out Kid / It’s Something You Did”: Zero Tolerance for Children, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 89-94 (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001); Wald & Thureau, *supra* note 12, at 16.

²² Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Misbehavior*, 37 J. CRIM. JUSTICE 280, 285 (2009).

²³ See *id.* at 284.

²⁴ See NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, DIVISION OF JUVENILE JUSTICE, 2011 ANNUAL REPORT 13 (2011), available at http://www.ncdjdp.org/resources/pdf_documents/annual_report_2011.pdf.

²⁵ *Id.* at 20.

²⁶ FLORIDA DEPARTMENT OF JUVENILE JUSTICE, *DELINQUENCY IN FLORIDA’S SCHOOLS: A SEVEN-YEAR STUDY (FY 2004-05 THROUGH FY 2010-11)* 3 (2011), available at <http://www.djj.state.fl.us/docs/research2/2010-11-delinquency-in-schools-analysis.pdf>.

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- In August 2012, the U.S. Department of Justice (DOJ) declared that the Lauderdale County Youth Court, Meridian Police Department, and Mississippi Division of Youth Services "helped to operate a school-to-prison pipeline whereby children arrested in local schools become entangled in a cycle of incarceration without substantive and procedural protections required by the U.S. Constitution."²⁸ The DOJ found that children "have been routinely and repeatedly incarcerated for allegedly committing school disciplinary infractions" and "arrested at school for offenses as minor as defiance," and that "children on probation are routinely arrested and incarcerated for allegedly violating their probation by committing minor school infractions, such as dress code violations, which result in suspensions."²⁹

This phenomenon is not limited to middle and high school students. Shocking stories of children as young as six-years-old who are suspended, handcuffed, arrested, and detained appear with some frequency.³⁰

Data from the U.S. Department of Education's Civil Rights Data Collection (CRDC) reveal that the students affected by these punitive policies are disproportionately students of

²⁷ ADVANCEMENT PROJECT, *ENDING THE SCHOOLHOUSE TO JAILHOUSE TRACK, CLAYTON COUNTY, GEORGIA*, available at <http://safequalityschools.org/pages/clayton-county-ga> (last visited July 21, 2013).

²⁸ See Press Release, U.S. DEP'T OF JUSTICE, JUSTICE DEPARTMENT RELEASES INVESTIGATIVE FINDINGS SHOWING CONSTITUTIONAL RIGHTS OF CHILDREN IN MISSISSIPPI BEING VIOLATED (Aug. 10, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-crt-993.html>.

²⁹ See *id.*; see also Maggie Lee, *Meridian Struggles with School-to-Pipeline Allegations*, JUVENILE JUSTICE INFORMATION EXCHANGE (Sept. 16, 2012), <http://jjie.org/meridian-struggles-schooltoprison-allegations/93318>.

³⁰ See Skiba & Knesting, *supra* note 10, at 4; William Ayers, Rick Ayers, and Bernardine Dohrn, *Resisting Zero Tolerance*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* xii (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2011); Kim Brooks, Vincent Schiraldi & Jason Ziedenberg, *School House Hype: Two Years Later* 26 (Justice Policy Institute & Children's Law Center eds., 2000), available at <http://www.prisonpolicy.org/scans/jpi/shh2.pdf>; ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, *OPPORTUNITIES SUSPENDED*, *supra* note 6.

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color, particularly African-American. The affected students are also disproportionately students with disabilities, and male students. Nationwide, during the 2009-10 school year:

- Over 70% of students involved in school-related arrests or referrals to law enforcement were Hispanic or African-American, even though Hispanic and African-American students made up approximately 38% of the total student population.
- African-American students represented 18% of students in the sample, but 35% of students suspended once, 46% of those suspended more than once, and 39% of students expelled were African-American.
- One in five African-American boys and more than one in ten African-American girls received an out-of-school suspension.
- Across all districts, African-American students were over three-and-a-half times more likely to be suspended or expelled than their White peers.
- While male and female students each represented about half the student population, males made up 74% of the students expelled.
- Students covered under the Individuals with Disabilities in Education Act (IDEA), the students with disabilities who need special education services, are over twice as likely as their non-disabled peers to receive one or more out-of-school suspensions.³¹

³¹ In March 2012, the Office for Civil Rights of the United States Department of Education released its Civil Rights Data Collection (CRDC). The 2009-10 CRDC collected data from a sample of approximately 7,000 school districts and over 72,000 schools. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DATA SUMMARY (Mar. 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf>; See also Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School* (2010), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research>; Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, NEW YORK TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html>; Motoko Rich, *Suspensions are Higher for Disabled Students, Federal Data*

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In 2006-07, over 3.3 million students were suspended and over 100,000 were expelled.³²

Researchers suggest that the persistent racial discipline gap may be due to a combination of factors unaccounted for by zero tolerance alone: including poverty, neighborhood characteristics (e.g., exposure to violence and substance abuse), unequal educational opportunity (e.g., poor facilities, inadequate resources, and fewer highly-qualified teachers), low academic achievement, implicit and systemic bias, racial stereotyping, and differential selection for discipline consequences.³³

Students who are suspended or expelled are more likely to be retained in the same grade, or to drop out entirely, than other students; they are also significantly more likely to become involved in the juvenile system.³⁴ Additionally, suspension and expulsion of students are associated with an increased number of mental health challenges for them, heightened conflict with adults, and substance abuse.³⁵ The juvenile or criminal courts are often the next stop for

Indicate, NEW YORK TIMES (Aug. 7, 2012) <http://www.nytimes.com/2012/08/08/education/analysis-examines-disabled-students-suspensions.html?pagewanted=all>.

³² U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, *2006 National and State Estimators*, ED.GOV, http://ocrdata.ed.gov/StateNationalEstimations/projections_2006 (last visited May 4, 2012).

³³ See Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin*, 39 EDUC. RESEARCHER, no. 1, 2010, at 60-63, available at http://web.multco.us/sites/default/files/ccfc/documents/the_achievement_gap_and_the_discipline_gap.pdf; NATIONAL ASSOCIATION OF SCHOOL PSYCHOLOGISTS, *supra* note 6, at 854; *Understanding Equity*, THE EQUITY PROJECT AT INDIANA UNIVERSITY, <http://www.indiana.edu/~equity/undequ.php> (last visited July 21, 2013). See generally RUSSELL J. SKIBA, ET AL., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (Indiana Educ. Policy Ctr. & Univ. of Nebraska-Lincoln eds., 2000), available at https://multco.us/sites/default/files/ccfc/documents/the_color_of_discipline.pdf.

³⁴ FABELO ET AL., *supra* note 11, at 75.

³⁵ See ANNENBERG INSTITUTE FOR SCHOOL REFORM ET AL., *supra* note 10; Simone M. Freeman, *Upholding Students' Due Process Rights: Why Students Are in Need of Better Representation at, and Alternatives to, School Suspension Hearings*, 45 FAM. CT. REV. 638, 640 (2007); ACTION FOR CHILDREN NORTH CAROLINA (FORMERLY THE NORTH CAROLINA CHILD ADVOCACY INSTITUTE), *ONE OUT OF TEN: THE GROWING SUSPENSION CRISIS IN NORTH CAROLINA* 5 (2005), available at http://www.ncchild.org/sites/default/files/Suspension_Report_September_2005.pdf; ADVANCEMENT PROJECT &

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suspended students.³⁶ Data from North Carolina provides an example of the close relationship between problems in school and involvement with the delinquency courts. In North Carolina, juveniles are assessed at intake for their risk of future offending and their individual needs to be addressed. In 2010, 44.6% had serious problems in school (e.g., suspension from school, expulsion, and/or dropping out).³⁷ Youth committed to the state's juvenile prisons—called “youth development centers” (YDCs)—are also assessed. In 2011, 80% of those youth had

THE CIVIL RIGHTS PROJECT, *OPPORTUNITIES SUSPENDED*, *supra* note 6, at 9-11; Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 82-83 (2003); JUDITH A. BROWNE, *DERAILED: THE SCHOOLHOUSE TO JAILHOUSE TRACK 7* (Advancement Project ed., 2003), available at http://b3cdn.net/advancement/c509d077028b4d0544_mlbrq3seg.pdf; DAVID RICHART ET AL., *UNINTENDED CONSEQUENCES: THE IMPACT OF “ZERO TOLERANCE” AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY YOUTH*, 8-9 (Building Blocks for Youth ed., 2003), available at <http://www.cclp.org/documents/BBY/kentucky.pdf>; NAACP LEGAL DEFENSE AND EDUC. FUND, INC., *DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 2-3* (2006), available at http://www.naacpldf.org/files/case_issue/Dismantling_the_School_to_Prison_Pipeline.pdf; American Academy of Pediatrics, Committee on School Health, *Out-of-School Suspension and Expulsion*, 112(5) PEDIATRICS 1207 (2003), available at <http://www.cde.state.co.us/cdeprevention/download/pdf/1206.pdf>; Alicia C. Insley, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1069-70 (2001); Gale M. Morrison, et al., *School Expulsion as a Process and an Event: Before and After Effects on Children at Risk for School Discipline*, in *ZERO TOLERANCE: CAN SUSPENSION AND EXPULSION KEEP SCHOOLS SAFE?: NEW DIRECTIONS FOR YOUTH DEVELOPMENT 56-58* (Russell J. Skiba & Gil G. Noam eds., 2001). See generally RUSSELL SKIBA ET AL., *ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 11* (American Psychological Association Zero Tolerance Task Force ed., 2006), available at <http://www.texasappleseed.net/pdf/ZTTF%20Report%20Final%20approved%20by%20BOD.pdf>.

³⁶ See NATIONAL JUVENILE DEFENDER CENTER, *JUVENILE DEFENDER DELINQUENCY RESOURCE GUIDE 8* (2006), available at <http://www.njdc.info/2006resourceguide/start.swf> [hereinafter NATIONAL JUVENILE DEFENDER CENTER, *RESOURCE GUIDE*]; Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876-77 (2009/2010); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 28-29 (2003) [hereinafter Tulman, *Disability and Delinquency*]; Joseph B. Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law Into Delinquency Representation in the Juvenile Law Clinic*, 42 WASH. U. J. URB. & CONTEMP. L. 223, 225 (1992) [hereinafter Tulman, *The Best Defense*].

³⁷ NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *2010 ANNUAL REPORT 26* (2010), available at http://www.ncdjdp.org/resources/pdf_documents/annual_report_2010.pdf.

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serious problems in school, with an average of 36 days of suspension in the year prior to their commitment.³⁸

In sum, when school administrators suspend or expel students, the result may be multiple and serious unmet educational needs as well as direct involvement in the juvenile or criminal courts.³⁹ Students in turn feeling frustrated, unwanted, and alienated, factors which contribute to further delinquency and criminal behavior, both in school and in the community.⁴⁰ Once in the juvenile or criminal system, particularly if removed from home, a young person may feel stigmatized, become unmotivated, and fall further behind academically.⁴¹ If charged with or adjudicated of a felony, she may be suspended or expelled from school.⁴² Difficulties in school consistently precede, accompany, and flow from a young person's involvement in the juvenile court; consequently, a vicious cycle may form that ends when a young person drops out of school or becomes incarcerated.

III. THE IMPERATIVE FOR ZEALOUS DEFENDERS TO INCORPORATE EDUCATIONAL RECORDS AND HISTORIES INTO DELINQUENCY REPRESENTATION AND OBTAIN EDUCATIONAL SERVICES FOR THEIR CLIENTS

³⁸ NORTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, 2011 ANNUAL REPORT 16 (2011), available at http://www.ncdjdp.org/resources/pdf_documents/annual_report_2011.pdf.

³⁹ See generally Dean H. Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 272-273 (2008).

⁴⁰ See generally Tulman & Weck, *supra* note 36, at 883 (2009).

⁴¹ See generally Kele Stewart, *The Connection Between Permanency and Education in Child Welfare Policy*, 9 HASTINGS RACE & POVERTY L. J. 511, 516-17 (2012).

⁴² *Think Before You Plead: Juvenile Collateral Consequences in the United States*, AMERICAN BAR ASSOCIATION, <http://www.beforeyouplea.com/ga> (last visited July 21, 2013).

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The school-to-prison pipeline affects thousands of young people each year, many of whom will ultimately be represented by a juvenile defender. Juvenile defenders are uniquely situated to help dismantle the pipeline.⁴³

Understanding a client's education history will assist the attorney in effectively communicating with her, winning her trust, and advocating on her behalf.⁴⁴ In addition to benefitting individual clients, education advocacy can transform the practices of defense attorneys. By asserting their delinquency clients' education rights, attorneys can turn delinquency defendants into education plaintiffs.⁴⁵ What is more, the attorney will have used the occasion of a delinquency case to help position the client to be more successful in school. Receiving appropriate educational services can help a child avoid the sorts of behaviors that contribute to involvement in the juvenile system. As one example, the University of the District of Columbia David A. Clarke School of Law undertook a multi-year project to train and mobilize defense attorneys to practice special education advocacy in the District. The result was an

⁴³ Defenders must undertake education advocacy only with their clients' knowledge and consent. Ethical rules and standards make clear that the juvenile client must be permitted to direct the legal representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 (2004).

⁴⁴ While our focus is on education, juvenile defenders must also be able to incorporate relevant aspects of a young person's history, such as physical and mental health records, and child welfare records. *See* generally Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003). Defenders must also be able to appropriately counsel their clients regarding immigration, employment, housing, and other consequences that flow from delinquency adjudications. *See* generally Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles About the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114-15 (2006).

⁴⁵ Tulman, *The Best Defense*, *supra* note 36, at 224-25. When they prevail, the attorney may be entitled to attorneys' fees. *See* 20 U.S.C. § 1415(i)(3)(B) (2005).

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explosion of special education advocacy on behalf of children in the delinquency system, which correlated with sharply reduced incarceration rates.⁴⁶

While some attorneys independently provide representation in education matters, others work in public defender offices with civil legal services divisions⁴⁷ or refer clients to local education advocacy organizations for assistance with ongoing educational needs.⁴⁸ The American Bar Association has adopted resolutions urging attorneys to help secure a high-quality public education for all students.⁴⁹ Similarly, the National Juvenile Defender Center (NJDC), which works to build capacity in the juvenile defense bar through training and technical assistance, has included in its best-practice standards a recognition of the importance of defenders knowing education law, being familiar with available educational services, and

⁴⁶ Joseph B. Tulman et al., *Reversing The School-To-Prison Pipeline: Initial Findings From The District Of Columbia On The Efficacy Of Training And Mobilizing Court-Appointed Lawyers To Use Special Education Advocacy On Behalf Of At-Risk Youth* (forthcoming).

⁴⁷ The Civil Legal Services Division, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, <http://www.pdsdc.org/PDS/CivilLegalServices.aspx> (last visited July 21, 2013); *Juvenile Rights Practice*, THE LEGAL AID SOCIETY, <http://www.legal-aid.org/en/juvenilerights/juvenilepractice.aspx> (last visited July 21, 2013); *EdLaw*, YOUTH ADVOCACY DIVISION (2011), <http://www.youthadvocacydepartment.org/edlaw/edlaw-about.html>.

⁴⁸ We recognize that many attorneys today take on, or are assigned, too many cases to defend them effectively. One might fairly expect that attorneys who fail to meet their clients before trial, investigate, or file motions, for example, will also fail to do educational advocacy or to incorporate educational histories into the defense of the case. See, e.g., Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 798-799 (2010) (identifying high caseloads as one structural cause of ineffective assistance); Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, THE CHAMPION 22 (2009), available at <http://www.nacdl.org/Champion.aspx?id=14650> (describing problem of high caseloads for defenders of indigent adults and juveniles); Jerry R. Foxhoven, *Effective Assistance of Counsel: Quality of Representation for Juveniles Is Still Illusory*, 9 BARRY L. REV. 99, 119 (2007) (noting national studies of juvenile defense that document caseloads as high as 1,500 cases per year in Virginia). The problem of inadequate and overburdened attorneys is a serious and chronic one.

⁴⁹ The ABA has also passed a resolution promoting laws that advance students' right to remain in school, including proactively addressing problems that lead to suspension, dropping out, and referral to the juvenile justice system and seeking laws and policies supporting the right to return to school for those students who have left American Bar Association. See American Bar Association, Recommendation 118B, available at <https://docs.google.com/viewer?url=http://www.cleweb.org/sites/default/files/ABA.118B.R;Recommendation118C>, available at [http://cleweb.org/sites/default/files/ABA.118C.RighttoResumeEducation%20\(1\).pdf](http://cleweb.org/sites/default/files/ABA.118C.RighttoResumeEducation%20(1).pdf).

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working to ensure that clients are in appropriate educational settings.⁵⁰ One of the NJDC's "Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems" is advocating for clients' educational needs."⁵¹ On a larger scale, by highlighting the link between draconian disciplinary policies and delinquency involvement—as well as the racially disparate impact that the school-to-prison pipeline has on youth of color, particularly African-American youth—the attorney fulfills the ethical obligation to ensure quality of justice and seek improvement of the law.⁵²

IV. PRACTICE RECOMMENDATIONS

Educational information can help a defender in multiple ways. A client's education records and history can provide a juvenile defender with valuable information that can aid in building and strengthening the attorney-client relationship. A defender can also use a client's education history and records to extricate the client from the juvenile system. For example, demonstrating to a prosecutor or probation officer that a client will receive special education and related services at school (e.g., psychological services, counseling services, social work services, parent counseling)⁵³ may convince her that delinquency proceedings will be redundant. Investigation of education records and interviews with school personnel can also be crucial to the defense of a case, enabling attorneys to make appropriate arguments during both the pre-trial and trial phases, as well as preventing a client's transfer from the juvenile to the adult criminal court.

⁵⁰ ROBIN WALKER STERLING, *ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT* 5, 21 (National Juvenile Defender Center ed., 2009), *available at* http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf.

⁵¹ NATIONAL JUVENILE DEFENDER CENTER & NATIONAL LEGAL AID & DEFENDER ASSOCIATION, *TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENDER DELIVERY SYSTEMS* 3 (2008), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.

⁵² *See* MODEL RULES OF PROF'L CONDUCT Preamble [1], [6] (2004).

⁵³ *See* 34 C.F.R. § 300.34 (2006).

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Finally, information about a student's education is an important component of dispositional arguments; showing a judge that a client will receive appropriate education services in the community that are not available in a locked facility may convince the judge to give a client probation rather than incarceration.⁵⁴ Each of these areas of advocacy is discussed here in more detail.

A. Investigation of Client's Education

A juvenile defender should discuss with a client her education; gather and review the client's education records, and seek to interview relevant school officials as soon as possible after being retained by or appointed to a client.⁵⁵ It is essential that defenders collect all available records from the school system that serves the juvenile, rather than simply relying on information provided by clients, clients' family members, juvenile probation officers, and others. Further, interviews with teachers, administrators, guidance counselors, school psychologists, and other staff can supplement the records and provide a more complete picture of the child's educational history and needs than would otherwise be available.

Throughout the process of investigating a client's education, juvenile defenders should be aware of ethical obligations to clients. Specifically, since juvenile defenders should represent the

⁵⁴ See Thomas A. Mayes and Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. DAVIS J. JUV. L. & POL'Y 125, 133-34 (2000); Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (July 2000), www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html; Eric Zogry, *Special Education Information Checklist*, Annual Juvenile Defender Conference (2006), <http://www.ncids.org/JuvenileDefender/Training%20Seminars/2006%20Juvenile%20Defender%20Conference/12%20Zogry%2004%20-%20special%20ed%20checklist.pdf>.

⁵⁵ See Burrell & Warboys, *supra* note 54; UNIV. OF D.C. SCHOOL OF LAW JUVENILE LAW CLINIC, SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 4-2, 11-3 (Joseph B. Tulman & Joyce A. McGree eds., 1998), *available at* <http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf>. When teachers and/or administrators are represented by counsel for the proceeding involving a defender's client, ethical rules require the defender to first contact counsel. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2004).

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expressed wishes of their clients,⁵⁶ and “consult with the client about the means by which the client’s objectives are to be accomplished[,]”⁵⁷ they must obtain permission from the client before beginning the educational investigation. Additionally, if parent or guardian authorization is needed to obtain records, defenders must be mindful of their duty of confidentiality to clients. There may be information in the education records that clients do not want shared with their parent or guardian, such as truancy or discipline referrals. Therefore, educational information gathered during the investigation process may not be shared with the parent or guardian, even if she provided authorization, without the client’s informed consent.⁵⁸

1. *Records Request*

The Family Educational Rights and Privacy Act (FERPA) is the federal law that enables juvenile defenders to access education records with proper authorization from the client or her parent or guardian.⁵⁹ FERPA applies to all educational agencies and institutions that receive funding from the U.S. Department of Education, which includes virtually all public schools.⁶⁰ It gives parents and “eligible students” the right to review the student’s education records maintained by the school.⁶¹ A parent is defined as “a legal guardian or other person standing *in loco parentis* (such as a grandparent or stepparent with whom the child lives, or a person who is

⁵⁶ MODEL RULES OF PROF’L CONDUCT R. 1.14; ELIZABETH CALVIN ET AL., JUVENILE DEFENDER DELINQUENCY NOTEBOOK 14 (National Juvenile Defender Center ed., 2d ed. 2006), *available at* http://www.njdc.info/delinquency_notebook/interface.swf (“Defense counsel’s function is to articulate and advocate as zealously as possible for the expressed legal position and desires of the child, your client.”).

⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2004).

⁵⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2004).

⁵⁹ See 20 U.S.C. § 1232(g) (2012); 34 C.F.R. § 99 (2012).

⁶⁰ See 20 U.S.C. § 1232g(a)(B) (2006); 34 C.F.R. § 99.1 (2012); U.S. DEP’T OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) (2011), *available at* <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> [hereinafter FERPA]; U.S. DEP’T OF EDUC., FAMILY POLICY COMPLIANCE OFFICE, FERPA GUIDANCE FOR PARENTS 1 (2011), *available at* <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html> [hereinafter FERPA GUIDANCE].

⁶¹ 34 C.F.R. § 99.10(a) (2012).

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legally responsible for the welfare of the child).”⁶² “Eligible students” are students age eighteen and older and students who have been emancipated.⁶³

Education records are those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution.⁶⁴ Attorneys should read state statutes and local school district policies to determine the extent of records that school administrators must maintain.⁶⁵

Education records do not include records⁶⁶ of the law enforcement unit⁶⁷ of an educational agency or institution,⁶⁸ such as a police department that provides SRO coverage. Accordingly, the law enforcement unit may refuse to provide an eligible student or parent with an opportunity to review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent's prior written consent.⁶⁹ Records of a law enforcement unit do not include (1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution

⁶² 20 U.S.C. § 1232h(c)(6)(D) (2006).

⁶³ 20 U.S.C. § 1232h(c)(5)(B) (2006).

⁶⁴ 34 C.F.R. § 99.3 (2012).

⁶⁵ See 20 U.S.C. 1232h(c)(1)(A) (2006); see also N.C. GEN. STAT. § 115C-402(b) (2003); WAKE COUNTY PUBLIC SCHOOL SYSTEM, BOARD POLICY 6300(B) (2011), available at <http://www.wcpss.net/policy-files/series/policies/6300-bp.html>; MIAMI-DADE COUNTY PUBLIC SCHOOLS, SCHOOL BOARD POLICY 8330 (2011), available at <http://www.neola.com/miamidade-fl/search/policies/po8330.htm>.

⁶⁶ Records of a law enforcement unit means those records, files, documents, and other materials that are: 1) created by a law enforcement unit; 2) created for a law enforcement purpose; and 3) maintained by the law enforcement unit. 34 C.F.R. § 99.8(b)(1) (2006).

⁶⁷ A “law enforcement unit” means any individual, office, department, division, or other component of a school, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by the school to: enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any law against any individual or organization; or to maintain the physical security and safety of the school. The law enforcement unit does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the school, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceeding against a student. 34 C.F.R. § 99.8(a)(1) (2006).

⁶⁸ 34 C.F.R. § 99.3 (2011).

⁶⁹ FERPA GUIDANCE, *supra* note 60, at 5.

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other than the law enforcement unit; or (2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose. In other words, records created by SROs that are maintained by the school should be provided by the school, as should records created by SROs exclusively for purposes of suspension or expulsion. In addition, juvenile defenders should try to obtain the memorandum of understanding (MOU) between the school system and local law enforcement agencies, if one exists, as well as any local school district policies that relate to SROs.⁷⁰ Such information should be available either through a subpoena or a public records request.

Juvenile defenders can review a client's education records by obtaining written consent from the “eligible student” or client's parent.⁷¹ The release must specify the records to be released, the reasons for such release, and to whom the records will be released (see Appendix A for a sample release).⁷² The defense attorney should send the release to the principal of the client's school, along with a letter detailing the specific records being requested (see Appendix B for a sample letter). Defenders should also send the release and request letter to the juvenile's guidance counselor and the school's record keeper, if one exists, because they are often the people who ultimately respond to the records request.

The school must comply with a request for records within a reasonable period of time, but not more than 45 days after it has received the request.⁷³ Schools often fulfill records

⁷⁰ See NATIONAL JUVENILE DEFENDER CENTER, DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL: A GUIDE FOR JUVENILE DEFENDERS 14 (2009), available at http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf [hereinafter NATIONAL JUVENILE DEFENDER CENTER, *INTERROGATED AT SCHOOL*].

⁷¹ See 20 U.S.C. § 1232g(b)(2)(A) (2006).

⁷² See FERPA, *supra* note 60; FERPA GUIDANCE, *supra* note 60, at 2.

⁷³ 34 C.F.R. § 99.10(b) (2011).

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requests more quickly, especially if the defender follows up with emails and calls. Additionally, schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records.⁷⁴ However, school staff or the school's attorney often provide copies of the records to attorneys who send requests, especially if the records can be scanned and emailed or faxed in order to save copying costs.

Schools sometimes refuse to share records that contain the personally identifiable information of other students. Though the right to view information applies only to the records of the parent's child, and not personally identifiable information about any other students contained in the same document,⁷⁵ schools can redact any identifying information about other students and release the redacted records.⁷⁶ Thus, juvenile defenders should ask for redacted records if the school attempts to block access based ostensibly on a concern for the privacy of other students.

If a school refuses to comply with an adequate records request, the remedies are somewhat limited. There is no private right of action to enforce FERPA under a § 1983 action.⁷⁷ The primary method of redress is filing a complaint, with the client's express permission, on behalf of an eligible student or the client's parent, with the U.S. Department of Education's

⁷⁴ See 34 C.F.R. § 99.10(d) (2011); FERPA, *supra* note 60.

⁷⁵ See 34 C.F.R. § 99.12(a) (2009).

⁷⁶ See Letter of Technical Assistance to School District re: Disclosure of Education Records Containing Information on Multiple Students, U.S. DEP'T OF EDUC. FAMILY POLICY COMPLIANCE OFFICE (Oct. 31, 2003), <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/1031.html>.

⁷⁷ See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

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Family Policy Compliance Office.⁷⁸ Some school districts also have grievance policies that can be used to address violations of FERPA.⁷⁹

The school may charge a fee for a copy of an education record,⁸⁰ unless “the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student’s education records.”⁸¹ Therefore, if the client’s family is indigent, the juvenile defender should request a waiver of copying fees, or alternatively, that the records be emailed or faxed. A school is not required to provide information that is not maintained or to create education records in response to a request.⁸² The school must “respond to reasonable requests for explanations and interpretations of the records.”⁸³

Parents of students who require services from the school system due to identified disabilities (generally, this will be a child who has an Individualized Education Program, an “IEP”) are specifically guaranteed access to their students’ educational records under state and federal law.⁸⁴ Though these provisions, and the accompanying enforcement regulations, do not

⁷⁸ See *About the Family Policy Compliance Office*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/policy/gen/guid/fpco/index.html> (last visited July 21, 2013).

⁷⁹ See e.g., WAKE COUNTY PUBLIC SCHOOL SYSTEM, BOARD POLICY 6520 (2010), <http://www.wcpss.net/policy-files/series/policies/6520-bp.html>; SCHOOL BOARD OF ALACHUA COUNTY, POLICY 5710, <http://www.neola.com/alachua-fl/search/policies/po5710.htm> (last updated March 20, 2012).

⁸⁰ However, “[a]n educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.” 34 C.F.R. § 99.11(b) (2011).

⁸¹ 34 C.F.R. § 99.11(a) (2011).

⁸² See FERPA, *supra* note 60; FERPA GUIDANCE, *supra* note 60, at 2.

⁸³ See 34 C.F.R. § 99.10(c) (2011).

⁸⁴ See, e.g., N.C. GEN. STAT. § 115C-109.3 (2006); GA. COMP. R. & REGS. 160-4-7-.09 (2010); FLA. ADMIN. CODE r. 6A-6.03311 (2008); LA. ADMIN. CODE tit. 28, pt. XLIII, § 502 (2008); ALA. ADMIN. CODE r. 290-8-9-.08 (2011).

necessarily require more from the school than FERPA already does, noting these additional requirements could bolster a defender's request for records.⁸⁵

2. *Building the Attorney-Client Relationship*

A strong and trusting relationship is crucial to effective representation of clients who are children.⁸⁶ Representation of minors requires attorneys to speak in language that is appropriate for the child's age and developmental level, and free of legal jargon.⁸⁷ Obtaining educational background and records can assist an attorney in ensuring that her communication is as effective as possible.⁸⁸

Education records can reveal, for example, that a client has language-processing problems. An attorney in this case would understand the need for frequently pausing in client meetings to confirm the client's comprehension. If the client has a long disciplinary history and negative interactions with school officials, the attorney will understand that she may have to work particularly hard to gain the child's trust. What is more, the client's IEP may contain strategies for assisting the child in learning (e.g., providing audio recordings of written materials, providing regular breaks, breaking down tasks into specific steps, and frequently checking for understanding), which the attorney can adapt in working with the client.⁸⁹ (See Appendix C for a sample educational background interview form.) Educational records may further reveal the

⁸⁵ 34 C.F.R. § 300.626 (2007); NC 1505-2.17 (located in the North Carolina Department of Public Instruction, Exceptional Children Division, Policies Governing Services for Children with Disabilities (amended June 2010), available at <http://www.dpi.state.nc.us/ec/policy/resources/>).

⁸⁶ See Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 243, 260 (Thomas Grisso & Robert G. Schwartz eds., 2000).

⁸⁷ Laura Cohen & Randi Mandelbaum, *Kids Will be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 378 (2006).

⁸⁸ See Tulman, *Disability and Delinquency*, *supra* note 36, at 42-44.

⁸⁹ See 20 U.S.C. § 1414(d) (2005).

presence of any number of psychological, social, or emotional disorders, which would be relevant to a defender in fashioning communication strategies as well as understanding the importance of ensuring that the client receives necessary support and assistance during the litigation of the delinquency case.

An attorney's simple and straightforward act of taking the time to learn about her client's educational history can show the child that the attorney cares. These concrete displays of concern will go a long way toward cementing the attorney-client relationship.

B. Employing Education Histories in the Pre-Trial, Trial, and Dispositional Phases

1. *Competency*

Clients' educational histories can also assist defenders in assessing and litigating a client's competency. The Supreme Court has held that an adult criminal defendant must have "sufficient present ability to consult with [their] lawyers with a reasonable degree of rational understanding,"⁹⁰ "rational as well as factual understanding of the proceedings against him,"⁹¹ and the ability to "assist in preparing his defense."⁹² The criminal trial of an incompetent defendant violates due process.⁹³

The Court has not expressly ruled on the applicability of the competency standard to juvenile court; however, in a majority of jurisdictions, the juvenile statutes reference competency and adopt the same standard the Supreme Court has articulated for adults in delinquency cases.⁹⁴

⁹⁰ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁹¹ *Id.*

⁹² *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

⁹³ See *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citation omitted); *Drope*, 420 U.S. at 171-172.

⁹⁴ Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 368 (2001).

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Other states find juveniles incompetent only in a more limited set of circumstances, such as where there is a showing that the juvenile is mentally ill or mentally retarded.⁹⁵

The question of the competency of the juvenile to proceed may be raised at any time by the prosecution, defense, or court.⁹⁶ When competency is questioned in court, the judge should order the juvenile to be evaluated by a qualified evaluator. Juvenile defenders should always seek funds to obtain an independent evaluation in order to have control over whether the court will see the evaluator's findings. After an evaluation, courts should conduct evidentiary hearings upon request of the defendant on the issue of incompetency.⁹⁷

If a child is found incompetent to stand trial and the court finds confinement necessary for the client to become competent, the client may be confined in a locked mental health facility. In some jurisdictions, the competency statute mandates the initiation of civil commitment proceedings pursuant to a finding of incompetency.⁹⁸ Thus, the decision of a defender to pursue competency must be made carefully and after considering all positive costs and benefits to the juvenile. In jurisdictions in which confinement is likely, defenders must proceed cautiously. However, in circumstances in which a client obviously lacks the necessary competency, defenders may be ethically obligated to raise the issue.⁹⁹

⁹⁵ *Id.* at 369. Even in those states in which statutes do not specifically provide for a claim of incompetency, there is little doubt that a state court would recognize such a claim. RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 228 (2008); *see also* Redding & Frost, *supra* note 96, at 355 (noting that punitive legislative changes to juvenile courts render capacity to stand trial a constitutional requirement for juveniles).

