1-1-2017

Special Education in Adult Correctional Facilities: A Right Not a Privilege

Melissa Edelson
Loyola Law School, Los Angeles

SPECIAL EDUCATION IN ADULT CORRECTIONAL FACILITIES: A RIGHT NOT A PRIVILEGE

Melissa Edelson[*]

> *A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.*[1]
>
> *– California Constitution art. IX §1*

I. INTRODUCTION

Although public education is not a constitutional right guaranteed by the U.S. Constitution,[2] it is a "uniquely fundamental personal interest in California."[3] Before 1975, however, children with disabilities were often denied a public education due to a lack of resources, understanding, or services.[4] With the passage of the Individuals with Disabilities Education Act ("IDEA") in 1975, those individuals are now assured access to a free appropriate public education that emphasizes special education and related services ("special education").[5] Yet despite constitutional and statutory mandates, a nationwide class of individuals is being denied

* J.D. Candidate, May 2017, Loyola Law School, Los Angeles; B.A. History, 2014, George Washington University. I would like to thank Professor Michael Smith for suggesting this topic and for providing invaluable advice and guidance throughout the writing process. I would also like to thank The Youth Justice Education Clinic at Loyola Law School for its work educating law students on how to effectively advocate for youths' rights in educational settings.

1. CAL. CONST. art. IX, § 1.
2. Butt v. State, 842 P.2d 1240, 1250 (Cal. 1992).
3. *Id.* at 1249.
4. *See* 20 U.S.C. § 1400(c) (2004) (detailing the situation before the Individuals with Disabilities Education Act was enacted).
5. *See* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (2004). Related services includes "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." Related services may include, among other things, transportation, speech-language therapy, and psychological therapy. *Id.* § 1401(26).

meaningful access to the education to which it is entitled.[6]

The IDEA legally entitles youth[7] incarcerated in adult correctional facilities who meet certain prerequisites to special education.[8] Specifically, they must either (a) have been previously identified as having a disability, (b) have received special education in the past, or (c) have an individualized education program ("IEP") in place.[9] This legal right may be terminated only when the individual has either received a high school diploma or reached the age of twenty-two.[10]

Yet, despite a federal mandate providing special education to individuals who meet statutory requirements, adult correctional facilities are skirting their responsibility to provide appropriate special education to qualified inmates.[11] For example, in 2011 it was estimated that approximately 61,000 individuals under age twenty-one were incarcerated on any given day in the United States.[12] Other estimates indicate that this number is much higher.[13] Nonetheless,

---

6. Liz Ryan, *Youth in the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUST., 10 (Oct. 2012), http://www.campaignforyouthjustice.org/images/policybriefs/policyreform/FR_YACJS_2012.pdf. ("Youth have limited access to education while in adult jails and prisons. According to the U.S. Department of Justice's Bureau of Justice Statistics (BJS) . . . only 11% of adult jails provide special education services.").

7. For clarity, the terms "youth" and "juvenile" are used throughout this Note to describe legal minors as well as those individuals below the age of twenty-two who are eligible to receive special education under the IDEA.

8. Melody Musgrove & Michael K. Yudin, "Dear Colleague" Letter on the Individuals with Disabilities Education Act for Students with Disabilities in Correctional Facilities, U.S. DEP'T OF EDUC. 1 (Dec. 5, 2014) [hereinafter *Dear Colleague Letter*], http://www2.ed.gov/policy/gen/guid/correctional-education/idea-letter.pdf.

9. 34 C.F.R. § 300.102(a)(2)(ii) (2008); *see* 20 U.S.C. § 1412(a)(1)(B)(2) (2004).

10. 34 C.F.R. § 300.102. Individuals are entitled to receive special education *until* they reach the age of twenty-two, unless they become twenty-two years of age while participating in an educational program. In that case, the individual may continue his or her participation in the program for the remainder of the current fiscal year. Thus, some statutes state the eligibility cut off as twenty-one and others specify the cut off age as twenty-two. *See* CAL. EDUC. CODE § 56026(c)(4) (West 2003); Patricia J. Guard, *Letter to State Directors of Special Education on Implementing the Funding Formula Under the IDEA*, U.S. DEP'T OF EDUC. (Mar. 9, 2005), http://www2.ed.gov/policy/speced/guid/idea/letters/2005-1/osep0507funds1q2005.pdf.

11. *See* James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, BUREAU OF JUST. STATS. 5 (Oct. 1, 2008), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=530.

12. Lois M. Davis et al., *How Effective Is Correctional Education, and Where Do We Go from Here?*, RAND CORP. 21 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR564/RAND_RR564.pdf. Estimates of the number of individuals incarcerated in adult correctional facilities that are entitled to special education under the IDEA vary from source to source. There is very little research or statistics on this population.

13. Jason Ziedenberg, *You're an Adult Now: Youth in Adult Criminal Justice Systems*, NAT'L INST. OF CORRS. 2 (Dec. 1, 2011), http://static.nicic.gov/Library/025555.pdf. ("It has been estimated that nearly 250,000 youth under age 18 end up in the adult criminal justice system

the Bureau of Justice Statistics found that out of 1,821 adult correctional facilities under state and federal authority, only 667 of them provided special education services.[14] Reoccurring issues with overcrowding, frequent movement of individuals, a lack of qualified teachers, and an inability to obtain student records in a timely manner, compound this problem.[15] As such, while youth are required to receive special education services wherever they are incarcerated, there is no information on the quality of such services.[16] With less than forty percent of adult correctional facilities having special education programs in place, it is likely that many youth incarcerated in such facilities are not receiving the services to which they are entitled.[17]

Several key IDEA provisions make this avoidance possible.[18] In particular, four primary provisions exempt adult correctional facilities from providing a free appropriate public education to school-aged youth in their facilities.[19] The first situation occurs when providing such services would be inconsistent with state law or practice.[20] The second situation occurs when the individual in question was not previously identified as a child with a disability before placement in the adult correctional facility.[21] Third, the child's IEP team may modify the child's IEP or placement if the

---

every year.").

14. Stephan, *supra* note 11.

15. Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, ANNIE E. CASEY FOUND. 25 (Oct. 4, 2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf.

16. Ziedenberg, *supra* note 13, at 6.

17. Stephan, *supra* note 11.

18. *See* 20 U.S.C. § 1412(a)(1)(B)(i) (2004) (allowing states to limit the provision of special education if it would be inconsistent with state law or practice); *id.* § 1412(a)(1)(B)(ii) (exempting adult correctional facilities from the child find obligation in limited circumstances), 20 U.S.C. § 1414(d)(7)(B) (2012) (allowing modifications of an incarcerated individual's IEP in certain circumstances), *id.* § 1416(h) (limiting the withholding power of the Secretary of Education in the context of adult penal institutions).

19. 20 U.S.C. § 1412(a)(1)(B)(i) (2004); *id.* § 1412(a)(1)(B)(ii); 20 U.S.C. § 1414(d)(7)(B) (2012); *id.* § 1416(h).

20. 20 U.S.C. § 1412(a)(1)(B)(i) (2004) ("The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children . . . 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice.").

21. *See id.* § 1412(a)(1)(B)(ii) (The obligation to provide special education does not apply to children "aged 18 through 21 . . . who, in the educational placement prior to their incarceration in an adult correctional facility [] were not actually identified as being a child with a disability . . . or [] did not have an individualized education program.").

State demonstrates "a bona fide security or compelling penological interest that cannot otherwise be accommodated."[22] Lastly, and perhaps most damaging, the federal government is statutorily limited in what penalties it may enact for IDEA noncompliance in the adult correctional facility context.[23]

While the above exceptions are legally permissible under the IDEA, many adult correctional facilities stretch these provisions beyond their intended scope and capacity by denying the provision of special education altogether to youth within their institutions.[24] Indeed, researchers have found that "[e]ducational programming available for school-age youth incarcerated in adult penal institutions is currently woefully inadequate."[25] Not only is this denial inconsistent with the IDEA's overall purpose and California's constitutional interpretation of public education as a fundamental right, but it also disregards the advantages that can be obtained through educating at-risk youth incarcerated in adult correctional facilities.[26]

Part II of this Note examines the constitutional and statutory provisions that should, in theory, allow all youth incarcerated in adult correctional facilities access to special education. Part III explores the mechanisms that adult correctional facilities use to avoid providing special education to youth within their institutions. Part IV explains how legal minors end up in the adult criminal justice system and the negative educational outcomes associated with youth in adult

22. 20 U.S.C. § 1414(d)(7)(B) (2012) ("If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement . . . if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.").

