The IDEA in Prison:
An Impossible Mandate?

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Abstract

Up to 85 percent of youth in prison have a qualifying disability under the Individuals with Disabilities Education Act ("IDEA"). Yet only one third receive some form of special education services in prison, and the services provided are inadequate. The failure of prisons to comply with the IDEA is due to the carceral system's inherent institutional and restrictive nature, which makes it impossible to comply with the IDEA's requirements for individualization and inclusion. As a solution, this Note suggests Congress should amend the IDEA to (1) remove the loopholes that have made prisons a purportedly appropriate setting for special education and (2) extend the IDEA's child assessment and manifestation determination requirements to criminal and delinquency proceedings. This solution would ensure that no youth with disabilities are sent to prison where they cannot receive the mandated services they need, and instead ensure they receive these services in the least restrictive environment along a continuum of non-prison alternative placements. This solution also addresses the racial and ableist biases that have contributed to the over-representation of youth with disabilities, particularly Black youth with disabilities, in prisons. Given that the vast majority of incarcerated youth have disabilities, a proscription on sending youth with disabilities to prison and the creation of alternative placements

would decrease the overall youth population in prison, which could reduce and potentially eliminate the need for prisons entirely.

About the Author

J.D. Candidate, May 2024, U.C. Berkeley, School of Law. I would like to thank Professor Jonathan Glater for providing invaluable advice and guidance throughout the writing process, fellow students in the Education Law and Policy seminar for their thoughtful feedback on this paper during the fall 2022 semester, the editors of the UCLA Disability Law Journal for their careful editing and suggestions, as well as Rich and Susan for their unwavering support.

The idea for this Note has come through my personal experience working with incarcerated youth, where I realized nearly every single youth qualified for special education under the IDEA. Professor Jamelia Morgan's article on using the Americans with Disabilities Act to reduce adult incarceration made me wonder whether the IDEA could similarly be used to reduce youth incarceration. See Jamelia N. Morgan, The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons, Geo. J. on Poverty L. & Pol'y 305, 315–16 (2020).

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Introduction

The Individuals with Disabilities Education Act (IDEA) aims to ensure that all children with disabilities receive special education and related services designed to "prepare them for further education, employment, and independent living."[1] However, these aims fall short in practice for youth with disabilities[2] in prison,[3] who do not—and cannot—receive the special education services they need and are entitled to under the IDEA.

The IDEA imposes an affirmative obligation on schools to provide all eligible students with disabilities a "free and appropriate public education" (FAPE) in the least restrictive environment along a continuum of alternative placements. The IDEA also imposes important procedural protections, including a manifestation determination review,[4] before

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1. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021).

2. For purposes of this Note, the term "youth with disabilities" includes children and young adults up to age 21 who have a qualifying disability that renders them eligible to receive special education and related services under the IDEA. Not all youth with disabilities are eligible under the IDEA, as only the disabilities that interfere with a youth's education qualify. Youth with disabilities may also be covered under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, which similarly require specialized education.

3. For purposes of this Note, the term "prison" is used to describe all carceral facilities, including state prisons and local jails, adult and juvenile correctional facilities, juvenile detention, etc.

4. The manifestation determination review determines whether the

schools can discipline students with disabilities. Yet despite these requirements, youth with disabilities are still more likely to face serious school discipline,[5] be arrested, and get charged with more severe offenses when referred to court.[6]

As a result, youth with disabilities, particularly youth of color with disabilities,[7] are overrepresented in the criminal legal system.[8] Up to 85

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conduct was "caused by, or had a direct and substantial relationship to the disability, or was the direct result of the school's failure to implement the IEP." 20 U.S.C. § 1415(k)(1)(E) (2018). If so, the school generally may not discipline the child. See 20 U.S.C. § 1415(k)(1)(F) (2018).

5. Amber Baylor, Criminalized Students, Reparations, and the Limits of Prospective Reform, 99 WASH. U. L. REV. 1229, 1247 (2021).

6. Aleksis P. Kincaid & Amanda L. Sullivan, Double Jeopardy? Disproportionality in First Juvenile Court Involvement by Disability Status, 85 EXCEPTIONAL CHILD. 453, 463 (2019).

7. Id. at 455 ("Black youth are petitioned and detained at highest rates, and Hispanic youth are incarcerated after adjudication at highest rates. Such racial disparities have been observed for decades, spurring concern for overrepresentation of students with disabilities because youth from racial-/ethnic-minority and economically disadvantaged communities have historically been overrepresented as having disabilities. This phenomenon is considered an artifact of ineffective educational services in general and special education.") (citations omitted).

8. For purposes of this Note, the terms "criminal legal system" and "criminal proceedings" encompass proceedings in the adult criminal and

percent of youth in prisons have disabilities that make them eligible for special education services,[9] which greatly exceeds the approximately 15 percent of youth with disabilities in public schools.[10] Black youth with

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juvenile delinquency systems.

9. Nat'l Council on Disability, Breaking the School-to-Prison Pipeline for Students with Disabilities 5 (2015), https://www.ncd.gov/system/files_force/Documents/NCD_School-to-PrisonReport_508-PDF.pdf?download=1 ("Up to 85 percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services[.]"); Nat'l Tech. Assistance Ctr. for the Educ. of Neglected or Delinq. Child. and Youth, NDTAC Fact Sheet: Youth with Special Education Needs in Justice Settings 3 (2014) [hereinafter NDTAC], https://neglected-delinquent.ed.gov/sites/default/files/NDTAC_Special_Ed_FS_508.pdf?utm_source=FindYouthInfo&utm_medium=Federal%20Links&utm_campaign=Reports-and-Resources, ("Rates of disabilities among incarcerated youth are generally estimated between 30 and 80 percent[.]"). It is difficult to fully characterize juvenile system involvement of youth with disabilities, as estimates have varied across time, geographic location, point of contact, and assessment of disability. Kincaid & Sullivan, supra note 6, at 455.

10. Nat'l Ctr. for Educ. Stat., The Condition of Education: Students with Disabilities 1 (2022), https://nces.ed.gov/programs/coe/pdf/2022/cgg_508.pdf. The overrepresentation of youth with disabilities persists in adult prisons, where 34.1 percent of all state and federal prisoners aged 18–24 reported a disability, compared to 6.2 percent in the general population.

disabilities represent 49.9 percent of IDEA students in prisons, compared with just 18.7 percent of the IDEA population overall.[11] This drastic over-representation of youth with disabilities in prison directly conflicts with the IDEA's principle that it is both discriminatory and ineffective to punish a child for behavior that is a manifestation of their disability.[12]

Incarcerated youth have significant educational needs, as they often enter prison with fewer academic credits and lower grade point averages than youth who are not incarcerated.[13] Yet the special education offered to youth with disabilities in prison is grossly inadequate,[14] if it

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Bureau of Justice Statistics, U.S. Department of Justice, Survey of Prison Inmates, 2016: Disabilities Reported by Prisoners 4 (2021), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf.

11. Nat'l Council on Disability, supra note 9, at 11; see also Daniel Losen et al., Disturbing Inequities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline, 5 J. Applied Rsch. on Child. 1, 2 (2014).

12. See Jillian Morrison, Juvenile (In) Justice: Reaffirming IDEA's Application in the Juvenile Correctional Context, 42 Child. Legal Rts. J. 96, 118 (2022); 20 U.S.C. § 1415(k)(1)(E) (2018); 34 C.F.R. § 300.530(e)–(g) (2021).

13. NDTAC, supra note 9; Blakely Evanthia Simoneau, Special Education in American Prisons: Risks, Recidivism, and the Revolving Door, 15 Stan. J. C.R. & C.L. 87, 110 (2019).

14. Letter from Melody Musgrove & Michael K. Yudin, U.S. Dep't of Educ., to "Dear Colleague" 2 (Dec. 5, 2014) [hereinafter Dear Colleague

is offered at all. In a study of Southern states, 70 percent of children in prisons qualified for special education services under the IDEA, yet only 30 percent received their required services.[15] During the COVID-19 pandemic, jails in Washington D.C. failed to provide any special education services to students with disabilities, even once all public schools had resumed instruction.[16] Inadequate education during incarceration substantially reduces the likelihood of high school completion and increases the likelihood of recidivism.[17] This is particularly true for youth with disabilities, as recidivism rates increase from 55 percent for the general population of incarcerated youth to 85 percent for youth with disabilities.[18]

Letter], https://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf.

15. Morrison, supra note 12, at 110.

16. Charles H. v. D.C., No. 1:21-cv-00997-CJN, 2021 WL 2946127 at *3 (D.D.C. 2021) (noting that the District of Columbia offered "almost no direct instruction, whether virtual or in-person," to incarcerated students with disabilities from March 2020 until "recently").

17. See Anna Aizer & Joseph J. Doyle, Jr., Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly Assigned Judges, 130 Q. J. OF ECON., 759, 759 (2015); Simoneau, supra note 13, at 127.

18. Theresa A. Ochoa et al., Education and Transition for Students with Disabilities in American Juvenile Correctional Facilities, 56 INTERVENTION IN SCH. & CLINIC 293, 293 (2021).

The bleak outcomes for incarcerated youth with disabilities beg the question whether prisons can provide the services required under the IDEA to prepare youth with disabilities for "further education, employment, and independent living."[19] These outcomes also call into question whether the IDEA, even if strictly enforced, can adequately serve and protect youth with disabilities in prisons. The IDEA itself enables criminal judicial authorities to send youth with disabilities to prisons,[20] where they do not—and cannot—receive the education and services they need, without any of the IDEA disciplinary protections afforded to those youth in school. This absence of procedural safeguards in criminal proceedings allows racial and ableist biases to permeate judicial decisions and contributes to the overrepresentation of youth with disabilities in prisons.