⁹⁶ *See* Redding & Frost, *supra* note 96, at 362; *see, e.g.*, FLA. STAT. ANN. § 985.19 (West 2013).

⁹⁷ *See* Pate v. Robinson, 383 U.S. 375 (1966).

⁹⁸ *See* HERTZ ET AL., *supra* note 95, at 230.

⁹⁹ Commentators differ on whether a defense attorney must raise competency issues absent the defendant's consent. *See* Redding & Frost, *supra* note 94, at 362 n.39.

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A client's educational history can provide important insights into a client's competency. Intellectual, developmental, academic, and psycho-social evaluations, as well as work samples, report cards, and notes about a student's behavior, may all be relevant to an attorney questioning whether the client is competent. Once the defender decides to raise competency as an issue in court, the records may be useful to an evaluator and during the hearing.¹⁰⁰

2. *Diversion*

When a defender is retained prior to the issuance of a formal delinquency petition, she can use education records and histories to argue that a particular case ought to be dismissed or diverted from, rather than prosecuted in, the juvenile court. Juvenile court probation intake officers are statutorily granted the ability to divert youth out of the system.¹⁰¹ These officers are generally charged with investigating the factual allegations in a complaint.¹⁰² When the officer finds the facts do not establish a case within the jurisdiction of the court, no petition is to be filed.¹⁰³ Even when an officer finds sufficient facts, the officer has discretion to divert many offenses, including felonies, from the system.¹⁰⁴ Officers may be directed to consider such

¹⁰⁰ See NATIONAL JUVENILE DEFENDER CENTER, RESOURCE GUIDE, *supra* note 36, at 54; LOU A. NEWMAN ET AL., NORTH CAROLINA JUVENILE DEFENDER MANUAL 97-98, 109 (John Rubin ed. 2008), *available at* <http://www.ncids.org/other%20manuals/JuvDefenderManual/JuvenileDefTOC.pdf>; Tulman, *Disability and Delinquency*, *supra* note 36, at 46-47.

¹⁰¹ See Charles Lindner, *Probation Intake: Gatekeeper to the Family Court*, 72 FED. PROBATION 48 (2008), *available at* http://www.uscourts.gov/fedprob/June_2008/13_probation_intake.html [hereinafter Lindner, Probation Intake]

¹⁰² See, e.g., N.C. GEN. STAT. § 7B-1701 (West 2013) ("When a complaint is received, the juvenile court counselor shall make a preliminary determination as to whether the juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile. If the juvenile court counselor finds that the facts contained in the complaint do not state a case within the jurisdiction of the court, that legal sufficiency has not been established, or that the matters alleged are frivolous, the juvenile court counselor, without further inquiry, shall refuse authorization to file the complaint as a petition.")

¹⁰³ *Id.*

¹⁰⁴ See, e.g., N.C. GEN. STAT. § 7B-1706(a) (West 2013) ("Unless the offense is one in which a petition is required ... upon a finding of legal sufficiency the juvenile court counselor may divert the juvenile pursuant to a diversion plan, which may include referring the juvenile to any of the following resources: (1) An appropriate public or private

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factors as the age, maturity, and ability of the child, along with whether a community-based resource may appropriately meet the child's needs.¹⁰⁵

A young person's education rights and background can assist an attorney in persuading an intake officer to divert a case. For example, the defender can explain that any special educational or other school-based services the child is receiving (e.g., school-based mental health services)—particularly any services that have begun since the time of the offense—will be a better means of rehabilitating the child, and ensuring the public safety, than the services available through the delinquency court. Additionally, if an attorney can demonstrate that a client's school-based delinquency offense was found, after a manifestation determination review, to be a manifestation of the client's disability, the attorney can argue that a prosecution is unfounded. Further, if a child prevails at a suspension hearing, that information should also be provided to the prosecutor to support an argument for dismissal.

3. *Detention Hearings*

In most states, a juvenile may be held in detention, without bail, during the pendency of a case.¹⁰⁶ Judges are typically permitted to detain juveniles if they find detention necessary to secure the child's appearance at the next hearing, as evidenced by previous court hearings at which the juvenile has failed to appear;¹⁰⁷ to ensure the physical safety of others in the community;¹⁰⁸ or to protect the juvenile from herself,¹⁰⁹ among other factors.

resource; (2) Restitution; (3) Community service; (4) Victim-offender mediation; (5) Regimented physical training; (6) Counseling; (7) A teen court program, as set forth in subsection (c) of this section.”).

¹⁰⁵ See, e.g., CAL. CT. R. 5.516.

¹⁰⁶ See, e.g., ALA. CODE § 12-15-128 (1975); FLA. STAT. ANN. § 985.255 (West 2011); N.C. GEN. STAT. § 7B-1903(b)-(c) (West 2012).

¹⁰⁷ See, e.g., N.C. GEN. STAT. § 7b-1903(b)(3) (West 2012); FLA. STAT. ANN. § 985.255 1(i) (West 2011).

¹⁰⁸ See, e.g., CAL. CT. R. 5.760.

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A client's records can be invaluable in preparing arguments to persuade the judge not to detain a client.¹¹⁰ For example, records can provide counsel with information that could support an argument that the prior failure to appear was not willful. A child with a learning disability may not have the requisite mental capacity to have “willfully” failed to appear in a courtroom. Further, the records might show that a parent brought the child to school on the day of the default, which could also negate willfulness, or, at a minimum, provide useful mitigating information. Counsel could also argue against detention because it would disrupt education, mental health, or family services.¹¹¹ She could further argue that keeping the juvenile in the community would facilitate appropriate educational, or psychosocial, evaluations.¹¹² Additionally, the client's records may provide insight into available community-based, less intrusive, less expensive, more beneficial alternatives, that can be offered to the court as providing both protection and supervision for the juvenile and protection of the public.¹¹³

4. *Suppression*

A juvenile client's education records may be helpful in motions to suppress evidence obtained from searches and interrogations, whether the case arose from an alleged incident in school or elsewhere.

a. *Searches*

¹⁰⁹ See, e.g., N.C. GEN. STAT. § 7B-1903(b)(6) (West 2012).

¹¹⁰ See UNIV. OF D.C. SCHOOL OF LAW JUVENILE LAW CLINIC, *supra* note 55, at 1-5.

¹¹¹ Burrell & Warboys, *supra* note 54.

¹¹² *Id.*; UNIV. OF D.C. SCHOOL OF LAW JUVENILE LAW CLINIC, *supra* note 55, at 2-12.

¹¹³ See, e.g., N.C. GEN. STAT. § 7B-1906(d) (West 2013); FLA. STAT. ANN. § 985.255 1 (West 2011).

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Generally speaking,¹¹⁴ searches of juveniles may not be conducted without a lawful arrest, a warrant supported by probable cause, consent of the juvenile, or, in certain locations and under certain circumstances, reasonable suspicion.

When a young person is in school, for example, typically she may be searched by school officials if there are reasonable grounds for believing that a search will turn up evidence that the student is violating the rules of the school or the law.¹¹⁵ The searches must be justified at their inception and be reasonable in scope.¹¹⁶ In most states, SROs are considered school officials, and thus by law may conduct searches under a reasonable suspicion, rather than probable cause, standard.¹¹⁷ However, courts may hold school searches to the more stringent probable cause standard when the search is more obviously conducted only for law enforcement, rather than educational, purposes.¹¹⁸ When outside law enforcement personnel—or a school official acting clearly at their behest—conducts a search; when the search’s purpose is to uncover criminal activity; and when the officer, rather than school officials, has initiated the search, probable cause is typically required.¹¹⁹ Searches may also be conducted if the juvenile consents.¹²⁰ However, the state cannot establish a juvenile’s consent merely by showing that the juvenile

¹¹⁴ This section is not meant to constitute an exhaustive list of all grounds for suppression of evidence obtained pursuant to a search. For a thorough discussion of search and seizure in delinquency cases, see HERTZ ET AL., *supra* note 95, at 445-551.

¹¹⁵ See *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985).

¹¹⁶ See *id.* at 342.

¹¹⁷ See National Juvenile Defender Center, *Interrogated at School*, *supra* note 72, at 8; *In re S.W.*, 614 S.E.2d 424, 428 (N.C. App. 2005). *But see* *Patman v. State*, 537 S.E.2d 118, 120 (Ga. 2000) (police officer in school triggers probable cause standard).

¹¹⁸ See, e.g., *State v. Meneese*, 282 P.3d 83, 88 (Wash. 2012) (school search exception to the warrant requirement inapplicable for school police officer conducting postarrest search of juvenile’s backpack).

¹¹⁹ See NATIONAL JUVENILE DEFENDER CENTER, *INTERROGATED AT SCHOOL*, *supra* note 70, at 9; *M.J. v. State*, 399 So. 2d 996, 998 (Fla. Dist. Ct. App. 1981).

¹²⁰ *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citations omitted).

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simply acquiesced to authority;¹²¹ consent must be shown by a totality of the circumstances, including both the characteristics of the accused (e.g., age, mental illness, mental retardation, limited intellectual ability, limited education) and the details of the interrogation.¹²²

Education records can help defenders dealing with a juvenile search in two ways. First, education records—particularly disciplinary records of an alleged incident, such as a written notice of suspension, witness statements, video footage, and recordings of suspension appeal hearings—can assist a defender in arguing that a search should comport with probable cause rather than the reasonable suspicion standard. For example, these records may contain information revealing greater law enforcement involvement than is otherwise apparent in the police report. They may also contain information indicating that the scope of the search was unreasonable, given the reasons state officials give for having conducted it in the first instance.

Second, education records may also contain statements or other information from witnesses that are inconsistent with what is contained in the police report. Whether or not these inconsistencies themselves directly pertain to constitutional issues, they can still assist a defender in arguing that the state's witnesses lack credibility. Finally, school records can help negate a state's claim that a student consented to a search. For example, schools frequently promulgate disciplinary codes requiring students to obey all orders from administrators.¹²³ Failure to do so can result in school discipline.¹²⁴ Defenders should obtain the disciplinary code for the school and consider attaching it to the written motion to suppress, and/or subpoena school officials to

¹²¹ See *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

¹²² See *Schneckloth*, 412 U.S. at 226.

¹²³ See, e.g., SMITH MIDDLE SCHOOL STUDENT HANDBOOK AND AGENDA 2010-2011 21, available at http://www.chccs.k12.nc.us/site_res_view_template.aspx?id=236b62cd-36f9-45c6-8115-65e8d99695c8 ("Students are expected to...Follow directions of all teachers/adults the first time they are given.").

¹²⁴ See e.g., *id.*

discuss the code in court. The code could support an argument that such “consent” was not freely given but instead mere acquiescence to authority.¹²⁵ Furthermore, records indicating mental illness, a developmental disability, or intellectual impairments could also support an argument by a defender that a juvenile could not have validly given consent to a search.

b. Interrogations

Defenders can move to suppress statements taken from their clients on multiple grounds.¹²⁶ For one, defenders can argue that the questioning that led to the statements was not preceded by *Miranda* warnings, but should have been. *Miranda* warnings are required when a juvenile is subject to custodial interrogation by law enforcement,¹²⁷ including SROs.¹²⁸ Second, a defender could argue that, if *Miranda* warnings were given, the juvenile’s waiver was not knowing, voluntary, or intelligent considering the totality of the circumstances. A third ground

¹²⁵ See *Bumper*, 391 U.S. at 548-49.

¹²⁶ In a minority of jurisdictions, juveniles are entitled to an enhanced set of protections that supplement those of *Miranda* and require the opportunity to consult with a parent or guardian. See HERTZ ET AL., *supra* note 95, at 521-22.

¹²⁷ See *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). See generally HERTZ ET AL., *supra* note 95, at 487-88 (citation omitted) (noting that the Supreme Court has not expressly recognized that the *Miranda* doctrine is applicable in juvenile court, but it has recognized the logic of extending the safeguards of adult court to juvenile confessional evidence).

¹²⁸ See NATIONAL JUVENILE DEFENDER CENTER, *INTERROGATED AT SCHOOL*, *supra* note 70, at 8. Most state courts have found that questioning by school officials (e.g., teachers and administrators) does not trigger the *Miranda* rule, unless it is conducted at the behest of or in conjunction with police officers. Compare *State v. Tinkham*, 719 A.2d 580, 583-84 (N.H. 1998) (principal not required to give *Miranda* warnings when not functioning as agent of police) with *In re Welfare of G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000) (finding custodial interrogation existed when school liaison officer and assistant principal worked together to question a student; the two went to the students’ class to take him to the office and the assistant principal told the student he was required to answer the questions and further explained that he would allow the officer to conduct the interrogation once he had asked some questions himself). See also *In Interest of J.C.*, 591 So. 2d 315, 316 (Fla. App. 1991) (describing that situation in which assistant principal questioned student in front of SRO and SRO “could have asked a question or two” does not constitute custodial interrogation as SRO involvement was *de minimis*); *J.D. v. Commonwealth of Virginia*, 591 S.E. 2d 721, 725 (Va. App. 2004) (where SRO is present but silent during questioning of student by associate principal, *Miranda* warnings not required because SRO did not direct questioning and the student was not in custody when questioned).

could be that any statements given were not voluntary under the Due Process Clause of the Fourteenth Amendment.¹²⁹

Education records and interviews with school officials can assist defenders in several ways as they argue for suppression of their clients' statements. For one, these sources of information regarding the incident may reveal circumstances not otherwise apparent from official court documents suggesting the juvenile was in custody at the time of an interrogation. For example, records and interviews may reveal that the client was questioned in a closed and confined space, such as a principal's office; that law enforcement initiated and controlled the interrogation, even if school officials asked the actual questions. Further, defenders should subpoena, or obtain via a public records request, memoranda of understanding and other law enforcement or school board policies regulating the relationship between a school district and the police department. Such documents could shed light on the question of whether a school official-conducted interrogation in fact was initiated and controlled by the police.

Education records can also aid defenders in arguing that a waiver was not voluntary, knowing, or intelligent given the totality of the circumstances. As these records should contain information regarding learning disabilities, including language processing disorders, grades, and relationships with school authority figures, they may convey the client's ability to comprehend warnings from police officers. Further, interviews with teachers and evaluators may also reveal

¹²⁹ This is not meant to be an exhaustive list of all grounds for suppression of statements. For a thorough discussion of suppression issues surrounding statements in juvenile delinquency cases, see HERTZ ET AL., *supra* note 95, at 487-531.

similar deficits.¹³⁰

Finally, school records and histories can assist in making arguments that a statement was involuntary under the Due Process Clause. The Supreme Court has recognized that personal characteristics are relevant in the voluntariness analysis.¹³¹ Such characteristics may include youth, mental illness, mental retardation, limited intellectual ability, limited education, intoxication, and the effects of drugs.¹³² As in the case of the waiver of *Miranda* rights, a juvenile's education history could relate to several of these factors, showing, for example, difficulties in passing classes, low standardized test scores, and the like.

5. *Transfer/Waiver to Adult Court*

Transfer or waiver to adult criminal court typically occurs either pursuant to a judicial hearing or by prosecutorial discretion.¹³³ In a juvenile hearing, the judge is typically required by statute to consider factors such as whether the protection of the public and the needs of the juvenile will be served by transfer of the case to adult court by considering, among other factors, the juvenile's age, maturity, and amenability to treatment and rehabilitation in the delinquency system.¹³⁴ A juvenile's education records, as well as interviews with school officials, may provide valuable information regarding each of these factors. Specifically, evidence of a juvenile's mental health issues, cognitive delays, and developmental status all support an

¹³⁰ See, e.g., *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972) (where special education teachers' testimony concerning the low I.Q. scores and comprehension levels of the juvenile defendants led to court's conclusion that their *Miranda* waivers were not "knowing and intelligent").

¹³¹ *Haley v. Ohio*, 332 U.S. 596 (1948).

¹³² See, e.g., *In the Interest of Jerrell C.J.*, 283 Wis. 2d at 160, 699 N.W.2d at 117 (Wis. 2005) (noting "limited education" along with "low average intelligence").

¹³³ MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, *JUVENILES IN COURT 3* (2003), available at <https://www.ncjrs.gov/pdffiles1/ojdp/195420.pdf>.

¹³⁴ See, e.g., N.C. GEN. STAT. § 7B-2203(b) (2011); FLA. STAT. ANN. § 985.565(1)(b) (West 2011).

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argument that the child is too immature for transfer to adult court. Similarly, these same factors could negate the state's argument that the juvenile is criminally sophisticated.

Records and school officials with a positive personal or professional opinion of the juvenile could also provide helpful insight into the juvenile's character and amenability to treatment. These same sources of information may also reveal concrete examples that the juvenile has begun to make positive progress since the time of the incident, which would in turn be evidence of further potential for continued rehabilitation. Finally, the records and interviews may show that the juvenile has a disability or mental health condition that can only be addressed through services available through the juvenile court. In those states that accord all decision-making power regarding a juvenile's transfer to the prosecutor,¹³⁵ the same information can be utilized in making arguments to the prosecutor to keep the juvenile in juvenile court.

6. *Post-Petition Negotiations with Prosecutors and Probation Officers*

As with arguments to probation intake officers at the intake phase, a client's records and history can provide an attorney with tools to argue for the prosecutor to dismiss the petition, drop one or more of the charges within the petition, or reduce charges. For example, the defender can explain that any special educational services the child is receiving will be a better means of rehabilitating the child, and ensuring the public's safety, than the services available through the court system. The attorney could also argue, when a juvenile's school-based delinquent conduct was found to be caused by or directly and substantially related to her disability in a manifestation

¹³⁵ See, e.g., FLA. STAT. ANN. § 985.56 (West 2011) (A child of *any age* who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in § 985.219(7) unless and until an indictment on the charge is returned by the grand jury).

determination review,¹³⁶ that the resulting charges should be dismissed or reduced because of lack of capacity, culpability, and/or *mens rea*.¹³⁷ Finally, the attorney could argue that disciplinary proceedings at school constitute a sufficient means of punishing and redirecting a child client's behavior, rendering delinquency proceedings duplicative and possibly harmful to the child's development.

7. *Adjudicatory Proceedings*

At the adjudicatory or fact-finding hearing, school records and histories can be used in a variety of ways. Disciplinary reports, which often contain statements from the juvenile and other witness statements, as well as video footage, could bolster a client's defense of duress, self-defense, or defense of another. Attendance records showing a client was in school could support an alibi defense for a crime that occurred during school hours and off campus. Records could be used to impeach the in-court testimony of teachers, school administrators, and SROs when those witnesses testify against the juvenile. They can be used to refresh the recollection of those same witnesses, when they testify on the juvenile's behalf. Records could also be used to show that:

- the student's behavior was found in an IEP Team meeting to be a manifestation of her disability, and therefore, she not have the specific intent requirement for the delinquency charge;¹³⁸

¹³⁶ See 20 U.S.C. 1415(k)(E)(i) (2005). The manifestation determination review is a hearing that must be conducted when a school seeks to suspend for more than ten days a student with a disability.

¹³⁷ Marsha L. Levick & Robert G. Schwartz, *Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases*, 9 D.C. L. REV. 53, 59 (2007).

¹³⁸ If a student with an individualized education program (IEP) is suspended for more than ten consecutive school days or a pattern of suspension accumulates to more than ten school days in a school year, the school must conduct a manifestation determination review (MDR). See 34 C.F.R. § 300.519 (2012). At the MDR, the IEP Team decides if the conduct in question was: 1) caused by, or had a direct and substantial relationship to, the child's disability; or 2) the direct result of the local educational agency's failure to implement the IEP. See Burrell & Warboys, *supra* note

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- the student has long-standing intellectual and/or developmental disabilities, or mental health problems, that might constitute a defense of lack of capacity, or insanity, where available;
- the case ought to be dismissed in the interest of justice because the juvenile's disability is so severe that it will render her compliance with court orders difficult, if not impossible;¹³⁹
- the school failed to provide the client with necessary services and interventions, the client's behavior was closely related to that failure, and the school filed a delinquency complaint against the client for the alleged misconduct (i.e., unclean hands defense) (e.g., a student is severely bullied for months; the student's parent reports the bullying to the school principal multiple times; the school fails to intervene; and the student assaults the bully).¹⁴⁰

Even if these defenses are not successful, the presentation to the court of records during the adjudicatory phase can prime the judge to be more sympathetic toward the client, and thus more lenient, at disposition. That is, a judge or jury might not find that the educational information negated proof beyond a reasonable doubt, but a judge may well find that the school's handling of a particular situation obviates the need for further punishment by the court.

8. *Dispositional/Sentencing Proceedings*

54; Elizabeth Calvin et al., *supra* note 56, at 272; UNIV. OF D.C. SCHOOL OF LAW JUVENILE LAW CLINIC, *supra* note 55, at 2-2.

¹³⁹ See Burrell & Warboys, *supra* note 54.

¹⁴⁰ See *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting) ("[A] court will not redress a wrong when he who invokes its aid has unclean hands.").

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Following an adjudication of delinquency, the court proceeds to a dispositional hearing.¹⁴¹ The purpose of dispositions in juvenile cases is typically to design a plan to maintain public safety and rehabilitate the juvenile.¹⁴² A client's educational record can help the defender in the dispositional proceeding to argue either that no juvenile court supervision is necessary, or that the juvenile should receive a disposition that includes appropriate terms and conditions. Barring a client's instructions to the contrary, the defense attorney should argue for the fewest and least restrictive available conditions.¹⁴³

Generally, the range of services available through special education in the public school system is typically superior to the range of services available through the juvenile court. In the special education system, services are, at least in theory, specialized, evaluated, collaborative, preventative, and cost-efficient.¹⁴⁴ In school, the responsibility for improvement is also more equally distributed between those giving (e.g., teachers) and those receiving the services (e.g., students),¹⁴⁵ rather than allocated solely to the child when the child is on probation. Thus, defenders can argue that provision of special education and related services (e.g., psychological

¹⁴¹ See, e.g., NEWMAN ET AL., *supra* note 100, at 198.

¹⁴² See, e.g., FLA. STAT. ANN. § 985.01(D) (2007) (noting purpose of juvenile court is “[t]o ensure the protection of society, by providing for a comprehensive standardized assessment of the child's needs so that the most appropriate control, discipline, punishment, and treatment can be administered consistent with the seriousness of the act committed, the community's long-term need for public safety, the prior record of the child, and the specific rehabilitation needs of the child, while also providing whenever possible restitution to the victim of the offense”).

¹⁴³ Barbara A. Fedders, *Defining the Role of Counsel at Juvenile Delinquency Sentencing*, LOYOLA CHILDREN'S LEGAL RIGHTS JOURNAL (forthcoming 2013).

¹⁴⁴ Tulman & Weck, *supra* note 36, at 902.

¹⁴⁵ Members of the IEP Team must include the parent of the child with a disability, at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment), at least one special education teacher, a representative of the local educational agency, an individual who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise regarding the child, and whenever appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B) (2012).

HOW JUVENILE DEFENDERS CAN HELP DISMANTLE THE SCHOOL-TO-PRISON PIPELINE

services, counseling, social work services, and parent counseling and training) is the best way to fulfill the traditional purposes of the juvenile court.

If these arguments are inapplicable, or denied, education records and school histories might still be useful in some or all of the following ways:

- countering, or providing context for, the probation officer's account of the juvenile's educational history;
- arguing that rehabilitation and treatment will be better addressed in the community rather than in a locked placement, when the client is receiving, or should receive, the services mandated in an IEP;
- identifying appropriate character witnesses (e.g., a teacher, guidance counselor, or social worker);
- arguing against any terms of probation for which compliance will be unduly difficult for the client (e.g., a juvenile may not be able to remain on good behavior if she has a severe behavioral disability; a juvenile cannot attend school regularly if she is suspended; and a juvenile may not be able to maintain passing grades if she has a severe learning disability and the school has not provided her with an adequate IEP); and
- communicating the juvenile's educational needs to a facility, if the juvenile is committed.

C. Advocating for Clients' Education Rights

Juvenile defenders can advocate for their clients' education rights, separate and apart from the delinquency case, in two primary ways. First, they can refer the client to a legal services provider or to lay education advocates. Second, they can provide legal representation themselves in education matters, such as:

HOW JUVENILE DEFENDERS CAN HELP DISMANTLE THE SCHOOL-TO-PRISON PIPELINE

- requesting interventions designed to prevent or remedy academic failure;
- assisting clients with enrolling in school;
- representing clients in suspension or expulsion appeals;¹⁴⁶
- attending IEP Team meetings;
- representing clients in special education proceedings (e.g., a contested case hearing in administrative court);¹⁴⁷
- filing formal state complaints for violations of special education law;¹⁴⁸
- filing complaints to the U.S. Department of Education's Office for Civil Rights for discrimination based on race, national origin, disability, or gender;¹⁴⁹ and
- filing grievances against school officials for mistreatment.

Juvenile defenders should advocate for their clients' education rights not only because of the importance of education in a young person's life and the fact that fighting injustice is simply the right thing to do, but also because it will improve the quality of the representation in the delinquency case. "Going the extra mile" and advocating for a client in the school setting will go a long way toward gaining the delinquency client's (and the parent's/guardian's) favor and trust. Moreover, prosecutors, juvenile probation officers, judges, and juries will likely view juveniles who attend school and experience educational success more favorably in the future. Finally, a juvenile defender can use suspension hearings, meetings with school officials, and education-related proceedings as an opportunity to gather valuable information (e.g., cross-examining a

¹⁴⁶ See *Goss v. Lopez*, 419 U.S. 565 (1975).

¹⁴⁷ 20 U.S.C. § 1415 (2012).

¹⁴⁸ See 34 C.F.R. § 300.153 (2012).

¹⁴⁹ *Civil Rights: Disability Discrimination*, U.S. DEP'T OF EDUC. (last updated Sept. 21, 2012), <http://www2.ed.gov/policy/rights/guid/ocr/disability.html>.

HOW JUVENILE DEFENDERS CAN HELP DISMANTLE THE SCHOOL-TO-PRISON PIPELINE

principal in a suspension hearing, asking questions of IEP Team members, or subpoenaing a teacher in a case before an administrative law judge).

V. Conclusion

Children in delinquency court have stories that need to be heard, read, told, and re-told in a way that will make a difference in the effectiveness of their defense and in their long-term chances for success and well-being. but can improve their lives in the long term. Until juvenile defenders discuss school with their clients, request and review clients' educational records, and interview personnel at clients' schools, juvenile defenders will not know the whole story and will likely miss critical information about their clients' cases. They will also be unable to fulfill their crucial role in ensuring their clients' educational rights are honored, and that the scourge of the school-to-prison pipeline is ended.

Client Centered Advocacy: LGBTQ Children

August 2013



**Client Centered
Advocacy:
LGBTQ Children**

Laura E. Austen, Assistant State Public Defender, Ohio



THE PLAN

1. LGBTQ youth
2. How to best advocate for kids
3. Troubleshooting, role play, questions



1. LGBTQ Youth

- Acronyms
- Sexual orientation
- Gender Identity



1. LGBTQ Youth

- Resources
 - Center for American Progress
The Unfair Criminalization of Gay and Transgender Youth
By Jerome Hunt and Asha Moodie-Mills
http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf
 - Office of the Juvenile Defender
Representing Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning (LGBTQ) Youth In Juvenile Court



2. How to best advocate for kids

- Consider the big picture.
- We are artists.
- Paint a picture that is comprehensive and compelling.



2. How to best advocate for kids

- Interviewing is personal.
- We must be available and present.
- Trust is essential.



2. How to best advocate for kids

- We might have to think in a different order.
- A picture is worth a thousand words.
- Does that make sense?
- Time is necessary.



2. How to best advocate for kids

- Emotional/sensitive cases
- Complicated cases
- Adolescence (irrational, hostile, Facebook, gangs, misplaced loyalty)



3. Troubleshooting, role play, questions

- Emotional/sensitive cases
- Complicated cases
- Adolescence (irrational, hostile, Facebook, gangs, misplaced loyalty)

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How Will Bradley Manning Be Treated in Prison as a Woman?

The former Army private, now known as Chelsea, is starting a 35-year sentence at an encouraging time for transgender inmates.

TERRY SCHUSTER/AUG 22 2013, 5:03 PM ET



Ken Lamarque/Reuters

Less than 24 hours after being sentenced to 35 years in prison, Bradley Manning, the Army private convicted for leaking classified documents, made an [unexpected announcement](#) to the American public. "I am Chelsea Manning," Manning said in a statement read on the TODAY show this morning. "I am female. Given the way that I feel, and have felt, since childhood, I want to begin hormone therapy as soon as possible."

In the past, a transgender prisoner like Manning would have been especially vulnerable to sexual violence. That may be changing, thanks to [the Prison Rape Elimination Act](#) (PREA). Although the law was passed by Congress 10 years ago, it was enforced for the first time earlier this week, when every state in the country had to demonstrate compliance with the new set of federal regulations. The regulations were

shaped by extensive research and graphic testimonies showing that gay and transgender prisoners were at particular at risk of victimization.

The reforms are particularly good news for male-to-female transgender inmates like Manning who, historically, have been housed with men in jails and prisons. These trans women, many of whom have breasts and feminine appearances, are frequently exposed to [unwanted sexual attention and abuse from male staff and inmates](#). They are particularly vulnerable in settings like communal showers, and they often find themselves targeted for unnecessary pat-downs and strip searches.

Part of the problem is that most jails and prisons have never before used the word "transgender" in any written policies. The first step taken by the new PREA rules is to define some basic terms: gender identity (internal sense of feeling male or female); transgender (a person whose gender identity is different from his or her assigned sex at birth); gender nonconforming (a person whose appearance or manner does not match up with traditional societal gender expectations); and intersex (a person whose sexual or reproductive anatomy or chromosomal pattern does not fit typical definitions of male or female).

After acknowledging all of these variations, the new PREA rules address the question of whether to house transgender inmates with males or females. Jails, prisons, and juvenile facilities are now required to determine on a case-by-case basis whether a trans inmate will be safer housed with men or with women, and must give serious consideration to the inmate's own views regarding his or her safety. Importantly, the label "transgender" is not reserved for those who have undergone surgery or hormone treatment; it's based solely on a person's internal sense of feeling male or female. This means a trans woman like Manning cannot be excluded from protection because she has a penis, or because the prison administrator making housing decisions thinks she doesn't look "female enough".

Notably, trans men (female-to-male) inmates -- even those with facial hair and surgically altered chests -- may choose to remain with women because they feel safer from sexual victimization there. For that reason, there are no one-size-fits-all rules about housing. Instead, prison authorities must focus on minimizing risk of sexual victimization on a case-by-case basis, and ensuring that transgender inmates feel safe.

The housing decision rule also applies to inmates who were born with intersex conditions, including people with atypical genitalia (not clearly identifiable as male or female), those whose genitals look male or female on the outside but who have different internal organs (e.g., a phallus on the outside and a uterus and ovaries on the inside), and those with typical male or female organs whose chromosomes do not match their appearance (e.g., a person who appears physically to be male but has XX or XXY chromosomes).

The PREA rules also include new policies related to showers, pat-downs, and strip searches. Transgender inmates and those born with intersex conditions must be allowed to shower separately from other inmates if they wish. Searches must be conducted in the least intrusive manner possible, and staff must undergo specific training on how to conduct searches of trans people in a respectful and professional manner. The PREA rules prohibit any searches or physical exams whose purpose is solely to determine a person's genital status.

Although not required by the new PREA rules, some prison systems are going further to address respectful treatment of transgender inmates. They ensure, for instance, that housing decisions are made before the inmate is automatically given a male haircut. They ask authorities to provide the institutional clothing that the inmate prefers and call trans inmates by the first names and pronouns they request. They also ensure that physicians and nurses are knowledgeable and non-judgmental about gender identity and healthcare related to gender transition, providing treatment in accordance with accepted professional standards.

Beyond that, [new prison policies focus broadly on reforming institutional cultures](#). This change is largely a response to the testimonies of current and former inmates who appeared before the PREA Commission. They described receiving violent beatings by groups of inmates wanting oral sex, and [being sold into sexual slavery to pay off the debts of gang leaders](#). A [prisoner from Colorado testified](#) that, "because I am openly gay, officials blamed me for the attacks, saying I should have kept a low profile. They said that as a homosexual I should expect to be targeted by one gang or another."

The predominance of "drop-the-soap" jokes has also contributed to the problem. Concluding [his testimony to the PREA commission](#), a prisoner from Louisiana stated, "I often hear that homosexuals just love being in jail. That it is akin to a kid in a candy store. That... is so far from the truth. When I choose to be with someone, it's personal and intimate. Being raped is anything but. Jail is a nightmare for anyone. But for a gay man - the target of sexual assaults - it is pure hell."