23. *Id.* § 1416(h). For IDEA violations that occur in adult jails and prisons, the federal government may only withhold funding from the agency responsible for providing special education in an amount proportionate to the number of eligible students in the adult correctional facilities for which the agency is responsible.

24. As of 2000, only 40% of state prisons, 60% of federal prisons, 22% of privately funded prisons, and 11% of local jails provided special education programs in their facilities. Caroline WOLF HARLOW, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., EDUCATION AND CORRECTIONAL POPULATIONS 4 (2003), http://www.bjs.gov/content/pub/pdf/ecp.pdf; Stephan, *supra* note 11.

25. Christine D. Ely, Note, *A Criminal Education: Arguing for Adequacy in Adult Correctional Facilities*, 39 COLUM. HUM. RTS. L. REV. 795, 796 (2008).

26. *See* 20 U.S.C. § 1400(d) (2004) (discussing the overall purpose of the Individuals with Disabilities Education Act); *see also* Butt v. State, 842 P.2d 1240, 1250 (Cal. 1992) ("[F]or California purposes, education remains a fundamental interest which [lies] at the core of our free and representative form of government.").

correctional facilities. Part V discusses potential solutions for the lack of special education programs in adult correctional facilities. Most importantly, the IDEA must be amended in order to close the loopholes that adult penal institutions use to limit the provision of special education in their institutions.[27]

II. THE RIGHT TO SPECIAL EDUCATION IN EXISTING LAW

There is a divide in California between the right to public education created by the California Constitution and state statutes, and the actual enforcement of those laws in adult correctional facilities. Under the California Constitution—and cases interpreting it—education is a fundamental right. Moreover, the IDEA affirms that youth are entitled to special education. However, California courts have not yet affirmatively considered the constitutional right to special education for individuals incarcerated in adult prisons. In contrast, the Washington Supreme Court has decided that incarcerated individuals above the age of eighteen are not entitled to protections under the IDEA.[28] It is unclear whether the California Supreme Court will follow Washington's precedent. Nevertheless, a general examination of California law, and of the IDEA in its entirety, demonstrates the divide between the IDEA's overall purpose and the way it is being enforced today.

A. The California State Constitution

While the Constitution does not guarantee youth the right to a public education, almost all states have constitutional provisions recognizing the importance of public education for all children within their state.[29] Moreover, "every state has compulsory school

27. There has been much research, advocacy, and scholarship centered on juveniles incarcerated in juvenile facilities. The same cannot be said for juveniles incarcerated in adult correctional facilities. For scholarship on the status of special education in juvenile facilities, see U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS (2014), http://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf; BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL'Y INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES (2006), http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; Stefanie Low, Comment, *Improving the Education of California's Juvenile Offenders: An Alternative to Consent Decrees*, 57 UCLA L. REV. 275 (2009).

28. *See* Tunstall v. Bergeson, 5 P.3d 691, 699–701 (Wash. 2000).

29. Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 12

attendance laws."[30] For California, this means that children ages six through eighteen are required to attend some form of schooling.[31] And, in exchange for mandatory attendance, California courts have established that "[p]ublic education is an obligation, which the state assumed by the adoption of the Constitution . . . . [and] the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis."[32]

Moreover, the Supreme Court has found that a property interest in education exists where states have mandated both the maintenance of a free, common school system and compulsory education.[33] This property right, the Court has found, is protected by due process.[34] Thus, since California's constitution and educational statutes do not specifically exempt incarcerated youth in their provisions, in theory, all incarcerated youth should enjoy the same guarantee of education as all other children in the state.[35] In that regard, "[f]rom a textual standpoint, the applicable court precedents . . . that define the contours of the right to education should also apply," to students in correctional contexts.[36]

Although California case law remains silent on the subject, other states that have traditionally advanced public education as a fundamental right have, in the same stroke, denied this right to juveniles incarcerated in adult correctional facilities.[37] For example, the Washington Supreme Court in *Tunstall v. Bergeson*[38] held that the constitutional right to basic and special education did not apply to students incarcerated in adult facilities that were above the age of

(2010); *see also* CAL. CONST. art. IX, § 1 (stating the legislative policy behind the constitutional prerogative); Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 231 (2013).

30. Sheldon-Sherman, *supra* note 29, at 231.

31. CAL. EDUC. CODE § 48200 (West 2003) ("Each person between the ages of 6 and 18 years not exempted . . . is subject to compulsory full-time education.").

32. Butt v. State, 842 P.2d 1240, 1248 (Cal. 1992).

33. Ely, *supra* note 25, at 817.

34. Goss v. Lopez, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.").

35. Katherine Twomey, Note, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 795 (2008).

36. *Id.*

37. *See* Tunstall v. Bergeson, 5 P.3d 691, 699–701 (Wash. 2000).

38. *Id.*

eighteen.[39] Thus, while minors held in Washington correctional facilities are entitled to an education, students above the age of eighteen are denied this right based on the Court's strict interpretation of the term "children."[40]

Unlike Washington, California courts have yet to hear a case regarding the constitutional right to education for individuals incarcerated in adult prisons.[41] However, they have unequivocally found that individuals incarcerated in juvenile facilities are constitutionally entitled to basic and special education.[42] It is unclear whether California courts will follow Washington's *Tunstall* example, or whether they will unambiguously extend California's constitutional right to special education beyond juvenile facilities.[43]

B. The IDEA

The IDEA, originally titled the Education for All Handicapped Children Act of 1975,[44] was enacted in order to improve educational results for children with disabilities.[45] Before its enactment, children with disabilities across the country were unable to meaningfully acquire public education because they "did not receive appropriate educational services,"[46] or else were "excluded entirely from the public school system and from being educated with their peers."[47] Thus, the IDEA promises that all students with disabilities "are entitled to receive a free appropriate public education that emphasizes special education and related services designed to meet

39. *Id.* at 701 ("[T]he common understanding of the definition of 'children' for most purposes in Washington, including education, includes individuals up to age 18. Consequently, we hold that the term 'children' under article IX includes individuals up to age 18.").

40. *Id.* at 710 (Johnson, J., dissenting) ("By manipulating the definition of 'child,' the majority denies Washington children their constitutional right to education and equal protection of the law.").

41. *But see* L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 778 (Cal. 2013) (finding that individuals under the age of twenty-two, incarcerated in county jails, are entitled to special education provided that they meet all IDEA requirements).

42. CAL. WELF. & INST. CODE § 224.71(n) (West 2016); *see* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1977) ("education is a fundamental interest"); Anna L. Benvenue, Comment, *Turning Troubled Teens into Career Criminals: Can California Reform the System to Rehabilitate Its Youth Offenders?*, 38 GOLDEN GATE U.L. REV. 33, 43 (2007).

43. *Garcia* has already extended the right to special education to individuals below the age of twenty-two that are incarcerated in county jails. 314 P.3d at 767, 772–73.

44. 20 U.S.C. § 1400(c)(2) (2006).

45. *Id.* § 1400(c)(3).

46. *Id.* § 1400(c)(2)(A).

47. *Id.* § 1400(c)(2)(B).

their unique needs and prepare them for further education, employment, and independent living."[48]

Under the IDEA, a state is entitled to receive federal financial assistance for educating students with disabilities, ages three through twenty-one.[49] In order to receive these funds, the state must implement and maintain policies and procedures that ensure the provision of a free appropriate public education[50] in the least restrictive environment[51] to all students with disabilities residing within its boundaries, subject to some important exceptions.[52] In practice, states must have procedures in place to find and assess potential individuals,[53] determine whether a student is eligible for special education, and create and implement individualized education programs that conform to IDEA requirements.[54]

Furthermore, the IDEA applies to *all* eligible students within states that receive federal funding support for the education of students with disabilities.[55] The U.S. Department of Education recently reiterated this point in a Dear Colleague Letter[56] that stated:

> Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities . . . the fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the

48. *Id.* § 1400(d)(1).