To ensure compliance with the IDEA and ensure provision of the mandated services designed to prepare all youth with disabilities for "further education, employment, and independent living,"[21] Congress should amend the IDEA to prevent states from sending youth with disabilities to prison. This Note suggests requiring criminal judicial authorities to conduct a child assessment and manifestation determination review before trial. These procedures would determine

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19. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021).

20. 20 U.S.C. § 1415(k)(6)(A) (2018) ("[N]othing in [the IDEA] prevent . . . judicial authorities from exercising their responsibilities with regard to . . . crimes committed by a child with a disability[.]").

21. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021).

whether youth with disabilities who come into contact with the criminal system should be removed, and if so, which placements along a continuum of non-prison alternatives could properly implement the youth's IEP and comply with the IDEA.

Part I of this Note describes the services and protections required under the IDEA in general, as well as those specifically afforded to incarcerated youth with disabilities. Part I then identifies the lack of procedural protections when schools refer students with disabilities to law enforcement and when criminal judicial authorities send youth with disabilities to prison. Both contribute to the overrepresentation of youth with disabilities, particularly Black youth with disabilities, in prison. Part II describes the systematic failure of prisons to comply with the IDEA. It further argues that it is in fact impossible to comply with the IDEA in prison given the inherent conflict between the restrictive nature of prisons and the statute's requirement for individualization and inclusion. Part III argues that to ensure compliance with the IDEA, states must stop sending youth with disabilities to prison, and should instead serve them in the least restrictive setting along a continuum of non-prison alternative placements. Closing the loopholes in the IDEA that have made prisons a purportedly appropriate setting for special education, as well as extending certain IDEA protections to criminal proceedings, will ensure youth with disabilities receive the services they need and are entitled to in the community instead of being thrown behind bars. Given the overrepresentation of youth with disabilities in prison, this Note's proposal has the potential to not only drastically decrease the overall youth

population in prison, but also to reduce and potentially eliminate the need for prisons entirely.

I. How the IDEA's Limited Scope and Reach Contribute to the Over-Representation of Youth with Disabilities in Prison

While the IDEA applies to both schools and prisons, it does not apply to the criminal judicial authorities that send youth with disabilities to prison. This means that the IDEA has little impact on preventing the over-representation of youth with disabilities in prison. Part I.A describes how the IDEA applies to schools generally and prisons specifically. Part I.B explores the consequences of the absence of IDEA protections when schools refer students with disabilities to criminal judicial authorities that subsequently send youth with disabilities, and especially Black youth with disabilities, to prisons.

A. The IDEA in Prison

The IDEA's requirements are extensive. They require state and local educational agencies, including state prisons and local jails, to identify and evaluate children with disabilities (child find and child assessment);[22]

22. 20 U.S.C. § 1412(a)(3) (2018); 34 C.F.R. § 300.111 (2021).

to provide each eligible student[23] with an IEP;[24] to ensure a FAPE[25] in the least restrictive environment,[26] including transition services;[27] and to follow procedural safeguards in disciplinary proceedings, including a manifestation determination review.[28] However, the IDEA excludes certain youth in adult prisons from receiving some, or any, of these protections and services, as explained below.

1. IDEA Services and Protections in School

The most important IDEA obligation imposed on states is the duty to provide all eligible students a FAPE.[29] The Supreme Court defined

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23. To be eligible, students must be younger than 22 years old and not have graduated from high school. 20 U.S.C. § 1412(a)(1)(A) (2018); 34 C.F.R. § 300.102(a)(3)(i) (2021). Students must have a qualifying disability that adversely affects their educational performance or ability to learn, requiring special education and related services as a result. 20 U.S.C. § 1401(3)(A) (2018); 34 C.F.R. § 300.8(c)(9)(i) (2021). Qualifying disabilities include intellectual disabilities, serious emotional disturbance, autism, specific learning disabilities, or other health impairments, such as attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD). 34 C.F.R. § 300.8(c)(9)(i) (2021).

24. 20 U.S.C. § 1414(d) (2018); 34 C.F.R. § 300.320 (2021).

25. 20 U.S.C. § 1412(a)(1) (2018); 34 C.F.R. § 300.101 (2021).

26. 20 U.S.C. § 1412(a)(5) (2018); 34 C.F.R. §§ 300.114–15 (2021).

27. 20 U.S.C. § 1401(34) (2018); 34 C.F.R. § 300.43 (2021).

28. 20 U.S.C. § 1415(k)(1)(E) (2018); 34 C.F.R. § 300.530(e)–(g) (2021).

29. 20 U.S.C. § 1412(a)(1) (2018); 34 C.F.R. § 300.101 (2021).

an "appropriate education" in the landmark case Endrew F. v. Douglas County School District Re-1, 580 U.S. 386 (2017). To meet its substantive obligation under the IDEA, a school must offer an IEP that is reasonably calculated and appropriate in light of the child's circumstances, to enable them to make progress.[30] Therefore, each child's educational program must be appropriately ambitious and every child should have the chance to meet challenging objectives.[31] Educational agencies must provide special education and related services, defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[32] These services include transition services to facilitate youth with disabilities' movement from school to postsecondary or vocational education, employment, and independent living.[33]

Furthermore, the IDEA compels school districts to provide special education and related services in the "least restrictive environment."[34] A student with disabilities may be placed outside the regular classroom only when the nature or severity of the disability of the student is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[35] The least restrictive

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30. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

31. Id. at 402.

32. 20 U.S.C. § 1401(29) (2018).

33. 20 U.S.C. § 1401(34) (2018); 34 C.F.R. § 300.43 (2021).

34. 20 U.S.C. § 1412(a)(5) (2018); 34 C.F.R. § 300.114 (2021).

35. 20 U.S.C. § 1412(a)(5) (2018); 34 C.F.R. § 300.114 (2021).

environment obligation requires that states offer a full "continuum of alternative placements," including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals or institutions.[36] On a continuum of "least restrictive environment[s]," instruction in the regular classroom would be the least restrictive setting (often referred to as inclusion), and a residential facility would be considered the most restrictive setting.[37] The placement selected for a child with disabilities must be a placement on the continuum in which "the child's IEP can be implemented."[38] The purpose of the integration presumption is to encourage the creation of a range of programming[39] to meet the needs of all children with disabilities.

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36. 34 C.F.R. § 300.115 (2021); 20 U.S.C. § 1401(29) (2018) ("[S]pecial education includ[es] (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings[.]").

37. IRIS CTR., INFORMATION BRIEF: LEAST RESTRICTIVE ENVIRONMENT 2 (2019), https://www.documentcloud.org/documents/22138117-iris_least_restrictive_environment_infobrief_092519 (last visited Dec. 3, 2022).

38. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46539, 46587 (Aug. 14, 2006) (to be codified at 34 C.F.R. pt. 300) [hereinafter Federal Register], https://www.federalregister.gov/documents/2006/08/14/06–6656/assistance-to-states-for-the-education-of-children-with-disabilities-and-preschool-grants-for (discussing revisions to the continuum requirement).

39. Ruth Colker, The Disability Integration Presumption: Thirty Years

Furthermore, recognizing that children with disabilities are especially vulnerable to discipline and subsequent exclusion from the classroom,[40] the IDEA also includes extensive procedural safeguards to protect the education rights of children removed from instruction for disciplinary infractions.[41] If a school wants to change the placement of a child with disabilities for more than 10 school days due to a disciplinary infraction, it must first conduct a "manifestation determination review" to determine whether the questioned behavior was caused by, or had a direct and substantial relationship to, either the child's disability or the failure to implement the child's IEP.[42] If so, the child typically must be returned to their original educational placement, and a functional behavioral assessment and behavior intervention plan must be created or modified.[43] Together, the functional behavioral assessment and behavior

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Later, 154 U. Pa. L. Rev. 789, 821 (2006).

40. Morrison, supra note 12, at 107.

41. See generally 20 U.S.C. § 1415 (2018); 34 C.F.R. §§ 300.530–37 (2021).

42. 20 U.S.C. § 1415(k)(1)(E) (2018); 34 C.F.R. § 300.530(e)(1) (2021).

43. 20 U.S.C. § 1415(k)(1)(F) (2018); 34 C.F.R. § 300.530(f) (2021). The functional behavioral assessment aims to address disruptive student behavior that may result in discipline by focusing "upon identifying biological, social, affective and environmental factors that initiate, sustain, or end the target behavior." Morrison, supra note 12, at 108. The behavior intervention plan is a written improvement plan created for the student based on the outcomes of the functional behavioral assessment, and

intervention plan recognize that misbehavior resulting from a child's disability is not "something the child should be disciplined for, and that discipline would be ineffective."[44] Instead, the school should work to find meaningful solutions, such as adding supplemental classroom support, to avoid or mitigate the behavior moving forward.[45] Importantly, the manifestation determination review, functional behavioral assessment, and behavior intervention plan requirements apply both to students who have already been identified for special education services and to those who have not been identified but whose parents or teachers have expressed concerns that they may need special education services.[46]

2. IDEA Requirements in Prison

The IDEA also applies to "state and local juvenile and adult correctional facilities."[47] The Department of Education has noted that "[t]he fact that youth have been charged with or convicted of a crime does not diminish their substantive rights, procedural safeguards, and

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must identify (1) baseline measures for problematic behavior, including frequency, duration, and intensity of the behavior; (2) intervention strategies to be used to alter antecedent events to help prevent the behavior's occurrence, including alternative and adaptive behaviors and consequences for the inappropriate behaviors; and (3) a schedule to measure the effectiveness of the interventions. Id. at 109.