Close supervision is particularly crucial when it comes to teenage prisoners. Because of their smaller size, adolescents in adult jails and prisons are extremely vulnerable to sexual victimization, especially when they identify as LGBT. Although teenagers represent a small percentage of inmates in adult facilities, [they account for a very large portion of prison rape victims](#). Prison administrators often try to protect them by placing them in what amounts to long-term solitary confinement. Young people who are isolated and deprived of social contact are known to experience intense agitation, hopelessness, paranoia, hallucinations, and other signs of mental health deterioration. In fact, those who are held in adult facilities are [36 times more likely to commit suicide](#) while in custody than their same-age peers in juvenile facilities.

Reform advocates pushed the Justice Department to use the Prison Rape Elimination Act as a vehicle to remove kids from adult facilities nationwide and require states to house them in juvenile facilities, whether they were tried as juveniles or as adults. Although this policy didn't make it into the final PREA regulations, the rules do focus on separating youth from adults in jails and prisons and warn administrators not to rely on solitary confinement to protect youth from sexual violence.

Meanwhile, sexual abuse happens in juvenile prisons too. In the past, staff have often let this harassment go unchecked, assuming that LGBT youth posed a danger to their peers. Little, if any, counseling was provided to affirm and support of LGBT identity.

But the PREA rules apply to juvenile prisons, too. In order to maintain federal funding, these facilities are now training staff to communicate professionally with LGBT youth. They are prohibiting employees from using terms that convey hatred, contempt, or prejudice, or imply that youth are abnormal or sinful. They are hiring and scheduling more staff to better supervise youth. They are also holding staff accountable for

reporting abuse and harassment, and requiring them to take immediate measures to protect those being victimized.

Taken together, these policies and training requirements are more comprehensive than those required in most schools and workplaces. It may be a while before LGBT inmates are truly free from harassment. But if Chelsea Manning plans to live out her 35-year prison sentence as a woman, she is beginning that process at a particularly hopeful time.

Prisons: The Next Frontier for LGBTI Rights

Written by Terry Schuster & Will Harrell on Friday, August 9th, 2013

This month every state in the country will attempt to show that their prisons, jails, and juvenile facilities comply with the new federal regulations on sexual abuse and harassment. Following the unanimous passage of the Prison Rape Elimination Act (PREA), and another decade of research, horrifying testimony, and several drafts of regulations, a set of rules now apply to nearly all secure lock-up facilities that aim to prevent and address sexual violence. Because lesbian, gay, bisexual, transgender, and intersex (LGBTI) inmates are particularly at risk for sexual victimization in these settings, the rules require States to adopt fairly progressive policies to protect them from abuse and harassment. Creating a safe environment for LGBTI inmates requires far more than taking steps to prevent rape in prisons. The facilities will have to prohibit and directly address homophobic slurs and other verbal harassment; they will have to discipline and relocate the perpetrators of the harassment, rather than isolating the victims for their own protection; and they will have to consider a transgender inmate's views regarding whether they feel safer and more comfortable living with males or with females.

It is a really interesting moment in history – when policies and staff training in prisons go a greater distance to support LGBTI people than those in most schools and workplaces.

There will be some variation in the LGBTI policies adopted by different systems, and some will certainly stand out as models of best practice. Those correctional systems that want to aim higher than the basic protections required for federal funding by going further to prevent and address sexual abuse and harassment behind bars will also affect public safety by improving inmates' prospects for success once released from prison. In this article, we discuss the basic protections for LGBTI inmates that every juvenile and adult correctional system will have to put in place, and offer up some extra provisions they should adopt to become models of best practice.

Transgender Inmates

More than any other group, male-to-female transgender inmates (trans women) who are housed with men are the most at risk for sexual victimization and harassment in jails and prisons. A 2007 report found that trans women were thirteen times more likely than other inmates to be sexually assaulted while in confinement, and also far more likely to be sexually assaulted on multiple occasions. Trans women, many of whom have breasts and feminine appearances, are frequently targeted by male staff members for unnecessary and traumatic frisks and strip searches. They are exposed to unwanted sexual attention from both staff and other inmates in showers, and are often treated as if they invited the violence and sexual attention by choosing to make changes in their physical appearance.

Most jails and prisons have never used the word “transgender” in their policies, much less instituted formal protocols to protect transgender inmates. In fact, because there is little understanding of trans people and identity among the country's general population, correctional staff and administrators have not been well-equipped to respond to their unique safety needs. The first step taken by the new PREA rules to eliminate sexual abuse and harassment of trans inmates

is to define some basic terms: gender identity (internal sense of feeling male or female); transgender (a person whose gender identity is different from the person's assigned sex at birth); gender nonconforming (a person whose appearance or manner does not conform to traditional societal gender expectations); and intersex (a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female). By defining these terms, the rules educate and generate compassion among practitioners working with trans inmates, and prevent them from drafting policies based on misunderstanding or prejudice.

The new PREA rules address the question of whether to house transgender inmates with males or females, prohibiting any hard-line rule about housing them based on their assigned sex at birth. Jails, prisons, and juvenile facilities are now required to determine on a case-by-case basis whether a trans inmate will be safer housed with men or with women and must give serious consideration to the inmate's own views regarding his or her safety. Importantly, "transgender" is not defined by whether a person has undergone surgery or hormone treatment to change their anatomy and appearance. It's defined solely on a person's internal sense of feeling male or female – so a trans woman (male-to-female) inmate cannot be excluded from this protection because she has male genitalia or because the prison administrator making housing decisions thinks she doesn't look "female enough." (It is not generally believed that this policy will lead to inmates who are not transgender faking a trans identity in order to be housed with the opposite sex. At intake, correctional agencies conduct assessments of each inmate for risk of sexual victimization. If that intake assessment reveals that a person is transgender and at risk of abuse when housed with men, the facility administrators must make a determination regarding how to reduce that risk. If it is clear that a male inmate is lying about his gender identity, the facility is under no obligation to house him with women.) Notably, trans men (female-to-male) inmates may have masculine appearances (facial hair, chest surgery, etc.), but may also feel safer from sexual victimization when housed with women. These housing decisions must focus on minimizing risk of sexual victimization on a case-by-case basis, and ensuring that transgender inmates feel safe.

The housing decision rule also applies to inmates who were born with intersex conditions, including people with atypical genitalia (not clearly identifiable as male or female), those whose genitals look male or female on the outside but who have different internal organs (e.g. having both a phallus on the outside and a uterus and ovaries on the inside, or having a clitoris, labia, and partial vagina, with testicles internally), and those with typical male or female organs whose chromosomes do not match their appearance (e.g., a person who appears physically to be male but has XX or XXY chromosomes).

The PREA rules also now require new policies related to showers and pat-down and strip searches. Transgender inmates and those born with intersex conditions must be allowed to shower separately from other inmates if they wish. Searches must be conducted in the least intrusive manner possible, and staff must get specific training on how to conduct searches of trans people in a respectful and professional manner. The PREA rules prohibit any searches or physical exams whose purpose is solely to determine a person's genital status.

The introduction of national regulations regarding the housing and treatment of trans and intersex inmates is groundbreaking, and the momentum of reforms, given that all States have to

demonstrate compliance with the new rules this month, is breathtaking. But they don't go far enough. If an invasive physical search of a transgender inmate is necessary, the best way to protect them from sexual exploitation is not simply to train staff on how to be professional, but to ensure that more than one staff member is conducting the search, and to ask the inmate what gender of staff they feel most comfortable with conducting the search. The rule on housing decisions is terrific, but it should also ensure that those decisions are made before the inmate is automatically given a male haircut. Transgender inmates should be provided the institutional clothing they prefer, including a bra for trans women (male-to-female) inmates. Trans inmates should be called by the first name and pronoun they request, even if their name has not been legally changed. One of the most prevalent forms of bullying and harassment of transgender inmates is the insistence by others on referring to the inmate by his or her assigned sex at birth. To create a safe environment for transgender inmates, those running the facility must demonstrate a commitment to being respectful and supportive of their gender identity.

The PREA regulations are also completely silent on the unique medical care needs of transgender individuals. They should ensure, for example, that physicians and nurses are knowledgeable and non-judgmental regarding gender identity and healthcare related to gender transition. When inmates arrive in the facility who were receiving transition-related hormone treatment prior to confinement, medical staff should evaluate and authorize continued treatment in accordance with accepted professional standards.

To those agencies that operate jails, prisons, and juvenile facilities, here's the take-home message: If you want to end sexual victimization, start by treating those who are at risk of abuse and harassment with dignity. Transgender inmates are, by far, the most vulnerable population in confinement settings, and meeting the unique safety needs of this population requires protective and supportive measures beyond those now required by federal law.

LGBTI Teenagers in Lock-up Facilities

Because of their smaller size, teenagers in adult jails and prisons are extremely vulnerable to sexual victimization by other inmates, whether or not they identify as LGBTI. Although teenagers represent a small percentage of inmates in adult facilities, they account for a very large portion of prison rape victims. They are harmed further by the measures that jail and prison administrators take to protect them, which often amount to long-term solitary confinement. Young people who are isolated and deprived of social contact experience intense agitation, hopelessness, paranoia, hallucinations, and other mental health deterioration. In fact, those who are held in adult facilities are 36 times more likely to commit suicide while in custody than their same-age peers in juvenile facilities. Reform advocates pushed the Justice Department to use the Prison Rape Elimination Act as a vehicle to remove kids from adult facilities nation-wide, and require States to house them in juvenile facilities whether they were tried as juveniles or as adults. Those advocates, however, were not successful. The final PREA regulations focused instead on separating youth from adults in jails and prisons, and not relying on solitary confinement to protect youth from sexual violence.

While teenagers are generally safer in juvenile facilities than in adult facilities, sexual abuse happens in juvenile facilities too, so the new PREA rules also apply to them. Because the new

rules focus broadly, not just on eliminating rape, but also on preventing and addressing sexual harassment, they are vastly improving the environment for LGBTI teenagers. Harassment of LGBTI youth and homophobic slurs are rampant in juvenile detention and correctional facilities, as they are in American schools. In fact, many LGBTI youth end up in the juvenile justice system as a result of their mistreatment by peers in school. Students who are routinely harassed based on their actual or perceived sexual orientation or gender identity are more likely than other students to be threatened or injured at school, more likely to get into fights, and more likely to skip school because they feel unsafe. Their home and families may not offer a refuge from the rejection and abuse they experience at school, as many if not most LGBTI youth also experience rejection or outright intolerance from parents and other family members. When these youth end up in court, it's often because they have skipped school or run away from home. Others have brought weapons to school, struggled with drugs and alcohol, or engaged in dangerous, promiscuous, or criminal behavior to cope or to survive. While LGBTI youth are a minority, they are disproportionately represented in juvenile court.

In correctional facilities, where staff members have total control over the lives and well-being of those in their custody, harassment and mistreatment of LGBTI youth often goes unchecked. Before the PREA regulations, few if any juvenile prison systems had policies or staff training on working with LGBTI youth. The testimony of former inmates before the PREA Commission consistently referenced indecent and abusive treatment, widespread ignorance and intolerance of LGBTI identity, homophobic slurs, inaccurate assumptions by staff that LGBTI youth were sexual delinquents or posed a danger to their peers, and limited or nonexistent counseling services affirming or supportive of LGBTI identity. The correctional culture is also a hostile environment for LGBTI staff, particularly for gay men. So gay adults who might serve as role models and help curb the mistreatment of LGBTI youth are often closeted at work, or simply seek employment elsewhere.

But in order to comply with the new PREA rules, juvenile prisons are now training staff on how to communicate professionally with LGBTI and gender nonconforming youth, hiring and scheduling more staff to better supervise youth, requiring staff to report abuse and harassment and to take immediate measures to ensure the safety of youth being victimized, and holding staff accountable for failure to report and intervene in abuse and harassment. Model policies in several systems are going even further to establish and maintain a safe and supportive culture. For example, some policies outright prohibit employees from using terms that convey hatred, contempt or prejudice toward LGBTI youth, or that express that LGBTI youth are abnormal, sinful, or that they can or should choose to change their sexual orientation or gender identity. Some model policies require staff training not only on how to communicate professionally with LGBTI youth, but on understanding and protecting them, and creating an environment in which they feel safe and accepted.

Punishment of Consensual Sex in Prisons

Jail and prison facilities are free to prohibit consensual sex between inmates, which means inmates can be punished for engaging in consensual sex. However, before the new PREA rules, some jail and prison systems would punish or prosecute inmates for engaging in consensual sex as though they had committed sexual abuse. These practices subjected inmates to extremely

harsh punishments like solitary confinement or new criminal charges, and disproportionately harmed LGBTI inmates. Some systems went even further in this direction, and presumed from the moment of intake that LGBTI inmates were more likely to sexually abuse other inmates. Those systems housed all LGBTI inmates in segregated housing or placed them in housing units for sex offenders. The extensive testimony before the PREA Commission, though, made clear that LGBTI inmates are far likelier to be the victims of sexual abuse than the perpetrators. The new PREA rules prohibit isolating LGBTI inmates or classifying them as sex offenders based simply on their sexual orientation or gender identity. They clearly define sexual abuse as non-consensual, and ensure that the measures put in place to protect abuse victims do not unfairly target consenting adults. Importantly, because the staff in correctional facilities exercise total control over the lives and well-being of inmates, any sexual contact between a staff member and an inmate is deemed to be abusive, and inmates cannot be punished for this sexual contact unless a thorough investigation determines that the staff member did not consent.

The rules are murkier, though, for juveniles, because PREA's definition of sexual abuse includes sexual contact with someone who is "unable to consent". If two similarly-aged girls or two similarly-aged boys in a juvenile facility engage in voluntary sexual contact, their behavior may or may not be deemed "consensual" based on the State's age-of-consent laws. While the new PREA rules require staff to be trained on the applicable State laws, they don't go far enough to distinguish between voluntary and involuntary conduct between teenagers. Juvenile facilities should make these distinctions in their policies. When both teenagers can legally consent, their sexual contact should not be treated as abuse. When the teenagers' sexual contact is voluntary, but not consensual due to the State's age-of-consent laws, the voluntary nature of the contact should still be taken into account when determining how to respond to the situation. Teenagers should not be targeted for prosecution for engaging in voluntary sexual activity with similarly-aged peers.

Prison Rape Elimination as a Catalyst for Fair Treatment of LGBTI Inmates

Rape is widely acknowledged by the general public as a fact of life in prison. It is a rare prison joke whose punch line does not involve rape. But while prisoners are not generally a sympathetic group in the eyes of the public, we as a society have declared – through the unanimous passage of the Prison Rape Elimination Act – that a sentence to a term of years in prison should not be a sentence to rape. As the PREA Commission and the Justice Department have examined and reexamined how to prevent and address sexual violence in lock-up facilities, they have established a surprising party line in those facilities – that a strong stance against sexual violence requires a strong stance against homophobia and transphobia. Because LGBTI individuals are uniquely vulnerable in confinement settings to sexual violence and harassment, the new PREA regulations have gone a great distance toward protecting them. Every State has undertaken extensive reforms to their correctional practices, changing the way they make housing decisions, the way they supervise and search inmates, the way they investigate and respond to allegations of abuse, and the medical and mental health care they provide to victims. Their new sensitivity to sexual harassment has indirectly addressed prejudice toward LGBTI inmates. It has translated into staff training on creating harassment-free living conditions, and engaging with LGBTI inmates in a supportive and non-judgmental way. It is a truly remarkable moment in time, when the righting of one societal wrong has carried with it the righting of another: prisons – an

improbably site for cultural advancement – are blazing a trail for our other societal institutions in guarding the safety and dignity of LGBTI people.

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Terry Schuster, J.D. is the Special Assistant to the Federal Court Monitor overseeing conditions in Ohio juvenile prison facilities. He was previously a Fellow at Juvenile Law Center, a law clerk for the Special Master overseeing conditions in the California juvenile prison system, and a law clerk for the Ombudsman of the Texas Youth Commission.

Putting Cases Together

August 2013

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http://www.nlada.org/Defender/Defender_Practitioner/Defender_Practitioner_Links#sites



Federal Court System. You do have to sign up.

https://pacer.login.uscourts.gov/cgi-bin/login.pl?court_id=00idx



NC Prison search

<http://webapps6.doc.state.nc.us/opi/offendersearch.do?method=view>



Public records Info

<http://www.dmlp.org/legal-guide/access-public-records-north-carolina>



Experts of all kinds

<http://expertpages.com/state-NC.htm>



DNA

<http://www.dna.gov/>



Lat/Long

<http://www.latlong.net/>



Past weather

<http://www.wunderground.com/>



Free State Searches

<http://www.docusearch.com/free.html>



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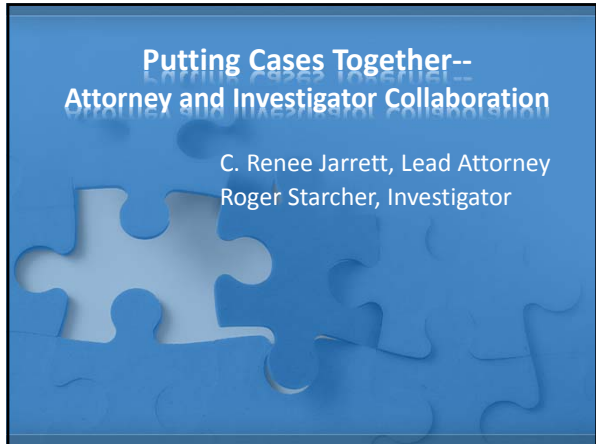


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**Putting Cases Together--
Attorney and Investigator Collaboration**

C. Renee Jarrett, Lead Attorney
Roger Starcher, Investigator



Putting Cases Together

- WHY DO ATTORNEYS NEED INVESTIGATORS
- HOW TO OBTAIN AN INVESTIGATOR
- AN INVESTIGATOR'S VIEW
- TIPS AND TRICKS

WHY YOU NEED AN INVESTIGATOR

- To prepare a Defense
 - DUTY to conduct Independent case review & Investigation
 - Assess and Reassess Theory of Case
- To assess the Prosecution 's case
- To rebut the Prosecution's case

Sound investigation = ZEALOUS ADVOCACY

WHEN SHOULD YOU REQUEST INVESTIGATOR

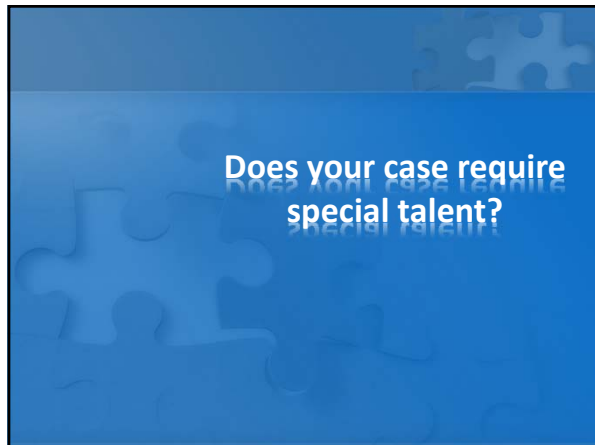
- Crime Scene Issues
- Eyewitness Issues
- Multiple Witnesses
- Out of State Witnesses
- Witness/Officer Credibility
- Concerns about Police Procedure
- Sexual Offenses/Transfer

HOW TO REQUEST AN INVESTIGATOR

- Motion and Court Order
 - Ex- Parte Motion for Funds
- Have a Solid reason
 - *Ake v. Oklahoma*, 470 U.S. 68 (1985)
 - Investigator will offer *material assistance*
 - Defendant's right to a *Fair Trial*
- If denied, preserve for appeal

You might think you need a
magician...







If you need these guys you have a bigger problem than you thought



I wouldn't even give you this guys name



These people and 1100 others.....are Private Investigators in NC

Make a List



Ensure that the investigator is licensed



Look at the private investigators past – GOOGLE HIM



Find out if the investigator is willing to testify in court



Make sure that he works from an office



Discuss fees and payment

Evaluate the private investigator's personal skills

Discovery

- It's all in the details.....
 - You are entitled to discovery. Get all of it

Discovery

- It's all in the details.....
 - You are entitled to discovery. Get all of it
 - A word about redactions – it makes my life miserable

Discovery

- It's all in the details.....
 - You are entitled to discovery. Get all of it
 - A word about redactions – it makes my life miserable
 - Videos
 - Any law enforcement officer conducting a custodial interrogation in an investigation of a juvenile shall make an electronic recording of the interrogation in its entirety

Resources and Tools

- IRB – cost effective
- Merlin – now TLO
- Black Book Online
- NLADA
- Google
- Internet in general
 - Social sites

Google Voice



magicJack



Typical things I do.....

- Locate people (Many times our clients)
- Collect and review evidence, photos
- Connect the dots, diagrams, timelines
- Subpoenas (Oh Ya)
- Provide leverage (information/disinformation)
- Court witnesses/Experts
- Scour the internet for info on social sites
- Due diligence/Verification

Examples of Game changers

- Video of recanted statement - Waffles
- The Incredibles
- Miranda and You been watching too much TV
- CMPD directives
- Finding the Swami
- The hand grenade girl
- DNA
- The Captain and the Subpoena

Look what I found!

I swear this is true.....



Why it Matters: Collateral Consequences and Juvenile Justice

August 2013



1. What happens in ^{juvenile} Vegas, stays in ^{juvenile} Vegas:

It happened. It only happened there. And it happened far enough away to have any negative effect on the "the here and now". And anyone who wasn't there at the time need not know about it. So [stfu](#) about it, and move on. But keep the memories. ;)

What



Court records

DJJD records

Law enforcement records

How



With a court order

Without a court order

Who (& a little bit of what & how)



Juvenile
Juvenile's attorney
Parent, guardian, etc.
Prosecutor
Court counselor
Probation officer
Public

Who (& a little bit of what & how)



Juvenile
Juvenile's attorney
Parent, guardian, etc.
Prosecutor
Court counselor
Probation officer
Public

- without a court order
- written part
- view and obtain copies

Who (& a little bit of what & how)



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Prosecutor

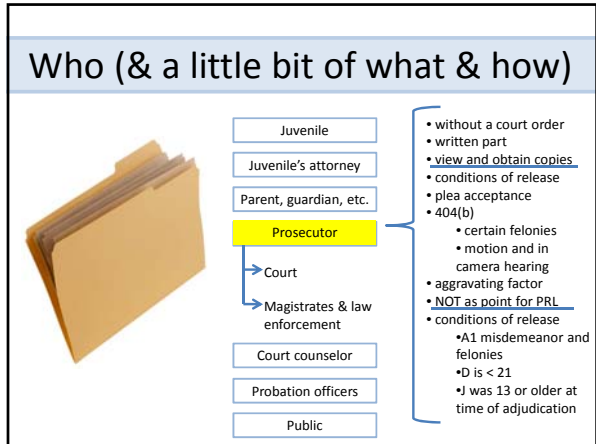
Court

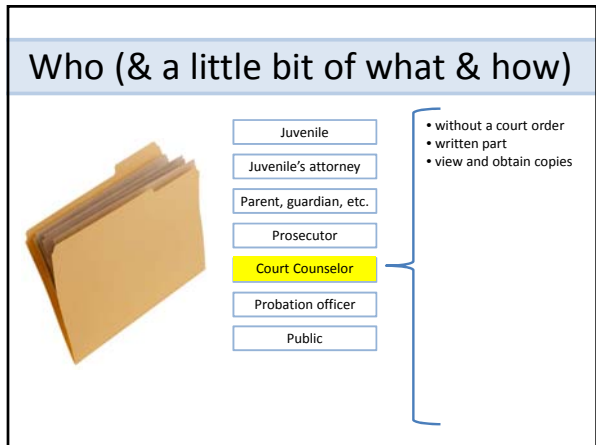
Court counselor

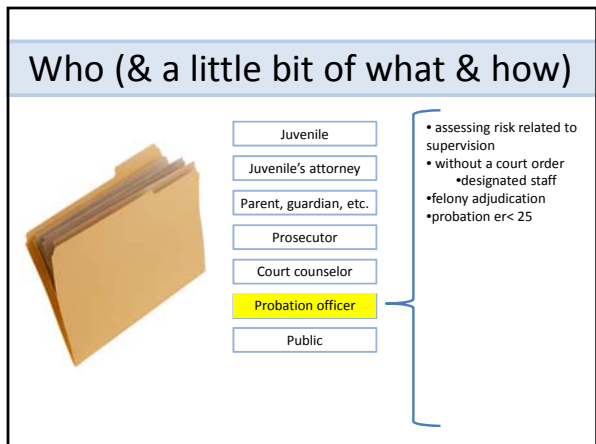
Probation officers

Public

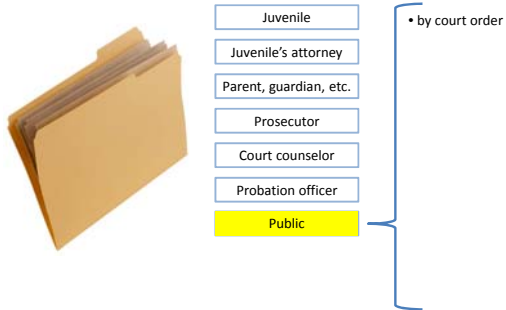
- without a court order
- written part
- view and obtain copies
- conditions of release
- plea acceptance
- 404(b)
 - certain felonies
 - motion and in camera hearing
- aggravating factor
- NOT as point for PRL







Who (& a little bit of what & how)



Sealing



How My Juvenile Record May Affect Me if I am Charged as an Adult
Como Mi Record Juvenil Me Puede Afectar si Me Ponen Cargos Como Adulto

English	Español
What has happened in court? You have been adjudicated (found guilty) of a crime, either a felony or A1 misdemeanor, that may affect you if you get in trouble with the law in the future.	Que paso en la corte? Te encontraron culpable de un crimen, o de una felonía o un <i>misdemeanor</i> tipo A1, que te puede perjudicar si tienes problemas con la ley en el futuro.
Who will know about my juvenile court history if I get charged as an adult? If you are 21 years old or younger and appear in criminal court, the following persons can find out about your juvenile record: law enforcement officers; magistrates (who determine whether or not you stay in jail when you are arrested); prosecutors; and judges.	Quien va a saber de mi historia de la corte juvenil si me ponen cargos como adulto? Si tienes 21 años o menos y apareces en la corte criminal, las siguientes personas pueden averiguar de tu record juvenil: oficiales de enforzar la ley (o sea, policías); magistrados (los que determinan si te vas a quedar en la cárcel cuando estas arrestado); fiscales; and jueces.
How will my juvenile record affect me if I am on adult probation? Information about your adjudication (your being found guilty in juvenile court) can be used to determine whether or not you get released from jail, how much your bond is, what plea you may enter with the prosecutor, and whether or not a judge accepts the plea.	Como me puede afectar mi record juvenil si estoy en probatorio como adulto? Información acerca de tu convicción puede ser usada para determinar si te dejan salir de la cárcel, cuanto es tu fianza, que tipo de acuerdo puedes sacar con el fiscal, y si el juez acepta el acuerdo.
Is there anything I can do to get my juvenile charges off my record? If you get placed on adult probation anytime before you are 25 years old, your probation officer can look at any records about your adjudication of a felony to determine whether or not it is likely that you will commit a crime while on probation. If you have been adjudicated of an offense that is less than a Class F felony, you can have the charges expunged from your record. “Expunged” means that juvenile proceedings will be removed from your record. To do this, you need to file a petition with the clerk 18 months after you have been out of juvenile court jurisdiction, and you have not been adjudicated or found guilty of any other crime.	Hay algo que yo pueda hacer para quitar los cargos juveniles de mi record? Si te ponen en probatorio adulto en cualquier momento antes de que cumplas 25 años, tu oficial de probatorio puede ver cualquier record acerca de tu convicción de felonía para determinar si es probable o no que cometeras un crimen mientras estas en probatorio. Si te encontraron culpable de una ofensa que es menos que una felonía de Clase F, puedes tener los cargos expunged de tu record. “Expunged” significa que los procedimientos juveniles serán borrados de tu record. Para hacer esto, necesitas llenar una petición con el secretario de la corte 18 meses después de que salgas de la jurisdicción de la corte juvenil, y que no te hayan encontrado culpable de cualquier otro crimen.

Juvenile Adjudications, Selected Collateral Consequences, & Expungement

Although juvenile proceedings are not criminal prosecutions and not synonymous with convictions, juvenile adjudications can have indirect sanctions or adverse results referred to as “collateral consequences.” Given North Carolina’s recently expanded access to juvenile court records in subsequent criminal proceedings and probation settings, providing juvenile clients with information regarding collateral consequences and expunction has become increasingly important. This document provides an overview of selected collateral consequences, as well as information regarding expungement of juvenile records.

School: Notification; Suspension and Expulsion; & Extracurricular Activities

If a petition is filed alleging that a juvenile committed a felony other than a motor vehicle offense, juvenile court counselors are required to notify the school principal. N.C.G.S. § 7B-3101(a)(1). If the court dismisses the petition, modifies or vacates any order or disposition, or transfers the case to superior court for a juvenile alleged or found to be delinquent, the school must be informed as well. N.C.G.S. § 7B-3101 (a)(2); (a)(3); (a)(5).

According to state school board policies, students charged, convicted, or adjudicated of a criminal offense as a result of a delinquency complaint can be suspended or expelled from school. The criminal offense can occur on or off school grounds. The principal can suspend or expel a student charged, convicted, or adjudicated of a criminal offense for a period of time determined appropriate if he or she determines that the student’s continued presence in school would threaten school safety.¹ *Note: There are some protections for juveniles with disabilities.*²

Additionally, schools that are a member of the North Carolina High School Athletic Association are required to prohibit a student adjudicated delinquent for an offense that would be a felony if committed by an adult from participating in extracurricular sports.³

Use of Juvenile Record in Subsequent Juvenile Court Proceedings

Prior juvenile adjudications can be used in subsequent juvenile court proceedings, and may enhance dispositions in such proceedings. For instance, prosecutors may share information in a juvenile’s records with law enforcement, magistrates, and the courts. N.C.G.S. § 7B-3000(b).

Sex Offender Registry

If found to be a danger to the community and adjudicated of either committing or attempting to, conspire to commit, solicit to commit, or aid or abet first-degree rape, second degree rape, first-degree sexual offense, and second degree sexual offense, a juvenile who is at least 11 years old may be ordered to register as a sex offender. N.C.G.S. § 7B-2509; §14-27.2, § 14-27.3; § 14-27.4, § 14-27.5; § 14-208.26(a1); § 14- 208.26-§ 208.32.

¹ This information was combined after reviewing selected school board policies throughout North Carolina.

² See Individuals with Disabilities Education ACT (IDEA), 20 U.S.C. §1400 et seq.

³ See “Eligibility Information” at <http://www.nchsaa.org/pages/685/Rules-Eligibility-Skills-Development-procedures/>.

Once the court makes a finding that the juvenile is a danger to the community, registration information is filed with the sheriff of the county of the juvenile's residence, forwarded to the Division of Criminal Statistics, and entered into the Police Information Network. N.C.G.S. § 14-208.26(b); § 14-208.26(b); § 14-208.31. Information in this file may be released to law enforcement agencies only, and the registration requirement terminates on the juvenile's eighteenth birthday or when the jurisdiction of the court ends, whichever occurs first. N.C.G.S. § 14-208.30.

Driver's License

If a juvenile is adjudicated delinquent, the court can decide that the juvenile may not get a driver's license for as long as the court has jurisdiction over him or her or for a shorter period as determined by the court. N.C.G.S. § 7B -2506(9).⁴

Post-Secondary Education & Federal Student Aid

Based on current research, colleges do not appear to ask about juvenile adjudications, but seem to focus on criminal convictions.⁵

Military Service

Military recruiters will specifically ask about any records of arrest, charges, juvenile court adjudications, traffic violations, probation periods, and dismissed or pending charges or convictions including those, which have been expunged or sealed. Generally, persons convicted of a felony can not be enlisted in the armed forces; however, pursuant to 10 USCS § 504 (a), "the Secretary may authorize exceptions, in meritorious cases...." An applicant may request a moral waiver. Each branch of the military has separate waiver procedures.⁶

⁴ If a juvenile is transferred to superior court for trial as an adult and convicted of drug or alcohol related offenses while driving, the state may revoke or suspend his or her driver's license. N.C.G.S. § 20-17(a)(2); § 20-19; § 20-138.1. Additionally, if transferred to superior court, a juvenile's driver's license may also be suspended or revoked for particular offenses specified in N.C.G.S. § 20-17(a). The suspension or revocation may range from 10 days to a permanent revocation subject to the nature and number of offenses although the state may offer limited driving privileges as granted by the court for purposes pursuant to N.C.G.S. § 20-179.3(a); § 20-19. See "After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records," published by the Legal Action Center.