49. 20 U.S.C. § 1412(a)(1)(A) (2004).

50. The term "free appropriate public education," as defined by 20 U.S.C. § 1401(9) (2004), is special education and related services provided under public supervision and at public expense that conform with state educational standards and the individual's individualized education program ("IEP").

51. The least restrictive environment, pursuant to 20 U.S.C. § 1412(a)(5) (2004), means that, "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled."

52. *Id.* § 1412(a)(1)(B) (2004); *see id.* § 1401(3) (defining "child with a disability").

53. This process is commonly referred to as "child find." *See id.* § 1412(a)(3) (2004).

54. *Id.* § 1412(a) (2004). An "individualized education program" ("IEP") means "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 20 USC § 1414(d)." *Id.* § 1401(14).

55. *Id.* § 1412(a); *see also* L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 772 (Cal. 2013) ("One of the conditions for a state's receipt of federal funding under the IDEA is its assurance that a 'free appropriate public education' is available to all qualified students residing in the state.").

56. 20 U.S.C. § 1406(e) (2004). Dear Colleague Letters are "informal guidance . . . not legally binding" that represent "the interpretation by the Department of Education of the applicable statutory or regulatory requirements." *Id.*

IDEA.[57]

Therefore, students in correctional facilities are entitled to the provision of a free appropriate public education under the IDEA.[58] However, as the Dear Colleague letter notes, "not all students with disabilities are receiving the special education and related services to which they are entitled," in correctional facilities.[59]

III. IDEA LOOPHOLES FOR THE PROVISION OF SPECIAL EDUCATION TO POTENTIALLY ELIGIBLE INMATES

There are several IDEA provisions that modify the rights of individuals incarcerated in adult correctional facilities without giving adult penal institutions the flexibility to deny special education altogether.[60] These provisions include: exclusion from state and district assessments,[61] termination of the right to transitional services if the inmate will not be released before their IDEA eligibility ceases,[62] and cessation of the right to a free appropriate public education in the least restrictive environment.[63] There is no doubt that the preceding provisions are harmful to the overall quality and adequacy of special education in adult correctional facilities. However, the IDEA provisions discussed below are commonly used by adult correctional facilities to avoid providing special education altogether to eligible students.

A. If the Provision of Special Education Would Be Inconsistent with State Law or Practice

Under the IDEA, the obligation to provide a free appropriate public education to students with disabilities does not apply to individuals aged eighteen through twenty-two if it "would be inconsistent with State law or practice."[64] Generally, courts have interpreted this exception to permit states to limit the guarantee of special education to entire age ranges, as opposed to particular

57. *Dear Colleague Letter*, *supra* note 8, at 1.
58. *Id.*
59. *Id.*
60. 20 U.S.C. § 1414(d)(7)(A)(i)–(ii), 1414(d)(7)(B) (2012).
61. *Id.* § 1414(d)(7)(A)(i) (2012); 34 C.F.R. § 300.324(d)(i) (2012).
62. 20 U.S.C. § 1414(d)(7)(A)(ii) (2012); 34 C.F.R. § 300.324(d)(ii) (2012).
63. 20 U.S.C. § 1414(d)(7)(B) (2012); 34 C.F.R. § 300.324(d)(ii)(2)(ii) (2012).
64. 20 U.S.C. § 1412(a)(1)(B)(i) (2004).

subsets in age groups.[65] Accordingly, under this exception, states cannot limit the provision of special education to students aged eighteen through twenty-two who are incarcerated in correctional facilities without limiting the provision of special education to *all* students aged eighteen through twenty-two in general.[66]

Despite this statutory interpretation, the Supreme Court of Washington, in *Tunstall*, held that students in adult correctional facilities over the age of eighteen were ineligible for the provision of special education under the IDEA.[67] The court reasoned that the inmate class was outside "the common school system," and thus not covered under Washington's basic and special education statutes.[68] Consequently, the provision of special education to these individuals under the IDEA would be "inconsistent with State law or practice," and thus inmates over eighteen years old were not guaranteed such services under the IDEA.[69]

Tunstall has been widely criticized as contrary to IDEA requirements.[70] However, the Supreme Court denied review of the decision, thereby leaving open a mechanism for states to deny the provision of special education to students incarcerated in adult facilities.[71] Nevertheless, several California education statutes and a California Supreme Court case suggest that California courts will *not* follow *Tunstall*.[72]

For example, section 56000 of the California Education Code states:

> It is the . . . intent of the Legislature to ensure that all individuals with exceptional needs are provided their rights to appropriate programs and services . . . under the federal Individuals with Disabilities Education Act . . . . [and] that this part does not abrogate any rights provided to

65. Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of Tunstall v. Bergeson*, 2003 BYU EDUC. & L.J. 193, 201 (2003).

66. *Id.*

67. Tunstall v. Bergeson, 5 P.3d 691, 706 (Wash. 2000). To be clear, this holding does not extend to students aged eighteen to twenty-two that are not incarcerated.

68. *Id.* at 698–99.

69. *Id.* at 706.

70. Lindsay McAleer, Note, *Litigation Strategies for Demanding High Quality Education for Incarcerated Youth: Lessons from State School Finance Litigation*, 22 GEO. J. POVERTY L. & POL'Y 545, 563 (2015); Ely, *supra* note 25, at 815–17; *see* Mayes, *supra* note 65, at 194.

71. Tunstall v. Bergeson, 532 U.S. 920 (2001).

72. L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 768 (Cal. 2013); *see* CAL. EDUC. CODE § 56000 (West 2003).

individuals with exceptional needs.[73]

The California legislature intended to incorporate the full rights and protections set forth in the IDEA.[74] The IDEA allows for the provision of special education to students in adult correctional facilities, provided they meet certain prerequisites.[75] As such, California should be providing those same services to individuals incarcerated in California adult correctional facilities.

Additionally, in *Los Angeles Unified School District v. Garcia*,[76] the California Supreme Court unequivocally ruled that eligible students not exempted by IDEA prerequisites are entitled to receive a free appropriate public education in California county jails.[77] *Garcia* raised the issue of which agency is responsible for providing special education to individuals incarcerated in county jails.[78] The California Supreme Court held that the responsibility for providing these services is governed by section 56041 of the California Education Code, which states:

> [I]f it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, . . . [is] the last district of residence in effect prior to the pupil's attaining the age of majority . . . as long as and until the parent or parents relocate to a new district of residence.[79]

Although the California Legislature has specifically delineated the entities responsible for providing special education in similar institutional settings, such as juvenile court schools, it "has not

73. EDUC. § 56000.

74. *Id.* The California legislature's intention is to provide California students with the same rights that they would have under the IDEA; they wish to neither abrogate nor enlarge these rights. *See id.*

75. *Dear Colleague Letter*, *supra* note 8, at 1.

76. 314 P.3d 767 (Cal. 2013).

77. *Id.* at 772 ("In the present matter, there is no dispute that, under the IDEA and the California statutes that implement its policies . . . Garcia[] was entitled to continue to receive a [free appropriate public education] while incarcerated in county jail: He was under the age of 22 years, had not received a high school diploma or otherwise met prescribed goals, and, prior to his incarceration, he had been identified as a disabled student and had an individualized educational program.").

78. *Id.* at 773.

79. EDUC. § 56041.

adopted a similar narrow statute applicable to the county jail setting."[80] In its absence, the agency responsible for providing special education in the county jail setting is the local educational agency in which the incarcerated student's parent resides.[81]

Accordingly, *Garcia* is significant for two reasons. First, it explicitly states that youth incarcerated in California jails are entitled to special education under the IDEA.[82] This proposition extends to all qualified youth in adult correctional facilities[83]—basic rights under the IDEA do not end when a juvenile is incarcerated in an adult correctional facility.[84] Consequently, it is unlikely that a California court will find the provision of special education to individuals aged eighteen through twenty-two "inconsistent with state law or practice."[85]

Second, *Garcia* assigns responsibility for the provision of special education for youth in county jails to the school districts where their parents reside.[86] This delegation raises logistical questions as to how school districts will work together with each other, and with the correctional institution, to provide a free appropriate public education to students under their responsibility.[87] With the issue raised, there may be more attention on if, and to what standard, special education is provided to youth in adult correctional facilities.