44. Morrison, supra note 12, at 109.

45. Id.

46. 20 U.S.C. § 1415(k)(5) (2018); 34 C.F.R. § 300.534(a) (2021).

47. 34 C.F.R. § 300.2(b)(1)(iv) (2021).

remedies provided under the IDEA to youth with disabilities," and that "'direct threat' or dangerousness is not a defense to the IDEA obligation to provide educational services to all eligible youth."[48] Unless a specific exception applies, all eligible students with disabilities in prison are entitled to IDEA services and protections. This includes a FAPE in the least restrictive setting, and a manifestation determination review before being removed to a more restrictive educational setting, such as solitary confinement.

The Department of Education has emphasized that "[p]roviding the students with disabilities in [correctional] facilities the free appropriate public education (FAPE) to which they are entitled under the IDEA should facilitate their successful reentry into the school, community, and home, and enable them to ultimately lead successful adult lives."[49] In fact, the Department of Justice has acknowledged that "special education services for older youth with disabilities in correctional facilities may be especially important, as these educational programs may be the youth's last opportunity to receive the special education and related services that enable them to progress academically before they 'age out' of IDEA coverage, typically when they turn 22."[50]

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48. Statement of Interest of the United States at 12, G.F. v. Contra Costa Cnty., No. 13-CV-03667-MEJ, 2015 WL 7571789 (N.D. Cal. Nov. 25, 2015).

49. Dear Colleague Letter, supra note 14.

50. Statement of Interest of the United States at 7–8, Charles H. v. D.C., No. 1:21-cv-00997-CJN, 2021 WL 2946127 (D.D.C. 2021).

3. Exceptions for Certain Youth in Adult Prisons

However, despite recognizing that education enables incarcerated youth with disabilities to "successfully pursue employment and continued educational opportunities, while decreasing the likelihood of recidivism,"[51] the IDEA exempts adult prisons from the requirement of providing a FAPE to certain youth with disabilities. First, adult prisons do not need to provide a FAPE to youth aged 18 through 21 who were not identified as IDEA-eligible prior to their incarceration.[52] This exception effectively takes away their right to special education and punishes them for their school district's failure to identify them prior to their incarceration.

Second, adult prisons are exempt from providing certain services and protections to youth with disabilities convicted as adults, such as placement in the least restrictive environment,[53] transition services, and educational progress evaluations.[54] This exemption effectively deprives them of their right to a FAPE. Given that 95 percent of youth convicted as adults are released by their 25th birthday,[55] not providing special education services to those with disabilities not only impedes

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51. Id. at 7.

52. 20 U.S.C. § 1412(a)(1)(B)(ii) (2018); 34 C.F.R. § 300.102(a)(2) (2021).

53. 20 U.S.C. § 1414(d)(7)(B) (2018); 34 C.F.R. § 300.324(d)(2) (2021).

54. 20 U.S.C. § 1414(d)(7)(A) (2018); 34 C.F.R. § 300.324(d)(1)(i) (2021).

55. Campaign for Youth Just., Youth in the Adult System: Fact Sheet 2 (2014), https://www.act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Youth%20In%20Adult%20System%20Fact%20Sheet%20Aug%202014%20FINAL.pdf.

all efforts at rehabilitation, but also fails to prepare them for "further education, employment, and independent living" as required under the IDEA. Additionally, the exemption creates a perverse financial incentive to convict youth as adults and detain them in adult prisons because it relieves states from their obligation to provide them with a FAPE.

These exceptions were not included when the IDEA was first passed in 1975. They were added in the 1997 reauthorization of the IDEA, at a time when public-safety concerns and public fear of the juvenile "super-predator,"[56] seen as "more culpable, and capable of heinous offenses,"[57] led to a movement to prosecute more youth in adult criminal court.[58] As applied to the IDEA, these anti-Black youth views led to a clear preference for helping white children with disabilities in schools, while criminalizing Black children with disabilities. Capitalizing on the concerns about the costs of providing education to incarcerated youth,[59] Congress

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56. Andrea Wood, Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller, 61 EMORY L.J. 1445, 1458 (2012).

57. Simoneau, supra note 13, at 113.

58. Wood, supra note 56, at 1458–59.

59. See Simoneau, supra note 13, at 113. While the IDEA was largely praised for preventing the denial of special education to children with disabilities, it also was criticized for being "too costly, cumbersome and overly protective of students with disabilities." Id. Opponents were concerned about the amount of funds they would receive and the risk of losing funding if they failed to comply with the mandates of the IDEA. Id. at 114. As a result, some representatives objected to requiring States to

added the exceptions to the IDEA, creating a pathway for Black youth to end up in adult prison without access to special education.[60]

B. The Absence of IDEA Protections in Criminal Proceedings

While schools and prisons generally must follow numerous procedures before disciplining a student with disabilities, such as assessing children for suspected disabilities and conducting a manifestation determination review, these procedural protections do not extend to schools' referrals to law enforcement nor criminal proceedings to send youth with disabilities to prison. The limited reach of the IDEA services and protections for youth with disabilities in criminal proceedings contributes to the over-representation of youth with disabilities in prison. Part I.B.1 explains how the lack of IDEA protections when schools refer students with disabilities to law enforcement reinforces the racial and ableist biases that have traditionally pushed Black youth with disabilities into the most restrictive educational settings and eventually out of school. Part I.B.2 outlines how the absence of IDEA procedural safeguards in criminal proceedings contributes to the overrepresentation of youth with disabilities in the prison system due to similar racial and ableist biases.

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spend their "scare [sic] education resources to serve prisoners." Id.

60. In 2018, Black youth represented 52 percent of youth prosecuted in adult criminal court, and Black youth were nine times more likely than white youth to receive an adult prison sentence. CHILD.'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN 8 (2021), https://www.childrensdefense.org/wp-content/uploads/2021/04/The-State-of-Americas-Children-2021.pdf.

1. Differential Treatment and Discipline of Students of Color with Disabilities

Under the IDEA, schools are not required to follow any of the IDEA disciplinary procedures, including conducting a manifestation determination review, before "reporting a crime committed by a child with a disability to appropriate authorities."[61] Referral to the criminal system is undoubtedly the harshest disciplinary action a school can take against students with disabilities, and the lack of disciplinary protections perpetuates the racial and ableist biases that have traditionally placed Black youth with disabilities into the most restrictive educational settings. In fact, special education has historically been misused to keep Black youth segregated from white students in schools,[62] and it continues to push Black youth not only into more restrictive educational settings, but also out of school and into the criminal system. Black students are over-identified and misdiagnosed as having learning disabilities, intellectual disabilities, and emotional disturbances in school, but under-represented for other disabilities such as autism.[63] As a result, Black students

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61. 20 U.S.C. § 1415(k)(6)(A) (2018); 34 C.F.R. § 300.535 (2021).

62. Dustin Rynders, Battling Implicit Bias in the IDEA to Advocate for African American Students with Disabilities, 35 Touro L. Rev. 461, 466 (2019).

63. Id. at 468–69; see also 20 U.S.C. § 1400(c)(12)(C) (2018) ("African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts."); Richard D. Marsico, The Intersection of Race, Wealth, and Special

are often placed in more restrictive educational settings[64] where they receive inadequate and inferior services,[65] resulting in poorer academic and social outcomes.[66] In addition, Black students with disabilities are subjected to harsher discipline than white students for the same

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Education: The Role of Structural Inequities in the IDEA, 66 N.Y.L.S. L. Rev. 207, 238 (2022) (finding that one in four and one in three Black children in programs for children with emotional disturbance and with intellectual disabilities should not have been there).

64. See Nicole M. Oelrich, A New "IDEA:" Ending Racial Disparity in the Identification of Students with Emotional Disturbance, 57 S.D. L. Rev. 9, 24 (2012) (finding that Black students are more than twice as likely as white students to be placed in the most restrictive setting, a separate, residential school); Marsico, supra note 63 ("[C]hildren classified with an intellectual disability spend the least amount of time in the general education classroom.").

65. Nat'l Council on Disability, supra note 9, at 34.

66. Youth with emotional or behavioral disorders generally earn lower grades, fail more courses, miss more days of school, and are being retained more than youth in any other disability category. NDTAC, supra note 9, at 2.

behaviors[67] and are disproportionately subjected to suspensions[68] and repeated arrests.[69] In turn, frequent use of out-of-school suspensions is strongly associated with a heightened risk for dropping out, and a greater likelihood of juvenile system involvement.[70] In fact, many students with learning disabilities are referred to the juvenile criminal system directly

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67. Nat'l Ctr. for Learning Disabilities, Significant Disproportionality in Special Education: Trends Among Black Students 2 (2020), https://www.ncld.org/wp-content/uploads/2020/10/2020-NCLD-Disproportionality_Trends-and-Actions-for-Impact_FINAL-1.pdf.

68. Nat'l Council on Disability, supra note 9, at 34. Students with disabilities are more than twice as likely to receive an out-of-school suspension, and the statistics are even worse for students of color with disabilities: 25 percent or one out of every four Black students with disabilities receive at least one suspension. Id. at 16.

69. Id. at 34; see also Nat'l Ctr. for Learning Disabilities, supra note 67, at 3 ("During the 2015–16 school year, Black students only made up 16 percent of students but 31 percent of students arrested or referred to law enforcement."); NDTAC, supra note 9, at 1 (finding that youth with emotional and behavioral disabilities are three times more likely to be arrested before leaving school when compared to all other students).