⁵ When applying for financial aid for college and completing the "Free Application for Federal Student Aid" (FAFSA), prospective students will be asked whether they have been convicted for the possession or sale of illegal drugs for an offense that occurred while receiving federal student aid. 20 U.S.C. § 1091, *Student eligibility, (r) Suspension of eligibility for drug-related offenses*. If there has been such a conviction, the student will be ineligible for federal financial aid for a specific length of time based on whether the offense is a first, second, or third offense, and whether the charge is for a possession or sale of a controlled substance. 20 U.S.C. § 1091, *Student eligibility, (r) Suspension of eligibility for drug-related offenses*. However, convictions will not be considered if they were removed from the record or if they occurred prior to 18 unless the student was tried as an adult. See also www.fafsa.ed.gov for "Free Application for Federal Student Aid" (FAFSA).

⁶ This information is based on a report prepared by the Juvenile Defense Network Youth Advocacy Project/Committee for Public Counsel Services, originally drafted in 2007.

Employment

When applying for a job in North Carolina, an applicant may be asked about whether he or she has criminal convictions, but he or she does not have to provide information regarding juvenile proceedings or juvenile records because juvenile proceedings are not criminal prosecutions.

Immigration

For immigration purposes, juvenile adjudications are not considered convictions, and therefore, a delinquency finding should not result in deportation. However, juvenile adjudications can affect immigration in other ways such as either preventing a finding of “good moral character,” in naturalization cases, or relief from removal in some cases.⁷

Public Assistance

Housing authorities may consider arrests that did not lead to conviction in its admission criteria although rehabilitation is considered in the appeals process. Housing authorities may also bar persons from public housing for a specific length of time depending on whether the conviction in question was for a misdemeanor or felony.⁸

Use of Juvenile Record in Criminal/Adult Court

Prior juvenile adjudications can be used in criminal proceedings, and may enhance penalties in such proceedings. Prosecutors may share information in a juvenile’s records with law enforcement, magistrates, and the courts for pretrial release, plea negotiation decisions, and plea acceptance decisions. N.C.G.S. § 7B-3000(e). The information may be shared when the adjudication was for a felony or an A1 misdemeanor, the juvenile was under 21 at the time of the adjudication, and the adjudication was within 18 months before the juvenile’s 16th birthday or after his 16th birthday. N.C.G.S. § 7B-3000(e). Additionally, an adjudication of delinquency for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult may be used against the juvenile in a subsequent criminal proceeding to indicate “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident” under N.C. Evidence Rule 404(b). Adjudications may also be used to prove aggravating factors for felonies and in capital cases if ordered by the court. N.C.G.S. § 7B-3000(f). Therefore, an adjudication of delinquency could possibly affect the verdict and the sentence in a subsequent criminal proceeding.

For juveniles later charged as an adult up to 25 years of age and put on probation, probation officers (POs) at the Department of Correction can access the offender’s juvenile record to assess risk related to supervision. N.C.G.S. §. 7B-3000(e)(1); (f). This means that without getting a

⁷ This information is based on a report titled, “Selected Immigration Consequences of Certain Massachusetts Offenses – Juvenile Adjudications,” written by Dan Kesselbrenner and Wendy Wayne.

⁸ Regarding other forms of public assistance, if a juvenile is transferred to superior court for trial as an adult and convicted of drug-related offenses, that juvenile may be eligible for Temporary Assistance for Needy Families (“TANF”) and food stamps six months after release or 6 months after date of conviction if not in custody if he or she: (1) does not receive subsequent felony convictions or (2) is enrolled in or completes a required substance abuse treatment. N.C.G.S. § 108A-25.2. See “After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records,” published by the Legal Action Center.

court order, the PO can obtain copies of the file if the adjudication was for a felony. N.C.G.S. §. 7B-3000 (e)(1); (f).

Expungement

Expunction of records of juveniles alleged or adjudicated delinquent and undisciplined is permitted pursuant to N.C.G.S. §. 7B-3200. Expunction is the legal process by which a juvenile's prior allegations or adjudications of delinquency or of being undisciplined may be sealed.

Records relating to an offense that would be a Class F, G, H, or I felony or a misdemeanor are eligible for expunction. N.C.G.S. §. 7B-3200 (b)(1). Any person who is 18 years of age and if at least 18 months have elapsed since the person was released from juvenile court jurisdiction may file a petition in the court where the person was adjudicated delinquent for expunction of all records of that adjudication. N.C.G.S. §. 7B-3200 (a); (b)(1); (b)(2). The person may not have been subsequently adjudicated delinquent or convicted as an adult of any offense other than a traffic violation. N.C.G.S. §. 7B-3200 (a); (b)(1); (b)(2).

Once a person satisfies the eligibility requirements, the petition must contain, at a minimum, the following:

- ❖ an affidavit by the petitioner stating that he or she has exhibited good behavior since the adjudication and not been subsequently adjudicated delinquent or convicted of an offense other than a traffic violation;
- ❖ verified affidavits of two persons who are not related to the petitioner or each other by blood or marriage, substantiating that they know the character and reputation of the petitioner and that the petitioner's character and reputation are good; and
- ❖ a statement that the petition is a motion in the cause in which the petitioner was adjudicated delinquent or undisciplined.

N.C.G.S. §. 7B-3200(c).

The petition must be served to the district attorney in the district where the adjudication took place, and must include notification of the date of the hearing. The district attorney has 10 days to file an objection. N.C.G.S. §. 7B-3200(c).



CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

CRIMINAL HISTORY SCREENING IN COLLEGE ADMISSIONS

A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS

January 2013 Edition

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A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS

INTRODUCTION

This Guide for Attorneys is the product of a journey that began with our clients. The Center for Community Alternatives (CCA) has long had a Reentry Clinic which assists people with criminal histories in overcoming many of the barriers they face because of their past convictions. Many of our Reentry Clinic clients have applied to college, and over the years they have shared with us the increasing array of barriers they face to admission because of their criminal records. In fact, one local community college had an outright bar to admission, informing potential applicants with past felony convictions that they “need not apply.”

Our clients’ experiences and difficulties compelled us to explore this problem further. In 2010, CCA partnered with the Association of Collegiate Registrars and Admissions Officers (AACRAO) to survey collegiate admissions officers about their policies and practices with regard to applicants who have past criminal justice involvement. This partnership led to CCA’s groundbreaking report, *“The Use of Criminal History Records in College Admissions Reconsidered,”* which not only identifies the growing problem of colleges screening applicants for past criminal justice involvement, but also discusses much needed policy changes.

Our journey did not end with this report. Since issuing it, we have received countless calls from defense attorneys whose clients are either enrolled in college or are college-bound and are facing criminal charges. They want to know what strategies they can use to ensure that their clients can still pursue their dreams of achieving a college degree. We also frequently receive telephone calls from attorneys whose former clients have called to ask about how their past conviction will affect their ability to get accepted into a college, or who are facing questions on college applications that seem to require the disclosure of sealed or confidential information.

Over the past two years, these telephone calls have led us to develop a number of strategies that defense attorneys can utilize to protect their clients’ dreams of graduating from college. Thanks to a grant from the New York Bar Foundation, we now have the opportunity to put these strategies into writing in this Guide.

A word about language. As we discuss further in this Guide, we live in a society that perpetually punishes people for having a past conviction. One common form of punishment is to attach



dehumanizing language to such individuals. A few years ago, the NuLeadership Policy Group issued an open letter calling for an end to this common practice, stating as follows:

When we are not called mad dogs, animals, predators, offenders and other derogatory terms, we are referred to as inmates, convicts, prisoners and felons. All terms devoid of humanness which identify us as “things” rather than as people. While these terms have achieved a degree of acceptance, and are the “official” language of the media, law enforcement, the prison industrial complex and public policy agencies, they are no longer acceptable for us and we are asking that you stop using them.

In an effort to assist our transition from prison to our communities as responsible citizens and to create a more positive human image of ourselves, we are asking everyone to stop using these negative terms and to simply refer to us as PEOPLE. PEOPLE currently or formerly incarcerated, PEOPLE on parole, PEOPLE recently released from prison, PEOPLE in prison, PEOPLE with criminal convictions, but PEOPLE.

Throughout this Guide, we have attempted to fully honor the NuLeadership’s request, and we refer to people with past convictions as people, not as ex-offenders, ex-convicts, etc.

In a similar vein, for years courts across this nation have clung to the legal fiction that there is a distinction between “direct” consequences of a criminal conviction (that is, the punishment pronounced by the sentencing court), and “collateral” consequences of a criminal conviction (that is, the life-altering consequences that are seldom discussed in court). This legal fiction has been fostered to prevent people from withdrawing their pleas after being confronted with a punishment for their conviction of which they were not aware when they decided to plead guilty. In 2010, the United States Supreme Court rejected this legal fiction in *Padilla v. Kentucky*, a decision which is discussed further in this Guide. Throughout this Guide, we too generally avoid using terminology that promotes this legal fiction, instead using terms that better reflect reality, such as “lifelong consequences,” “enmeshed consequences” or “invisible consequences.” We use the term “collateral consequences” only when necessary to avoid confusion.

With the foregoing in mind, we hope that you find this Guide to be a beneficial tool for more effective advocacy. We also hope that in some small way this Guide will help you open the door to education for your clients, enriching their lives, increasing their opportunities, and making our communities safer places for us all to live.

ACKNOWLEDGMENTS

Funding for this Guide was provided by the New York Bar Foundation.

We are indebted to our colleague McGregor Smyth, formerly the Managing Attorney of the Civil Action Practice at The Bronx Defenders and currently the Executive Director of New York Lawyers for the Public Interest. As you will see, throughout this Guide we rely on McGregor's sage advice and well-reasoned articles for strategies and best practices for defense attorneys.

DISCLAIMER

Nothing contained in this Guide should be considered legal advice. We have attempted to provide information that is current and topical. However, because the law and policies of institutions of higher education change so rapidly, we cannot guarantee that this information will always be up-to-date or correct.

Because this Guide was written for New York defense lawyers, much of it (particularly Parts V and the Appendix) focus solely on New York law. Nonetheless, much of the advice and advocacy suggestions in this Guide are applicable outside of New York.

USE OF THIS GUIDE FOR PURPOSES OTHER THAN CLIENT ADVICE AND ADVOCACY

If you would like to use this Guide or portions of it for training or CLE purposes, whether oral or print, please contact the Justice Strategies unit of the Center for Community Alternatives. Questions about the availability of CCA staff to conduct training or CLEs related to this Guide should also be directed to CCA's Justice Strategies unit.

JUSTICE STRATEGIES

Substantive questions about this Guide and the information contained herein as well as questions about its use should be directed to CCA's Co-Directors of Justice Strategies:

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Patricia Warth, Esq. - (315) 422-5638, ext. 229, pwarth@communityalternatives.org



A GUIDE FOR ATTORNEYS REPRESENTING COLLEGE APPLICANTS AND STUDENTS DURING AND AFTER CRIMINAL PROCEEDINGS

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Part I

THE GROWTH OF CRIMINAL HISTORY SCREENING IN COLLEGE ADMISSIONS

The enmeshed or “collateral” consequences of a criminal conviction affect people long after they have paid their debt to society, creating barriers to employment, housing, civic participation and to a rapidly growing extent, a college education. In recent years, colleges and universities across the United States have increasingly asked applicants about past criminal justice involvement on admissions applications, conducted criminal background checks as part of the application process, and created exclusionary policies based on the information disclosed by applicants or the background checks.¹

There is no evidence that students with criminal history records commit crimes on campus at a rate any higher than other students. Yet, a few high profile crimes and concerns about campus safety and institutional liability have led to admissions policies that now require prospective applicants to disclose their criminal records and even their secondary school disciplinary history. Since 2006, the Common Application,² which is currently used by 488 universities and colleges, has included questions about both criminal convictions and school disciplinary records.³ Many colleges that do not use the Common Application also include such questions on their applications.

The Center for Community Alternatives (CCA) in partnership with the American Association of Collegiate Registrars and Admission Officers (AACRAO) conducted a nation-wide survey to explore the use of criminal records in college applications and admissions and determine how widespread the use of criminal records is. In 2011 CCA released a pioneering report discussing the findings of the survey and the depth of the issue, entitled *The Use of Criminal History*

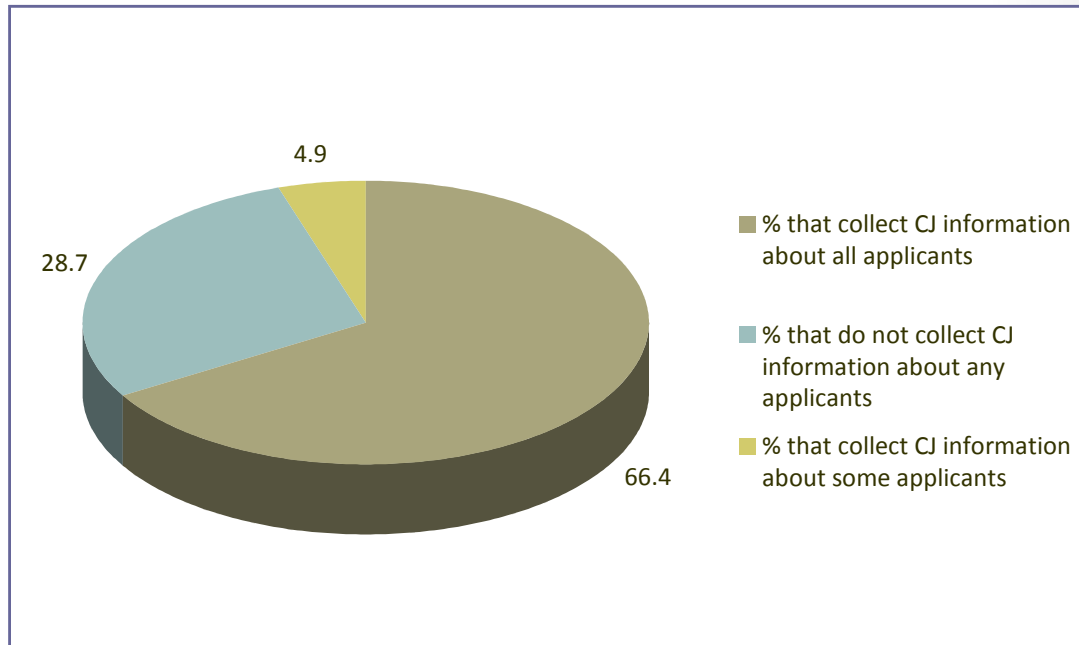
¹ Center for Community Alternatives and National H.I.R.E. Network, *Closing the Doors to Higher Education: Another Collateral Consequence of a Criminal Conviction*, (2008) available at www.communityalternatives.org/pdf/HigherEd.pdf.

² The Common Application is a not-for-profit membership organization that provides a common, standardized college application for use by its member organization. The application is available in online and print version for First-year and Transfer Applications. By using this one application, students may apply to multiple schools who are organization members.

³ Jaschik, S. Innocent (Applicant) Until Proven Guilty. *Inside Higher Ed* (March 6, 2007) available at <http://www.insidehighered.com/news/2007/03/06/common>.

*Records in College Admissions Reconsidered.*⁴ Among other findings, the survey discovered that a majority of the responding colleges collect criminal justice information in the application process. As shown in Figure 1 below, 66.4% of colleges collect criminal justice information.

Figure 1
Practices regarding the collection of criminal justice information



The number of colleges that are members of the Common Application and accept their applications has more than doubled in the past 10 years, so it is anticipated that the use of criminal records in admissions will continue to be a growing problem. Nonetheless, a significant minority - 38% - of the colleges that responded to the CCA survey do not consider criminal justice information in the application process, and none of these colleges indicated any concern that this policy had diminished safety on their campuses.⁵

Current Practices

There are two primary methods through which colleges and universities collect criminal history information: self-disclosure in response to questions on the application; and criminal background checks. Though self-disclosure is the most common practice, 20% of the colleges that responded indicated that they engage in some form of background screening, either in

⁴ Center for Community Alternatives, *The Use of Criminal History Records in College Admissions Reconsidered*, (2010) available at <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

⁵ *Id.*

addition to or instead of self-disclosure.⁶ For the colleges that require self-disclosure on the application, the inquiry may not end with the application. An affirmative response to the self-disclosure question may give rise to a request for additional information or a background check. Examples of information that some colleges request once they learn of an applicant's criminal conviction include:

- Certificate of Disposition
- Letter from parole or probation officer
- Certificate of Relief from Disabilities
- Letter of explanation
- Criminal History Record (Some SUNY colleges specifically require applicants to provide a copy of their personally-obtained Division of Criminal Justice Services (DCJS) Criminal History Record.)

In a recent SUNY draft policy statement (FAQ) all campus admissions offices are being advised that they must request the Criminal History Record from applicants who respond affirmatively to the self-disclosure question. This practice requires an applicant to make a request directly to DCJS to obtain his or her own criminal history record, at his or her own expense, and to submit it to the admissions office. This procedure is particularly troublesome for several reasons. Pursuant to 9 NYCRR § 6050.1, a person may request his or her own DCJS Criminal History Record for personal use and to confirm the accuracy of the criminal history information. The Criminal History Record provided by DCJS to an individual requesting his or her own record is for the requester's "eyes only" as it is an "unsuppressed" copy meaning that it includes arrests and dispositions that have been sealed and "convictions" that resulted in Youthful Offender adjudications that are confidential and are not considered criminal convictions. It is ironic that the instructions to the online SUNY application instruction sheet indicate that an applicant should not disclose a Youthful Offender adjudication, but when an applicant is required to provide the campus admissions office with a DCJS Criminal History Record, the confidential Youthful Offender information contained in that record is improperly revealed and stripped of its confidential nature.

Not all affirmative responses give rise to an automatic exclusion, but many colleges have created at least some criminal justice-related automatic bars to admission. Violent felony convictions and sex offense convictions are the most likely to trigger automatic denial of admission.⁷ Almost forty percent of colleges surveyed require that prospective students have completed any term of community supervision (probation or parole) before they can be admitted.⁸

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*



Examples of Application Questions

College applications differ from college to college and among the various system-wide applications and there is a wide variation when it comes to how the criminal history inquiry is posed. The questions range from those applications that limit the question to felony convictions to other applications that broadly ask about any arrest, even if the arrest did not result in a criminal conviction. Still other applications do not even ask about criminal history. As discussed later in this Guide, being aware of these variations may help you work with a college applicant to develop a strategy that enhances his or her chances for admission. Below are some examples of the questions about criminal history that appear on admissions applications:

Common Application:

Have you ever been adjudicated guilty or convicted of a misdemeanor, felony, or other crime?

☐ Yes ☐ No

[Note that you are not required to answer “yes” to this question, or provide an explanation, if the criminal adjudication or conviction has been expunged, sealed, annulled, pardoned, destroyed, erased, impounded, or otherwise ordered by a court to be kept confidential.]

SUNY [Application Services Center (ASC) online application]:

Have you been convicted of a felony? ☐ Yes ☐ No

The instructions to the SUNY ASC application provide guidance to the applicant as follows: A felony in NY State law is defined as a crime for which more than one year in prison may be imposed. The felony question applies if you have been convicted as an adult. If you have been adjudicated as having juvenile delinquent or youthful offender status, you are required to respond to the felony question 20a by indicating a response of “no.”

It is interesting to note that not all SUNY schools ask for self-disclosure in the same way. For those applicants who use an application to a particular campus instead of the ASC application, the inquiry may be:

Have you ever been convicted of a crime? ☐ Yes ☐ No

There may be no instruction giving guidance as there is with the ASC application.

Depending upon the school the individual is applying to, the applicant may have a choice as to which application to use. For example, a student applying to SUNY New Paltz could elect to apply via the Common Application or the SUNY ASC application.⁹

⁹ SUNY New Paltz is one of 11 of the 64 SUNY campuses that is a member of the Common Application.

Other Examples:

There are colleges that require extensive disclosure about criminal history that extends well beyond a felony or misdemeanor conviction. Below are examples of questions that appear on some far-reaching applications:

- Have you been adjudicated, processed, involved in pretrial diversion or entered into a contract through juvenile court, or arrested without a conviction? ☐ Yes ☐ No
- Have you ever been pardoned or had your record expunged in any court? If so, please provide details as to the crime and conviction. ☐ Yes ☐ No
- Have you ever entered into any pretrial diversion program as an adult? ☐ Yes ☐ No
- Have you been arrested for a crime or an offense? ☐ Yes ☐ No

These questions require applicants to disclose not only arrests that have resulted in criminal convictions, but also arrests for charges that have been dismissed, sealed, expunged, acquitted, pardoned, etc. For example, applicants who have been arrested in New York may be asked about arrests that resulted in a dismissal (and thus are sealed under CPL § 160.50), or a non-criminal offense (which may be sealed under CPL § 160.55), or a Youthful Offender adjudication, (which are deemed confidential under CPL § 720.35). Though these far-reaching questions are of debatable legality and clearly undermine the purpose of New York’s sealing and Youthful Offender statutes, there is no law in New York that explicitly prohibits colleges from asking about or considering sealed arrests or arrests that resulted in Youthful Offender adjudications.¹⁰

These questions are likely to be confusing to college applicants who have been arrested, but whose arrest resulted in a sealing, Youthful Offender adjudication, expungement order, etc. These individuals have often been told by the judge and/or their defense lawyer that they need not disclose these arrests. But should they elect not to disclose, and risk that the college will learn of the arrest and act adversely against them assuming that they “lied” on the application, or should they disclose the arrest and risk not being accepted because of the arrest?

For a more thorough analysis of how to advise clients to answer the criminal history questions on college applications in light of the legal effects of New York’s sealing statutes, conditional sealing, Youthful Offender and Juvenile Delinquency adjudications and other dispositions, see Part V of this Guide.

¹⁰ Human Rights Law § 296(16) prohibits employers and occupational licensing agencies from asking about or considering sealed arrests and arrests that resulted in a Youthful Offender adjudication, but the statute does not extend its protections to the domain of higher education. There is an argument that for arrests that are sealed pursuant to CPL § 160.50, the arrest is a “legal nullity” that need not be disclosed. See CPL § 160.60.



Part II

CRIMINAL JUSTICE INVOLVEMENT: THE POTENTIAL IMPACT ON FEDERAL STUDENT LOAN ASSISTANCE

While many criminal defense attorneys are aware that a person's involvement in the criminal justice system may affect his or her ability to receive federal student loan assistance, there is confusion about the specifics of this impact. Convictions for what types of offenses might affect eligibility for student loan assistance? Does a conviction bar eligibility for life? Do only criminal convictions affect student loan eligibility, or can convictions for non-criminal offenses have an impact as well? These are just some of the commonly asked questions. To answer these questions and others, we begin with the general rule and then address the specifics.

The General Rule

A student's eligibility for any grant, loan, or work assistance is automatically *suspended* if the student is convicted of any *offense* under any state or Federal law involving the possession or sale of a *controlled substance*. This automatic suspension applies *only* if the conviction stems from conduct occurring while the person was receiving student aid. See 20 U.S.C. § 1091(r)(1).

The Specifics

- *The automatic suspension applies only if the conviction involves conduct that occurred while the student was receiving federal student loans.*

Prior to 2006, the automatic suspension applied to convictions stemming from conduct that occurred even when the student was not in receipt of federal student loans. But in early 2006, federal law was amended to narrow the student loan eligibility suspension to only convictions for conduct that occurred while the student was in receipt of federal student loans. See Pub. L. No. 109-71, § 8021, 120 Stat 4 (February, 2006).

The Federal Application for Federal Student Aid (FAFSA) application has been updated to reflect this amendment. Question #23 now asks the following: "*Have you been convicted for the possession or sale of illegal drugs for an offense that occurred while you were receiving federal student aid (grants, loans, and/or work study)?*" Applicants are specifically instructed to answer "No" if the offense was



for conduct that occurred while the applicant was not in receipt of federal student loan assistance.

- *The automatic suspension can apply to criminal and non-criminal offenses involving controlled offenses.*

20 USC § 1091(r)(1) suspends eligibility for federal student loan assistance upon a student's conviction for "*any offense*" involving a "*controlled substance*." "Offense" can include non-criminal as well as criminal offenses. To define "controlled substance," 20 USC § 1091(r)(3) incorporates the definition of "controlled offenses" set forth under 21 USC § 802(6), which includes marijuana. Thus, a student's conviction for Unlawful Possession of Marijuana under New York Penal Law § 221.05 will result in the student's suspension for eligibility for federal student loan assistance, despite the fact that this is a non-criminal offense.

- *The automatic suspension applies to any grant, loan, or work assistance as defined in 20 U.S.C. § 1070 et seq. and 42 USC § 2751 et seq.*

20 USC § 1091(r)(1) specifically suspends eligibility for "any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42." Chapter 28 of Title 20, entitled "Higher Education Resources and Student Assistance" is found at 20 USC § 1070, *et seq.* while part C of subchapter I of chapter 34 of Title 42 refers to "Federal Work Study Programs," which is found at 42 USC § 2751 *et seq.*

- *The period of the automatic suspension depends upon the type of conviction and the number of prior offenses.*

The duration of the suspension begins on *the date of the conviction* and ends after the following intervals:

Type of offense	Ineligibility Period for 1 st Offense	Ineligibility Period for 2 nd Offense	Ineligibility Period for 3 rd Offense
Possession of a controlled substance	1 year	2 years	Indefinite
Sale of a controlled substance	2 years	Indefinite	Indefinite

- *Under certain circumstances, the ineligible student may be able to receive federal student loan assistance prior to the expiration of the suspension period.*

There are three ways by which a student may prove his or her “rehabilitation” and thereby be permitted to receive federal student loan assistance prior to the expiration of the suspension period.

First: The student *completes a drug rehabilitation program* that: (i) complies with criteria established by the Secretary of Education; and (ii) includes two unannounced drug tests. *See* 20 USC § 1091(r)(2)(A). The Secretary of Education’s criteria for drug rehabilitation programs are found at 34 CFR § 668.40, and include programs that: have received or are qualified to receive funds under a Federal, State or local government program; are administered by a Federal, State, or local government agency or court; have received or are qualified to receive payment from Federally or State licensed insurance company; or are administered or recognized by a Federally or State licensed hospital, health clinic, or medical doctor.

Second: As part of a drug rehabilitation that meets the criteria established by the Secretary of Education (set forth above), *the student successfully passes two unannounced drug tests.* *See* 20 USC § 1091(r)(2)(B).

Third: The student’s conviction is “reversed, set aside, or otherwise rendered nugatory.” *See* 20 USC § 1091(r)(2)(C).

The Hope Scholarship Tax Credit

A conviction for a controlled substance offense may also limit a student’s eligibility for the Hope Tax Credit. The Hope Tax Credit allows for tax credits to students or their taxpaying family member, who have incurred education expenses related to the first two years of post secondary education. *See generally* 26 USC § 25A. This tax credit, however, “shall not be allowed for qualified tuition and related expenses for the enrollment or attendance of a student for any academic period if such student has been convicted of a Federal or State felony offense consisting of the possession or distribution of a controlled substance before the end of the taxable year with or within which such period ends.” *See* 26 USC § 25A (b)(2)(D).

Part III

DUTY TO COUNSEL CLIENTS ON ENMESHED CONSEQUENCES OF CRIMINAL JUSTICE INVOLVEMENT

Introduction

For the past three decades, a growing number of professional organizations, including local, state, and national bar organizations, have recognized that defense counsel have a duty to advise their clients of the “invisible” consequences of a criminal conviction – that is, those penalties that are not pronounced in court at sentencing, but which flow from the conviction and have the potential to significantly impact a person’s life. The recognition of this duty arises from the reality that in today’s world, a criminal conviction results in life-long punishment.

There are at least three phenomena that have contributed to this perpetual punishment:

- 1) Decision-makers in the domains of employment, housing, volunteer work and other areas are increasingly more likely to conduct criminal history record checks on applicants.¹¹
- 2) The incredible growth of private, for-profit background check companies has made it easier and less-expensive to obtain a person’s criminal history record. As noted by a recent report: *“Despite its promotion as a public service, the sale of criminal background reports has become a big business generating billions of dollars in revenue. The Internet has facilitated the emergence of scores of online background screening companies, with many claiming instant access to millions of databases.”*¹²
- 3) Our “tough on crime” policies have not only resulted in harsher sentencing laws, but also a growing array of barriers to employment, housing, public benefits, and student aid for people with criminal records. The existence of these needless barriers to living a full, law-abiding life in the community was aptly captured in a recent report of a special committee of the New York State Bar Association, which concluded as follows:

¹¹ This growing trend of colleges and universities to conduct background checks is discussed in CCA’s report, *“The Use of Criminal History Records in College Admissions Reconsidered.”*

¹² National Consumer Law Center, “Broken Records: How Errors by Criminal Background Check Companies Harm Workers and Businesses,” (2012), available at: <http://www.nclc.org/issues/broken-records.html>



New York has unwittingly constructed formidable barriers to those attempting to re-enter society following interaction with the criminal justice system... As they presently stand, these collateral consequences hinder successful reintegration by restricting access to the essential features of a law-abiding and dignified life - family, shelter, work, civic participation, and financial stability. These barriers doom us all: those blocked from successful re-entry find themselves on the road to recidivism, and the rest of us pay the price.¹³

The Standards and Guidelines

Professional organizations now recognize that because of the life-long, albeit “invisible,” nature of the consequences of a criminal conviction, people arrested for a criminal offense cannot make informed decisions about possible dispositions of their cases unless the “invisible” penalties are revealed to them. A sampling of these professional standards and guidelines requiring counsel to identify and discuss these so-called “invisible penalties” – most often referred to as “collateral consequences” – is set forth below:

AMERICAN BAR ASSOCIATION: CRIMINAL JUSTICE STANDARDS

In 1993, the American Bar Association (ABA) adopted “black letter” standards for criminal defense lawyers, prosecutors and judges which are set forth in the “*ABA Standards for Criminal Justice*.” The section pertaining to guilty pleas, *Criminal Justice Standards on Pleas of Guilty*, includes the following standard:

Standard 14-3.2. Responsibilities of Defense Counsel

- (f) To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from the entry of the contemplated plea.

Ten years later, in 2003, the American Bar Association went a significant step further, adopting *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*. One commentator referred to these new standards as the “first effort since

¹³ Special Committee of the New York State Bar Association, “Re-Entry and Reintegration: The Road to Public Safety,” (available at the publications section of the New York State Bar Association at www.nysba.org), at 443.

the 1970s to address the collateral legal consequences of a conviction in a coherent and comprehensive fashion.”¹⁴

The ABA’s comprehensive approach to hidden punishments includes standards that are designed to accomplish the following: i) *expose hidden punishments* by requiring legislatures to collect and compile all collateral punishments in a single part of the jurisdiction’s criminal code; ii) *limit the existence of hidden sanctions* by prohibiting legislatures from imposing collateral sanctions that are not necessary to promote safety; iii) *ensure that defendants are notified of hidden sanctions*; iv) *require consideration of hidden sanctions* by requiring judges to consider such sanctions when deciding upon a sentence; v) *ameliorate hidden sanctions* by calling upon legislatures to enact laws and procedures that allow for review or modification of and waiver or relief from these sanctions; and vi) *prohibit unreasonable discrimination* based upon a person’s conviction history.

Unfortunately, these ABA standards differentiate between “collateral sanctions” and “discretionary disqualifications” stating that the stronger standards apply to the former while the weaker ones apply to the latter. “Collateral sanctions” are defined as “a legal penalty, disability or disadvantage, however, denominated, that is imposed on a person automatically upon that person’s conviction for a felony misdemeanor or other offense, even if it is not included in the sentence,” while “discretionary disqualification is “a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.” The financial aid bars described in Part II of this manual are clearly “collateral sanctions,” necessitating that, at the very least and *prior* to the entry of a guilty plea, defense counsel identify and counsel clients on this hidden sanction, and the possible dispositions that can ameliorate or avoid it.

The barriers to admission to college, which are described in Part I of this manual, can be characterized as “discretionary disqualifications.” However, defense counsel should not view the ABA standards as alleviating their responsibility to counsel clients on the barriers to college admission that are erected by criminal justice involvement. This is true for several reasons. First, the barriers to college admission are real and significant, as discussed in CCA’s report, *The Use of Criminal History Records in College Admissions Reconsidered*. From the perspective of a person with a conviction history who is seeking admission to college, the reality of this sanction is not diminished merely because it is not codified. Second, other professional standards, some of which are set forth below, do not make this distinction. Finally, for good reason, the ABA’s distinction has been criticized by practitioners who regularly work with people who have a past conviction history. As one practitioner stated: “[M]any of the most dangerous hidden punishments qualify only as ‘discretionary disqualifications’ under the current definition. Most immigration, public housing, and employment decisions require the intervening decision of an independent court, agency, or official.”¹⁵

¹⁴ Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URBAN L. J. 1705, 1727 (2003).

¹⁵ McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 UNIVERSITY OF TOLEDO L. R. (2005) 479, 493.



NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION

In 1995, the National Legal Aid and Defenders Association (NLADA) adopted *Performance Guidelines for Criminal Defense Representation*. Several sections of the NLADA Guidelines instruct defense counsel of their responsibilities with regard to the life-long consequences of criminal justice involvement, including the following:

Guideline 6.2. The Contents of Plea Negotiations

- (a) In order to develop an overall negotiations plan, counsel should be fully aware of, and make sure the client is fully aware of: ...
- (3) other consequences of conviction, such as deportation, and civil disabilities...

Guideline 6.4. Entry of the Plea before the Court

- (a) Prior to the entry of the plea counsel should:
- (2) make certain that the client fully and completely understands the conditions and limits of the plea agreement and the maximum punishment, sanctions *and other consequences the accused will be exposed to by entering a plea*. (Emphasis added).

Guideline 8.2. Sentencing Options, Consequences and Procedures

- (b) Counsel should be familiar with direct and collateral consequences of the sentence and judgment, including:
 - (8) deportation;
 - (9) use of the conviction for sentence enhancement in future proceedings;
 - (10) loss of civil rights;
 - (11) impact of a fine or restitution and any resulting civil liability;
 - (12) restrictions on or loss of license.

NEW YORK STATE BAR ASSOCIATION

In 2010, the New York State Bar Association (NYSBA) issued its Revised Standards for Mandated Representation, designed to ensure the delivery of high quality criminal defense services. The following Standards discuss counsel's duties relevant to the so-called "collateral" consequences of a criminal conviction:

Standard I-7: Criminal Matters

No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high quality representation. Such representation at the trial court stage means, at a minimum:

- a. Obtaining all available information concerning the client's background and circumstances for purposes of ... (v) avoiding, if at all possible, collateral consequences including but not limited to deportation or eviction...



e. Providing the client with full information concerning such matters as ... (v) immigration, motor vehicle licensing, and other collateral consequences under all eventualities...

NEW YORK STATE DEFENDERS ASSOCIATION

In 2004, the New York State Defenders Association adopted “Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State.” Standard VIII, A, Duties of Criminal Defense Counsel, includes the following as number 7:

Counsel should ordinarily meet with the client before entering into plea negotiations, and should explore the possibility and desirability of reaching a negotiated disposition of the charges rather than proceeding to trial.... **Counsel should be fully aware of and make sure the client is fully aware of, all direct and potential collateral consequences of a conviction by plea.** Counsel should develop a negotiation strategy based on knowledge of the facts and law of the particular case, the practices and policies of the particular jurisdiction, and the wishes of the client....

This standard puts squarely upon defense counsel the duty of identifying and discussing with the client what the life-long consequences of a conviction may be. The NYSDA standard does not distinguish between “collateral sanctions” and “discretionary disqualifications,” but instead requires defense counsel to learn of all “direct *and potential* collateral consequences.”

The Duty to Counsel

Taken as a whole, these professional standards and guidelines clearly lay out the duty of defense counsel to fully inform clients about the enmeshed penalties of a criminal conviction. *See Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct. 1473, 1482 (2010) (citing these and other sources in holding that the Sixth Amendment right to the effective assistance of counsel mandates that non-citizen defendants be provided advice, prior to pleading guilty, on the immigration consequences of a conviction).

In the context of barriers to higher education, what does this duty to counsel mean? This question is discussed more fully in the next section of this Guide entitled, *Practice Tips: Providing Advice and Representation*.

Part IV

PRACTICE TIPS:

PROVIDING ADVICE AND REPRESENTATION

Advising clients about barriers to higher education caused by a criminal history record has taken on new importance in light of the expanding use of criminal history screening in college admissions discussed in Part I.

There is a second phenomenon that heightens the need for attorneys to provide representation and advice with this particular barrier in mind – mass criminalization. A criminal history record is now commonplace. As of December 31, 2008, over 92 million adults in the U.S. have a criminal history record (for a misdemeanor or felony arrest or conviction) on file with one of the state criminal history central repositories.¹⁶ A study published in 2012 shows that nearly one-third of American adults have been arrested for illegal or delinquent offenses, excluding minor traffic offenses, by age 23.¹⁷ One of the authors of this study, Robert Brame, told USA Today that, “Arrest is a pretty common experience.”¹⁸

Since there are currently more than 20 million¹⁹ college students enrolled at institutions that confer degrees, undoubtedly, in the course of your practice you will encounter a situation in which you will need to provide guidance and advocacy for a client regarding this issue.

In this part we will address this issue in two different contexts. First, we will discuss advice and representation that should be provided while the criminal case is pending, for both the currently enrolled college student and for the aspiring student who intends to apply to college. Second, we will discuss advice that an attorney should provide after the disposition of the criminal case with regard to the college application process.

Advice and Representation While the Case is Pending

Your representation in most criminal cases should include interviewing and advising your client as to the following:

¹⁶ Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2008*, CRIMINAL JUSTICE INFORMATION POLICY REPORT, Washington, D.C., October 2009.

¹⁷ Robert Brame, Michael G. Turner, Raymond Paternoster, and Shawn D. Bushway, “Cumulative Prevalence of Arrest From Age 8 to 23 in a National Sample,” *PEDIATRICS*, (January 2012): 21-27.

¹⁸ Donna Leinwood, “Study: Nearly One in Three Will Be Arrested by Age 23,” *USA Today*, Dec. 19, 2011.

¹⁹ National Center for Educational Statistics, *Digest of Educational Statistics* (enrollment fall 2009), Table 196.



1. *Determine if your client is currently enrolled in college. If so,*

Determine if your client is currently receiving financial aid; if so, advise your client as to the consequences of a conviction for a drug offense.²⁰

- i) Determine what the college policy is with regard to arrests and convictions while enrolled as a student to decide if your client has an affirmative duty to disclose the arrest or conviction to college officials, and if so, what the implications of this disclosure will be as well as the implications of failing to disclose.
- ii) Determine if your client will be subject to a college administrative hearing and what the procedures will be and advise accordingly.
- iii) Explain the consequences of a criminal conviction with regard to applying to graduate school and/or pursuing a career that requires occupational licensing. Many careers, not just professional ones, require some kind of licensing. A helpful resource for attorneys whose clients live and work in New York is the Legal Action Center's "New York Occupational Licensing Survey."²¹

2. *If your client is not currently enrolled in college, determine if your client aspires to continue his or her education to the post-secondary level. If so,*

- i) Explain how a criminal conviction may cause barriers to admission to institutions of higher education and how criminal history records are used to screen students in the admissions process at a majority of colleges and universities.
- ii) Talk to your client to help him or her prioritize what consequences of the criminal conviction he or she wants to address.
- iii) Explain to your client the possible and realistic dispositions of the case and how each may ameliorate the consequences in terms of his or her higher education goals.
 - Youthful Offender Adjudication
 - Adjournment in Contemplation of Dismissal
 - Dismissal
 - Plea to a violation
 - Plea down from felony to misdemeanor
 - Sealing Statutes (CPL 160.50 and CPL 160.55)
- iv) Discuss with you client and provide advice about the best and realistically achievable disposition.

²⁰ See Part II of this Guide.

²¹ This survey is available on-line at:

http://lac.org/doc_library/lac/publications/Occupational%20Licensing%20Survey%202006.pdf.



- v) Explain to your client what can be done to ameliorate the disposition, including, for example, applying for the following:
 - Certificate of Relief from Disabilities or Certificate of Good Conduct pursuant to Correction Law § 700, et seq.
 - Conditional Sealing (CPL §160.58)
- vi) Carefully describe and clarify the nature of the disposition of the case so that the client can later explain the disposition on an application or during an interview. It is best to follow up this conversation with a letter so your explanation is memorialized in writing for your client to review at a later date in time.

3. Whether or not your client is in college at the time of arrest, explain how he or she can obtain a copy of his or her official criminal history record and recommend that this be done. This will provide your client an opportunity to check to make sure that the disposition was properly recorded and that the record properly reflects any sealing, conditional sealing, or YO adjudication from which your client should have benefited.²² Impress upon your client the importance of doing this. Explain that if the answer he or she gives to a criminal history question does not correspond to the background check that the college receives, the college may use this as a basis to deny admission. CCA's study found that college admissions officers are likely to assume that a student has falsified an application even when it is an honest misunderstanding or when the background check is erroneous and contains information at odds with the applicant's disclosure.²³

4. Develop and employ the negotiation strategies discussed in Part VI of this guide.

²² Instructions on obtaining a personal DCJS record are available at: <http://www.criminaljustice.ny.gov/ojis/recordreview.htm>. Instructions on obtaining a personal FBI criminal history record are available at: <http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi>.

²³ *The Use of Criminal History Records in College Admissions Reconsidered* at p. 19. Thirty-two percent of schools that consider criminal history information reported that they automatically deny admission to applicants who fail to disclose their criminal record and 46 percent stated that they might deny admission. Most of the comments offered in conjunction with this question on the CCA survey suggest that failure to disclose a criminal record is considered to be a deliberate act of lying or falsification.

Post-Disposition Advice About the College Admissions Process

After the disposition of the case you close your file. However, for your clients, the enmeshed consequences that flow from the case never allow them to close their files. Long after a case is over, a former client may return to your office with questions about a college application, or a new client may consult with you about her desire to apply to college but concerned that her criminal history may stand in the way. Below are some issues that you may want to explore with your client should you find yourself in this situation.

1. Help your clients obtain their criminal history record from the Division of Criminal Justice Services (DCJS) and the FBI.²⁴ This will allow you and your clients to know exactly what their criminal history is.

- Do not rely on your clients' recollection of the disposition. Most people are confused about what their record is and as a result, do not accurately report it. Explain to your clients why accuracy is important and as noted above, make them aware that any inaccuracy in their reporting of a disposition may cause the admissions officer to assume that they are intentionally falsifying information if it is different than what appears on a background check.

2. Carefully review the criminal history record with your clients. Review each cycle shown to identify:

- Errors, oversights, mistaken entries, etc.
- Pending arrests and/or incomplete entries

3. Correct errors that you find in the DCJS record and resolve incomplete cycles. These corrections may include:

- Incorrect dispositions
- Failure to indicate that an arrest resulted in a Y.O. adjudication
- Failure to enter sealing order

²⁴ See note 21, *supra*.



4. For each cycle/disposition, explain to your clients what the disposition actually was and the legal significance. Here is some common terminology that needs to be explained:

- Was there a conviction for a felony, misdemeanor, or violation?
- Is the disposition reportable as a criminal conviction?
- What does an “A.C.D.” mean? What does a “C.D.” mean?
- What does a Y.O. adjudication mean?
- What does it mean if your client’s case was handled in Family Court as a J.D.?
- What if your client’s case was handled in adult court as a J.O.?
- What does a sealing under CPL § 160.50 or § 160.55 mean?
- What about a conviction that has been conditionally sealed under CPL § 160.58?

5. Explain to your clients how each disposition legally entitles them to respond to questions that may be included in any application. *For example:*

- Have you ever been convicted of a crime?
- Have you ever been convicted of an offense?
- Have you been convicted of a felony?
- Have you ever been convicted of a misdemeanor, felony or other crime?
- Have you ever been arrested?

6. Explain to your clients that different colleges have different policies. About one-third of all colleges do not consider criminal records, however, a majority of colleges do. Some colleges rely entirely on self-disclosure while others do their own background checks or pay a private company to do so. Still others utilize self-disclosure, and for positive responses, engage in a more far-reaching backgrounding and disclosure process. CCA’s report, *The Use of Criminal History Records in College Admissions Reconsidered*, is helpful to familiarize yourself with many of the different policies.

7. Explain to your clients that while some colleges use the criminal justice information to exclude all or some people with certain types of convictions, other colleges do not engage in automatic exclusions, instead using a more balanced and thoughtful approach. For example:

- SUNY relies on the multi-factor analysis of Article 23-A of New York’s Correction Law.
- For clients interested in a SUNY school, review Article 23-A with them.

8. Review an application, or several different applications with your client, with an eye towards the particular criminal history question contained in each.

- Point out the differences in how the SUNY application, the Common Application, and the CUNY application treat the criminal history question.

9. With these three types of applications in mind, you should point out that different applications ask the criminal history question in significantly different ways and that some do not ask at all.

10. Help your client choose which application to use. Some colleges use an application form that is unique to their own college or campus. Other colleges that are part of a state or city-wide system accept either the system-wide applicant (i.e. SUNY ASC) or their own unique form. These same schools may also be members of the Common Application and will accept that application form as well. Since each of these application forms may ask a significantly different version of the criminal history question, it is in your client's best interest to wisely choose which application to use.

- Compare the SUNY application criminal history question with how that question is worded in the Common Application.
- Note how an applicant with a misdemeanor conviction would not have to disclose that conviction when responding to the SUNY application but would have to disclose when responding to the Common Application question.

11. Different application forms provide different instructions regarding responses to the criminal history question. Some provide no instructions at all. Note that the instructions may differ significantly, particularly regarding what dispositions need not be reported (exclusions).

- Compare the exclusions in the SUNY application and in the Common Application. (See Part I).
- A review of these instructions and exclusions will help you guide your client as to which application to use when there is a choice of using two different applications for the same college. (i.e. Some SUNY schools accept either the SUNY ASC application or the Common Application).

12. Some colleges are much more transparent and forthright in the process they use when screening from criminal history records, while others are far less transparent about their process. When possible, review with your client the policies of the schools in which he or she has expressed an interest.

13. Review with your client whether his conviction for a drug offense (felony, misdemeanor, or even a violation) occurred while he was receiving federal student aid. If so, explain the automatic suspension period that is applicable and if the suspension period is still in effect, explain what your client can do to become eligible for federal student assistance by proving "rehabilitation." (See Part II of this Guide).

14. Prepare and encourage your client to proactively submit proof of rehabilitation, transformation, changes in goals and attitudes, insights into prior criminal behavior, and reasons he or she is pursuing higher education. This may be part of a personal statement he or she submits with the application.

15. Warn your client about the danger of providing too much information. Some schools do not ask for self-disclosure of criminal history information on the application. However, if an applicant supplies such information in a personal statement or essay, that information may trigger further inquiry from the admissions office that would not have been made had the information not been volunteered. For some of your clients this may be a difficult choice. Understandably the applicant may be very proud of the accomplishment and transformation in his or her life during and/or post-incarceration and want to share it. This should be done with great caution and careful forethought.

16. Encourage your client to request a personal interview when possible. Prepare your client for this interview.

- How to address criminal history
- How to discuss rehabilitation, transformation, motivation, and lessons learned

17. Explain to your client what he or she can do to mitigate his or her criminal history.

- Certificate of Relief from Disabilities or Certificate of Good Conduct
- Conditional sealing

18. A difficult question arises if your client applies to a college that asks applicants to provide the admissions office with a personally-obtained DCJS criminal history record. For most SUNY colleges, this is now standard practice once an applicant discloses a felony conviction on the application as discussed in Part I. A review of the client's DCJS record will allow you to point out that there may be information shown on the record that would otherwise be sealed from public view or is confidential. Disclosure does not mean automatic denial of admission, but your client should be forewarned. Your client may wish to proceed or may decide to save the time and effort and apply to a school where the talent, diversity, perspective, and other contributions to campus life that he or she has to offer will be appreciated.

Part V

HOW TO ADVISE A CLIENT ABOUT ANSWERING THE CRIMINAL HISTORY QUESTION ON A COLLEGE APPLICATION

Practice Advisory

Advising a client about how to respond to the criminal history question on a college application – which has various versions depending on the application - is indeed challenging. It requires both a mastery of New York’s sealing and confidentiality laws that are intended and carefully designed to prevent discrimination and avoid the stigma that attaches from an arrest or conviction. It requires a deep understanding of how criminal justice information can contain errors, be misconstrued, and be easily accessed. It also requires giving careful guidance when simple legal answers do not suffice. As noted at the end of Part I, it requires a balancing of the “black and white” legally defensible answer with the more nuanced concern that an admissions officer will not understand the legal justification for a negative response to the criminal history question and will instead assume that there has been an intentional misrepresentation if he or she becomes aware of some seemingly contrary criminal history information. This may result in a denial of admission (or, after admission, a dismissal) without providing the applicant with an opportunity to explain.

In some instances, the application questions that call for the disclosure of information that has been sealed or deemed confidential results from admissions officers’ lack of expertise about criminal justice issues. In many other instances, however, college admissions officials have intentionally designed questions that require the disclosure of sealed and confidential information. Such questions are not merely improper and possibly illegal, they also thwart public policy designed to protect against the disclosure of certain information as a means of preventing needless discrimination, promoting a person’s successful reintegration into the community, and ultimately enhancing public safety. It is ironic that in their efforts to keep their college campuses safe, some gatekeepers of higher education flagrantly violate public policy and evade legal restrictions. Not only do these improper questions create a dilemma for the applicant, they send a message that in the name of campus safety, many admissions officers have come to engage in questionable practices.

Though improper and possibly illegal, many colleges persist in this problematic practice. When advising their clients, thoughtful lawyers balance the practical reality that colleges often act adversely against applicants who do not disclose the requested information against the legally



authorized responses that college applicants may provide. As you guide your client through the criminal history question(s) on the application you must ensure that your explanation of each of the legally defensible answers suggested below, or the many others that we have not anticipated, are accompanied by a counseling session that reviews the pros and cons of the responses and the possible repercussions caused if the college later learns of the information that the applicant elected - lawfully – to keep confidential. Do not simply provide the answer suggested below. Your most valuable advice is that which is practical.

Never assume that any particular answer is safe and that information will not arise at a later date to contradict the answer provided on the application. Information about your client's criminal history may be revealed in any number of ways. More and more colleges are using internet searches, Facebook searches and the like to search for background information. Some colleges use private background checks. Others require background checks for participation in subsequent internship programs. Disgruntled fellow students have been known to contact the admissions office upon learning of a fellow student's past arrest. For those students who may have multiple criminal justice entries, disclosure of one, perhaps a valid conviction, may lead to disclosure of another that would otherwise be kept confidential.

Legally Authorized Answers to Common College Application Questions

Below are legally authorized answers to questions that commonly appear on college applications with a brief justification for the answer.

I. IF YOUR CLIENT WAS ADJUDICATED A YOUTHFUL OFFENDER

Question: Have you been convicted of a crime?

Answer: No.

The answer "no" to this question is based upon the Youthful Offender statute itself, CPL § 720.35. The statute provides that:

- 1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense...*
- 2. Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential...*



Question: Have you been adjudicated guilty of a crime?

Answer: No.

Although the question asks about an adjudication of guilty of a crime rather than about a conviction the answer remains “no.” This is how the question is posed on the Common Application. There are at least two reasons why the answer to this question would be “no,” if responding to the common application. First, a Youthful Offender adjudication is comprised of a Youthful Offender finding and a Youthful Offender sentence. [CPL § 720.10 (6)]. It is not an adjudication that one is guilty of a crime. Second, the Common Application excludes from this question any adjudication that has been ordered by a court to be kept confidential. Upon the judge adjudicating a youth a Youthful Offender, CPL § 720.35 (2) specifically provides that all official records are confidential. It would appear that the adjudication and statute would place a Youthful Offender adjudication within the Common Application’s confidentiality exclusion.

Question: Have you been arrested for a crime?

Answer: Yes, although the more legally correct - albeit less practical - response is to refuse to answer this question based upon the confidentiality bestowed by the Youth Offender statute.

This is a good example of a question that is improper to ask on an application. The law in New York is quite clear that the confidentiality conferred by CPL § 720.35 (2) attaches not only to the physical documents constituting the official record of the adjudication of a Youthful Offender but also to the information contained in those documents, including the arrest and the charges. *Barnett v. David M.W.*, 22 A.D.3d 575 (2nd Dept. 2005). As the court in *Barnett* held, a person adjudicated a Youthful Offender can refuse on grounds of confidentiality to answer questions about charges filed against him or her. To require disclosure of charges or an arrest by a person adjudicated a Youth Offender would undermine the statutory grant of confidentiality. *State Farm Fire and Casualty Co. v. Bongiorno*, 237 A.D.2d 31 (2nd Dept. 1997). College admissions officers – or at least their legal counsel - should know this. Yet they continue to ask the question knowing that practically, applicants cannot refuse to respond based upon confidentiality. This question on a college application flies in the face of the public policy of which “the confidentiality of information is part of the comprehensive legislative plan to relieve youth offenders of the consequences of a criminal conviction and give them a ‘second chance.’” *Id.* at 36.

This question also helps to illustrate another strategy you may wish to employ. Although a particular college’s application may ask about arrests and create the quandary about how to reply for your client who was adjudicated as a Youth Offender, you may want to determine whether that very same college accepts the Common Application, which does not ask about arrests but only convictions.

II. IF YOUR CLIENT WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND THE CASE WAS SUBSEQUENTLY DISMISSED

Question: Have you been convicted of a crime?

Answer: No.

The answer “no” is based upon the ACD statute itself, which provides that an ACD “shall not be deemed a conviction or an admission of guilt.” [CPL § 170.55 (8)].

Question: Have you been arrested for a crime?

Answer: No.

The answer “no” in this context requires some statutory analysis coupled with case law:

- Both ACD statutes, CPL §§ 170.55 (8) and 170.56 (4) provide that upon the dismissal of the accusatory instrument “the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.”
- Since an ACD dismissal meets the definition in CPL § 160.50 (3) of a “termination of a criminal action in favor of the accused” it gets the benefit of the provisions of CPL § 160.60, which provides both that “the arrest and prosecution shall be deemed a nullity” and that “no such person shall be required to divulge information pertaining to the arrest or prosecution.” This key terminology ties into the holding in two cases below, *Kushner v. De La Rosa* and *People v. Ellis*.
- In *Kushner v. De La Rosa*, 72 Misc.2d 319 (Sup. Ct. Queens Co. 1972) the court focused on the language in the ACD statute – “the arrest...shall be deemed a nullity...” to conclude that a person who is conferred the benefit of such statutory language is entitled to legally deny a question about the arrest.
- The court in *People v. Ellis*, 184 A.D.2d 307 (1st Dept. 1992) also concluded that a person could deny an arrest when the criminal action was terminated in favor of the accused, however the *Ellis* court focused on different language. Relying upon the language of CPL § 160.60 that provides that “no such person shall be required to divulge information pertaining to the arrest or prosecution,” the court concluded that a person could “deny the existence of prior arrests” that resulted in dismissal of charges and were sealed. The negative answer to the arrest question condoned by the holding in *Ellis* was recently approved in *Padilla v. Bailey*, 2012 WL 4473958 (SDNY 2012).

III. IF YOUR CLIENT'S CASE WAS DISMISSED AND SEALED PURSUANT TO CPL § 160.50

Question: Have you been convicted of a crime?

Answer: No.

Because the charge has been dismissed there has been no conviction.

Question: Have you been arrested for a crime?

Answer: No.

The legally proper answer is “no” because the sealing pursuant to CPL § 160.50 receives the protection of CPL § 160.60. The language in CPL § 160.60 and the applicable case law – *Ellis* and *De La Rosa* – for the reasons discussed above in the ACD section authorize a person to legally deny the arrest question.

As noted above, knowing the legal answer is only half of the equation in giving sound advice to your client. What if this arrest surfaces later? What if the college requires a DCJS criminal history record for another conviction, and this arrest is revealed? It is important to know the law and the protection it provides, but to also consider the practical implications of denying the arrest.

IV. IF YOUR CLIENT WAS CONVICTED OF A VIOLATION WITH OR WITHOUT CPL § 160.55 SEALING

Question: Have you been convicted of a crime?

Answer: No.

The answer is “no” based upon the definition of “crime” found in Penal Law § 10.00 (6) which is defined as “a misdemeanor or a felony.” A conviction for a violation is neither and is therefore not a crime.

Question: Have you been convicted of an offense?

Answer: Yes.

The answer is “yes” because under the Penal Law, a violation is defined as an offense. The answer is “yes” even if the violation was sealed pursuant to CPL § 160.55. This is because a CPL § 160.55 sealing does not benefit from CPL § 160.60, and thus there is nothing defining a CPL § 160.55 sealing as a “legal nullity” which one shall not “be required to disclose.” Moreover, though Human Rights Law § 296(16) states that *employment* applicants shall not be required to divulge arrests that resulted in CPL § a 160.55 sealing, this protection does not explicitly extend to the domain of higher education.



Question: Have you been arrested for a crime?

Answer: No - if the arrest charges included only violation charges, since a violation is not a crime.

Yes - if the arrest charges included at least one misdemeanor or felony offense, which are criminal offenses.

Question: Have you been arrested for any offense?

Answer: Yes.

For the same reasons discussed above about the question regarding a conviction for an offense, there appears to be no protection from such a question.

V. IF YOUR CLIENT WAS CONVICTED OF A CRIME BUT THE CONVICTION WAS CONDITIONALLY SEALED PURSUANT TO CPL § 160.58

Question: Have you been convicted of a crime?

Answer: Yes.

CPL § 160.58 sealing does not benefit from CPL § 160.60 and its “legal nullity” language. Additionally, while Human Rights Law § 296(16) prohibits employers from asking job applicants to disclose conditionally sealed convictions, this statute does not explicitly extend to the higher education domain. Thus, there appears to be no protection from such a question.

Exception: If the instructions to the criminal history question in the application provide for an exclusion for sealed records then the answer to this question should be “no.”

Question: Have you been arrested for a crime?

Answer: Yes.

For the same reasons stated above, there appears to be no protection from such a question.

VI. IF YOUR CLIENT WAS CONVICTED AS A JUVENILE OFFENDER

Question: Have you been convicted of a crime or a felony?

Answer: Yes to either question.

Since a Juvenile Offender is treated as criminally responsible as an adult and because the juvenile is considered to have an adult criminal record, the answer is “yes.”

Exceptions:

- i) If your client was adjudicated a Youthful Offender after the Juvenile Offender conviction then the answer to this question would be “no” because there has been no conviction for a crime as explained in the above section on YO. [CPL § 720.35 (1)].
- ii) Note should be taken for a client who is applying to a SUNY college. In 2012 SUNY issued a draft FAQ that instructed that “if an applicant was convicted of a felony as a Youthful Offender, Juvenile Delinquent, or Juvenile Offender, or has otherwise had their records sealed...” the applicant “should answer ‘no’” to the criminal history question on the application.

Question: Have you been arrested for a crime?

Answer: Yes.

There is no apparent protection from this question even if the Juvenile Offender was adjudicated a Youthful Offender. See note to YO question above.

VI. IF YOUR CLIENT WAS ADJUDICATED A JUVENILE DELINQUENT IN FAMILY COURT

Question: Have you been convicted of a crime?

Answer: No.

The answer to this question is “no” based upon the provision in the Family Court Act § 385.1 (1) that a Juvenile Delinquency adjudication shall not be denominated a conviction and no such person so adjudicated shall be denominated a criminal.

Question: Have you been adjudicated guilty of a crime?

Answer: No.

Although the question asks about adjudication rather than conviction, the answer remains “no.” Section 380.1 (1) of the Family Court Act provides that no adjudication as a JD shall be denominated a conviction nor shall such juvenile “be denominated a criminal.” That provides some basis for a negative answer. In addition, Family Court Act § 380.1 (3) provides that “no person shall be required to divulge information pertaining to the arrest...or any subsequent proceedings” regarding a juvenile delinquency proceeding. That non-disclosure language is the same as the language focused upon by the court in *People v. Ellis*, 184 A.D.2d 307 (1st Dept. 1992) to authorize a negative response to an inquiry about an arrest. Counsel should also review the Family Court records with the client. You may find that the records were expunged (Family Court Act § 375.3), sealed (Family Court Act § 375.1, or destroyed (Family Court Act § 354.1). Once you have determined the status of the juvenile delinquency records you may find



that the instruction to the criminal history question provides exclusions for adjudications that have been expunged, sealed or destroyed, as is the case for the Common Application.

Question: Have you been arrested for a crime?

Answer: No.

For some of the same reasons addressed above regarding the question about whether the applicant was adjudicated guilty of a crime, the appropriate answer is “no.” Reliance upon the statutory language that prohibits requiring any person “to divulge information pertaining to the arrest” regarding a juvenile delinquency proceeding when read in conjunction with the *Ellis* case provides sound basis for a negative response to this question.

Part VI

USING THE EXISTENCE OF THE ENMESHED CONSEQUENCES AS LEVERAGE FOR BETTER ADVOCACY AND OUTCOMES

In a 2009 landmark decision, the United States Supreme Court held that criminal defense attorneys have the affirmative duty to accurately inform their non-citizen clients of the immigration consequences of a guilty plea, particularly deportation. *See Padilla v. Kentucky*, 599 U.S. ___, 130 S.Ct. 1473 (2010). While the *Padilla* decision deals most directly with the advice that defense counsel must provide to their non-citizen clients, the decision also encourages defense counsel to use the *existence* of the so-called “collateral consequences” of a conviction to leverage better outcomes.

The *Padilla* underpinnings for this strategy, and approaches to best effectuate it, are outlined in The Bronx Defenders publication, “Defender Toolkit & *Padilla* Compliance Guide: Using Knowledge of ‘Enmeshed Penalties’ (or Collateral Consequences) to Get Better Results in the Criminal Case.” (“*Padilla* Compliance Guide”). This publication is available at: <http://www.reentry.net/ny/library/item.135140>.

McGregor Smyth has also written the following two companion articles that discuss in more detail how to use the existence of “collateral consequences” to leverage better dispositions:

“From ‘Collateral’ to ‘Integral’: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation” HOWARD LAW REVIEW, Vol. 54, No. 3, 795 (2011), available at: [www.reentry.net/ny/library/folder.128172-Manuals and Overviews of Reentry and Collateral Consequences](http://www.reentry.net/ny/library/folder.128172-Manuals%20and%20Overviews%20of%20Reentry%20and%20Collateral%20Consequences).

“‘Collateral’ No More – The Practical Imperative for Holistic Defense in Post-Padilla World... Or, How to Get Consistently Better Results for Clients,” in publication, will be available at: [www.reentry.net/ny/library/folder.128172-Manuals and Overviews of Reentry and Collateral Consequences](http://www.reentry.net/ny/library/folder.128172-Manuals%20and%20Overviews%20of%20Reentry%20and%20Collateral%20Consequences).

Many of the concepts discussed below are taken from the Bronx Defender's "*Padilla* Compliance Guide" and McGregor Smyth's articles. The information in this part is not intended to supplant the "*Padilla* Compliance Guide" or articles, but instead to pique the interest of defense attorneys and encourage them to read further.

Padilla Revisited: A Framework for Better Advocacy

For years, advocates have recognized the ever-increasing punishments associated with criminal justice involvement and described its broader impact on lawyering:

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability of criminal history data to alter drastically the impact of criminal charges on clients – and the practice for lawyers.²⁵

In *Padilla*, the United States Supreme Court recognized that these so called "collateral consequences" can result in life-long punishment, and that it is no longer constitutionally permissible for defense lawyers to ignore this reality in representing their clients. The Court urged lawyers to defend their clients in a manner that takes into account and, where possible, ameliorates the life-long consequences of criminal justice involvement. The Court did so in two significant ways:

- **First, the *Padilla* Court summarily rejected the oft-relied upon legal fiction that there is a distinction between "direct" and "collateral" consequences of a criminal conviction.** For years, courts throughout the country had held that defendants did not receive ineffective assistance of counsel when their lawyers failed to advise them of the life-long consequences of their conviction. Courts did so by adopting the legal fiction that these punishments are not the "direct" result of the conviction, but are instead merely "collateral." The *Padilla* Court soundly rejected this legal fiction, stating: "We have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." *Padilla*, 130 S.Ct. at 1481. While it is true that deportation is "civil" in nature and not pronounced in criminal court as part of the sentence to be imposed, deportation is nonetheless "*intimately related to the criminal process*," *Id.* at 11481. Moreover, deportation can be just as punitive, if not more so, than the criminal penalty that is pronounced at sentencing.

Of course, deportation is not the only civil consequence that is "intimately related" to the criminal process. Our "tough on crime" and "zero tolerance"

²⁵ The Bronx Defenders, "*Padilla* Compliance Guide."



policies of the last three decades have resulted in an ever-increasing number of civil consequences that are “intimately related” consequences, including loss of employment, disenfranchisement, loss of public housing, loss of student loan eligibility, and barriers to college admission. In *Padilla*, Justice Alito’s concurring opinion recognized deportation is not the only significant penalty that flows from a conviction. *Padilla*, 599 U.S. at 1488.

• **Second, the *Padilla* Court explicitly encouraged attorneys to use the existence of these enmeshed consequences to negotiate for better outcomes.**

The decision in *Padilla* is not merely about the advice that criminal defense attorneys must provide their clients about possible enmeshed penalties. It is also a decision about opportunity – that is, the opportunity for defense lawyers to be more effective advocates if they use the existence of enmeshed penalties as a means of gaining more leverage in plea negotiations, and thus obtaining better results for their clients. The Court could not have been more clear on this point, stating as follows:

Informed consideration of deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and the prosecution may well be able to reach agreements that better satisfy the interests of both parties... Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduces the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.²⁶

Knowing your client and the possible life-long consequences he or she may face as a result of a criminal conviction is not only a constitutional mandate, it is an opportunity for better, client-centered advocacy.