B. Exemption from Certain Child Find Procedures

Another exception to the general guarantee of a free appropriate public education for students with disabilities specifically targets

80. *Garcia*, 314 P.3d at 780.

81. *Id.* at 775.

82. *Id.* at 780 ("An individual with a qualifying disability who is between the ages of 18 and 22 years and has met certain specified prerequisites is entitled to continue his or her special education program while incarcerated in a county jail.").

83. *Id.* at 772. The *Garcia* court discusses only two exceptions to the general special education entitlement: either the student has received a regular high school diploma or the student, before his or her incarceration, was not identified as a child with a disability or did not have an IEP. *Id.* Thus, if the individual has been previously identified as a child with a disability and has not yet received a high school diploma, the CA Supreme Court implicitly states that he or she is entitled to the provision of special education in adult penal institutions. *Id.*

84. *Dear Colleague Letter*, *supra* note 8, at 1 ("[T]he fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the IDEA to students with disabilities . . . .").

85. 20 U.S.C. § 1412(a)(1)(B)(i) (2004).

86. *Garcia*, 314 P.3d at 774.

87. *Id.* at 779.

individuals aged eighteen through twenty-two in adult correctional facilities.[88] Under the IDEA, if individuals were not previously identified as having a disability or did not have an IEP in their previous educational placement, they are not entitled to receive special education in adult correctional facilities.[89]

In effect, this provision exempts adult penal institutions from performing child find procedures for inmates between the ages of eighteen and twenty-two.[90] However, as the U.S. Department of Education makes clear, "States must make [free appropriate public education] available to students with disabilities in adult prisons who do not fall into that exception. Therefore, States and local educational agencies [] must include in its child find system, those incarcerated youth who would be eligible to receive [a free appropriate public education]."[91] This includes those incarcerated individuals that are below the age of eighteen in adult correctional facilities.[92] Thus, adult penal institutions are not entirely exempt from child find procedures; inmates who have been previously identified as children with disabilities, as well as those below the age of eighteen, must be identified and evaluated for special education.[93]

Adult penal institutions, however, currently apply this provision to circumvent their child find obligation to eligible individuals.[94] The institutional characteristics of prisons, with their punitive focus, do not lend themselves to ensuring that the educational needs of its inmates are met.[95] Richard Morris and Kristin Thompson, professors of special education and disability at the University of Arizona, noted that, "it is frequently reported that . . . the school records of incarcerated youths are difficult to obtain from their regular public school to ensure continuity of needed services and IEP implementation."[96] Additionally, confusion regarding the agency

88. 20 U.S.C. § 1412(a)(1)(B)(ii) (2004).

89. *Id.* § 1412(a)(1)(B)(ii); *see* CAL. EDUC. CODE § 56040(b) (West 2003); 34 C.F.R. § 300.102(a)(2) (2008).

90. Letter from Stephanie Smith Lee, Dir., Office of Special Educ. & Rehab. Serv., U.S. Dep't of Educ., to Geoffrey A. Yudien, Legal Counsel, Vt. Dep't of Educ. (Aug. 19, 2003) [hereinafter *IDEA Letter*], http://www2.ed.gov/policy/speced/guid/idea/letters/2003-3/yudien081903fape3q2003.pdf.

91. *Id.*

92. 20 U.S.C. § 1412(a)(1)(B)(i) (2004).

93. *IDEA Letter*, *supra* note 90, at 1–2.

94. *Dear Colleague Letter*, *supra* note 8, at 8 n.20.

95. Sheldon-Sherman, *supra* note 29, at 235–38.

96. Richard J. Morris & Kristin C. Thompson, *Juvenile Delinquency and Special Education*

responsible for the provision of special education often delays, if not dispels, service delivery altogether.[97] If adult correctional facilities do not have a child find system in place, qualified individuals may be denied a free appropriate public education simply because they remain unidentified.[98] Therefore, even though this provision allows adult correctional facilities to dispense with their child find duty in *some limited* instances, these institutions continue to have an obligation to find unidentified, but qualified, individuals both above and below eighteen years of age.[99]

Many adult correctional facilities, however, do not have child find procedures in place.[100] Indeed, this specific exception to the IDEA mandate of special education has been criticized because "[p]roper identification of youth with special education needs [and] exposure to special education curriculum . . . should be available to juveniles in adult prisons as well as those in juveniles facilities."[101]

C. Modification of a Child's IEP or Placement

Under the IDEA, a student's IEP or placement can be modified in light of certain demonstrated safety or penological considerations.[102] Specifically, the IDEA states that if a child with a disability "is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement . . . if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated."[103]

This provision differs from the exceptions discussed above in two significant ways. First, it applies to youth of all ages incarcerated

---

Laws: Policy Implementation Issues and Directions for Future Research, 59 J. CORR. EDUC. 173, 175–76 (2008).

97. *See also Dear Colleague Letter*, *supra* note 8, at 2 ("Challenges such as overcrowding, frequent transfers in and out of facilities, lack of qualified teachers, inability to address gaps in students' education, and lack of collaboration with the LEA contribute to the problem."); *cf.* Sheldon-Sherman, *supra* note 29, at 236–37 (discussing this issue in the context of juvenile correctional facilities).

98. Cate, *supra* note 29, at 17 ("As young students' disabilities are often undetected . . . this provision has the potential to deny special education to a large number of incarcerated youth.").

99. *IDEA Letter*, *supra* note 90, at 1–2.

100. *See Dear Colleague Letter*, *supra* note 8, at 8.

101. JAMES AUSTIN ET AL., JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, 67 (2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

102. 20 U.S.C. § 1414 (2012); 34 C.F.R. § 300.324 (2012).

103. 34 C.F.R. § 300.324.

in adult correctional facilities.[104] If a penal institution demonstrates a bona fide security or compelling penological interest, students' IEPs may be modified or abrogated.[105] Second, it applies only to youth who have already been *convicted* as adults under state law and incarcerated in adult prisons.[106] The provision does not apply to youth in jails being held in pre-trial detention.[107]

Only one federal district court—the Middle District of Pennsylvania in 2015—has analyzed this provision's scope.[108] In *Buckley v. State Correctional Institution-Pine Grove*,[109] the court found that the "[u]se of the adjective 'bona fide' indicates that any security interest must be actual or genuine to the student, as opposed to theoretical."[110] Thus, the security interest must be particular to the student and not based upon a blanket policy applicable to all inmates at a certain security level.[111]

Moreover, "the established safety concern must be of such a quality that it 'cannot otherwise be accommodated.'"[112] *Buckley* held that "a student's IEP must be implemented as drafted where a bona fide security interest exists and can be accommodated."[113] Additionally, commentary by the Department of Education iterated that a compelling security or penological interest does not include budgetary or funding concerns: "States must accommodate the costs and administrative requirements of educating all eligible individuals with disabilities."[114]

Even when a bona fide security or compelling penological interest exists, however, this provision only grants correctional facilities the ability to *modify* an existing IEP or placement.[115] The

104. *IDEA Letter*, *supra* note 90, at 2.

105. Buckley v. State Corr. Inst.-Pine Grove, 98 F. Supp. 3d 704, 713 (M.D. Pa. 2015).

106. *Id.* at 715; *see also* 20 U.S.C. § 1400 (2006) ("If a child with a disability is incarcerated, but is not convicted as an adult under State law and is not incarcerated in an adult prison, the requirements of the Act apply."); *IDEA Letter*, *supra* note 90.

107. L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 772 (Cal. 2013).

108. *See Buckley*, 98 F. Supp. 3d at 704.

109. 98 F. Supp. 3d 704 (M.D. Pa. 2015).

110. *Id.* at 715.

111. *See* 64 Fed. Reg. 12,537, 12,577 (Mar. 12, 1999) ("A definition of the terms 'bona fide security or compelling penological interest' is not appropriate, given the individualized nature of the determination and the countless variables that may impact on the determination.").

112. *Buckley*, 98 F. Supp. 3d at 715.

113. *Id.* at 715–16.

114. 64 Fed. Reg. 12,537, 12,577 (Mar. 12, 1999).

115. *Buckley*, 98 F. Supp. 3d at 718.