70. Nat'l Council on Disability, supra note 9, at 16; see also Rynders, supra note 62, at 471 ("Suspended students are more likely to be held back or drop out, and they are the most likely to engage in activities that are not conducive to learning when suspended from school.").

by schools,[71] and youth with learning disabilities are more readily referred to the juvenile system than youth without disabilities.[72] These disparities easily explain the over-representation of Black youth with disabilities in prisons.

Just like in schools, incarcerated youth are more likely to be classified for special education services due to behavioral and learning disabilities.[73] Unsurprisingly, half of incarcerated youth with disabilities are Black students.[74]

2. Vulnerability of Judicial Decision-Making to Racial and Ableist Biases

The procedural protections afforded to youth in regard to school discipline, such as child assessment and manifestation determination review, do not apply to criminal judicial authorities that send youth with disabilities to prison. In fact, nothing in the IDEA "shall be construed . . . to prevent State law enforcement and judicial authorities

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71. NDTAC, supra note 9, at 1; see also Nat'l Council of Juv. & Fam. Ct. Judges, Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases 150 (2005) [hereinafter Delinquency Guidelines], https://www.ncjfcj.org/wp-content/uploads/2019/10/Juvenile-Delinquency-Guidelines.pdf (noting that some schools have managed youth with learning disabilities exhibiting delinquent behaviors by removing them from the school environment through suspensions, expulsions, or filing delinquency petitions in court).

72. NDTAC, supra note 9, at 1.

73. See NDTAC, supra note 9, at 1; Aizer & Doyle, supra note 17, at 764.

74. Nat'l Council on Disability, supra note 9, at 11.

from exercising their responsibilities with regard to . . . crimes committed by a child with a disability."[75] The IDEA requirements only apply to the State and "political subdivisions of a State that provide special education and related services to students with disabilities."[76] While judicial authorities send youth with disabilities to placements where "subdivisions of a State" provide special education, judicial authorities are not the ones providing this education, so they are not bound by the IDEA.

As a result, there are no IDEA protections applicable to the harshest disciplinary action and change of educational placement setting youth with disabilities can face: incarceration. Without the IDEA's child assessment and manifestation determination review requirements, youth with disabilities can be sent to prison for behaviors that may have been caused by their disability or school's failure to implement their IEP. This situation directly conflicts with the IDEA's recognition that it is both discriminatory and ineffective to punish a child for a behavior resulting from their disability.[77] This lack of safeguards creates a parallel discriminatory system in which disability is criminalized rather than met with the needed services in school.

National delinquency guidelines recommend that if a youth is adjudicated delinquent, a judge should consider the youth's educational, mental-health, emotional, and developmental needs when deciding a

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75. 20 U.S.C. § 1415(k)(6)(A) (2018); 34 C.F.R. § 300.535(a) (2021).

76. Dear Colleague Letter, supra note 14, at 6 (emphasis added).

77. Morrison, supra note 12.

disposition.[78] However, much is left to the judge's discretion.[79] Judicial discretion enables implicit and explicit racial and ableist biases which have contributed to the criminalization and over-representation of youth, and especially Black youth, with disabilities in prison.[80] In fact, because

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78. Lisa M. Geis, An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process, 44 U. MEM. L. REV. 869, 912 (2014) (citing to DELINQUENCY GUIDELINES, supra note 71, at 142–43).

79. National delinquency guidelines are not binding, and few juvenile courts are required to consider disability status before making adjudication and disposition decisions. Instead, defense counsel has borne the burden of asserting the youth's special education needs. See, e.g., Mark Peikin, Alternative Sentencing: Using the 1997 Amendments to the Individuals with Disabilities Education Act to Keep Children in School and Out of Juvenile Detention, 6 SUFFOLK J. TRIAL & APP. ADVOC. 139, 141 (2001) (encouraging juvenile defenders to argue that traditional prison setting is not adequate to satisfy the IDEA's requirements and that child's IEP objectives cannot be met in a detention or incarceration facility such that alternative placement is necessary); Geis, supra note 78 (noting that where counsel shows that a youth suffers from a qualified disability, the charges against the youth should be withdrawn or dismissed); NAT'L COUNCIL ON DISABILITY, supra note 9, at 66 (recommending advancing FAPE violations argument to pursue special education services to divert status offense system involvement).

80. See Kincaid & Sullivan, supra note 6, at 455–56 (noting that

youth of color with disabilities are regarded as "more adult-like, more threatening, and more dangerous than similarly situated white youth,"[81] they are more likely to both receive a higher degree of offense[82] and be incarcerated.[83]

This over-representation of youth of color with disabilities not only undermines the IDEA's goal of eliminating systemic exclusion, but also begs the question whether the IDEA's limited reach can adequately serve

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differential treatment of students with disabilities by agents within the justice system may contribute to the overrepresentation of students with disabilities in the juvenile system); Jamelia Morgan, The Paradox of Inclusion: Applying Olmstead's Integration Mandate in Prisons, Geo. J. on Poverty L. & Pol'y 305, 316 (2020) ("[C]riminalization is informed and reinforced by racism . . . and ableism, which in turn render certain groups more susceptible to . . . imprisonment."); Subini Ancy Annamma & Jamelia Morgan, Youth Incarceration and Abolition, N.Y.U. L. Rev. & Soc. Change 471, 488–90 (observing that juvenile judges' sole discretion to determine a sentence creates space susceptible to being filled by explicit or implicit racial and ableist stereotypes); Nat'l Council on Disability, supra note 9, at 7 (noting that conscious and unconscious racial biases that combine with disability discrimination contribute to the school-to-prison pipeline).

81. Annamma & Morgan, supra note 80, at 492 (citing to Mariam Kaba, We Do This 'Til We Free Us 3 (2021)).

82. Kincaid & Sullivan, supra note 6.

83. Id. at 454–55.

and protect youth with disabilities who come into contact with the criminal system. In fact, in addition to gaps in IDEA protections that lead to youth with disabilities being incarcerated for what may be a manifestation of their disability, prisons do not—and cannot—provide the appropriate special education and related services youth with disabilities need and are entitled to under the IDEA.

II. Can Prisons Comply with the IDEA?

Up to 85 percent of youth in prisons have disabilities that make them eligible for special education services.[84] Yet it is impossible to comply with the IDEA and provide a FAPE to youth with disabilities in prison. Part II.A describes how prisons have systematically failed to comply with the IDEA and provide a FAPE to incarcerated youth with disabilities. This is explained by the inherent institutional and restrictive nature of prisons, which makes it impossible to comply with the IDEA's requirements for individualization and inclusion. Even if prisons strictly enforced the IDEA, Part II.B explains that prisons can never provide an adequate FAPE to youth with disabilities, and Part II.C notes that prisons do not satisfy the least restrictive environment requirement. Therefore, because it is impossible to comply with the IDEA in prison, placement in prison is inappropriate under the IDEA.

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84. Nat'l Council on Disability, supra note 9.

A. Systematic Failure of Prisons to Comply with the IDEA

Despite the extensive IDEA requirements, the special education services and protections afforded to youth in prison are inadequate.[85] Prisons systematically fail to identify youth with disabilities, to comply with students' IEPs, to provide adequate transition services, and to follow procedural requirements before imposing discipline.

First, prisons fail to identify youth with disabilities eligible for special education and related services in prison. Despite child find requirements, youth with disabilities are "significantly less likely to be identified as in need of special education services" in juvenile facilities.[86] Less than half of the youth who have a qualifying disability under the IDEA receive special education services while in custody.[87]

Second, prisons fail to provide adequate education and comply with incarcerated students' IEPs. The Department of Justice recently found that a youth prison in Mississippi deprived students of a FAPE because they did not provide the education services described in students' IEPs.[88]

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85. Dear Colleague Letter, supra note 14.

86. Simoneau, supra note 13, at 117.

87. Child.'s Def. Fund, supra note 60, at 31; see also Morrison, supra note 12, at 110 ("[A] study of juvenile correctional centers in Southern states found that while 70% of children in correctional facilities qualified for special education services under IDEA, only 30% received the required services.").

88. U.S. Dep't of Just., C.R. Div., Investigation of Compliance with the Individuals with Disabilities Education Act at Leflore County, Mississippi,

A youth prison in Northern California was similarly found to fail to provide adequate individualized education as required under the IDEA. There, incarcerated students' IEPs were "strikingly similar regardless of the students' varying disabilities, needs, and previous IEPs."[89] Tutors "rarely provide[d] actual instruction and, instead, provide[d] worksheets for the youth to complete."[90] Youth with disabilities placed in the restrictive security program "missed hundreds of hours of education combined."[91] Another youth prison in Connecticut violated the IDEA when youth with disabilities were "locked in a bare cell on the isolation unit for a minimum of 23 hours a day;"[92] classes were frequently canceled because of teacher absences, trainings, and lockdowns; and students rarely attended school for the full five hours scheduled each day.[93]

JUVENILE DETENTION CENTER 1 (Jan. 12, 2016), https://www.justice.gov/crt/file/812646/download.

89. G.F. v. Contra Costa Cnty., No. 13-CV-03667-MEJ, 2015 WL 7571789, at *1 (N.D. Cal. Nov. 25, 2015).

90. Statement of Interest of the United States, G.F. v. Contra Costa Cnty., supra note 48, at 5.

91. Id. at 1.

92. U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF MANSON YOUTH INSTITUTION 5 (Dec. 21, 2021), https://www.justice.gov/opa/press-release/file/1458001/download?utm_medium=email&utm_source=govdelivery.