Concrete Steps for Better Advocacy

In his article “‘Collateral’ No More – The Practical Imperative for Holistic Defense in a Post-*Padilla* World... Or, How to Get Consistently Better Results for Clients,” McGregor Smyth discusses The Bronx Defenders’ fifteen years of experience using the existence of enmeshed consequences for better outcomes. In light of this experience, he states:

²⁶ *Padilla*, 599 U.S. at 1486.



Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results – and even outright dismissal – when they are able to educate prosecutors and judges on *specific* and severe consequences for their clients and their families. When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness – those that are absurd, disproportionate, or harm innocent family members.²⁷

The inability to access higher education is a specific and severe consequence that may result from a conviction and that impacts defendants and their family members.

McGregor Smyth outlines several strategies for responding to the *Padilla* Court’s insistence that we no longer close our eyes to the true reality of the punishment associated with criminal justice involvement, and for that reason, his article is a must-read for all defense attorneys. In the context of access to higher education, these strategies can be summarized as follows:

- *Get to know your client and the circumstances of his or her life.* There is much more to our clients than the crimes they have been charged with, and competent defense lawyers must embrace the responsibility to learn more about their clients’ lives than the alleged crime. “Focusing narrowly on the “facts” of the criminal allegations can have counter-productive results and miss critical opportunities for better outcomes.”²⁸ In the context of higher education, counsel must find out if the client is currently in college or, if not, is college-bound. Counsel must also discover whether or not the client is currently receiving financial aid to pay for college.
- *Identify the enmeshed penalty or penalties specific to your client.* It is critical to identify the specific consequence or consequences that will result in unfair and disproportionate punishment for your client. As Smyth advises: “Focus on the measured risk of *identifiable* penalties for *specific* clients.... For the purposes of targeted advocacy and negotiation, the penalty must be serious, likely for that client, and something the prosecutor or judge has the power to change.”²⁹ In the context of higher education, the very real consequences not only involve loss of student loan eligibility, but also significant barriers to admission. For the former, counsel need only cite the statute (found in Part II of this Guide); for the latter, CCA’s report, “*The Use of Criminal History Records in College Admissions Reconsidered*,” can be an effective means of conveying the likelihood that a conviction, particularly a felony conviction, will erect barriers to admission to college.
- *Identify the disposition that is realistic and has the best possibility of ameliorating the enmeshed penalty.* While it would be wonderful for every case to result in a dismissal or a sealable disposition, such an outcome simply is not possible in every situation. You must

²⁷ McGregor Smyth, “‘Collateral’ No More,” at 151 (emphasis in the original).

²⁸ *Id.* at 156.

²⁹ *Id.* at 160.



identify what is realistic in light of the charges your client faces, his or her prior history and personal circumstances, and local practice. “Advocacy is local and personal. It depends on the law and practice of the courthouse, the community and jury pool, and the circumstances of the person charged with the crime and their family. It also depends on the goals, priorities, and preconceptions of the individual prosecutor and judge. In the context of your own local practice, you will develop a menu of proven strategies based on your knowledge of the law and your clients.”³⁰

- *Humanize your client by telling his or her story.* Telling your client’s story is perhaps the most effective means of transforming him or her from “criminal” to “person” in the eyes of the judge and prosecutor. It is also a means by which to instill in the prosecutor the fact that his or her decision can make a difference in the client’s life. “Since they enjoy nearly unfettered discretion, prosecutors must acknowledge that the decision to impose, mitigate, or avoid many of these penalties on people charged with crimes and their families lies in their power.”³¹
- *Educate the prosecutor and/or judge about the enmeshed consequence and the impact it will have on your client’s life.* Be direct, and talk about what loss of the ability to attend college will mean for your client and his or her family members. Remind the judge and/or prosecutor that the imposition of this penalty will result in unfair, disproportionate punishment.
- *Use the enmeshed consequences to argue for the outcome you want.* “Work towards a shared understanding of both proportionality of penalty and rehabilitative goals in light of the client’s story, which can form a productive ground for negotiation at every stage in individual cases, from bail applications to pleas to sentencing.”³² Where appropriate, discuss the disproportionate impact, reminding the prosecution and the judge that you are not seeking “preferred treatment” for your client, but instead insisting that your client not be over-punished. There is no question that loss of the ability to attend college is a significant punishment with life-long implications.
- *Remind the prosecutor and/or the judge of the duty to impose a disposition that best promotes the convicted person’s “successful and productive reentry and reintegration into society.”* Penal Law § 1.05(6). In this sense, the inability to attend college is not only disproportionate punishment, it is also counter-productive. CCA’s report, “*The Use of Criminal History Records in College Admissions Reconsidered*,” pages 29-30, can provide defense counsel with the research and data needed to convince even the most reluctant prosecutor of the benefits to the community as a whole, including the public safety benefits, of ensuring that people with past criminal justice involvement are able to access higher education.

³⁰ *Id.* at 163.

³¹ *Id.* at 162.

³² *Id.* at 161.



Putting These Concrete Steps into Action: An Illustration

The following example illustrates how knowing about the barriers to higher education that are closely related from criminal justice involvement can result in better advocacy.

*Terrence*³³

One warm night last summer, 19 year old Terrence was hanging out with some friends on Buffalo's west side when two police officers approached and asked Terrence and his friends to empty their pockets. Terrence had a marijuana cigarette in his front left pocket, and as a result of pulling it out of his pocket, he was issued an appearance ticket charging him with Penal Law §221.35 (a B Misdemeanor). Two weeks later, Terrence appeared in Buffalo City Court for arraignment. His assigned counsel, Joanne, looked at the appearance ticket and Terrence's rap sheet (he had no previous arrests), and thought that she could likely negotiate a quick disposition to a guilty plea to Unlawful Possession of Marijuana (UPM), a non-criminal offense, in exchange for a fine and no jail time. Before doing so, however, she spent a few minutes talking to Terrence to learn more about him. She discovered that Terrence grew up in Buffalo, graduated from Buffalo City Schools, and was about to enter his sophomore year at State University of New York (SUNY), Geneseo. Terrence had finished his freshman year with a 3.4 grade point average, and smiled proudly when he told Joanne he had made the Dean's list. School was very important to Terrence, as he was the first person in his family to attend college. Joanne asked Terrence how he was paying for college, and he explained that he was paying through a combination of federal work-study grants and student loans.

Joanne's strategy changed: a UPM conviction would mean loss of the federal work-study and student loans for Terrence. She had a quick conference with the prosecutor handling arraignments, discussing Terrence's lack of arrest record, how well he was doing in school, and the disproportionate punishment of losing the ability to complete college. With this information, she convinced the prosecutor to consent to an adjournment in contemplation of dismissal. Terrence was able to return to college at the end of the summer.

What Worked

Joanne followed the steps outlined above, as follows:

- *Get to know your client*

Before delving into the case with a disposition that she *thought* would be helpful to Terrence, Joanne took a little extra time to talk to Terrence and to learn critical information about the context of his life. Learning that he was enrolled in college and dependant upon federal student assistance was critical to the outcome of the case.

³³ This scenario is largely taken from McGregor Smyth's article, "‘Collateral’ No More."



- *Identify the enmeshed penalty specific to your client*

Joanne quickly identified that a conviction for *any* offense involving marijuana would automatically suspend Terrence's eligibility for federal student loan assistance. (See Part II)

- *Identify the disposition that is realistic and can best ameliorate the enmeshed consequence*

Joanne identified the outcome she wanted: an adjournment in contemplation of dismissal. She determined that this disposition was still a realistic possibility, despite the fact that in her particular court, it was outside the normal disposition offered at arraignments for misdemeanor arrests. If this had not worked, Joanne would have asked instead for a guilty plea to disorderly conduct, a violation level conviction that would not result in loss of federal student aid eligibility.

- *Humanize your client by telling his story*

It was neither time consuming nor difficult for Joanne to humanize Terrence by telling the arraiging assistant district attorney Terrence's story. Joanne explained that he was in college, that he was on the Dean's list, and that he was on target to successfully graduate from college. She further explained that he was a first-generation college student and determined to make his family proud. In telling Terrence's story, Joanne transformed the prosecutor's initial impression of Terrence as a "stoner" to that of a goal-oriented young man with potential.

- *Educate the prosecutor and/or the judge*

Joanne informed the prosecutor that Terrence would automatically lose the ability to pay for college and would have to drop out if he was convicted of any controlled substance offense, even if the conviction was for a non-criminal offense.

- *Use the enmeshed consequence to argue for the outcome you want*

In advocating for an adjournment in contemplation of dismissal, Joanne talked about how the inability to attend college would be disproportionate punishment for Terrence's mistake of possessing a small amount of marijuana; she talked about how this would be needless disappointment for Terrence's family; and she also convincingly argued how unproductive for the community as a whole it would be for Terrence to drop out of college.

- *Remind the prosecutor/judge of Penal Law § 1.05(6)*

Joanne reminded the prosecutor that imposing a disposition that allowed Terrence to complete college would be most consistent with Penal Law § 1.05(6). Such a disposition would best ensure that, in the future, Terrence would achieve success as law-abiding, productive community-member.

Appendix A

GLOSSARY OF TERMS FOR CRIMINAL HISTORY REPORTING PURPOSES

Adjournment in Contemplation of Dismissal – This disposition of a case is often referred to as an ACD or ACoD and the procedure is found in both CPL § 170.55 and § 170.56. An ACD is an adjournment of the action with a view toward ultimate dismissal of the accusatory instrument in the furtherance of justice. As noted in subdivision (8) of CPL § 170.55 and ACD “shall not be deemed a conviction or an admission of guilt.” The purpose is to wipe the slate clean. Upon the dismissal of the accusatory instrument as a result of an ACD “the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and conviction.” [CPL § 170.55 (8) and § 170.56 (4)]. An ACD dismissal is considered a termination of a criminal proceeding in favor of the accused as defined in CPL § 160.50 (3) and is thus subject to automatic sealing under that statute. An ACD dismissal is also subject to the benefits provided by CPL § 160.50 and upon receiving the dismissal “no such person shall be required to divulge information pertaining to the arrest or prosecution.”

Conviction – Means the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument, other than a felony complaint, or to one or more counts of such instrument. [CPL § 1.20 (13)].

Crime – Means a misdemeanor or a felony. [PL § 10.00 (16)].

Felony - Means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. [PL § 10.00(5)].

Juvenile Delinquency – Means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime (felony or misdemeanor) if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law. [Family Court Act § 301.2 (1)]. No adjudication under this type of proceeding may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication. Such adjudication “shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling.” (Family Court Act § 380.1).

Juvenile Offender – A youth aged 13, 14 or 15 who is prosecuted and convicted of certain felonies in adult criminal court as a juvenile offender is by law criminally responsible and as a result will have an adult criminal record and must report it as such, unless also adjudicated Youthful Offender. [CPL § 1.20 (42) and PL § 10.00(18)].

Misdemeanor - Means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed. [PL § 10.00 (4)].

Offense - Means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same. [PL § 10.00 (1)]. Included within this term are the terms crime, felony, misdemeanor, petty offense, violation and traffic infraction.

Petty Offense – Is the generic term for the non-criminal offense terms of “violation” and “traffic infraction.” [CPL § 1.20 (39)].

Violation - Means an offense, other than a “traffic infraction,” for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed. [PL § 10.00 (3)].

Youthful Offender – Means a person who has been charged in adult criminal court with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old or a person charged with being a juvenile offender who has been adjudicated a youthful offender by a finding, substituted for the conviction of an eligible youth, that he is a youthful offender and has had a youthful offender sentence imposed. (CPL §720.10). “A Youthful Offender adjudication is not a judgment of conviction for a crime or any other offense.” [CPL § 720.35 (1)]. All official records relating to a case involving a youth who has been adjudicated a Youthful Offender are confidential. [CPL § 720.35 (2)].

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CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

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Special thanks to the many men and women who were willing to share their stories about their experiences applying to college. We have highlighted but a few of the accounts of difficulties faced by people with criminal records in applying to college. These narratives of hurdles and successes are what animate this report.

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The Center for Community Alternatives (CCA) promotes reintegrative justice and a reduced reliance on incarceration through advocacy, services and public policy development in pursuit of civil and human rights.

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Executive Summary

This report reviews findings from a first-of-its-kind survey conducted by the Center for Community Alternatives in collaboration with the American Association of Collegiate Registrars and Admissions Officers (AACRAO) that explores the use of criminal history screening in college admissions procedures. A 59-question survey was administered electronically between September 30 and October 29, 2009 through AACRAO's network of 3,248 member institutions in the United States. In all, 273 institutions responded to the survey. The survey helped inform the recommendations contained in this report.

Key Findings

- A majority (66%) of the responding colleges collect criminal justice information, although not all of them consider it in their admissions process. Private schools and four-year schools are more likely to collect and use such information than their public and two-year counterparts.
- A sizable minority (38%) of the responding schools does not collect or use criminal justice information and those schools do not report that their campuses are less safe as a result.
- Self-disclosure through the college application or in some cases the Common Application is the most typical way that colleges and universities collect the information. A small minority of schools conduct criminal background checks on some applicants, usually through contracting with a private company.
- Most schools that collect and use criminal justice information have adopted additional steps in their admissions decision process, the most common of which is consulting with academic deans and campus security personnel. Special requirements such as submitting a letter of explanation or a letter from a corrections official and completing probation or parole are common.
- Less than half of the schools that collect and use criminal justice information have written policies in place, and only 40 percent train staff on how to interpret such information.
- A broad array of convictions are viewed as negative factors in the context of admissions decision-making, including drug and alcohol convictions, misdemeanor convictions, and youthful offender adjudications.
- If it is discovered that an applicant has failed to disclose a criminal record there is an increased likelihood that the applicant will be denied admission or have their admission offer rescinded.
- A slight majority of schools that collect information provides support or supervision for admitted students who have criminal records, with more emphasis on supervision rather than supportive services.

Discussion

The collection and use of criminal justice information (CJI) by colleges and universities is problematic for a number of reasons.

No link has been established between having a criminal record and posing a risk to campus safety.

While college campuses are not immune from crime, the data show that they are remarkably safe places compared to the community-at-large. This is particularly true for serious crimes that involve personal violence. Violent crime on campus is rare, and the few college students who are victims of such crimes are mostly victimized off-campus by strangers. The Virginia Tech incident, a tragic but aberrational event, was committed by a student who did not have a criminal record. Our argument for eliminating the collection and use of CJI in admissions decisions is in large part based on the absence of any empirical evidence showing that students with criminal records pose a safety risk on campus.

Having a criminal record is not an unusual characteristic in America today.

There has been a dramatic increase in the reach of criminal sanctions over the past three decades. As a result, by year end 2008 more than 100 million Americans had a criminal history record (arrest and/or conviction) on file in the state repositories, and more than 2.3 million people were in jails and prisons, giving the U.S. the highest incarceration rate in the world. These high numbers are largely driven by the phenomenon of “overcriminalization” – classifying an ever-widening range of behaviors as criminal. Misdemeanor cases, many of them involving petty offenses like under-age drinking, have doubled in the past thirty years.

This is a civil rights issue.

Racial disparities have been documented in the processing of every type of crime, from juvenile delinquency to low-level misdemeanors to the imposition of the death penalty. So pervasive is the criminal justice system in the lives of black men that more black men have done prison time than have earned college degrees. Because racial bias occurs at every stage of the criminal justice system, screening for criminal records cannot be a race-neutral practice.

Criminal records are often inaccurate and/or misleading.

The U.S. Department of Justice, Bureau of Justice Statistics has found that “inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation’s criminal history record information systems” and that “Many of the criminal history records currently circulated by the repositories are difficult to decipher, particularly by noncriminal justice users and out-of-state users.”

Accepting college applicants with criminal records promotes public safety.

Higher education opens doors of opportunity, enhances critical thinking, and leads to better and more stable employment. Studies show that a college education dramatically reduces recidivism. Colleges and universities promote public safety when they open their doors to people with criminal records who demonstrate the commitment and qualifications to pursue a college education.

Recommendation

Colleges and universities should refrain from collecting and using criminal justice information in the context of college admissions.

Secondary Recommendations

For those colleges and universities that continue to screen for criminal history record information, the following steps should be taken to reduce the detrimental effects of these practices:

1 Remove CJI disclosure requirement from initial application for admission.
a) Make CJI inquiry only after conditional admission.

2 Limit disclosure requirement to specific types of convictions:
a) Only convictions for felonies, not misdemeanors or infractions.
b) Only felony convictions imposed within the past five years.
c) Only convictions for felonies committed after the individual's nineteenth birthday.

3 Establish admissions criteria that are fair and evidence-based:
a) Remove barriers to admission of individuals who are under some form of community supervision.
b) Avoid policies that impose blanket denials for particular crimes.
c) Provide an opportunity to document personal growth and rehabilitation.
d) Avoid requiring applicant to produce his "official" criminal history record information.

4 Base admissions decisions on assessments that are well-informed and unbiased:
a) Develop in-house expertise.
b) Perform an assessment and multi-factor analysis to determine whether a past criminal offense justifies rejection.
c) Failure to disclose should not be the grounds for automatic rescission of an offer of admission or an expulsion.

5 Establish procedures that are transparent and consistent with due process:
a) Any policy regarding criminal history information screening should be in writing to ensure fairness and consistency.
b) Inform students in writing of the reason for the withdrawal of an offer of admission.
c) Applicants should be afforded the right of appeal.

6 Offer support and advocacy:
a) Provide on-campus support services for students who have criminal records.
b) Provide information and assistance when a prospective student's chosen field or profession bars individuals with criminal records.

7 Evaluate the policy periodically to determine whether it is justified.

THE USE OF CRIMINAL
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I. Introduction

Juan¹ graduated from a four-year university in May 2010. He began his higher education at a community college which did not ask about his criminal record. But questions about criminal convictions were included on the application to the four-year institution to which he transferred.

Juan’s criminal record made it difficult for him to enroll and attend the school of his choice. He was admitted after undergoing reviews of his record (which pre-dated college) but the university placed him on disciplinary probation. He remained on disciplinary probation for the next two years in spite of the fact that he had no further criminal involvement or on-campus problems of any kind. Each semester a hold was put on his admission and he would have to go through a special review before being permitted to return. Disciplinary probation status restricted Juan’s ability to fully participate in campus activities. He was selected for the Beta Alpha Psi Honor Society, but his disciplinary probation status prevented him from serving as an officer or representing the university in any way.

Juan graduated with honors and applied and was accepted into a graduate MBA program at the same university. Despite the fact that he has an excellent undergraduate record, the university will require that he continue on disciplinary probation while in graduate school. Juan has appealed this decision. At the time this study was completed, Juan was notified that his appeal was successful and he will no longer be subject to disciplinary probation. While he is pleased with results, Juan stated that he was bothered by having to go through such a process after so many years.

Juan was disappointed that he could not be an officer and could not represent the university. He also found the university’s attitude towards him to be very discouraging and could understand how someone with less commitment and fortitude would be deterred from pursuing their higher education goals.

Despite these obstacles, Juan describes college as “*part of his redemption....College has helped change my life.*”

¹ All of the names in the case histories have been changed to protect the confidentiality of the particular individuals.

Juan's situation is not an isolated example.

Juan's story is one of many that show how a criminal conviction can serve as an unfair and unjustified obstacle to gaining a higher education. Juan's situation is not an isolated example. While it is easy to assume that exclusions based on criminal records only affect a few "bad" people, in fact there are millions of people with criminal records in the U.S. today. As of 2008, an estimated 100 million people in the U.S. had a criminal history record (arrest and/or conviction) (SEARCH 2009). An additional 14 million arrests are recorded annually (FBI 2009). African American and Latino communities have been hit particularly hard by extremely aggressive policing, prosecution and incarceration. The explosive growth of criminal records databases and the ease with which those databases can be accessed on the Internet means that punishment no longer ends at the prison door or even at the end of probation or parole. The collateral consequences of a conviction affect people long after they have "paid their debt to society," creating barriers to civic participation, employment and, to an increasing extent, a college degree.

This report reviews the responses and findings from a first-of-its-kind survey conducted by the Center for Community Alternatives (CCA) in collaboration with the American Association of Collegiate Registrars and Admissions Officers (AACRAO) that explores the use of criminal history screening in admissions procedures. The findings heighten CCA's concern that people with criminal records are finding it increasingly difficult to enroll in colleges and universities to the detriment of both public safety and equal opportunity.

The use of criminal justice information (CJI) to screen prospective college applicants grows out of legitimate concerns for public safety which emerged in the aftermath of the tragic and highly publicized events at Virginia Tech and a few other college campuses. While college campuses are not immune from crime, the data show that they are remarkably safe places compared to the community-at-large. This is particularly true for serious crimes that involve personal violence. Violent crime on campus is rare, and the few college students who are victims of such crimes are mostly victimized off-campus by strangers. The Virginia Tech incident, a tragic but aberrational event, was committed by a student who did not have a criminal record. Our argument for eliminating the collection and use of CJI in admissions decisions is based on the absence of any empirical evidence showing that students with criminal records pose a safety risk on campus.

Depriving people of access to higher education based on a criminal record does not make campuses safer; instead it undermines public safety by foreclosing an opportunity that has proven to be one of the most effective deterrents to recidivism. Just as important, given the extreme racial disparities present throughout the criminal justice system, it becomes a de-facto abrogation of civil rights. In 21st century America, a criminal record has

become a surrogate for race-based discrimination, serving the same function, albeit unintentionally, as the Black Codes and Jim Crow laws in earlier times (Alexander 2010). Hyper-aggressive law enforcement in low-income communities of color has led to the overrepresentation of African Americans and Latinos among those with criminal convictions. Excluding otherwise qualified applicants from attending college because of a criminal record has the effect of depriving large numbers of people of color from opportunities that form the core of the "American Dream."

In recent years there has been a growing awareness of the effect of a criminal record on access to employment and the right to vote. We have come to understand that denying jobs to people who are striving to rehabilitate themselves means locking them out of the labor market. There is a growing movement to limit the use of criminal records in employment, from campaigns

to "ban the box" on employment applications to expanding anti-discrimination protections to cover people with criminal records. In the area of voting rights, many states have reformed laws that disenfranchised people with criminal records.

There is less public awareness about barriers to higher education, although this issue is beginning to receive some attention. Earlier this year, the American Bar Association passed a resolution calling upon "federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions."² The resolution specifically urges the passage of laws to "Prohibit colleges, universities, financial aid offices, and other educational institutions...from considering juvenile adjudications or criminal convictions unless engaging in the conduct underlying the adjudication or conviction would provide a substantial basis for denial of a benefit or opportunity even if the person had not been adjudicated or convicted."

This report describes the current state of the practice of using CJI in the college application process and how these practices affect prospective students. Part II summarizes the evolution of the concern about crime on campus. Part III provides major findings from the national survey. Part IV discusses the implications of these findings in the context of how the criminal justice system functions in the United States. Part V briefly discusses the importance of a college education in enhancing public safety and long-term rehabilitation. Part VI provides practical recommendations for improving public safety on college campuses without resorting to the screening and exclusion of people with criminal records. For those institutions committed to criminal history screening, we offer guidance on how to minimize the risk that such screening will result in the denial of admission to an otherwise qualified applicant who poses no greater threat to campus safety than the average student who has no prior criminal history record.

**As of 2008,
an estimated
100 million
people in
the U.S. had
a criminal
history
record.**

² <http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/summaries/102A-passed-as-revised.pdf>

II. College Campuses and Public Safety Concerns

College campuses are commonly seen as “Ivory Towers,” immune from the travails of daily life, including crime. However in 1991, in the throes of a general “tough on crime” political environment, Congress passed the Crime Awareness and Campus Security Act (known as the Clery Act) that requires colleges and universities to track and report campus crime statistics, post security policies and make timely warnings. As with most federal criminal justice legislation, the Clery Act was named for an individual victim of a heinous, but aberrant, crime. Jeanne Clery was a 19-year old Lehigh University College freshman who was murdered in her dormitory. Her parents mounted a campaign to pass a law that would provide students and their families with information about crime on campus so that the relative safety of a campus could be considered as a factor in the college selection process.

Clery Act reports filed by colleges and universities show that they are very safe places. They also show that crimes committed on campus are more likely to involve students who have no criminal records, such as those students who killed Jeanne Clery and the student who opened fire at Virginia Tech. Nevertheless, a few high profile crimes and concerns about institutional liability have prompted the adoption of admissions policies that require prospective applicants to disclose their criminal records and even their secondary school disciplinary history. The Common Application, used by more than 390 universities and colleges, added questions about both criminal convictions and school disciplinary records in 2006 (Jaschik 2007). Many colleges that do not use the Common Application have also started to include such questions on their applications.

These practices are overreactions to exceedingly rare occurrences. Violent crime on campus is very uncommon, and the few college students who are victims of violent crimes are mostly victimized off-campus by strangers. According to the U.S. Department of Education (2001) the overall rate of criminal homicide at colleges and universities was .07 per 100,000 students compared to a rate of 14.1 per 100,000 young adults in society-at-large. This means that college students are 200 times less likely to be the victim of a homicide than their non-student counterparts. Rape and sexual assault are the only crimes showing no statistical differences between college students and non-students (Hart 2003; Baum & Klaus 2005); these crimes are most often committed at campus parties by inebriated students who have no prior criminal records. The U.S. Department of Education (2001) concluded that “students on the campuses of post-secondary institutions [are] significantly safer than the nation as a whole” (p.5).

The assumption that is made in order to justify criminal history record screening is that doing so will make campuses safer. However, there is no evidence upon which to base this assumption. In fact, in the only study that has investigated the correlation between criminal history screening and improved campus safety, no connection was found (Olszewska 2007). In this study, administered to undergraduate admissions directors, the practices of inquiring about past disciplinary histories during the admissions process (including criminal information, school judicial background, military discharge information and the practice of conducting criminal background checks) were examined and compared to campus crime rates. Olszewska found that there is no statistically significant difference in the rate of campus crime between institutions of higher education that explore undergraduate applicants’ disciplinary background and those that do not (Olszewska 2007).

“students on the campuses of post-secondary institutions [are] significantly safer than the nation as a whole.”



III. Findings from the National Survey of Screening and Use of a Criminal History in the College Admissions Process

The Center for Community Alternatives in partnership with the American Association of Collegiate Registrars and Admission Officers (AACRAO) developed a survey instrument to explore the use of criminal records in college applications and admissions. The 59-question survey was administered electronically from September 30 to October 29, 2009 through AACRAO's network of 3,248 member institutions in the United States. In all, 273 institutions responded.

The survey instrument provided space for respondents to offer comments and we reviewed the comments carefully to enrich our understanding of the data. In addition, we conducted follow-up interviews with six college admissions officers to learn more about the reasons underlying decisions of whether or not to require the disclosure of CJI as part of the application process.³ At the start of the survey, respondents were asked to enter their educational institution identification number for the purpose of cross-tabulating survey responses with demographics and other relevant data from U.S. Government databases. To insure confidentiality respondents were informed that AACRAO would not share institutional identities with CCA researchers who received only coded demographic data for respondents in the data set.

The survey questions focused on several key issues:

- 1. How widespread is the collection of CJI in the college application process and how do colleges collect this information?
- 2. Does the institution have special procedures to evaluate the admission of prospective students with criminal records?
- 3. In what ways does an applicant's criminal history affect his or her admission to the college or university?
- 4. What post-enrollment conditions or services are required of or offered to students with criminal records?

³ The interviews were conducted only with individuals who noted on their survey that they would be open to a follow-up contact.

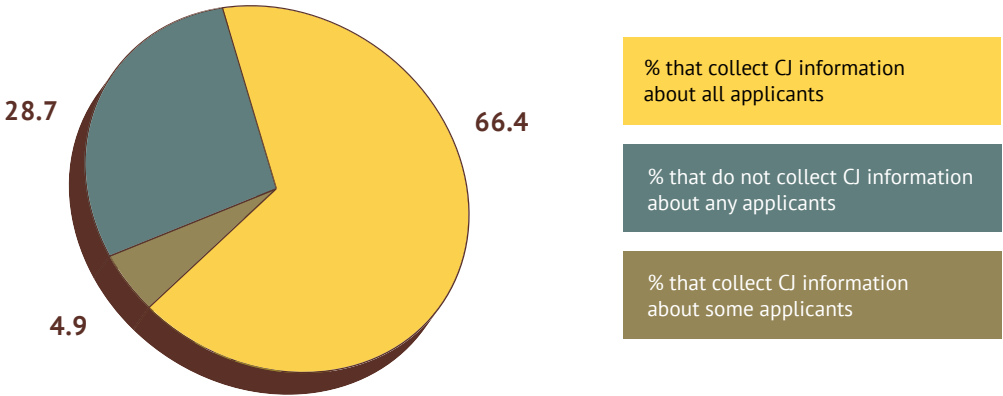
1

How widespread is the collection of CJI in the college application process and how do colleges collect this information?

A majority of the responding colleges collect CJI, although not all of them consider it in their admissions process. (Figure 1). Sixty-six percent collect it from all applicants but 16 percent of respondents indicated that although they collect the information, they do not use it in the admissions process.⁴ Five percent collect CJI only for applicants who are applying to specific programs. Another twenty-nine percent do not collect it at all, but a small subset of those colleges use CJI in their admissions process if the information comes to them through a source other than self-disclosure.

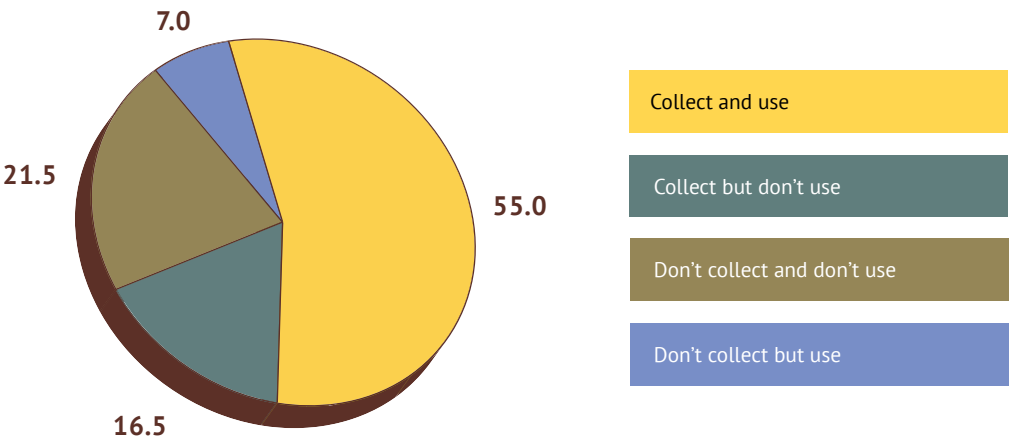
As shown in Figure 2, the total percentage of colleges who do not use CJI is 38 percent (Figure 2). None of the respondents whose colleges do not use CJI indicated in their comments that they believed their campuses were less safe as a result.

Figure 1
Practices regarding the collection of criminal justice information



⁴ Some colleges that use the Common Application will automatically “collect” criminal justice history information through the Application’s self-disclosure question. Although collected, some colleges report that they do not consider it in the admissions decision.

Figure 2
A majority of schools collect criminal justice information, but not of them all use it in the admissions process



The responses differ significantly by sector and level, with private schools and four-year schools being much more likely to consider criminal history in the admissions decision than their public and two-year counterparts. Private four-year schools are significantly more likely to “collect and use” than other schools.

Kanye, a former high school track star and honor student, grew up with two sets of companions—his school friends and his ‘dropout’ friends from the nearby housing project, kids with high unmet needs ‘at risk’ for problems. “*You don’t stop being friends because somebody quit school,*” he says. So Kanye studied, ran track, stocked groceries, and helped an elderly neighbor, but hung out in the evening with friends who stole and did drugs. “You can get caught up in wanting things, showing off to friends. I made a big mistake.” Kanye went along with a plan concocted by one of those friends and was charged near the end of his junior year with felony armed robbery.

Afterward, Kanye expressed sorrow and shame for his victim’s trauma. Fortunately for him, Kanye’s attorney was able to get him adjudicated as a youthful offender. His record was sealed and jail time reduced to less than a year. Spending half his senior year behind bars, Kanye was fortunate to have the support of his high school teachers. He did lessons by mail and, despite resistant corrections officials, took his SATs in jail to meet NCAA standards for a track scholarship. Released

in February of his senior year, he took day and night classes to graduate on time.

Kanye says he was lucky. “*As a youthful offender, I didn’t have to disclose that I had a charge.*” He started college with partial funding the next fall. “*Going to college meant everything to me,*” he says.