Buckley court held that the provision does not give IEP teams at adult correctional facilities "carte blanche to denude an IEP of special education services . . . . [A]n education program should be revised, not annulled."[116] Accordingly, adult penal institutions that follow the law may not terminate an individual's right to special education altogether.[117] In reality, as the *Buckley* court noted, "youth with disabilities, who are incarcerated at disproportionate rates, often are denied their right to an appropriate education while institutionalized."[118]

D. Penalties in the Event of IDEA Violations

The IDEA provision concerning the consequences of an IDEA violation in adult correctional facilitates is perhaps the most harmful mechanism that adult prisons use in order to avoid providing a free appropriate public education to IDEA-eligible inmates. Generally, the state educational agency oversees all local educational agencies within the state and ensures that they are in compliance with the IDEA.[119] If a local educational agency fails to provide a free appropriate public education to eligible students, the state educational agency shares the blame.[120] However, in the case of adult prisons:

> [T]he Governor (or another individual pursuant to State law), . . . may assign to any public agency in the State the responsibility of ensuring that the requirements . . . are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons."[121]

States may transfer their supervisory responsibility for IDEA compliance in adult correctional facilities to another agency, such as the state department of corrections.[122] Consequently, states' responsibility, and more importantly, the *consequences* for IDEA

116. *Id.*
117. *Id.*
118. *Id.* at 720.
119. 20 U.S.C. § 1416 (2012) (States are required to "monitor implementation of this subchapter by local educational agencies; and enforce this part . . . .").
120. *Id.* § 1416. For a review of all the enforcement mechanisms available to the Secretary of Education, see 20 U.S.C. § 1416(d)–(e).
121. 20 U.S.C. § 1412(a)(11)(C) (2004).
122. Mayes, *supra* note 65, at 198.

violations in the adult prison context, are severely abrogated.[123]

The Secretary of Education has limited disciplinary measures for IDEA violations when an agency—other than the state educational agency—is assigned responsibility for eligible students in adult prisons:

> [T]he Secretary . . . shall take appropriate corrective action to ensure compliance with this subchapter, except that . . . any reduction or withholding of payments to the State shall be proportionate to the total funds allotted . . . to the State as the number of eligible children with disabilities in adult prisons under the supervision of the other public agency . . . [and] any withholding of funds . . . shall be limited to the specific agency responsible for the failure to comply with this subchapter.[124]

The Secretary of Education's withholding power is one of the principal enforcement mechanisms to ensure IDEA compliance.[125] But this power is limited where IDEA violations occur in the prison context.[126] Any funding reduction must be in an amount proportionate to the number of eligible students under the agency's responsibility, relative to the total number of IDEA-eligible students in the state.[127] Thus, if the agency systematically violates the IDEA, the state's overall funding is not in jeopardy.[128] In turn, adult penal institutions have less motivation to provide special education to eligible youth within their facilities.

It is important to note that the Secretary of Education's power to withhold is limited only to where youth are convicted and held in adult prisons.[129] As stated in *Garcia*, school-aged youth incarcerated in adult jails, either pre-adjudication or afterward, are entitled to a free appropriate public education provided by the local educational agency where their parents reside.[130]

Nonetheless, adult correctional facilities use this exception, and

123. 20 U.S.C. § 1412 (2004).
124. 20 U.S.C. § 1416(h) (2012).
125. *Id.* § 1416(e).
126. *Id.* § 1416(h); *see id.* § 1412(a)(11)(c).
127. *Id.* § 1416(h); Cate, *supra* note 29, at 19; *see* H.R. REP. NO. 105–649, at 3 (1998); 71 Fed. Reg. 46,540, 46,802 (Aug. 14, 2006).
128. 20 U.S.C. § 1416(h); Cate, *supra* note 29, at 19.
129. 20 U.S.C. § 1416(h).
130. L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 775 (Cal. 2013).

those discussed above, to circumvent providing school-aged youth in their institutions with a free appropriate public education.[131] While some of these institutions adhere to the letter of the law, all fail to observe the underlying principles of the IDEA—that a free appropriate public education should be available to *all* children with disabilities.[132] Indeed, the Supreme Court has found that "education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[133]

IV. TRANSFER LAWS AND THEIR SERIOUS EFFECTS ON YOUTH

Several IDEA provisions allow adult correctional facilities to bypass the provision of special education to school-aged youth in adult correctional facilities.[134] But how do legal minors end up in the "adult" criminal justice system in the first place? Normally, "[s]tate juvenile courts with delinquency jurisdiction handle cases in which 'juveniles'[135] are accused of acts that would be crimes if 'adults' committed them."[136] Essentially, individuals accused of committing crimes before the age of eighteen are usually under the jurisdiction of the juvenile justice system.[137] Those individuals accused of crimes after they turn eighteen enter the criminal justice system.[138] However, "[a]ll 50 states and the District of Columbia have legal mechanisms for trying juveniles as adults in criminal court."[139] The

131. All four provisions of the IDEA discussed above are meant to restrict the provision of special education in specific, *limited* circumstances.

132. *See* 20 U.S.C. § 1400(d)(1) (2004) (The purpose of this act is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.").

133. Plyler v. Doe, 457 U.S. 202, 221 (1982).

134. *See* 20 U.S.C. § 1412(a)(1)(B) (2004); 20 U.S.C. § 1414(d)(7) (2012).

135. Here, the term "juvenile" is limited; it means legal minors below the age of eighteen nationally, and below the age of seventeen in California.

136. Patrick Griffin et al., *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, JUV. OFFENDERS & VICTIMS: NAT. REP. SERIES, Sept. 2011, at 2, https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

137. *Id.*

138. *Id.*; *see, e.g.*, CAL. WELF. & INST. CODE § 603 (West 2015) (stating that juvenile courts have original jurisdiction over individuals below the age of eighteen unless the alleged crime is one listed in section 707.01 of the California Welfare and Institutions Code); CAL. WELF. & INST. CODE § 606 (West 2016) (stating that cases involving minors must be filed in juvenile court unless other provisions apply).

139. Jason J. Washburn et al., *Detained Youth Processed in Juvenile and Adult Court:*

different types of transfer laws and their particular forms in California are discussed in subsection A.

Transfer laws increase the amount of incarcerated individuals in adult penal institutions who are eligible for special education under the IDEA. Subsection B explores the many negative consequences associated with incarcerating youth in adult facilities. Moreover, in light of the damaging effects of incarceration on youth, the provision of special education in adult correctional facilities can help mitigate these negative consequences.

A. Transfer Laws

There are three primary categories of transfer laws that can be found in most states.[140] These include, but are not limited to, judicial waiver, prosecutorial waiver, and statutory exclusion laws.[141]

1. Judicial Waiver Laws

Judicial waiver laws permit juvenile courts to waive jurisdiction for certain cases, thereby opening the way for criminal prosecution.[142] Waiver determinations are made at formal hearings and require that minimum standards be met.[143] Factors such as the nature of the alleged crime and the accused individual's "age, maturity, history, and rehabilitative prospects" are taken into account.[144] Nevertheless, cases subject to waiver may usually be transferred to a criminal court based on a judge's discretion and "[w]aiver thresholds are often quite low . . . ."[145] Some states, though, make waiver presumptive for certain crimes or else designate specific sets of circumstances where waiver is mandatory.[146]

To illustrate, under presumptive waiver laws, "a juvenile who meets age, offense, or other statutory thresholds . . . must present

---

Psychiatric Disorders and Mental Health Needs, JUV. JUST. BULL., Sept. 2015, at 2, http://www.ojjdp.gov/pubs/248283.pdf.

140. Sarah Hockenberry & Charles Puzzanchera, *Delinquency Cases Waived to Criminal Court, 2011*, JUV. OFFENDERS & VICTIMS: NAT. REP. SERIES, Dec. 2014, at 29, http://www.ojjdp.gov/pubs/248410.pdf.

141. Griffin et al., *supra* note 136, at 2.

142. *Id.* ("A total of 45 states have laws designating some category of cases in which waiver of jurisdiction may be considered.").