93. Id. at 17.

In addition, provision of special education services is "extremely limited" in adult prisons,[94] if available at all. In fact, the District of Columbia failed to provide any special education services to students aged 18 through 21 who had disabilities and who were incarcerated in the D.C. jails during the COVID-19 pandemic, even after all other schools had resumed instruction.[95] Just like youth prisons, adult prisons routinely fail to comply with incarcerated students' IEPs and provide the individualized education required under the IDEA. In adult prisons in New Jersey, incarcerated students are taught by uncertified teachers; instruction consists of independently completing worksheets; students of different ages and ability levels are routinely placed in a single classroom with only one teacher; and sometimes the only classroom is a GED classroom.[96] Students placed in administrative segregation, if they receive any education at all, are not receiving education in a classroom, and instead are provided with worksheets "either in their cells or in a cage while an instructor watches from outside."[97] In doing so, the New Jersey Department of Corrections "disregard[s] the requirements laid out in students' IEPs," fails to "differentiate instruction to meet each student's

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94. Simoneau, supra note 13, at 112.

95. Charles H. v. D.C., No. 1:21-CV-00997 (CJN), 2021 WL 2946127, at *3 (D.D.C. June 16, 2021).

96. Complaint at 17–18, Adam X. v. New Jersey Dep't of Corr., No. CV-1700188-FLW-LHG, 2022 WL 621089 (D.N.J. Mar. 3, 2022).

97. Id. at 4.

individual needs,"[98] and fails to provide a continuum of alternative educational placements as required under the IDEA.

Third, prisons routinely fail to follow procedural requirements mandated by the IDEA to respond to behavior caused by disabilities, including manifestation determination reviews, before placing students with disabilities in solitary confinement or administrative segregation.[99] Prisons also often fail to rely on positive behavioral interventions and supports to counter behavior that impedes learning as required under the IDEA.[100]

Fourth, local educational agencies often fail to provide the required transition services to incarcerated students with disabilities upon their discharge from prison and return to public school. For instance, upon being released from custody in New York, youth with disabilities have been denied "timely re-enrollment" in schools in their communities, and as a result, have spent weeks, and in some cases several months, out of school or "warehoused" in alternative settings that do not afford them "minimally adequate educational services."[101]

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98. Id. at 17.

99. See, e.g., A.T. v. Harder, 298 F. Supp. 3d 391, 416–17 (N.D.N.Y. 2018); Adam X Complaint, supra note 96, at 19.

100. See, e.g., G.F. v. Contra Costa Cnty., No. 13-CV-03667-MEJ, 2015 WL 7571789, at *1–2 (N.D. Cal. Nov. 25, 2015); Adam X Complaint, supra note 96, at 19.

101. Second Amended Complaint at 2, J.G. ex rel. F.B. v. Mills, 995 F. Supp. 2d 109 (E.D.N.Y. 2011) (No. 04 Civ. 5415).

Prisons' failure to comply with these various IDEA requirements violates Endrew's FAPE standard. The Supreme Court in Endrew noted that "a student offered an educational program providing 'merely more than de minimis' progress from year to year can hardly be said to have been offered an education at all."[102] It emphasized that "[f]or children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly . . . awaiting the time when they were old enough to drop out.'"[103] The inadequacy of special education and services in prisons, and the increased drop-out rates[104] and recidivism rates after incarceration for youth with disabilities[105] strongly suggest that those responsible for providing IDEA services in prisons have been 'sitting idly,

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102. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 402–03 (2017).

103. Id.

104. See CHILD.'S DEF. FUND, supra note 60, at 27 ("Without adequate educational resources, young people in juvenile justice facilities are chronically behind in school and make no meaningful progress in academic achievement while incarcerated. Approximately 2 in 3 drop out of school after exiting the juvenile justice system."); Statement of Interest of the United States, Charles H. v. D.C., supra note 50, at 7 ("Compared to youth without disabilities, youth with disabilities in correctional facilities have poor education and employment outcomes after their release.").

105. Ochoa et al., supra note 18 ("The rates of recidivism increase from about 55% for the general population of incarcerated youth to approximately 85% for youth with disabilities.").

awaiting the time' incarcerated youth are old enough to either drop out, or age out of IDEA eligibility. This situation not only violates Endrew, but it also defeats both the IDEA's goal of preparing youth with disabilities "for further education, employment, and independent living,"[106] as well as the juvenile system's purported rehabilitative goals.

Unfortunately, these issues are not new, and litigation to enforce incarcerated youth with disabilities' right to special education has not resolved them.[107] Prisons have continuously failed to comply with the IDEA over the past 50 years since the enactment of the IDEA.

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106. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021).

107. Litigation is not a satisfactory mechanism to enforce the IDEA in prison. Incarcerated students not only lack the resources to file due process complaint, but they may also worry about retaliation given that complaints are filed directly against prison officials. See Simoneau, supra note 13, at 125. Cases take years to resolve, and the court remedies are inadequate: damages do not sufficiently compensate youth for the life-long effects of inappropriate education in prison, and school districts often fail to comply with court orders. See, e.g., Adam X. v. New Jersey Dep't of Corr., No. CV-1700188-FLW-LHG (D.N.J. Mar. 3, 2022) (offering only $8,000 to compensate for each year formerly incarcerated students failed to receive the special education services they were entitled to in prison); Charles H. v. D.C., No. 1:21-CV-00997-CJN, 2021 WL 2946127 (D.D.C. Feb. 16, 2022) (finding the District of Columbia in contempt for failing to comply with a court order to provide special education to students in D.C. jails).

The continued failure to comply with the IDEA in prison and the bleak outcomes for incarcerated youth with disabilities beg the question whether the IDEA can adequately serve and protect incarcerated youth with disabilities, even if it were strictly enforced, and whether prisons can ever comply with the IDEA. Part II.B argues that the inherent institutional and restrictive nature of prison makes it impossible to comply with the IDEA's requirements for individualization and inclusion.

B. Impossibility of Providing a FAPE to Youth with Disabilities in Prison

It is impossible to provide a FAPE to youth with disabilities in prison. The FAPE requirement mandates schools to provide youth with an IEP reasonably calculated to enable them to make progress appropriate in light of their circumstances.[108] However, institutionalization undermines the FAPE's requirement for individualization, and carceral logics rooted in punishment impede educational progress.

Institutionalization in the prison system is in direct conflict with the provision of students' individualized education plans required under the IDEA to meet each child's unique needs. The Department of Justice has noted that the IDEA "contemplates specifically tailored, individualized services, supports, and interventions because 'a focus on the particular child is at the core of the IDEA,'"[109] even for youth in prison. Nevertheless, not only have prisons failed to provide students

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108. Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

109. Statement of Interest of the United States, Charles H. v. D.C., supra note 50, at 10 (citing to Endrew F., 580 U.S. at 400).

with an individualized education as required by their IEPs,[110] but prisons also have pervasive institutional logics which trump any attempt at individualization.[111] Prison life is characterized by "rigid schedules, regimented, and repetitive routines," "formal and informal institutional policies," and "total control of bodies and mind."[112]

Not only do these institutional logics run contrary to the IDEA's individualization requirement, but they are also antithetical to the successful implementation of a FAPE in prison. In fact, "[t]he institutional characteristics of prisons, with their punitive focus, do not lend themselves to ensuring that the educational needs of its inmates are met,"[113] let alone the special education needs of young inmates with disabilities. Incarceration is by design focused on "diminish[ing] the everyday life activities of individuals, including family relations, social contacts, . . . educational advancement, and cultural enrichment."[114] As a result, the goals of incarceration are in direct contradiction to the IDEA's goals of providing all children with disabilities "opportunities to develop their talents, share their gifts, and contribute to their communities,"[115]

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110. See supra Part II.A.

111. See Morgan, supra note 80, at 317.

112. Id.

113. Melissa Edelson, Special Education in Adult Correctional Facilities: A Right Not a Privilege, 50 Loy. of L.A. L. Rev. 93, 105 (2017).

114. Morgan, supra note 80, at 314.

115. About IDEA: History of the IDEA, U.S. Dep't of Educ., https://sites.ed.gov/idea/about-idea/#IDEA-History (last visited Nov. 9, 2022).

as well as preparing them for "further education, employment, and independent living."[116]

In addition, as Professor of Law Jamelia Morgan has noted, "security concerns will invariably be prioritized over access and accommodations" in prisons.[117] Morgan explained that "[t]his is particularly true where harmful conduct—conduct that may be caused by or linked to disability—is labeled solely as threats warranting a punitive response (solitary confinement, use of force, etc.) and not as opportunities for treatment and care."[118] But even absent harmful conduct, security concerns such as limited prison staff available due to trainings or COVID-19 are also prioritized over ensuring youth's access to special education and related services.[119]

Moreover, incarceration not only exacerbates but also causes emotional trauma and psychological harm that affect student learning.[120]

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116. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021).

117. Morgan, supra note 80, at 315.

118. Id.

119. See supra Part II.A. (showing that limited prison staff and COVID-19 concerns have been prioritized over providing special education and related services in many youth and adult prisons).

120. While the IDEA was not designed to, and cannot, regulate what happens to children with disabilities outside of school, the lines between the classroom and non-classroom context is blurred for youth receiving their education in prison. It is common for the correctional agency to provide educational services to these youth, and school discipline in

While incarcerated, children are "at greater risk of maltreatment, physical and psychological abuse, sexual assault, and suicide."[121] According to the Juvenile Law Center, many incarcerated youth are subject to abusive practices, such as strip searches, restraints, shackles, chemical sprays, and solitary confinement.[122] These harmful carceral practices not only disrupt education, but they also interrupt healthy adolescent brain development and "compound[] the trauma imposed by isolation and separation from their families, friends, and communities."[123]

Thus, the inherently institutional and traumatizing experience of incarceration impedes youth's education and conflicts with the IDEA's promise of an individualized and appropriate education. Because it is impossible to comply with the IDEA's requirement of a FAPE in prison, placement in prison is inappropriate.