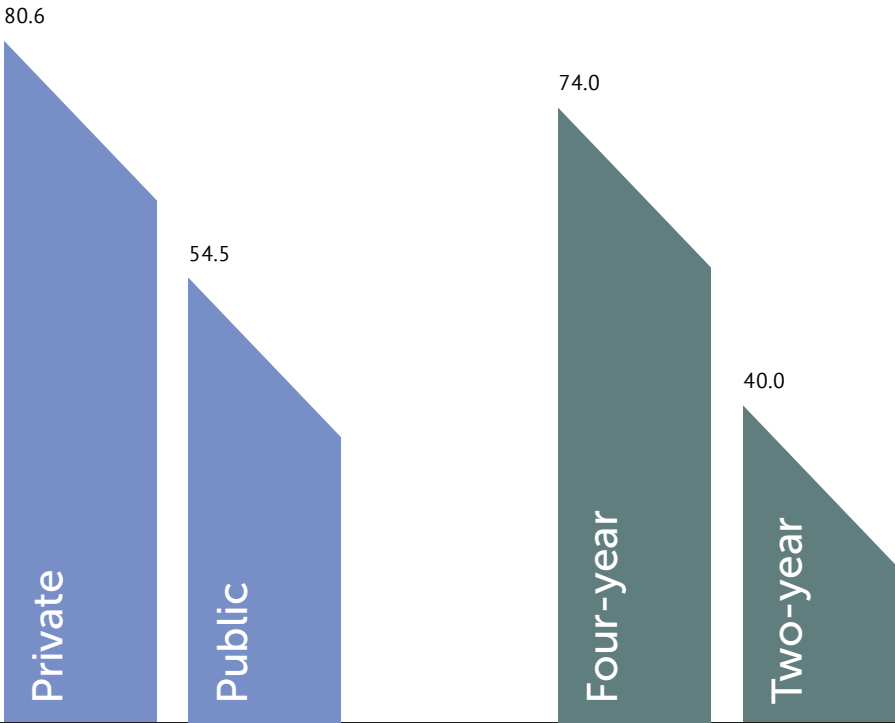
At college, Kanye met the director of a national not-for-profit organization located in Washington, DC. The director was so impressed with the Kanye that he recruited him into his organization with salary and full college tuition. Kanye transferred to a nearby University and completed his bachelor of science while working.

Now twenty-seven years old, Kanye directs a major national program to reduce school violence. He travels the country to establish partnerships between community organizations and city schools. He recruits others like himself to be school mentors. Once jailed for a violent crime, he works to prevent youth violence. Kanye is back on track and leading his community to a better future because he was given a second chance.

There are two primary mechanisms through which colleges and universities collect criminal history information – through self-reporting and/or criminal background screening. Self-reported information typically comes in response to questions posed in the admissions application. Background check information can be collected in a variety of ways including through the State Central Repository (the state agency responsible for collecting and maintaining official criminal records), through a public information search, through another database, or by contracting with a private company that specializes in background checks. The background checks can be multi- or single-state.

Self-disclosure through the college application is the most common way that colleges and universities collect CJ: 64 percent of the institutions that responded to the survey reported that their applications ask for disclosure of a criminal record. It is more common for private institutions to ask such questions on the application (81%) and four year colleges were more likely to ask for self-disclosure than 2-year colleges (74% compared to 40%) (Figure 3).

Figure 3
Percentage of responding schools that require applicants to self-disclose a criminal record, by sector and level



Some institutions (5% of respondents) require only a subset of applicants to disclose their criminal record. Most often this occurs when someone applies to a program that prepares students for jobs that appear to be closed to people with criminal records. Health-related degree programs were identified as one example. One of the admissions officers interviewed stated that although her college does not automatically reject students with criminal records, such applicants who want to enroll in the Health Division are told that they will not be able to fulfill their degree requirements since they will not be permitted to intern at a clinical site. *“At that point,”* the admission officer added, *“people usually withdraw their application.”*

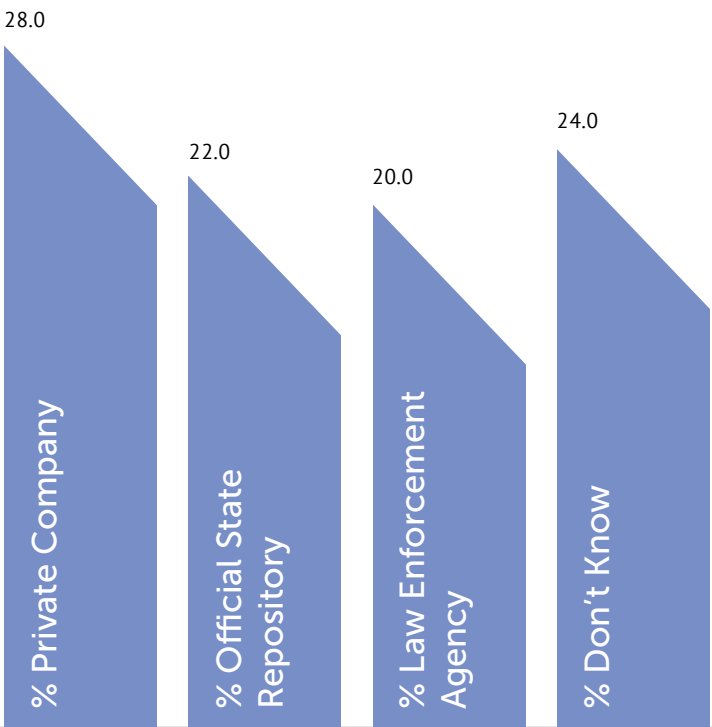
Alfreda began college after being convicted of a felony. She started at a two-year community college, was a Dean’s list student, and graduated with honors. She wanted to pursue a Bachelor’s Degree but feared that she would be rejected if her criminal conviction was revealed.

She is convinced that one school did not admit her because of her record. She completed the application, disclosing her criminal record. The college admissions office then requested additional information describing the offense and the legal charge. Although the request made her feel *“Shamed, dirty and less-than-deserving”*, Alfreda quickly provided the required information. Almost immediately she received a letter of rejection: *“We regret to inform you...I have that memorized.”* After that she limited her applications to schools that did not ask about criminal history records. Alfreda did not have the financial resources to pay application fees to schools she believed would automatically reject her.

Although she wants to further her education Alfreda is discouraged because she has been repeatedly told that she will never get a nurse’s license or be able to work in the health field: *“The major thing holding me back from a higher college degree in the fields that I am interested in is licensing – can’t get licensed with a felony-- in nursing, or any medical.”* Nonetheless, she greatly values her college experience: *“I’m sure if I hadn’t gone to college, I’d be either dead or working as a maid in a hotel...Instead I work in the mental health field which I enjoy.”*

Only 20 percent of schools (50 institutions) reported that they conduct a criminal background check, most commonly through a contract with a private company (Figure 4). Twenty-two percent of those schools noted that they conduct background checks through the official state repository agency and another 20 percent reported collecting this information through a single-state law enforcement agency. Twenty-four percent of the schools that conduct criminal background checks--the second highest response-- answered that they did not know how the background checks were conducted.

Figure 4
Source of information for criminal background checks



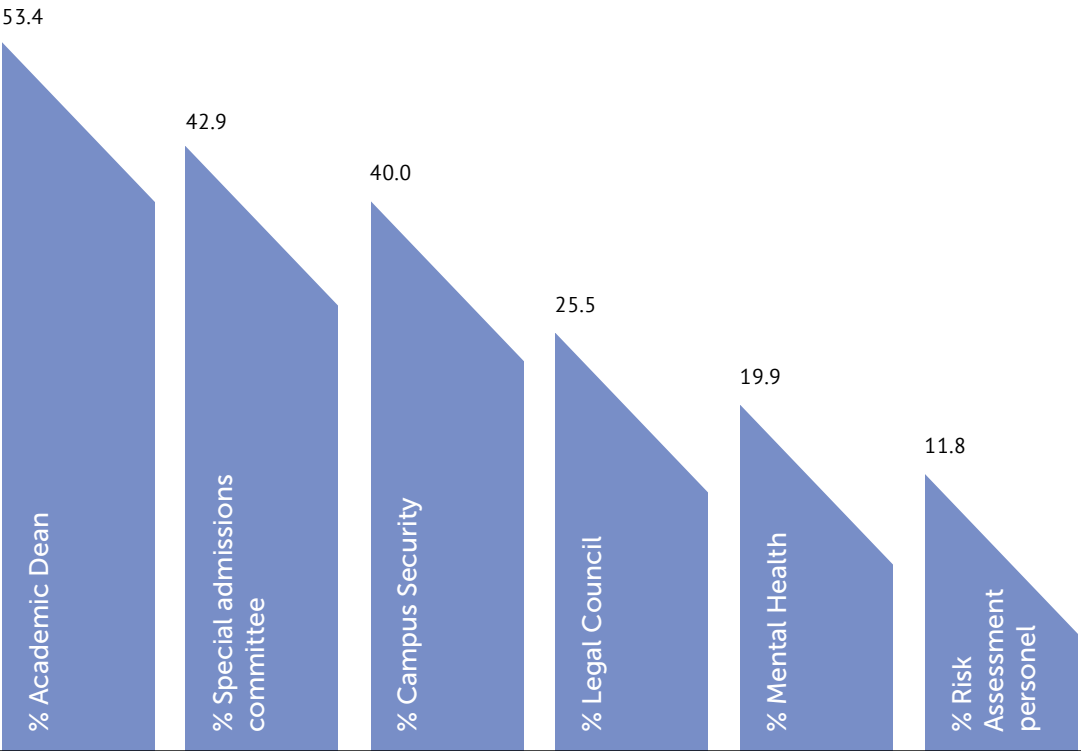
Of the 50 schools that conduct some form of background check screening, 14 percent do so for all students and another 14 percent do so only for students who are selected for admission. The remaining 72 percent of schools conduct background screenings only in certain circumstances: 56 percent screen applicants who disclosed a criminal conviction, 20 percent conduct screening for applicants applying to specific programs where future employment could be affected by a criminal record, and 10 percent conduct screening on a case-by-case basis.

2

Do the colleges and universities that collect and use CJI have special procedures for evaluating whether or not to admit students with criminal records?

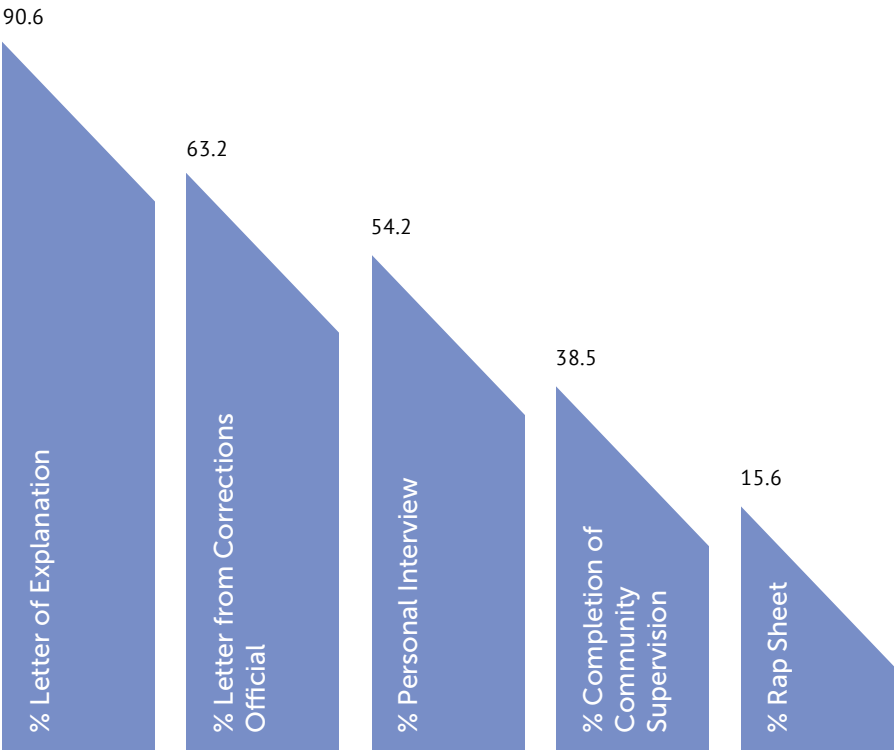
Most schools in this category have adopted additional procedures for making admissions decisions about applicants with criminal records. Only 6 percent of the schools that consider a criminal history say their process is identical for applicants with and without a criminal record. Seventy-five percent of colleges with special procedures bring in decision-makers who are not generally involved in admissions decisions. Academic deans and campus security staff are the most common choices: fifty-three percent of schools bring in deans and 40 percent of schools include campus security personnel. (Figure 5). Fifteen of the responding schools indicated that a campus security office’s negative recommendation results in an automatic denial of admission. Special admissions committees are used by 43 percent of schools who have special procedures. Less common is the involvement of legal counsel (25%), counseling or mental health staff (20%) or risk assessment personnel (12%).

Figure 5
Personnel involved in admissions decision for applicant with a criminal record



A majority of the schools with special procedures have extra requirements for applicants with criminal records. The most common of these is a letter of explanation (90%) and/or letter from corrections official (probation, parole, corrections) (63%) (Figure 6). Fifty-four percent of colleges that consider criminal histories require a personal interview. Almost forty percent require that prospective students have completed any term of community supervision before they can be admitted. Eighteen percent require the applicant to produce official criminal justice documents, such as a rap sheet.

Figure 6
Special requirements for applicants with criminal records



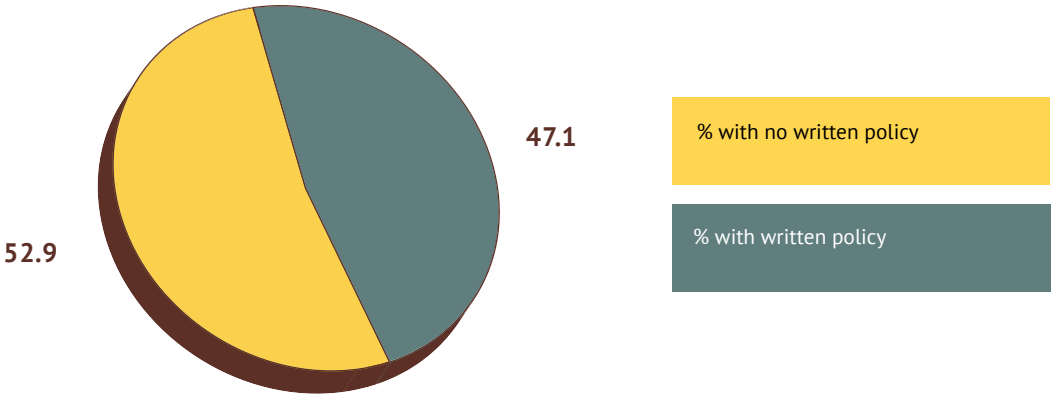
One admissions director interviewed stated that applicants who disclose a criminal record are asked to submit their rap sheet, a letter from their parole officer and a personal essay, noting that “a lot of people drop out [of the application process] at that point.” He estimated that only about 5 out of an estimated 30 applications a year from prospective students who disclose a criminal history will move forward with their applications once the additional information is requested.

Rachael, who graduated with honors from her undergraduate college, wanted to pursue a Ph.D. in political science. She was shocked to learn that many of the doctoral programs were requesting information about arrests and convictions. Rachael, who had a misdemeanor conviction, decided not to apply to her first-choice school; she assumed her record would be held against her and could not afford to spend \$200 on an application fee when she feared she would not get a fair review. Her own words convey her feelings about being discouraged from applying to her first-choice school: *“I was disappointed....I felt like it was a waste of time to try to apply when that was one of the first questions asked in the application process. Despite being one of the best suited departments*

for my particular interests, I chose not to apply ... I was also scared that despite reaching a point in my life where I was a strong contender for the top ten political science doctoral programs, my mistake may destroy my future opportunities.” Rachael instead applied and was accepted into a graduate program that did not ask about criminal records and is now working with a widely recognized professor whose interests include the collateral consequences of a criminal conviction. Rachael commented: *“It struck me as odd that if someone was at a point in their life to apply for doctoral programs that a criminal record should play a role in the decision-making process.”*

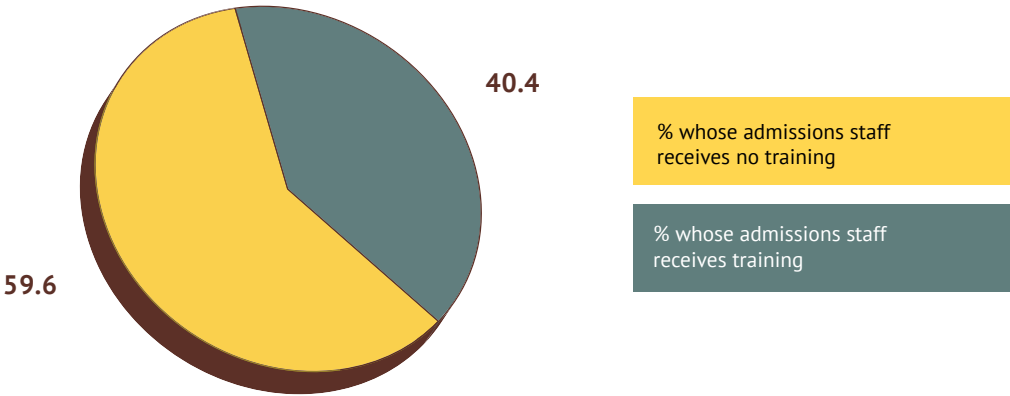
Less than half of the schools that collect and use criminal justice information have written policies to guide admissions officers and others involved in the admissions process (Figure 7). Several of the admissions officers we interviewed commented that written policies and best practices would be helpful.

Figure 7
Existence of a written policy regarding the admissions of applicants with a criminal record



Finally, only 40 percent of schools that consider criminal history information in the admissions process train staff on how to interpret CJ (Figure 8). The people who are most likely to receive such training are admissions staff and the training is most often provided by campus security (one-third of the schools indicate that campus security are the trainers), other admissions staff (23%), “other staff” (23%), or legal staff (22%).

Figure 8
Training for admissions personnel on interpreting criminal records



“I felt like it was a waste of time to try to apply when that was one of the first questions asked in the application process.”

3

How does an applicant's criminal record affect his or her admission?

It is noteworthy that a quarter of the schools that collect CJI from applicants report that they do *not* use that information as a basis for denying admission. Disclosure of a criminal record is more likely to trigger additional screening rather than automatic disqualification. Sixty-one percent report that they consider criminal justice information in the admissions decision, while a quarter of the responding schools report that they have created at least some criminal justice-related automatic bar to admission. Convictions for a violent or sex offense are the most likely to trigger an automatic denial of admission. Of the schools that responded to the survey indicating that they impose some special requirements for applicants with criminal records, almost 40 percent stated that they do not admit students who have not yet completed their term of community supervision.

Latesha's choice of what kind of college to go to and what course of study to pursue was greatly influenced by her past criminal history. She wanted to be a nurse but believed that nursing schools would not admit her and that, even if she was able to graduate, she would not be able to get her nurse's license. *"I did not apply [to nursing schools and even certain colleges] because I knew my felony would hold me back ... I would not be able to get in."* Instead, Latesha chose to pursue a degree in social work, although she was aware that it might be difficult to find work in that field because of a past criminal record.

At the time of her application, Latesha had pending charges in another state. She was charged with a violent felony offense. She disclosed this on her application and was asked to provide additional information including a statement of the circumstances of the crime and official records. She said that having to provide this additional information was discouraging and she expected to be rejected. But she was admitted, graduated with a Bachelor's Degree in Social Work and is completing her Master's Degree.

Because her case was pending, Latesha faced competing demands of court and school requirements. During her first year of college,

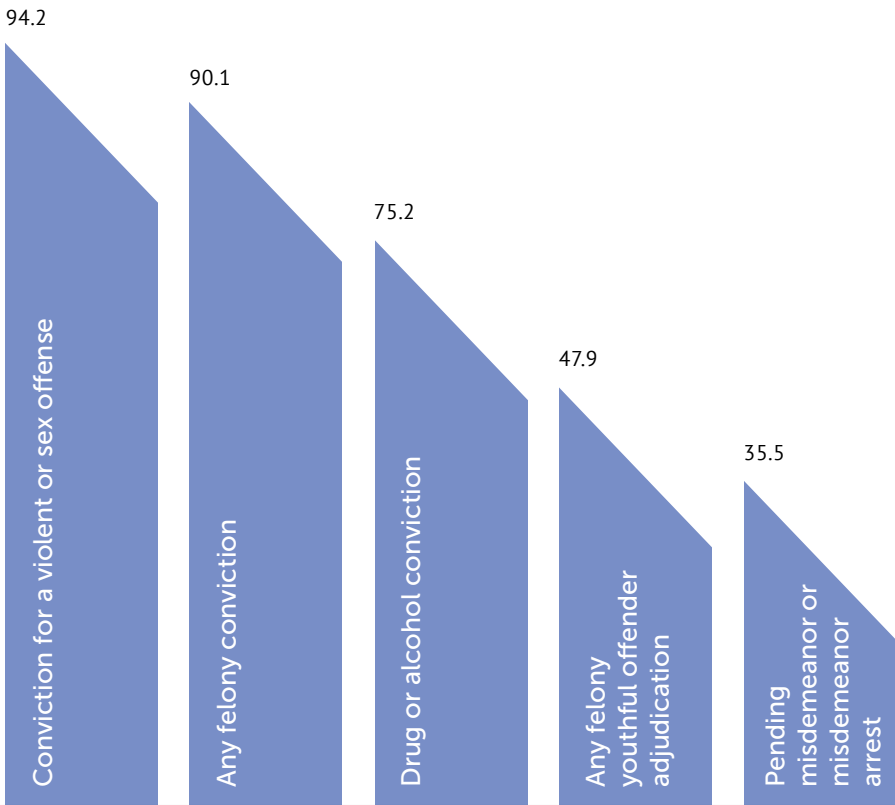
Latesha had to make monthly court appearances. She says: *"Although a first time offender, dealing with court and school and being judged in my school life and personal life was difficult."*

Latesha credits support from her advisor, the Dean of the School, and some professors for helping her through this difficult time: *"I was blessed... [my advisor] gave me much emotional guidance. The few professors who knew my circumstances allowed me to hand in my work online while away at court. I was able to make up assignments when I was absent for court as well."*

With a Bachelor's degree in hand, and an MSW underway, Latesha has been able to obtain satisfying work. She says of her college opportunity: *"Having a college degree has always been a goal of mine and was instilled in me. It makes me feel blessed and thankful that I do have a degree. My degree has helped my life because although I do have a conviction, my degree, work history and character have blessed me with strong employment opportunities. I currently work in the social service field; my degree and life experience have helped me to be able to relate to my clients."*

The survey also looked at how colleges and universities that collect and use CJI interpret that information and found that a broad array of convictions are viewed as negative factors in the context of admissions decision-making (Figure 9). Not only are convictions for a violent crime or sex offense viewed negatively (94 percent view each of these crime convictions negatively) but 90 percent of schools reported that they considered any felony conviction negatively, and 75 percent considered a drug or alcohol conviction negatively. Over half reported that youthful offender adjudications for underlying violent or sex offenses were a negative factor and almost half reported that they considered any felony youthful offender adjudication negatively.⁵ About a third of schools reported that they considered pending misdemeanors or misdemeanor arrests in a negative light and 11 percent stated that they viewed "lesser offense youthful offender adjudications" negatively.

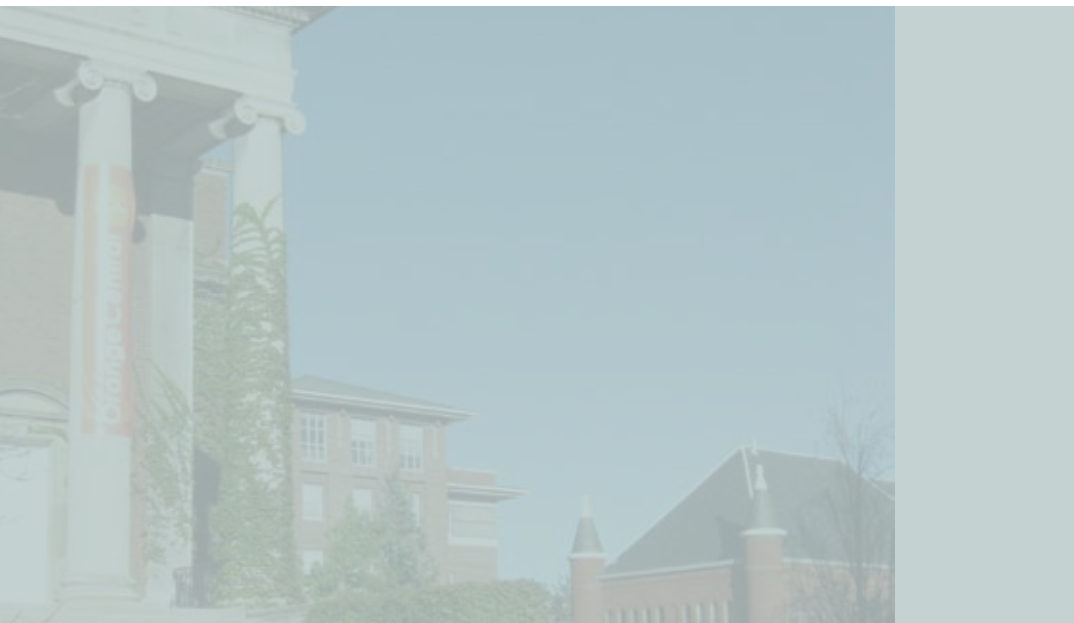
Figure 9
Percentage of schools that view specific types of criminal records negatively



⁵ Treatment of a YO adjudication as a negative factor underscores the broad misunderstanding about the criminal justice process. In most states it is not considered a criminal conviction and a person is legally entitled to not disclose it. In the State of New York where a YO adjudication is more familiar to admissions officials, some State University of New York (SUNY) applications actually, and correctly, warn students that they should not report a YO adjudication as a conviction.

If a college admissions official concludes that an applicant has failed to disclose a criminal record there is an increased likelihood that the applicant will be denied admission or have the admission offer rescinded. Thirty-two percent of schools that consider criminal history information reported that they automatically deny admission to applicants who fail to disclose their criminal record and another 46 percent stated that they might deny admission. Most of the comments offered in conjunction with this question suggest that failure to disclose a criminal record is considered to be a deliberate act of lying or falsification.⁶ The interviews with admissions staff provided some examples of how schools learn of a criminal history in the absence of self-disclosure. In one instance, further investigation, after a student was involved in some trouble on campus, turned up a past record. In another instance, a high school guidance counselor disclosed CJl and in another case, the school was contacted by the FBI about an ongoing investigation.

Of the 160 schools that report that admission can be denied on the basis of having a criminal record, two-thirds report that they inform applicants that their record is the reason for denial. Of those, one-third of the schools report that they do not have an appeals process. Over half of the schools that have an appeals process provide that information to all applicants denied because of a criminal record, and an additional 14 percent provide that information only to some denied applicants. Twenty-eight percent report that although they have an appeals process, they do not inform denied applicants of that option.



⁶ Such a conclusion may not be justified. As explained elsewhere in this report, the mistaken conclusion that the student intentionally falsified the application by failing to disclose may be the result of misreporting on a background check, a misinterpretation of a background check entry, or confusion on the part of the applicant about the exact nature of the conviction.

4

What post-enrollment services or conditions are offered to or required of students with criminal records?

More than half (55 percent) of the schools that collect CJl report that they either provide some level of support or require supervision for at least some students who have a criminal record. Of the schools that responded to the open-ended question regarding support services or supervision, the greater emphasis was on supervision by a 3 to 2 margin. Forty-three percent of the schools commented that their assignment of a student to special programs is made on a case-by-case basis.

Richard applied to schools that did not ask about his criminal record and was able to enroll with ease. He was assisted in his college application process by an organization called College Initiative (CI) located in New York City. CI is a not-for-profit reentry education program that helps formerly incarcerated people begin or continue their higher education after release from prison or jail, during probation or parole, or while fulfilling alternative-to-incarceration commitments. CI's free services include one-on-one guidance counseling, help with financial aid and college applications, preparation for entrance examinations, textbook stipends, and on-going support and mentoring. CI developed strong contacts with colleges and universities that did not discriminate against people with criminal records. CI's partnership with COPE (College Opportunity to Prepare for Employment) offices on ten City University of New York (CUNY) campuses offers students access to COPE's services including free academic support, transportation assistance, employment counseling and childcare referrals. As an analysis of the data from 2007-08 revealed, CI students performed on par with the general CUNY population, and CI students entering with general equivalency diplomas (GEDs) outpaced average CUNY GED earners. In the 2009-2010 academic year, 315 students enrolled in colleges and universities with 72% majoring in a public service related field. As of June of 2010, 93 students had earned

104 degrees (26 associate, 51 bachelors and 27 masters), many with scholarships and academic honors. Ninety-seven percent had no further involvement in the criminal justice system, and of those who did, most faced technical violations of the conditions of their release, not new criminal charges.

Until contacted by CCA for this study, Robert had no idea that some colleges were making it difficult to enroll: *"I was never discouraged from applying to any college because of my criminal history. That said, had I encountered an application with questions about a criminal history, I would have definitely thought twice about applying to that particular college, especially since my own history seemed to make no difference at the colleges that accepted me."* He says of his ability to attend college: *"I'm not exactly starting a college education; I'm finishing one. But it feels fantastic. Honestly, attending college and finishing my BA (and later my master's at the least) feels like a matter of life or death. Not literally, of course, but it is the most important thing I feel I need to do. As I said, I think this is one of the very few ways I can make my history an asset rather than a detriment. I couldn't even get a job at a moving company due to my history. Ironically, I may end up working as a professional in the social justice/prisoner advocacy field largely because of that same history. So it feels great and extremely important."*

Other conditions may apply to enrolled students with criminal records. Thirteen percent of schools that collect CJJ have special registration requirements including ensuring that the student is in compliance with any state registration rules, meeting with a school official, and the entry of the student's name in a special database and/or restrictions on class enrollment. Other special requirements noted in comments provided by responding admissions officers include "providing court documents and recommendations;" "a letter informing us about the issue;" "paying for a criminal background check;" and "housing restrictions." In one follow-up interview, the admissions officer stated that students with criminal records are subject to additional surveillance by campus security and might not be permitted to take courses on campus; instead they are restricted to taking classes online.

Fifty-three schools or 32 percent of the schools that collected CJJ as part of the admissions process reported having restrictions on access to student services. Seventeen (10 percent) noted that such restrictions are handled on a case-by-case basis. Housing restrictions were mentioned by 22 responding colleges and restrictions on work study assignments were mentioned by two respondents. Finally, 6 percent of schools noted that they include an annotation in the student's transcript.

In summary, the survey results show that criminal history screening of college applicants is becoming increasingly common; that people with criminal records are subjected to special admissions screening procedures; that college personnel other than admissions officials often participate in the admissions decision; that a wide range of criminal convictions and even arrests can negatively impact the admissions decision; that failure to disclose a conviction can result in rejection or expulsion; and that even after admission, students with records may be subject to special restrictions. However, the survey also shows that a sizeable minority of schools—38 percent—either do not collect any criminal history information, or if collected, do not use such information in admissions decisions.

IV. Closing Doors to Higher Education: The Impact of the U.S. Criminal Justice System

The use of CJJ in admissions decisions has to be evaluated in the context of the operation of the criminal justice system in the United States. There are several areas of concern which colleges should consider in determining both the utility of such screening and its impact on particular groups of prospective students.

Major areas of concern are:

- 1. The widespread use of the criminal justice system in the U.S. to address social and public health problems;***
- 2. The disproportionate impact of the criminal justice system on people of color; and***
- 3. The prevalence of errors in the reporting or the interpretation of criminal records.***

1 Expansive Reach of the Criminal Justice System

There has been a dramatic increase in the reach of criminal sanctions over the past three decades. Behaviors that were formerly addressed in other domains - family, faith community and schools - are now under the purview of the criminal justice system. Criminal justice practitioners and scholars call this phenomenon "widening the net." The enormous number of people under criminal justice control today demonstrates the breadth of this phenomenon: More than 2.3 million people are in jails and prisons, giving the U.S. the highest incarceration rate in the world, and more than 7.3 million people are under some form of correctional supervision (prison, jail probation or parole) (Glaze & Bonczar 2009; Pew Center for the States 2009). Two studies by the Pew Center on the States in 2008 and 2009 captured the magnitude of the U.S. criminal justice system. More than one in every 100 adults is currently locked up in the U.S. and an astonishing one in every 31 adults is under some form of correctional control or supervision (Pew Center on the States 2009; Pew Center on the States 2010).

The explosive growth of misdemeanor arrests, prosecutions and convictions is a major reason for the fact that more than 100 million Americans have criminal history records. Misdemeanor cases have more than doubled since the 1970's and now account for 10.5 million cases per year (NACDL 2009). These offenses are relatively petty—a very common misdemeanor charge in many jurisdictions is underage drinking, a not infrequent occurrence on college campuses. Because of the tremendous volume of these cases there is pressure on everyone, including defendants, to enter a guilty plea at the first court appearance, whether or not they committed the crime (NACDL 2009).