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

evidence rebutting the presumption, or the court will grant waiver and the case will be tried in criminal court."[147] Under mandatory waiver laws, juvenile courts *must* waive jurisdiction over cases that meet specific age, offense or prior record criteria.[148] The court's only function under mandatory waiver laws is to ensure that the requirements are met.[149]

In the past, judicial waiver was the primary mechanism that juvenile courts used to transfer youth to criminal court.[150] The circumstances have changed today with the proliferation of other transfer laws.[151] Indeed, although the proportion of juvenile cases in which prosecutors seek waiver is unknown,[152] there has been a definitive decline over the last decade in the number of cases that are judicially waived to criminal court.[153] Today, the primary methods for transferring juveniles to the adult criminal justice system are through prosecutorial discretion laws and statutory exclusion laws.[154]

In California, discretionary judicial waiver is available in any case where a minor is accused of violating any criminal statute or ordinance and is sixteen years of age or older.[155] The juvenile court, upon the prosecution's motion, may consider whether the individual is "a fit and proper subject to be dealt with under the juvenile court law."[156] If the court finds that the minor is not amendable to the care and services provided through juvenile justice system facilities, then the court may waive the case to criminal court.[157] This determination is based on: the "degree of criminal sophistication" demonstrated by the minor,[158] "whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction,"[159] "the minor's previous delinquent history,"[160] and the "circumstances and gravity"

147. *Id.* at 4. Presumptive waiver laws exist in fifteen states. *Id.*
148. *Id.*
149. *Id.* Fifteen states have mandatory waiver. *Id.*
150. Washburn et al., *supra* note 139, at 2.
151. *Id.*
152. Griffin et al., *supra* note 136.
153. Hockenberry & Puzzanchera, *supra* note 140, at 3.
154. Washburn et al., *supra* note 139, at 2.
155. CAL. WELF. & INST. CODE § 707(a) (West 2016).
156. *Id.*
157. *Id.*
158. *Id.* § 707(a)(1)(A).
159. *Id.* § 707(a)(1)(B).
160. *Id.* § 707(a)(1)(C).

of the alleged offense.[161]

Additionally, although California does not have any mandatory judicial waiver laws, its presumptive judicial waiver laws are quite broad.[162] Presumptive waiver is required where a minor has previously committed murder or one of the statutorily enumerated sex offenses, and is then accused of another felony offense when he or she is over the age of sixteen.[163] In those cases, a minor shall be presumed not "a fit and proper subject to be dealt with under the juvenile court law," unless the juvenile court concludes, based on evidence, that the individual would be amendable to the care and services available through the juvenile justice system.[164] This determination is based on the same factors considered in discretionary waiver but the standard is much stricter.[165] The court must make a favorable finding as to every factor listed.[166] However, presumptive waiver only applies if the minor is found to have committed two or more felony offenses when he or she was above the age of fourteen.[167] Overall, from 2003 to 2008, 40% of documented transfers in California were through judicial waivers.[168]

2. Prosecutorial Discretion Laws

Prosecutorial discretion laws, also known as concurrent jurisdiction laws, refer to the types of cases that may be brought in either the juvenile justice system or the criminal justice system depending on prosecutorial discretion.[169] For these types of cases, a hearing is not necessary to determine which court is appropriate as there may be little or no formal standards for making that decision.[170]

In California, the prosecutor may choose to file a case in a criminal court if the alleged offense was committed by a minor aged sixteen or above and if the alleged offense is one of the crimes listed

161. *Id.* § 707(a)(1)(E).
162. *See* Griffin et al., *supra* note 136, at 3.
163. *See* WELF. & INST. § 707(a)(2).
164. *Id.* § 707(a)(2)(B).
165. *See id.* § 707(a)(2)(B).
166. *Id.* § 707(a)(2)(B).
167. *Id.* § 707(a)(2)(A).
168. Griffin et al., *supra* note 136, at 18–19. But "currently, only 13 states publicly report the total number of their transfers." *Id.* at 1.
169. *Id.* at 2.
170. *Id.* at 2–5 ("[P]rosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision making."). *But see* WELF. & INST. § 707(d) (enumerating standards and protocols for prosecutorial discretion in California).

in subdivision (b) section 707 of the California Welfare and Institutions Code.[171] Additionally, the prosecutor may file a case in criminal court if the minor is above the age of sixteen and has not currently committed one of the listed crimes, but has previously committed one.[172] Moreover, the prosecutor has discretion to file a case in criminal court for minors above the age of fourteen when certain circumstances apply.[173]

3. Statutory Exclusion Laws

Statutory exclusion laws, also known as automatic transfers, "exclude juveniles from the jurisdiction of the juvenile court solely on the basis of the type of offense, criminal history, and age of the youth."[174] Thus, criminal courts gain exclusive jurisdiction over certain crimes involving juvenile offenders; if the case "falls within a statutory exclusion category, it must be filed originally in criminal court."[175] Murder and sexual crimes are the most common types of offenses designated in statutory exclusion laws.[176] Twenty-nine states have statutes that exclude juveniles from the jurisdiction of juvenile courts simply because they meet threshold requirements such as age, offense, or prior record criteria.[177]

Subsection (b) of section 602 of the California Welfare and Institutions Code describes California's policy on automatic transfers. The provision states that if any person fourteen years of age or older is accused of committing murder or certain listed sex offenses, he or she must be prosecuted under state criminal law in the "adult" criminal justice system.[178]

Thus, school-aged youth may be tried as adults through legal mechanisms including judicial waiver, prosecutorial discretion, or

171. WELF. & INST. § 707(d).

172. *Id.*

173. *See id.* § 707(d)(2) (providing an in-depth review of the circumstances in which a prosecutor has discretion to file cases in criminal court for individuals ages fourteen and above).

174. Washburn et al., *supra* note 139, at 2.

175. Griffin et al., *supra* note 136, at 2.

176. *Id.* at 6; Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, CAMPAIGN FOR YOUTH JUST. 23 (Mar. 21, 2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf (District attorneys are required to "file cases in adult criminal court for minors age 14 and older charged with either murder with special circumstances . . . or certain enumerated sex offenses.").

177. Griffin et al., *supra* note 136, at 6.

178. WELF. & INST. § 602(b).

statutory exclusion.[179] The minimum age that youth may be transferred to the "adult" criminal justice system varies between states, but is fourteen in California.[180] Additionally, any juvenile above the age of sixteen may be tried as an adult for any offense in California.[181] Transfer laws have an extensive effect on the overall criminal justice system, in part because the incarceration of youth in adult correctional facilities is associated with negative outcomes for school-aged youth.[182]

B. The Consequences of Sentencing Youth as Adults

National and state data are "fragmentary" on the numbers of school-aged youth incarcerated in adult jails and prisons.[183] This is in part because there is no national dataset that tracks the amount of cases that are transferred to adult courts.[184] Lower estimates of minors incarcerated in adult *jails* range from 4,000 to 7,500.[185] However, some researchers suggest that the actual number of juveniles held in adult *jails* "may be ten to twenty times higher than the daily estimate, given 'turnover rates' of youth funneled in and out of the system."[186] Additionally, little to no data has been collected concerning the number of juveniles incarcerated in adult correctional facilities besides jails.[187] However, while the numbers are ambiguous, it is clear that a significant minority of school-aged youth[188] in the United States are being held and incarcerated in adult

179. *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, CAMPAIGN FOR YOUTH JUST. 5 (Mar. 21, 2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_ConsequencesMinor.pdf [hereinafter Campaign for Youth Justice].

180. *See* CAL. WELF. & INST. CODE § 211 (West 2016).

181. *Id.* § 707(a).

182. *See, e.g.*, Ziedenberg, *supra* note 13, at 19−20.

183. Griffin et al., *supra* note 136, at 12.

184. *Id.*

185. *Compare* Ely, *supra* note 25, at 797 ("Approximately 7,500 youths under eighteen are held in adult jails every day across the country."), *with* Todd D. Minton & Zhen Zeng, Bureau of Just. Stat., U.S. Dep't of Just., *Jail Inmates at Midyear 2014*, BUREAU OF JUST. STAT. BULL., June 11, 2015, at 1, http://www.bjs.gov/content/pub/pdf/jim14.pdf ("About 4,200 juveniles age 17 or younger were held in local jails at midyear 2014.").