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prison usually extends beyond the classroom. The parens patriae doctrine never really ends during a period of incarceration, and the state has the duty to protect the interests and welfare of incarcerated youth in prison, whether they are in the classroom or not.

121. CHILD.'S DEF. FUND, supra note 60, at 31.

122. Children in Prison, JUV. L. CTR., https://jlc.org/children-prison#:~:text=These%20abusive%20practices%20cause%20physical,their%20families%2C%20friends%20and%20communities (last visited Dec. 5, 2022).

123. Id.

C. Impossibility of Satisfying the Least Restrictive Requirement in Prison

The IDEA compels school districts to provide children with disabilities a FAPE in the "least restrictive environment" along a "continuum of alternative placements" to meet their needs.[124] This continuum must include "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions."[125] However, prisons are not, and cannot be, the least restrictive environment on the continuum of alternative educational placements. First, Part III.C.1 explains that limiting placement options to "instruction in institutions" for incarcerated youth with disabilities effectively confines them to a range of placements within the most restrictive setting rather than offering them the full mandated continuum. Second, Part III.C.2 highlights statutory and regulatory support for a continuum that excludes prison as an appropriate placement under the IDEA. Finally, Part III.C.3 describes alternatives to incarceration, proving that prison is not the least restrictive environment.

1. Impossibility of Providing the Mandated Continuum of Alternative Placements in Prison

Prisons cannot provide the mandated continuum of alternative placements in prison, given that the range of options available in prison is limited to the most restrictive setting on the mandated continuum: instruction in institutions. Some may argue that prisons satisfy the

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124. 34 C.F.R. § 300.115 (2021).

125. Id.

continuum requirement, in that prisons offer a range of settings: the least restrictive environment would be the regular prison classroom, home instruction would be instruction in the youth's own cell, and the most restrictive setting would be solitary confinement. However, not only do prisons rarely offer such a range of educational options in prison,[126] but this way of thinking about the continuum requirement equates the harshly limited settings within the prison system with the full range of environments required to be offered to satisfy the youth's IEP under the IDEA.[127] Limiting placement options to variations within the most restrictive setting under the IDEA fails to offer the full continuum of alternative placements to which incarcerated youth with disabilities are entitled. In addition, incarceration is by definition exclusion, and the regular classroom in prison is already extremely restrictive. Given the over-representation of youth with disabilities in prison, incarceration amounts to segregation of youth with disabilities. Yet the IDEA recognizes that segregating children with disabilities is often destructive to their education and future.[128]

While some may also argue that judges' ability to send youth with disabilities to prison sets the default least restrictive environment as the regular classroom in prison, this argument is circular. Judges who would

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126. See supra Part II.A; CHILD.'S DEF. FUND, supra note 60, at 31 ("[Y]outh with disabilities are often placed in isolation due to lack of available services or accommodations.").

127. See Federal Register, supra note 38.

128. Simoneau, supra note 13, at 124.

like to follow national delinquency guidelines and consider educational, mental-health, emotional, and development needs in deciding disposition have their hands tied when incarceration is the only placement available.[129] These considerations would point judges to a different placement than prison, since prisons cannot comply with the IDEA. Yet, for lack of alternative placements, many judges have been forced to place some youth in prisons, including those who posed no threat to public safety.[130]

2. Support in the IDEA for a Continuum of Non-Prison Alternative Placements

Allowing states to send youth with disabilities to prison where they cannot receive a FAPE leads to an untenable conflict between incarceration and the statutory mandate. In fact, statutory and regulatory language in the IDEA itself supports a continuum of

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129. See Geis, supra note 78.

130. DELINQUENCY GUIDELINES, supra note 71, at 82 ("Due to the absence of alternatives, many juvenile justice systems have historically relied on social control through the use of restrictive out of home placements . . . [to house] many youth who pose no significant threat to community safety and who could be managed as effectively in less restrictive and less costly programs."); see also NDTAC, supra note 9, at 1 ("Youth with learning disabilities have been more readily referred to the juvenile system than other youth due in part to few community-level service options available to youth with educational needs who exhibit delinquent behaviors.").

non-prison alternative placements that does not consider prison to be an appropriate placement.

First, states must provide a FAPE to all children with disabilities in the least restrictive environment as a condition of receiving federal IDEA funds. Provision of a FAPE in the least restrictive environment is the first priority area in monitoring and enforcement of the IDEA.[131] Because prisons cannot provide an adequate FAPE to youth with disabilities, states that send youth with disabilities to prison could lose funding in whole or in part for "failure to comply" with the statutory mandate.[132]

Second, when selecting the least restrictive environment for a youth with disabilities, consideration should be given to "any potential harmful effect [of the environment] on the child or on the quality of services that [they] need."[133] Placement in prison has a "harmful effect" on youth with disabilities because it exacerbates and causes mental health issues.[134] Placement in prison also has a "harmful effect" on the "quality of services" that youth need, because prisons do not, and cannot, provide a FAPE

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131. 20 U.S.C. § 1416(a)(3)(A) (2018).

132. 20 U.S.C. § 1416(e)(3), (h) (2018) (providing for the withholding of funds when states or correctional agencies fail to substantially comply with the IDEA). In practice, however, the Department of Education has rarely withheld IDEA funds for non-compliance.

133. 34 C.F.R. § 300.116 (2021).

134. See supra Part II.B.

to incarcerated youth with disabilities.[135] Therefore, sending youth with disabilities to the harmful placement that is prison violates the IDEA.

Third, the IDEA provides that, to the extent practicable, IEP teams must base the selection of special education, related services, and supplementary aids and services on "peer-reviewed research" to enable the child to "advance appropriately toward attaining [their] annual goals."[136] As described earlier, there is a plethora of data on the failure of prisons to comply with the IDEA and provide a FAPE to incarcerated youth with disabilities over the last 25 years. In addition, the higher drop-out rate[137] and recidivism rate[138] among incarcerated youth with disabilities prove that instruction in prison does not realize the IDEA's goals of preparing youth for "further education, employment, and independence." Instead, there is a wealth of data on successful alternatives to incarceration which can comply with the IDEA's requirement to provide a FAPE in the least restrictive environment.[139] Therefore, continuing to send youth with disabilities to prison where the services fail the "peer-reviewed research" requirement violates the IDEA.

Finally, while the continuum requirement allows for "instruction in institutions," institutions can take on many forms, including some less

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135. Id.

136. 20 U.S.C. § 1414 (d)(1)(A)(i)(IV) (2018); 34 C.F.R. § 300.320(a)(4) (2021).

137. See supra note 104.

138. See supra note 105.

139. See infra Part II.C.3.

restrictive than prison. Decarceration efforts across the country, some described in the next section, show that states can develop alternatives to incarceration which can provide a FAPE along the mandated continuum in a less restrictive environment than prison. Thus, prison is not the "least restrictive environment" on the continuum.

3. Successful Less Restrictive Alternatives to Incarceration

The mandated "continuum of alternative placement" requirement should not, and need not, include prison. Decarceration efforts across the country, such as justice reinvestment programs, prove that states can create successful alternatives to incarceration which can provide a FAPE in a less restrictive environment than prison along the continuum. Justice reinvestment programs redirect resources spent on prisons to restorative justice, community-based alternatives to incarceration and neighborhood prevention.[140] Justice reinvestment programs not only enable youth with disabilities to receive a FAPE along a continuum of educational placements in the community, including their neighborhood schools, but they are also more conducive to providing services designed

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[140.] For an overview of justice reinvestment programs, see Susan B. Tucker & Eric Cadora, Ideas for an Open Society: Justice Reinvestment, 3 Open Soc'y Inst. 6–7 (2003), https://www.opensocietyfoundations.org/publications/ideas-open-society-justice-reinvestment. Within one year, the restorative justice service program in Oregon reduced youth incarceration in state facilities by 72 percent, a national high according to the National Center for Juvenile Justice. Id. at 7.

to prepare youth with disabilities for "further education, employment, and independent living."[141]

While there should be a strong presumption against removing youth with disabilities who exhibit delinquent behaviors from their home and current educational placement, there are compelling alternatives to incarceration for youth that the state deems must be removed. These alternatives are more conducive to providing the special education services youth need and are entitled to. For instance, the Missouri Division of Youth Services is known for operating a "regional continuum" of placements for youth who come into contact with the criminal system,[142] including day-treatment centers, special schools, supervision in regular school, group homes in community with special schools,

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141. 20 U.S.C. § 1400(d)(1)(A) (2018); 34 C.F.R. § 300.1(a) (2021). In addition, justice reinvestment programs and other restorative justice programs are consistent with the abolitionist agenda as alternative ways of responding to harms in our society. See Annamma & Morgan, supra note 80, at 506.

142. Annie E. Casey Found., The Missouri Model: Reinventing the Practice of Rehabilitating Young Offenders 16 (2010), https://assets.aecf.org/m/resourcedoc/aecf-MissouriModelFullreport-2010.pdf. The Missouri system holds young people on a range of charges and serves children with disabilities: in 2010, 34 percent youth in the Missouri system had an educational disability, 49 percent had a prior mental health condition, and 38 percent had an active diagnosis. Id. at 18.

moderately secure small community-based rehabilitative facilities,[143] and a now-empty secured facility.[144] The Missouri Model consistently shows better outcomes than traditional juvenile systems: three years after their system involvement, 84 percent of youth in the Missouri system are productively involved in their community through school, work, or both.[145] One-third of the youth return to their communities with a high school diploma or GED, and another 50 percent successfully return to school.[146]

Nonetheless, to ensure compliance with the IDEA, these alternatives to incarceration must be committed to creating a restorative, rehabilitative, home-like structure that is not focused on control and punishment. In an effort to transform the juvenile system in Los Angeles, the Los Angeles Youth Justice Work Group[147] has recommended replacing Juvenile Halls

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143. Nell Bernstein, Burning Down the House: The End of Juvenile Prison 284–85 (2014).