In addition to the 100 million people with criminal history records on file in the state repositories as of the end of 2008, another 14 million arrests are made each year (FBI 2009). More than 3 million of the arrests in 2008 were for felonies (SEARCH 2009). The largest category of arrests in 2008 was for drug offenses, which accounted for 1.7 million arrests (FBI 2009). The same FBI report indicated that people of college age (under 25 years old) represented 44.3 percent of the total arrests (FBI 2009). According to the Bureau of Justice Statistics in 2006 alone more than 1.1 million people were convicted of felony-level offenses in state courts, a 37 percent increase from 1990 (Durose et al. 2009). This number does not include felony convictions in federal courts. Uggen et al. (2006) estimated more than 16 million people in the United States – 7.5 percent of the adult population – had a felony conviction. In practical terms it can now be fairly estimated that more than one in three adults in America have some type of criminal history record – arrest, misdemeanor or felony conviction- on file with state criminal justice agencies (New York State Bar Association 2006).

Not only has the number of people incarcerated expanded dramatically, there has been a corresponding increase in the number of people being released from prison and reentering their communities after being incarcerated. In 2008, over 735,000 people were released from state and federal prison (Sabol, West & Cooper 2009). Many returned home seeking to rebuild their lives through education and employment.

The widening of the net has ensnared millions of people whose behavior would not have been considered criminal in the past. One scholar illustrates the overcriminalization of behavior in the U. S. with a laundry list of crimes that include: maiming oneself to excite sympathy (a felony in the state of Delaware); training a bear to wrestle (a crime in Alabama); failing to return library books (against the law in Utah); frightening pigeons from their nests (an offense in Massachusetts); and spitting in public spaces (a misdemeanor in

Virginia) (Luna 2005). It is difficult to measure the number of crimes that have been added to state penal codes, but an American Bar Association (ABA) study (1998) found that an astonishing 40 percent of federal crimes enacted since the Civil War were passed into law between 1970 and 1998.

Moreover, the labels attached to behaviors can often imply a level of dangerousness not commensurate with the actual deed. In New York State, for example, the theft of a bicycle from a garage attached to a house is classified as a violent crime, even if the theft did not involve actual violence or any interaction with another person, and did not penetrate the actual home itself. In Delaware, students can be criminally charged with the crime of “offensive touching,” which implies some type of sexual assault but typically involves adolescent behavior such as bra snapping or patting someone’s behind.

The efficacy of screening for CJ in the college application context must be considered in light of the fact that in 21st Century America, having a criminal record is no longer an unusual characteristic. Given the sheer numbers involved, it is inevitable that otherwise qualified and deserving applicants are either being rejected or are being discouraged from applying in the first place.

Of added significance is the fact that only a small percentage of people who engage in criminal behavior are arrested, prosecuted and convicted. Many more prospective college students are never arrested, prosecuted as adults or receive adult convictions despite their criminal behavior. A national survey conducted by the National Center for Addiction and Substance Abuse at Columbia University (1994) found that almost half of all full time college students binge drink and/or abuse prescription and illegal drugs, and a study by the U.S. Department Substance Abuse and Mental Health Services Administration found that in the age group, 18-25, more than one quarter acknowledged marijuana use in the past year. Is it the bad fortune of getting caught and having a criminal conviction that makes one unfit for college admission, or is it the “criminal behavior?” Clearly, screening for criminal convictions when the behavior itself is relatively commonplace does not make college campuses any safer.

Clearly, screening for criminal convictions when the behavior itself is relatively commonplace does not make college campuses any safer.

2 The Racial Impact of Using Criminal Records in Admissions Screening

It has now been well-documented that racial disparities infect the entire criminal justice system, from policing to sentencing. Such disparities have been documented in the processing of every type of crime, from juvenile delinquency to low-level misdemeanors to the imposition of the death penalty (Kalegeros 2003; Golub et al. 2007; Mufioz et al. 1998; Dieter 1998; Baldus 1998; Cole 1999). Because racial bias, whether deliberate or inadvertent, occurs at every stage of the criminal justice system, screening for criminal records cannot be a race-neutral practice.

Disparate treatment of young people of color begins in the schools with disproportionate suspensions and in-school arrests--a phenomenon known as "the school-to-prison pipeline" (Wald & Losen 2003; Skiba et al. 2000; Weissman 2008). High levels of police deployment in communities of color combined with racial profiling and "stop and frisk" practices also bring disproportionate numbers of young people of color into the criminal justice system (Markowitz & Jones-Brown 2000; New York Attorney General 1999). As a result, an estimated one in three adult black men has a felony conviction, twelve percent of black men between the ages of sixteen and thirty-four are incarcerated, and more than twice that number are on probation or parole (Uggen et al. 2006; Harrison & Beck 2005; Glaze & Bonczar 2008). In 2004 alone, more than one million people were convicted of felony offenses in state courts, almost 40 percent of whom were African American, far exceeding their 12 percent representation in the U.S. population (Durose & Langan 2007).

Racial disparities are starkly apparent in incarceration rates: Blacks are imprisoned at a rate of 3,218 per 100,000, Latinos at 1,220 per 100,000, and whites at 463 per 100,000 (Glaze & Bonczar 2008). The same Pew Center studies that documented that one in 100 adults were incarcerated and one in 31 adults in the U.S. were under correctional control, dramatically show the racial disparity when controlling for race or gender. One in nine African American males is currently incarcerated while one in eleven African American adults is under correctional supervision. A recent Bureau of Justice Statistics study that analyzed the total incarcerated population at year end 2008 concluded that black males were imprisoned at a rate six and a half times higher than white males (Sabol, West & Cooper 2009). So pervasive is the criminal justice system in the lives of black men that more black men have done prison time than have earned college degrees (Western et al. 2003). This is a national tragedy.

The disparate enforcement of drug laws is a significant contributor to the overrepresentation of African Americans and Latinos in criminal justice statistics. It is well documented that illegal drug use does not differ significantly for whites, blacks or Hispanics (SAMHSA 2007), yet 62 percent of people incarcerated for drug crimes are black (Human Rights Watch 2000). Recent research on marijuana possession arrests shows huge disparities as well. In New York City from 1997 to 2006, marijuana misdemeanor arrestees were 52 percent black, 31 percent Hispanic and 15 percent white, although their population in the City was 26 percent, 27 percent and 36 percent, respectively (Levine and Small 2008). Similar disparities exist throughout the country and are particularly significant here given the prevalence of marijuana use among college-age people. According to government statistics, a higher percentage of white 12th graders and whites between the ages of 18-25 use marijuana than their black and Hispanic counterparts. Yet blacks in particular are arrested for possessing small amounts of marijuana at far higher numbers, and, in many jurisdictions, those arrests result in a guilty plea and a criminal record.

Because so many people of color are caught in the criminal justice system, the imposition of institutional barriers such as admissions policies that screen out people with a criminal record constitute a de facto return to race-based discrimination in higher education. The criminal justice system has created a new divide in the United States. Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), official discrimination was accepted in many areas of life including education. Today, unofficial discrimination and exclusion are perpetuated and justified under the guise of ostensibly "race neutral" criminal justice policies and practices.⁷



⁷ The use of a criminal record has already had an impact on the ability of low income students, many of whom are students of color, to get a college education. Until 2006, Section 484, Subsection (r) of the 1998 Amendments to the Higher Education Act of 1965 denied or delayed eligibility for financial aid to people with drug convictions. A GAO report (2005) determined that about 20,000 students each year were denied Pell Grants and 30,000-40,000 lost out on student loans because of this federal law. Wheelock and Uggen (2006) concluded, "Relative to Whites, racial and ethnic minorities are significantly more likely to be convicted of disqualifying drug offenses... and significantly more likely to require a Pell Grant to attend college... It is therefore plausible that tens of thousands have been denied college funding solely on the basis of their conviction status" (p. 23). Thus, while screening of prospective college applicants for criminal records may appear to be race neutral, the racial disparities in the criminal justice system means this practice has the potential of having significant racially exclusionary effects.

3 Challenges in Interpreting Criminal Records and Identifying Inaccurate Information

Carla's conviction dates back to 1993 and for many years she has worked to help formerly incarcerated people reintegrate into the community. She recently decided to get a college degree and applied to a local university. Her experience shows the inaccuracy of criminal records: *"My application to a University here in ...Texas has been breaking my heart. My last offense was in 1993 and they will not move forward on my application until I prove that I completed my sentence. I received my background check ... and nowhere does it say 'sentence completed.' I have been waiting over a month now just trying to clear this up and prove that I have served my time. I have been on an emotional roller coaster because it seems that my past will not die, stay dead and remain buried. I will go to District Court tomorrow and try to get something that shows I paid my debt to society."*

For criminal justice policy makers and researchers, not all convictions are alike. There are important distinctions to be made based on the level of crime (e.g. felony, misdemeanor, and noncriminal violation), the individual's status at conviction (e.g., juvenile delinquent, Youthful Offender, Juvenile Offender, adult), the type of crime, and the state laws governing types of convictions or adjudications. There are differences with respect to which, if any, convictions, can be sealed or expunged. There are also differences at the state level regarding the age at which a person is considered an adult for criminal justice purposes. In New York State, for example, anyone 16 years or older is considered an adult for any crime and prosecuted in the adult court system. In contrast, many other states do not prosecute youth as adults until they reach the age of 18. As a result, applicants from different states will answer the same application questions about their criminal history differently, not because of differences in the behavior involved, but because of differences in state criminal and juvenile justice laws and definitions.

Two college applicants from different states, convicted of the very same offense at age 15 could end up with entirely different criminal history records. One could be saddled with an adult felony conviction and the other could end up with no adult criminal record at all. How could an admissions officer possibly fairly compare the two applicants to determine which, if either, posed a future threat to campus safety?

Sealing, expungement, pardons, deferred prosecution, *nolle prosequi*, and Youthful Offender status pose challenges for both the prospective student and the admissions officer trying to assess the student's response on the application for admission. Records that are sealed or expunged, as well as convictions that are covered by "youthful offender" status are not supposed to

be reported by the individual who has such a conviction. Sealed and expunged records are required to be removed from criminal history information. Unfortunately, many people are not made aware of their rights and continue to respond in the affirmative when asked whether they have a criminal record. College admissions officers may not be familiar with what kinds of convictions do not have to be reported and what specific offenses mean, and as a result, may misinterpret CJI included on a college application.

Errors in criminal history records are a major problem in the U.S. Common errors include the failure to report a final disposition in a case, the inclusion of information that should have been sealed, the failure to note Youthful Offender status when applicable, and the misreporting of arrests and convictions. A study by the federal Bureau of Justice Statistics (BJS) noted that many states still do not have the capacity to record dispositions (BJS 2009). A 2001 survey of state criminal history practices conducted by BJS found considerable variation in state procedures for auditing the quality of their criminal justice data: 22 states reported that they had not done an audit in the five years preceding, leading BJS to conclude: *"The issue of the accuracy and completeness of criminal history records was identified as an important concern during the earliest stages of the development of a national criminal history record program. More recently, the data quality issue has emerged as one of the most important and timely issues confronting the criminal justice community. ... In the view of most experts, inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation's criminal history record information systems"* (BJS 2001:38). The errors identified included missing, inaccurate, or incomplete information, and audits of various state repositories found error rates that were deemed "unacceptable" (p. 39). The report also noted great dissimilarities in reporting and classification among states and warned that, *"Many of the criminal history records currently circulated by the repositories are difficult to decipher, particularly by noncriminal justice users and out-of-State users"* (p. 42).

Errors regarding Youthful Offender status are particularly relevant in the context of college admissions. Many states as well as the federal government grant certain young people "Youthful Offender" status allowing for more lenient sentencing options and conveying other benefits that protect the young person from the long term negative consequences of a criminal conviction. In New York State, for example, a person who receives Youthful Offender status for a felony or a misdemeanor is legally permitted to answer "No" when asked if he or she has been convicted of a crime. Many people, however, do not know this and may answer "Yes" on college applications. Even more troubling, Youthful Offender convictions are not always properly recorded or sealed and may be accessible through criminal background checks. Thus, for example, an applicant may correctly answer in the negative to a question about a criminal conviction for which she was subsequently adjudicated a Youthful Offender, only to have a college admissions office assume she has falsified her application when a background check erroneously reveals the Youthful Offender adjudication as a criminal conviction.

The prevalence of criminal convictions in the general population and the racial disparities found at all stages of the criminal justice system compounded by the prevalence of errors in criminal history information raise grave concerns about the collection and use of criminal history information in making admissions decisions.

V. Higher Education and Promotion of Public Safety

Higher education opens doors of opportunity, enhances critical thinking, and leads to better and more stable employment. Studies of recidivism rates of people who attend college while in prison, as well as those with criminal records who attend college following release, show that a college education dramatically reduces recidivism. Post-secondary educational programs have been shown to reduce recidivism by approximately 40 percent (New York State Sentencing Commission 2007). A research brief prepared by the Open Society Institute (1997) reported on a Texas study in which participation in higher education lowered recidivism to 15 percent, 13 percent and under 1 percent for people who earned an associate's, bachelors, and master's degree, respectively. In contrast, the general recidivism rate hovers around 63 percent nationally (Vacca 2004). A study of recidivism rates among women showed that only 7.7 percent of those who took college courses in prison returned to prison after release, compared to 29.9 percent of those who did not participate in the college program (Fine et al. 2001). State-level studies in Texas (Tracy & Johnson, 1994), California (Chase & Dickover 1983), Alabama, and Maryland (Stevens & Ward 1997) have, over the course of many years, shown significant reductions in recidivism associated with higher education in correctional settings.

There is less information about the impact of post-release college education on recidivism. We do know, however, that people with college educations generally have substantially less involvement in the criminal justice system than do people without higher education. U.S. Department of Justice data shows that 13 percent of incarcerated people and 24 percent of people on probation had a postsecondary education compared with 48 percent of the general population (Harlow 2003). The College and Community Fellowship, one of a few organizations that works directly with formerly incarcerated individuals who are in college in New York City, has tracked success rates. The program, housed at the City University of New York Graduate Center, has enrolled more than 200 formerly incarcerated people in its first seven years and reports a recidivism rate of less than one percent. None of the students were re-incarcerated (Haberman 2006; College and Community Fellowship 2007).

Higher education is also a pathway to a productive, healthy and fulfilling life. It is strongly associated with improved employment prospects and future earnings. The Center for Labor Market Studies at Northeastern University found a clear relationship between employment rates and level of education for African Americans. Higher education significantly increases employment rates among African Americans with 86 percent of college educated African Americans employed compared to 57 percent of high school graduates and a mere 33 percent of high school dropouts (Sum et al. 2007).

At least eight out of ten of the fastest growing jobs in the U.S. require some postsecondary education (U.S. Department of Education 2003). A college graduate is expected to earn more than twice as much as a high school dropout, and even one year of college is estimated to increase lifetime earnings by 5 to 15 percent (National Governor's Association 2003). The median earnings for full-time employees were \$28,800 for a person with a high school diploma compared to \$46,300 for a person with a bachelor's degree. Increases in annual earnings associated with higher levels of formal education persist throughout a person's lifetime. The U.S. Census Bureau reports that the lifetime earnings for people with a high school diploma are \$1.2 million, compared to \$2.1 million for people who obtain a bachelor's degree.

There are larger social benefits associated with increases in higher education - ranging from the expansion of knowledge to helping people become better parents, more informed voters and more engaged citizens (Joint Economic Committee in January 2000). Colleges and universities promote public safety in the larger community when they open their doors to people with criminal records who demonstrate the commitment and qualifications to pursue a college education.

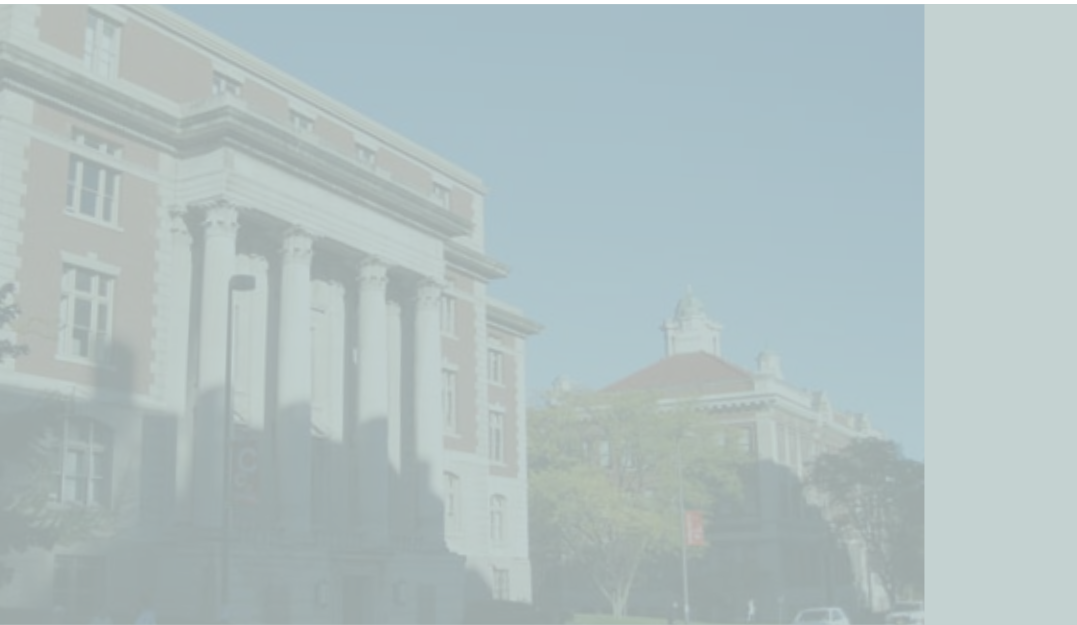
At least eight out of ten of the fastest growing jobs in the U.S. require some postsecondary education (U.S. Department of Education 2003).

VI. Recommendations for Reintegrative Justice: Making College Accessible to People with Criminal Records

The role of education in American society was eloquently stated by Chief Justice Earl Warren in the historic *Brown v. Board of Education* decision:⁸

It [education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. (Brown, 347 U.S. at 493).

Rather than excluding people with criminal records, colleges and universities can fulfill their commitment to equal opportunity and contribute to a stronger and safer future for the country by welcoming otherwise qualified students with criminal records into their ranks, and, where appropriate, offering support services.



31 ⁸ The principles of *Brown v. Board of Education* were extended to institutions of higher education in 1956 in *Hawkins v. Board of Control*, 350 U.S. 413,414.

Recommendation:

Colleges and universities should refrain from engaging in CJI screening.

Almost 40 percent of the colleges and universities surveyed do not use CJI in their application process and there was no indication from the survey results or other data that those campuses are any less safe than those that do use CJI. This is not surprising given what we know about the lack of any demonstrable link between campus safety and students with criminal records. There is no evidence that screening for criminal histories increases campus safety, nor is there any evidence suggesting that students with criminal records commit crimes on campus in any way or rate that differs from students without criminal records. On the contrary, the Olszewska study leads to the conclusion that the practice of inquiring into applicants' criminal background, school judicial background, and military discharge information may not be an effective means of reducing campus crime because there is no substantially significant difference in the rate of campus crime between institutions of higher education that explore undergraduate applicants' disciplinary background and those that do not (Olszewska 2007). There is, however, considerable evidence that using CJI as part of the college admissions screening process will disproportionately impact young men and women of color. There is also evidence that obtaining a college education greatly reduces the likelihood of recidivism and improves a range of life outcomes from employment, to health and mental health functioning. Because broad access to higher education is good for public safety and the economic growth and well-being of the country as a whole, colleges and universities should refrain from engaging in CJI screening.



Secondary Recommendations:

If an institution continues to perform CJ screening, it should adopt policies and prodecures that will help mitigate the negative effects of such screening. The policy should be fair and consistent and should be formalized in writing so that all staff know what the policy is and do not consider criminal convictions outside of the written guidelines. A written policy will also make the process more transparent and and will give notice to prospective students so that they are aware of what will be required to gain admission to the school.

Policies and their outcomes should be evaluated periodically through data collection and analysis to determine whether using CJ in college admissions decisions is actually necessary. We suspect that through the collection of data regarding incoming students and their behavior while on campus, admissions officers will discover that the crime rate while on campus is no higher for students with prior criminal records than it is for other students. Such a finding would lead to the conclusion that criminal history screening is not predictive of future behavior on a college campus, and is costly, time-consuming, and counter-productive.

1. Remove CJ disclosure requirement from initial application for admission.

Disclosure should be required only after the initial admission decision is made. All applicants who have received a conditional offer of acceptance can be sent an inquiry about any felony convictions within the preceding five years (see recommendation 2 below). Limiting CJ inquiries to applicants who have been admitted ensures that those with records are considered for admission under the same criteria as all other applicants. It also reduces the likelihood that qualified and deserving individuals with criminal records will be discouraged from applying. Limiting the number of records that admissions staff must review and investigate to applicants who are conditionally admitted will allow them to spend more time evaluating the individual circumstances of college applicants with a criminal record.

2. Limit disclosure requirement to specific types of convictions.

a) Only convictions for felonies, not misdemeanors or infractions.
Misdemeanor convictions, which rarely involve incarceration and which, as noted in Section IV, have dramatically increased in number over the past decade, should not be included in any disclosure requirements. Convicted misdemeanants are commonly accused of offenses such as underage drinking, turnstyle jumping, dog leash violations, and driving without a license—offenses which do not have any impact on public safety.

b) Only felony convictions imposed within the past five years.
This limitation is supported by research showing that with time, a person with a criminal record is no more likely to commit a crime than a person without a criminal record. Depending on the offense and the age at which it was committed, after the passage of 4½ to 8 years, if no further arrests have taken place, an individual has a minimal risk of re-offending (Blumstein & Nakamura 2009).

c) Only convictions for felonies that were committed after the individual's nineteenth birthday.
States differ with respect to the age at which an individual can be prosecuted as a juvenile as opposed to an adult. A fourteen-year-old in one state might be prosecuted as an adult and end up with a criminal record while a seventeen-year-old in another state might be prosecuted as a juvenile for the same offense and end up with a clean slate. In addition, states confer various forms of Youthful Offender adjudications which remove criminal convictions from the records of young people between the ages of thirteen and twenty-two, depending on the state. Because of the lack of uniformity it is nearly impossible to compare the records of applicants from different states in a way that is fair and equitable. A viable solution is to limit disclosure to convictions for felonies committed after age nineteen. This acknowledges the rationale underlying the distinction between adult and juvenile criminal processes: society's recognition that crimes committed before a certain age are the result of immature behavior not likely to be repeated with age and maturity, and society's commitment to the idea that an individual who commits a criminal act as a juvenile is more amenable to rehabilitation (ABA Resolution 102A February 2010).



3. Establish admissions criteria that are fair and evidence-based.

a) Remove barriers to admission of individuals who are under some form of community supervision.

Terms of community supervision (probation) vary depending upon state law and state and local early discharge policies and practices. In some jurisdictions community supervision extends over five years, ten years, or a lifetime. Barring college admission in such cases is therefore tantamount to a policy of blanket denial. Terms of supervision also vary depending on the nature of the criminal conviction. Colleges and universities should regard community supervision as an added support that will help the student be successful rather than as a bar to admission.

b) Avoid policies that impose blanket denials for particular crimes.

Admissions officers should refrain from imposing a policy that creates a blanket denial for any type of offense. Careful individual evaluation should be undertaken in every case where a criminal conviction is considered as a factor for admission.

c) Provide an opportunity to document personal growth and rehabilitation.

Applicants who have disclosed a criminal record should be encouraged to provide information about their rehabilitation, including, but not limited to:

- a copy of the certificate of disposition from the court in which the conviction occurred along with a personal statement explaining the circumstances surrounding the conviction, the lessons learned, insights gained and personal changes that have occurred since the conviction;
- letters of recommendation from any individual who may be able to speak to the applicant’s rehabilitation or good conduct since the conviction;
- documents showing the applicant’s participation in or successful completion of programming while incarcerated;
- documents showing the applicant’s participation in any re-entry program upon release, including vocational and training achievements;
- documents showing the applicant’s participation in a community service program or showing community service achievements;
- documents showing participation in or successful completion of a substance abuse, anger management, domestic violence, or other program;
- letters or documents regarding any work experience the applicant may have had;
- a Certificate of Rehabilitation, Certificate of Relief from Disabilities, Certificate of Good Conduct, Pardon, or like document.

d) Avoid requiring applicant to produce his “official” criminal history record information.

When an individual requests his or her own criminal history record information from the state central repository this information is private. In some states the information on the record includes information that cannot be disclosed to the public, including employers and educational institutions. It may include information that has been legally sealed, expunged or is confidential under state law. In some cases it contains information that the applicant cannot legally be required to disclose. If an admissions officer wants to know about any criminal convictions, disclosure of a certificate of disposition should be sufficient and will avoid disclosure of otherwise confidential information.

4. Base admissions decisions on assessments that are well-informed and unbiased.

a) Develop in-house expertise.

Admissions offices should institute a training program to equip staff to interpret criminal records, including differences among the states in how they define specific crimes and reportable offenses. Staff should be familiar with the research on disparities in the criminal justice system and the link between higher education and desistance from crime and should keep abreast of new information regarding collateral consequences of a criminal conviction. Admission officers may find it helpful to develop a decision-making panel with a broad range of expertise. Conferring veto power upon any one individual, on the other hand, should be avoided.



b) Perform an assessment and multi-factor analysis to determine whether a past criminal offense justifies rejection.

It is not enough to conclude that a criminal record reflects a “poor moral character.” Rather, there should be a direct relationship between the specific circumstances surrounding the criminal conviction and the individual’s status as a student. If there is something about the person’s criminal record that gives rise to a concern that he or she will engage in criminal activity as a student, then it is appropriate to refuse or defer admission. But each case should be individually assessed in the context of the person’s desire to be a college student and a multi-factor analysis should be done to determine (a) whether or not there is a high probability that the person will re-offend on campus and (b) whether the denial of admission will undermine public policy.

The following factors should be considered:

- The age of the person at the time of the criminal offense and how much time has elapsed since its occurrence;
- The nature of the offense and whether it bears a direct relationship to the person’s status as a student;
- Whether the person is more likely to engage in future criminal conduct than similarly situated students who do not have a criminal record based on information submitted regarding rehabilitation and the low risk of re-offending (see below);
- Whether the institution’s legitimate interest in protecting property, safety and the welfare of the college community will be put at risk if the person is admitted;
- Whether a negative decision would undermine important public and institutional policies, such as:
 - promoting equal access to educational opportunity and preventing the exclusion of people of color who are disproportionately represented in the criminal justice population because of racial profiling and other discriminatory practices;
 - promoting campus diversity;
 - supporting rehabilitation and public safety by offering the benefits of higher education known to improve life chances and reduce recidivism.

c) Failure to disclose should not be the grounds for automatic rescission of an offer of admission or expulsion.

Given the confusion that characterizes criminal record-keeping and the uncertainty about one’s rights and responsibilities to disclose or not disclose a record, college admissions officials should not assume that students have deliberately lied. The student or applicant should be afforded a chance to explain his or her understanding of what was asked and answered. This should be reviewed by the staff with expertise in understanding criminal history information.

5. Establish procedures that are transparent and consistent with due process.

a) Inform students of the reason for the withdrawal of an offer of admission.

Colleges and universities should be transparent about informing applicants that their criminal record was the reason for rejection or withdrawal of admission. Transparency will help prevent admissions decisions based on inaccuracies endemic to criminal justice record-keeping in the U.S. The applicant should be given the opportunity to correct a mistake in the criminal history record or background check that may have led to the incorrect assumption that the applicant failed to disclose a past conviction, and to explain the basis for their original response.

b) Applicants should be afforded the right of appeal.

The appeals process should be designed to encourage applicants to pursue admission rather than to discourage further efforts to enroll. An admissions professional trained in criminal justice issues will be able to assist applicants with criminal records in providing the documentation and information needed for reconsideration.

6. Offer support and advocacy.

a) Provide on-campus support services for students who have criminal records.

Access to a range of support services will increase a student’s chance to succeed and lessen the potential for harrassment or surveillance. Colleges can develop their own program or partner with service organizations with a proven record of success. Model programs include the College Initiative which helps people enroll in college following their release from prison, the College and Community Fellowship Program housed at the City University of New York which provides mentoring, tuition and academic support to help formerly incarcerated women make the transition to academic life, and Project Rebound, which operates out of San Francisco State University and provides counseling on balancing academic responsibilities with the responsibilities of the parole or probation process, and assists with tutoring, financial aid, and financial supports that help defray the cost of books, transportation and meals.

b) Provide information and assistance when a prospective student’s chosen field bars individuals with criminal records.

Rather than discouraging students from entering a profession which prohibits the licensing or certification of individuals with criminal records, colleges should inform such students about ways to overcome those barriers, such as administrative waivers, certificates of rehabilitation and other forms of advocacy. In this way, students will be informed about potential barriers but not discouraged from pursuing a course of study that may lead to the desired career goal. We further recommend that colleges and universities become proactive in convincing licensing boards and other professional certification entities that students with past criminal records who successfully complete a course of study and have been positive members of the campus community should not face bars to employment for which they are otherwise qualified.

Programs that Work

The College Initiative (CI) was founded in 2002 by an educator with years of experience developing in-prison college programs. The loss of Federal Pell and New York State TAP grants for prisoners in 1994-1995 (primary funding source for higher education program in prisons until that time) was a motivating factors in her decesion to address the critical need for access to higher education for people in reentry. CI is a project of the Fund for the City of New York with offices at The Fortune Society's headquarters in Long Island City and LaGuardia Community College, both located in Long Island City, Queens. CI is part of the CUNY-wide Black Male Initiative and works in collaboration with College Opportunity to Prepare for Employment (COPE) on ten CUNY campuses. To help ease the return to school, CI offers fall, spring and intensive summer College Prep Program. Additionally, most new enrolees are paired with successful CI students who are trained as peer mentors. In its first four years, the Initiative helped 167 former state prisoners enroll in 27 different colleges and universities in New York. The Initiative offers a preparatory program called "Bridge to College" that helps students, most of whom have been out of school for many years, refresh their verbal and math skills. The College and Community Fellowship Program (CCF), a not-for-profit organization, is housed at the City University of New York. It provides mentoring, tuition and academic support to help formerly incarcerated women make the transition to academic life. It provides a small stipend to participants each semester as well as an array of

social supports to help participants address other facets of reentry including family reunification, and balancing school, family and work. Between 2000 and 2008, 234 people have enrolled in college through CCF. To date, 14 women have earned Associate's degrees, 49 have earned Bachelor's degrees, 30 were awarded Master's degrees, and one participant has earned a Doctoral degree. The recidivism rate among participants is less than one percent. Project Rebound, one of the nation's oldest higher educational support programs for formerly incarcerated people, was founded in 1967 by the late Professor John Irwin, a noted criminologist and formerly incarcerated person. The project operates out of San Francisco State University providing special admissions services for people with criminal records (people leaving jail and prison and people in pre-trial court diversion). The program provides counseling on balancing academic responsibilities with the responsibilities of parole or probation, making the transition from a secure institution to academia, and orienting new students to the rules of the university. Finally, the Second Chance Program is a part of the City College of San Francisco and recruits, enrolls, and supports people with criminal records in pursuing an academic degree. It orients students to colleges, helps them negotiate the registration process, and assists with tutoring, financial aid, and financial supports that help defray the cost of books, transportation and meals.

7. Evaluate the policy periodically to determine whether it is justified.

Colleges and universities that screen for criminal records should begin to collect the data necessary to analyze whether students with a prior criminal record are any more likely to commit a criminal offense when enrolled as a student than their counterparts who do not have criminal records. There are no existing empirical data indicating that a campus is made safer by criminal history screening. If screening does not, in fact, help in the prediction of increased rates of criminal behavior, then it serves little purpose. It is both unfair and unwise to continue to screen for criminal records if it does not serve any legitimate purpose and may have adverse impact.



VII. Conclusion

There is growing support for returning higher education to correctional facilities. The Second Chance Act, which passed Congress on March 11, 2008, and the Senate and House versions of H.R. 4137, the College Opportunity and Affordability Act of 2007 all include provisions that improve access to higher education for people during their incarceration. It is ironic that as the doors to higher education are reopening in prisons, they are closing on the outside. Given what we know about the commission of serious crimes on campus—that they are most often committed by students without criminal records - excluding people with records from attending college will only serve to create a false sense of security.

Sensible and proven measures to increase campus safety include education and discussion among students on campus about excessive use of alcohol, education about what constitutes healthy and consensual sexual relationships, campus-wide responses to hate crimes, and making changes to the physical environment of a college such as improving security in dormitories. Barring people with criminal records from attending college does not improve campus safety, but does undermine public safety in the larger community. Finally, because of the enormous racial disparities found at every stage of the country's criminal justice system, policies and practices that exclude people with criminal records from institutions of higher learning are a setback to the gains earned through the long and arduous struggle of civil rights activists to open higher education to all people, regardless of race or ethnicity.

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