186. Ely, *supra* note 25, at 798.

187. *Id.* In 2005, 4,775 youth under eighteen were incarcerated each day in state prisons. However, this number is under-inclusive because it does not include youth incarcerated in federal prisons and little information has been collected on the number of youth, aged eighteen to twenty-two, that are incarcerated in state and federal prisons. *Id.*

188. The term "school-aged youth" is used here to refer to both minors and those individuals above the age of eighteen that are still entitled to rights under the IDEA.

jails and prisons.[189]

There are a number of negative consequences associated with incarcerating youth in adult correctional facilities.[190] Studies have confirmed that youth incarcerated in adult correctional facilities are more likely to reoffend than those retained in the juvenile justice system.[191] Indeed, placing youth in adult correctional facilities often results in distorted attitudes towards antisocial behavior and an increased association with more "hardened" criminals.[192]

Moreover, incarceration in adult facilities is expensive.[193] In California, it costs about $674.55 a day or $246,210 a year to confine a young person.[194] Additionally, the danger of self-harm, assault, and the occurrence of mental health conditions is much greater for youth in adult facilities.[195] Indeed, "incarcerated youth experience from double to four times the suicide rate of youth in the community."[196] Furthermore, there is a severe racial disparity in the demographics of youth that get transferred to adult criminal courts.[197] Historically, racial and ethnic minority groups, particularly those from lower socio-economic classes, represent a disproportionate amount of juveniles transferred to the adult criminal justice system.[198]

---

189. Davis et al., *supra* note 12, at 21 ("In 2011, about 61,000 individuals below age 21 were incarcerated on any given day in the United States.").

190. *See, e.g.*, Ziedenberg, *supra* note 13 (discussing the safety, service, and cost challenges that arise when youth are detained in jails while awaiting trial).

191. Neelum Arya, *Legislative Victories from 2005 to 2010: Removing Youth from the Adult Criminal Justice System*, CAMPAIGN FOR YOUTH JUST. 17 (Mar. 22, 2011), http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf. ("[Y]outh who are transferred . . . to the adult criminal system are approximately 34% more likely than youth retained in the juvenile court system to be rearrested for violent or other crimes."). For more information on the recidivism rates of youth incarcerated in adult correctional facilities, see, for example, NAT'L CTR. FOR JUV. JUST., U.S. DEP'T OF JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT, 111–12 (2014), http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf.

192. *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, CAMPAIGN FOR YOUTH JUST. 7–8 (Nov. 2007), http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf [hereinafter *Jailing Juveniles*].

193. *See* HOLMAN & ZIEDENBERG, *supra* note 27, at 10–11.

194. *Factsheet: The Tip of the Iceberg: What Taxpayers Pay to Incarcerate Youth*, JUST. POL'Y INST. 2 (Mar. 2015), http://www.justicepolicy.org/uploads/justicepolicy/documents/factsheet_costs_of_confinement.pdf.

195. *See Jailing Juveniles*, *supra* note 192.

196. HOLMAN & ZIEDENBERG, *supra* note 27, at 9.

197. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., DEP'T OF JUST., JUVENILE COURT STATISTICS 2013 20–27 (2015), http://www.ncjj.org/pdf/jcsreports/jcs2013.pdf.

198. Washburn et al., *supra* note 139, at 3.

This Note's discussion concerning the negative effects of incarceration on juveniles is nowhere near exhaustive. Numerous advocacy groups have discussed the adverse consequences of transfer laws and their effect on America's juvenile population.[199] However, there has been limited dialogue concerning education, particularly special education, and its ability to mitigate many of the negative consequences of incarceration in adult prisons.[200]

"Although many factors account for why some formerly incarcerated adults and youth succeed and some don't, lack of education and skills is one key reason."[201] Conversely, improved school performance is associated with a reduction in criminality and delinquency.[202] Moreover, researchers have found that a disproportionate amount of incarcerated youth have learning disabilities and are in need of special education.[203] Not only would providing special education to youth incarcerated in adult correctional facilities substantially reduce recidivism rates,[204] it would also be more cost effective.[205] Davis suggests that there would be a "savings of five dollars on reincarceration costs for every dollar spent on correctional education."[206] Special education in adult correctional facilities also emphasizes the potential for rehabilitation and strengthens the criminal justice system's deterrence goals.[207]

In theory, youth incarcerated in adult jails and prisons have the opportunity for a structured environment emphasizing learning and future planning.[208] As argued throughout this Note, however, special

199. *See* Campaign for Youth Justice, supra note 179, at 23.

200. *See* Davis et al., *supra* note 12, at iii ("Correctional education . . . reduces the risk of post-release reincarceration . . . and does so cost-effectively . . . . And when it comes to post-release employment for adults . . . researchers find that correctional education may increase such employment.").

201. *Id.*

202. KATHERINE A. CARLSON & MICHELLE M. MAIKE, OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, WASH., EDUCATING JUVENILES IN ADULT JAILS: A PROGRAM GUIDE 12 (2013), http://www.k12.wa.us/InstitutionalEd/pubdocs/EducatingJuvenilesInAdultJails.pdf.

203. Davis et al., *supra* note 12, at 22 ("[B]etween 30 and 50 percent of incarcerated youth have special education disabilities, as compared with approximately 10 percent of non-incarcerated youth.").

204. Ely, *supra* note 25, at 807; Davis et al., *supra* note 12, at iii.

205. Davis et al., *supra* note 12, at iii.

206. *Id.*

207. Mayes, *supra* note 65, at 208–09.

208. *Dear Colleague Letter*, *supra* note 8, at 1 ("[T]he fact that a student has been charged with or convicted of a crime does not diminish his or her substantive rights or the procedural safeguards and remedies provided under the IDEA to students with disabilities and their parents.").

education in the adult correctional facility context does not meet minimally adequate standards.[209] Indeed, adult penal institutions "may fail to offer educational programs at all, may provide programs run by entities ill-equipped to educate school-aged youth, or may have insufficient resources to provide appropriate services."[210] As of 2000, only 40% of state prisons, 60% of federal prisons, 22% of private prisons, and 11% of jails provided special education programs to their inmates.[211] Thus, despite federal statutes and state constitutional prerogatives, adult correctional facilities continue to violate the educational rights of incarcerated juveniles.[212]

V. LEGISLATION AS A POTENTIAL SOLUTION

The adequate provision of special education to eligible juveniles incarcerated in adult facilities is currently inadequate. Individuals below the age of eighteen, and those between the ages of eighteen and twenty-two, experience institutional reluctance when attempting to obtain the free appropriate public education to which they are entitled. However, this is not a new phenomenon.[213] For years, advocates have been trying to bring the provision of special education in adult correctional facilities up to minimally adequate levels.[214]

There are many possible avenues to improve upon the provision of special education in adult correctional facilities.[215] This Note argues for legislation as a solution to this issue.

Because much of special education law is rooted in statutes, legislative advocacy is an essential tool for advocates against special education inadequacy in adult correctional facilities.[216] Activists need to argue for clarification and reduction of the IDEA exceptions so that adult penal institutions will not improperly broaden their scope. For example, in its current state, the statutory framework for the IDEA differentiates between individuals incarcerated in adult

209. Ely, *supra* note 25, at 809–11.
210. *Id.* at 801.
211. Harlow, *supra* note 24, at 4.
212. *See Jailing Juveniles*, *supra* note 192, at 4.
213. Sheldon-Sherman, *supra* note 29, at 235.
214. *Id.*
215. *See, e.g.*, Sheldon-Sherman, *supra* note 29, at 272–74 (arguing for more research to develop effective ways of incentivizing correctional facilities to comply with the law); Ely, *supra* note 25, at 828–32 (arguing for school finance litigation "adequacy" claims).
216. Cate, *supra* note 29, at 35.

correctional facilities and those incarcerated in juvenile correctional facilities.[217] Its measures limit the provision of special education for those individuals incarcerated in adult, but not juvenile, facilities.[218]

However, this distinction is unrealistic. As discussed above, the decision to transfer youth to the adult criminal justice system is often discretionary.[219] This discretion, in turn, permits judicial officers and prosecutors to decide the quality of education that juveniles will receive; the decision to prosecute juveniles as adults and incarcerate them in adult facilities is a decision that currently delivers these individuals to institutions with inadequate special education services.[220]

Additionally, the IDEA limitations discussed above are not compatible with the overall purpose of the IDEA, which asserts that *all* youth with disabilities are entitled to a free appropriate public education.[221] Moreover, as currently utilized, adult correctional facilities use these IDEA limitations to eliminate the provision of special education altogether.[222] As such, amending the IDEA to clarify and reduce the four IDEA loophole provisions would improve outcomes for all juveniles with disabilities and ensure compliance with the overall purpose of the IDEA.