144. The secure facility was empty as of 2010 and has rarely served more than 5 youths a year. Marian Wright Edelman, Juvenile Justice Reform: Making the "Missouri Model" an American Model, Child's Def. Fund (Mar. 12, 2010), https://www.childrensdefense.org/child-watch-columns/health/2010/juvenile-justice-reform-making-the-missouri-model-an-american-model.

145. Bernstein, supra note 143, at 284. In addition, fewer than 8 percent of the youths in the Missouri system return again after their release, and fewer than 8 percent go on to adult prison. Edelman, supra note 144.

146. Edelman, supra note 144.

147. The Los Angeles Youth Justice Work Group was established in 2019

with small, home-like, community-based and therapeutic housing called "Safe and Secure Healing Centers."[148] However, recognizing the risks of "merely reconstitut[ing] punishment or the punishment system in other forms,"[149] the work group has emphasized that placement in a Healing Center should only be "[i]f a secure placement is required,"[150] and Healing Centers should be family-based settings whenever possible.[151] Healing Centers must have "healing and restorative practices embedded into [their] structure and operations," a focus on supported reentry, and be built to "minimize the feeling of institutionalization and the harmful impacts of institutionalization and removal from home."[152] To the maximum extent possible, youth in Healing Centers stay engaged with their school and employment while only receiving support and housing at the

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to reimagine a youth justice system rooted in healing, wellbeing, racial equity, and youth development. W. Haywood Burns Inst., Los Angeles Cnty.: Youth Justice Reimagined 5 (2020).

148. Id. at 12.

149. Morgan, supra note 80; see also W. Haywood Burns Inst., supra note 147, at 18 (noting that the 2019 Los Angeles Board of Supervisors recognized that "housing supervision and services within an agency with a Law Enforcement orientation may be counterproductive.").

150. W. Haywood Burns Inst., supra note 147, at 13.

151. Id. at 47. These family-based settings should be with a relative, nonrelative extended family member, or a foster care placement, and be as home-like as possible. Id.

152. Id. at 13, 47.

Healing Center during the night.[153] Youth who cannot remain in their prior educational placement or another less restrictive alternative go to "Achievement Centers" where they receive holistic services in an actual school environment in the community.[154]

The Missouri and Los Angeles examples illustrate that there are alternatives to incarceration that fit in the IDEA's continuum of alternative placements and can provide a FAPE in a non-punitive setting that is conducive to individualization. Thus, prison is not the least restrictive environment along the mandated continuum to meet the needs of youth with disabilities who come into contact with the criminal system.

III. How to Prevent the Incarceration of IDEA-Eligible Youth

Given that prisons do not, and cannot, comply with the IDEA and provide the FAPE which youth with disabilities are entitled to in the least restrictive environment, Congress and states must act to ensure no youth with disabilities are sent to prison. This Note offers a two-step solution. Part III.A suggests that Congress should amend the IDEA to remove the loophole that has allowed youth with disabilities to be sent to prison where they do not receive the services they are entitled to. Then, Part III.B recommends extending the child assessment and manifestation determination review requirements to criminal proceedings, to ensure all youth with disabilities are placed in the least restrictive environment that will implement their IEPs along a continuum of non-prison alternative

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153. Id. at 47.

154. Interview with Laura Ridolfi, Racial Justice and Well-Being Strategist, W. Haywood Burns Inst., in Berkeley, Cal. (Oct. 5, 2022).

placements. Congress could provide financial incentives to encourage states to create such a continuum of non-prison alternative placements and extend IDEA procedural protections to criminal proceedings.[155]

A. Remove IDEA Exceptions Enabling Incarceration of Youth with Disabilities and Require Continuum of Non-Prison Placements

Prisons do not, and cannot, comply with the IDEA. Therefore, Congress must act to prevent youth with disabilities from being sent to prison. A straightforward solution is to remove the IDEA exceptions which have explicitly enabled incarceration of youth with disabilities. These are the exceptions that exempt states from providing a FAPE to (1) youth with disabilities ages 18 through 21 who had not been identified prior to their criminal involvement,[156] and (2) youth adjudicated as adults and

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155. Congress can induce state and local governments to comply by putting conditions on federal funds if the conditions are clearly stated, related to the purpose of the program, and not unduly coercive. See South Dakota v. Dole, 483 U.S. 203, 210–12 (1987); Nat'l Fed. Of Indep. Business v. Sebelius, 567 U.S. 519, 585 (2012). Thus, Congress can condition the receipt of IDEA funding on non-prison placement of youth with disabilities because the condition clearly relates to the goal of ensuring all youth with disabilities receive a FAPE in the least restrictive environment. This approach is not unduly coercive and addresses concerns over federalism, given that states could still decide to send youth with disabilities to prison, but would not receive funding for providing them with the required FAPE under the IDEA.

156. 20 U.S.C. § 1412(a)(1)(B)(ii) (2018).

detained in adult prisons.[157] The racist undertone of the exceptions,[158] the flawed financial reasoning behind the exceptions,[159] and the plethora of evidence that prisons cannot comply with the IDEA are sufficiently compelling arguments to remove the exceptions.[160] Removing the exceptions would effectively eliminate all explicit and substantive mentions of incarceration in the statute.[161] This is a necessary step to

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157. 20 U.S.C. § 1414(d)(7) (2018).

158. See supra Part I.A.3.

159. When the IDEA exceptions were adopted, some lawmakers warned that the "small savings gained by not serving these children while they are in adult correctional facilities will pale in comparison to exorbitant future costs of additional prison time or reliance on social welfare programs." 143 CONG. REC. E973 (daily ed. May 13, 1997) (statement of Rep. Martinez). Given the higher drop-out and recidivism rates for youth with disabilities, see supra note 104 and 105, these predictions have proven true 25 years later.

160. For a discussion on eliminating these exceptions, see generally Simoneau, supra note 13 (analyzing the IDEA exceptions' overall economic and individual costs).

161. There are other mentions of "correctional facility/agency" in the statute, but these are not relevant to this Note's argument and could be removed or replaced by "noneducational facility/agency." See 20 U.S.C. §§ 1412(a)(21)(B)(xi) (correctional agencies' representatives), 1411(e)(2)(C)(ix) (activities in correctional facility), 1415(m)(1)(D) (transfer of incarcerated student's rights at majority), 1416(h) (withholding funds

enable the Department of Education to clarify that instruction in a prison setting is not an appropriate alternative placement along the mandated continuum. Adding an official comment to 34 C.F.R. Section 300.115 would be sufficient, given that the regulatory provision as well as its statutory counterpart do not mention prison but only "institutions."[162] As explained earlier, there is support within the IDEA for such a continuum of non-prison alternative placements.[163]

The effect of such a comment would be far-reaching, as it would effectively force states to provide a FAPE in the least restrictive environment along a continuum of non-prison alternative placements, including for youth with disabilities the state has sent or would send to prison.[164] The development of the continuum must be informed

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when correctional agencies fail to comply). In addition, the Department of Education should remove the regulations implementing the exceptions, namely, 34 C.F.R. §§ 300.102(a)(2), 300.2(b)(1)(iv)-(2), 300.324(d)(2), 300.713 (2021).

162. See 34 C.F.R. § 300.115 (2021); 20 U.S.C. § 1401(29) (2018).

163. See supra Part II.C.2.

164. Some states already have such a continuum of non-prison alternative placements which can comply with the IDEA. See supra Part II.C.3. Financial concerns are not a defense to the continuum requirement: public agencies are not allowed to make placement decisions based on the agency's needs or available resources, including budgetary considerations. Federal Register, supra note 38. In fact, ceasing to send youth to prison are likely to save states money. See,

by "peer-reviewed research"[165] and states must be careful not to use placements that have "harmful effect" on the youth or the quality of the educational services the youth need[166]—otherwise these placements, just like prisons, would fail to comply with the IDEA. States should use alternative placements that adopt a restorative justice approach to responding to harms in society, since alternatives situated in "punishment and control"[167] would similarly fail to comply with the IDEA. Given that residential rehabilitative programs, including small, rehabilitative, home-like facilities, are vulnerable to carceral logics of control and punishment rooted in racism and ableism,[168] states should center those most affected by the prison system, ask them what they need to thrive,[169] and give them "access to power and resources so they can create systems that support them and their communities."[170]

As a result of the requirement for a continuum of non-prison alternative placements, criminal judicial authorities would now have a range of placement options to select from for youth with disabilities that

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e.g., Tucker & Cadora, supra note 140 (noting that justice reinvestment programs in Oregon saved the state $17,000 per youth).

165. 20 U.S.C. § 1414 (d)(1)(A)(i)(IV) (2018); 34 C.F.R. § 300.320(a)(4) (2021).

166. 34 C.F.R. § 300.116 (2021).

167. Annamma & Morgan, supra note 80, at 505.

168. Id. at 504.

169. Id. at 506.

170. Id. at 502.

would not only implement their IEPs, but also further the justice system's rehabilitative goals.

B. Extend IDEA's Child Assessment and Manifestation Determination Requirements to Pre-Trial Criminal Proceedings

It is one thing to proscribe the incarceration of youth with disabilities, but it is another thing to implement it. This Note suggests that one way to stop sending youth with disabilities to prison is by extending certain IDEA procedural protections to criminal proceedings. Concretely, Congress could amend Section 1415(k)(6)(A) of the IDEA to remove the provision that "nothing in [the IDEA] prevent . . . judicial authorities from exercising their responsibilities with regard to . . . crimes committed by a child with a disability," and instead require (1) a pre-trial disability assessment for all youth under 22 years old who come into contact with the criminal system and have not yet graduated from high school, and (2) a pre-trial manifestation determination review for those eligible youth to determine where they should be placed along the continuum of non-prison alternative placements, if removed from their prior placement at all. Absent a federal amendment, states could also amend their laws to require the same procedures.[171]

[171.] States should independently adopt the proposed procedures. States have a duty to comply with the IDEA, therefore they have a duty not to send youth with disabilities to prisons, which the proposed procedures would help them do. In addition, the proposed procedures would increase educational attainment, improve employment outcomes, reduce recidivism, and save taxpayers' money. Not only would the

The proposed solution is only a procedural fix to ensure all youth with disabilities who come into contact with the criminal system are identified, so that none end up in prison. In fact, states are already required to have procedures to ensure all children with disabilities are assessed,[172] and national delinquency guidelines encourage courts to consider disability and educational needs when making youth disposition.[173] This solution simply suggests creating additional processes to limit the racial and ableist biases that have traditionally placed youth with disabilities in the most restrictive settings, even along a continuum of non-prison alternative placements.[174]

First, before trial, courts should be required to assess the IDEA eligibility of all youth who come into contact with the criminal system, are under 22 years old, and have not yet graduated from high school. In practice, this could be implemented the same way the Indian Child Welfare

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proposed procedures further the justice system's rehabilitative goals, but judicial authorities themselves support solutions that prevent out-of-home placement of youth with disabilities and encourage wraparound interdisciplinary services based in natural home environments. See DELINQUENCY GUIDELINES, supra note 71, at 151–52.

172. 34 C.F.R. § 300.111(a)(1)(i) (2021).

173. See Geis, supra note 78.

174. This solution is consistent with the National Council on Disability's recommendation that "efforts to break the school-to-prison pipeline for students with disabilities must address both conscious and unconscious racial biases that combine with disability discrimination to contribute to the crisis." NAT'L COUNCIL ON DISABILITY, supra note 9, at 7.

Act's child find requirement is: the court and probation agency could share an "affirmative and continuing duty to inquire whether the child is or may be eligible" under the IDEA.[175] In addition, courts could start relying on a "rarely enforced"[176] IDEA provision requiring schools to provide copies of special education records of youth they refer to judicial authorities,[177] and request an expedited evaluation[178] when youth have never been evaluated.

If a youth is eligible under the IDEA, the court should not be able to send them to prison. Instead, the court should conduct a manifestation determination review before trial to evaluate whether the problematic behavior was "caused by, or had a direct and substantial relationship to the disability, or was the direct result of the school's failure to implement the IEP," the same way schools do before disciplining and removing a youth with disabilities.[179] As applied to criminal proceedings, the

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175. See Jud. Council of Cal., ICWA Information Sheet: ICWA Inquiry (Dependency) 1 (2022), https://www.courts.ca.gov/documents/ICWA-inquiry-dependency-Information-checklist.pdf. In addition, the probation agency could be required to conduct an initial IDEA inquiry when making first contact with a youth and document it in the delinquency petition, just as the child welfare/probation department do for dependency petitions under ICWA.

176. Nat'l Council on Disability, supra note 9, at 66.

177. 20 U.S.C. § 1415(k)(6)(B) (2018).

178. 34 C.F.R. § 300.354 (2021).

179. 20 U.S.C. § 1415(k)(1)(E) (2018). In schools, the manifestation determination is made by the school, the parent, and the IEP team,

manifestation determination will guide the decision whether to remove the youth from their placement, and if so, which least restrictive placement along the continuum of non-prison alternative placements would best meet their educational needs. It will also serve as a safeguard to prevent courts from disproportionately placing youth of color with disabilities into the most restrictive settings along the continuum of non-prison alternative placements.

If the behavior was a manifestation of the disability or a school's failure to implement the youth's IEP, there should not be further delinquency or criminal proceedings, with the understanding that it is discriminatory and ineffective to punish a child for a behavior resulting from their disability.[180] There is a presumption that the court must return the youth to their prior placement, the same way schools do if the behavior was a manifestation of their disability,[181] with an updated functional behavioral assessment and behavior intervention plan to address the behavior so it does not recur.[182]

Nevertheless, even when a behavior was a manifestation of a student's disability, the IDEA allows schools to remove students with disabilities

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who review all relevant information in the student's file. In court, this determination could similarly be done by the school, the parent, and the IEP team. The court may also order a third-party manifestation determination review or conduct a manifestation determination hearing.

180. Morrison, supra note 12.

181. 20 U.S.C. § 1415(k)(1)(F) (2018).

182. 34 C.F.R. § 300.530 (2021).

from their placement for not more than 45 days if the behavior inflicted injuries to another person.[183] As applied to criminal proceedings, this requirement would allow courts to send youth with disabilities to different placements on the continuum of non-prison alternative placements for 45 days if the behavior inflicted injuries to someone else.[184] However, ideally, courts should not distinguish between non-violent and violent crimes if the behavior was a manifestation of the youth's disability, given that their disability is not something they can control and should be disciplined for.[185] Because youth of color with disabilities are often regarded as "more threatening, and more dangerous than similarly situated white youth,"[186] additional safeguards must be put in place to prevent courts from systematically and disproportionately applying the 45-days provision to youth of color with disabilities.[187] Furthermore, the temporary placement

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183. 20 U.S.C. § 1415(k)(1)(G) (2018).

184. This would not be a criminal disposition. It could be a civil preventive detention with possibility to appeal both the injury finding and the placement decision. See, e.g., Annamma & Morgan, supra note 80, at 485, fn. 96 (noting the existence of abolitionist proposals to replace "juvenile court with some sort of civil regime.").

185. Morrison, supra note 12.

186. Annamma & Morgan, supra note 80, at 492.

187. For instance, a threshold could be established to limit discretion in deciding whether the injury inflicted was serious enough to warrant removal, a continued threat of violence could be required for removal, and restorative justice attempts could be required before allowing removal.

must still comply with the IDEA: the placement should never be in any setting that follows carceral logics; the placement must be the least restrictive environment along the continuum that can implement the youth's IEP; the placement must not be harmful to the youth or the quality of the services the youth need; and the behavior intervention plan must establish a "schedule to measure the effectiveness of the interventions."[188]

Finally, if the behavior was not a manifestation of the disability or the school's failure to implement the youth's IEP, the IDEA provides that the "disciplinary procedures applicable to children without disabilities may be applied to the child with disabilities in the same manner and for the same duration," except that the child must continue to receive a FAPE.[189] As applied to criminal proceedings, if the behavior was not a manifestation of the disability, the court could continue with the criminal or delinquency proceeding the same way it would for youth without disabilities. However, the placement the court selects must still comply with the IDEA: the placement cannot be prison; the placement must be the least restrictive environment to implement the youth's IEP along the continuum of non-prison alternative placements; and it must not be harmful to the youth or the quality of the services the youth needs.

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188. See Morrison, supra note 12, at 109. In the judicial context, the behavior intervention plan would require regular review of the progress to measure the effectiveness of the services provided. This schedule would ensure youth with disabilities are not lost in the system.

189. 20 U.S.C. § 1415(k)(1)(C) (2018).

Nevertheless, manifestation determination findings and placement decisions are still vulnerable to racial and ableist biases. These biases may continue to disproportionately find Black youth's behavior not to be a manifestation of their disability, thereby disproportionately criminalizing them and placing them in the most restrictive settings, even along the continuum of non-prison alternative placements. Therefore, manifestation determination reviews in criminal proceedings should be interpreted broadly, and recognize that a youth's delinquent behavior may be the direct result of the school's failure to develop the proper IEP for the youth—especially for Black youth who have been disproportionately misdiagnosed and pushed out of schools as a result of receiving inadequate services—and that a formerly incarcerated youth's recidivist behavior may be the direct result of the prison's failure to implement the youth's IEP.[190] As a safeguard against such biases in manifestation determination reviews, youth and their parents should have the right to appeal the manifestation determination finding and placement decision, as well as bring a civil action under Section 1415(i) of the IDEA.

Furthermore, ideally, special education and delinquency adjudication should not intersect: if a youth qualifies for special education, they should not be adjudicated delinquent[191]—even if the behavior was found not to

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190. See supra Part II.

191. Savannah L. Murphy, It Starts and Ends with the School: Using Strict IDEA Enforcement to Sunder the School-to-Prison-Pipeline for Special Education Students, 48 OHIO N.U. L. REV. 359, 359 (2022); see also supra note 79.

be a manifestation of their disability. In addition, all youth, regardless of their disability status, will benefit from the creation of alternatives to incarceration. As such alternatives become available, the reliance on prisons to house youth should decrease, potentially reducing and eliminating the need for prisons altogether.

Conclusion

It is impossible to comply with the IDEA in prison. Yet up to 85 percent of incarcerated youth are entitled to receiving special education and related services under the IDEA. To address the racial and ableist biases that have contributed to the over-representation of youth with disabilities in prison, Congress and states should extend certain IDEA procedural safeguards to criminal proceedings and recognize that incarceration is not an appropriate educational placement for youth with disabilities under the IDEA. Instead, if removal is deemed necessary, youth with disabilities should be placed in the least restrictive environment along a continuum of non-prison alternative placements that will implement their IEPs. Such a proscription on sending youth with disabilities to prison will not only promote the IDEA's goals of preparing youth with disabilities for "further education, employment, and independent living," but will also decrease the overall youth population in prison, thereby reducing and potentially eliminating the need for prisons entirely.