First, the "inconsistent with State law or practice"[223] exception should be amended to ensure that the *Tunstall* example is not followed.[224] The statutory language of this provision needs to clearly

---

217. *Compare* 20 U.S.C. § 1412(a)(1)(B)(i) (2004) (allowing states to limit the provision of special education if it would be inconsistent with state law or practice), *id.* § 1412(a)(1)(B)(ii) (exempting adult correctional facilities from the child find obligation in limited circumstances), 20 U.S.C. § 1414(d)(7)(B) (2012) (allowing modifications of an incarcerated individual's IEP in certain circumstances), *and id.* § 1416(h) (limiting the withholding power of the Secretary of Education in the context of adult penal institutions), *with* CAL. WELF. & INST. CODE § 224.71 (West 2016) (promising all individuals incarcerated in juvenile facilities a quality education that complies with state law).

218. 20 U.S.C. § 1412(a)(1)(B)(ii) (2004).

219. *See* discussion *supra* Part IV (detailing the different types of transfer laws and how they are applied).

220. *See* Ziedenberg, *supra* note 13, at 23 ("With the adult conviction they get no services, education . . . . The [juveniles tried as adults] population does not belong to anyone . . . neither adult nor juvenile.").

221. 20 U.S.C. § 1400(d)(1) (2004).

222. *See supra* notes 11–17 and accompanying text (discussing the current state of special education in adult correctional facilities).

223. 20 U.S.C. § 1412(a)(1)(B)(i).

224. Tunstall v. Bergeson, 5 P.3d 691, 708 (Wash. 2000) (holding that students in adult correctional facilities over the age of eighteen are ineligible for the provision of special education under the IDEA).

pronounce that states are permitted to limit the provision of special education to particular age groups but *not* merely to subsets within age groups. Thus, a state can decide that providing special education for all individuals above the age of eighteen is "inconsistent with state law or practice."[225] However, under this provision, states may not limit the provision of special education to those individuals above the age of eighteen in adult correctional facilities, without restricting this right to individuals not incarcerated in adult correctional facilities.[226]

Second, the provision limiting the child find obligation in adult correctional facilities should be eliminated altogether.[227] In its current state, this provision allows adult penal institutions to dispel with their child find obligation for those individuals above the age of eighteen who have not previously been identified as a child with a disability.[228] However, without active child find systems in place, many eligible students are denied special education simply because they remain unidentified.[229] Eliminating this exception to the provision of a free appropriate public education would ensure greater compliance with IDEA requirements.[230] Additionally, by requiring these institutions to find and assess the needs of youth within their facilities, officials would have a greater understanding of the needs of their inmate population. Thus, appropriate services can be provided to meet these needs and enhance the outcomes of these individuals.[231]

Third, the IDEA provision allowing a student's IEP or placement to be modified in light of certain demonstrated "bona fide security or compelling penological interests"[232] is acceptable so long as adult correctional facilities comply with the provision's intended

225. 20 U.S.C. § 1412(a)(1)(B)(i).

226. Mayes, *supra* note 65, at 201.

227. 20 U.S.C. § 1412(a)(1)(B)(ii).

228. *Id.* § 1412(a)(1)(B)(ii).

229. *See* Sheldon-Sherman, *supra* note 29, at 236–38; *see also* Morris & Thompson, *supra* note 96, at 178 (discussing the difficulty of implementing child find policies and procedures in a correctional setting.).

230. By requiring adult correctional facilities to identify and assess all potentially eligible individuals within their institution, those individuals eligible under the current statutory scheme would be identified, and, under the IDEA, they must be provided with special education.

231. Davis et al., *supra* note 12, at iv ("[T]he debate should no longer be about whether correctional education is effective or cost-effective but rather on where the gaps in our knowledge are and opportunities to move the field forward.").

232. *See* 20 U.S.C. § 1414(d)(7)(B) (2012).

scope.[233] The *Buckley* decision provided a reasonable explanation concerning the scope of this provision.[234] Adult penal institutions must first demonstrate that the compelling safety or penological consideration is specific to the individual.[235] They must then show that such a concern cannot be accommodated through reasonable means other than modifying the juvenile's IEP.[236] As such, adult penal institutions that follow the law may only modify a juvenile's IEP in specific, limited circumstances.

Lastly, the IDEA provision limiting the Secretary of Education's withholding power in the event of IDEA violations in adult prisons needs to be eliminated.[237] The Secretary of Education's withholding power is one of the principal enforcement mechanisms to ensure IDEA compliance.[238] Without the threat of such a penalty, adult correctional institutions can violate the IDEA without losing a significant portion of their federal IDEA funding.[239] Thus, many of these institutions take this minimal forfeiture rather than creating special education programs in their institutions.[240] With the removal of this provision, such institutions would be pressured to ensure compliance with the IDEA or risk losing their federal IDEA funding altogether.

In short, the IDEA provisions that allow adult correctional facilities to limit the provision of special education to youth incarcerated in their institutions need to be modified and their scope clarified. Ideally, this would occur on the federal level, with the IDEA being amended. However, advocates may have a greater chance of success if they first attempt to modify the California statutes implementing the IDEA. California has expressed the intent to neither enlarge nor abrogate the rights expressed in the federal IDEA.[241] However, the California Constitution affords greater

233. *See* Buckley v. State Corr. Inst.-Pine Grove, 98 F. Supp. 3d 704, 713 (M.D. Pa. 2015).
234. *Id.* at 715–20.
235. *Id.* at 715–16.
236. *Id.*
237. 20 U.S.C. § 1416(h) (2004).
238. *Id.* § 1416(e).
239. *Id.* § 1416(h).
240. *See* Stephan, *supra* note 11, at 5–6. Fewer than 40% of adult prisons and jails currently have special education programs. *Id.* This number would be much higher if the states where they resided were threatened with losing a significant portion of their federal IDEA funding.
241. CAL. EDUC. CODE § 56000 (West 2003).

educational protection than does the U.S. Constitution.[242] Moreover, *Garcia* suggests that California lawmakers may be open to such legislation.[243]

VI. CONCLUSION

The provision of special education is a right guaranteed to all eligible youth within the United States.[244] However, for a substantial, but largely unacknowledged population, it is a right they are not receiving. Four specific IDEA provisions limit the provision of special education in adult correctional facilities for certain individuals.[245] However, expansive use of these supposedly limited exceptions coalesces to create a substantial lack of special education programs in adult penal institutions. Legislation amending the IDEA is necessary at the federal level in order to ensure that these loopholes are closed for all juveniles incarcerated in adult correctional facilities nationwide. However, until this occurs, California should attempt to modify and clarify these provisions so that juveniles within the state of California are accorded their constitutional rights. As "the denial of appropriate education undoubtedly serves to perpetuate a vicious circle of incarceration for this at-risk population . . . the provision of a meaningful educational benefit may yet interrupt it."[246]

242. *See* discussion *supra* Section II.A (discussing the California constitution and the educational protections it affords its residents).

243. *See* L.A. Unified Sch. Dist. v. Garcia, 314 P.3d 767, 780 (Cal. 2013). *Garcia* held that qualified individuals under the IDEA had rights to the provision of adequate special education in county jail. *Id.* Although this holding was limited to county jails, it suggests that the California Supreme Court and lawmakers may be open to clarifying the statutory scheme implementing the IDEA. *See id.*

244. 20 U.S.C. § 1400(d)(1) (2004).

245. *See* 20 U.S.C. §§ 1412(a)(1)(B)(i)–(ii), 1414(d)(7)(B), 1416(h).

246. Buckley v. State Corr. Inst.-Pine Grove, 98 F. Supp. 3d 704, 720 (M.D. Pa. 2015).