Using Hindsight Evidence When Evaluating IEPs for Youth with Disabilities in Adult Correctional Facilities

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Introduction

Youth in correctional facilities are as entitled as their non-incarcerated peers to an education. But, youth with disabilities in correctional facilities, particularly adult correctional facilities, often have difficulty receiving the services they are legally entitled to under the Individual with Disabilities Education Act (the IDEA).[1] This is due to a variety of issues including children who are incarcerated as adults, a lack of training for teachers in correctional facilities, improper record transfers, and other conditions within correctional facilities that create barriers to educational access.[2] This deficiency of services is impactful—studies suggest between 30% and 70% of the juveniles in the justice system have disabilities, and thus, are eligible for services under the IDEA.[3] Under the IDEA, youth with disabilities are entitled to an Individualized Education Programs (IEP), one of the most important services for youth with disabilities, including those in the juvenile justice system.[4] IEPs include an evaluation of the student's current level of achievement, goals and measurable objectives, and a statement of related aid and services.[5] IEPs provide a roadmap to

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1 *See* Blakely Evanthia Simoneau, *Special Education in American Prisons: Risks, Recidivism, and the Revolving Door*, 15 Stan. J.C.R. & C.L. 87, 109 (2019) (noting that prison teachers and facility staff are often unable to utilize resources to identify children with disabilities).

2 *See* Greg Carter, Note, *Repairing the Neglected Prison-to-School Pipeline: Increasing Federal Oversight of Juvenile Justice Education and Re-Entry in the Reauthorization of the Elementary and Secondary Education Act*, 25 Geo. J. Poverty L. & Pol'y 371, 374, 389 (2018).

3 Jennifer A.L. Sheldon-Sherman, T*he IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & Educ. 227, 229 (2013).

4 20 U.S.C. § 1412(a)(4).

5 20 U.S.C. § 1414(d); *see also* Paolo Annino, *The 1997 Amendments to the IDEA: Improving the Quality of Special Education for Children with Disabilities*, 23 Mental & Physical Disability L. Rep. 125, 125 (1999) ("[An IEP] documents the child's present level of performance, his or her needs, and the programs and services available.").

effective learning and, without IEPs, it is more difficult to ensure a youth's needs are met.[6] However, because of the exceptions added by the 1997 amendments to the IDEA, adult correctional facilities can change a youth's IEP based on largely undefined "bona fide security" interests.[7] The lack of definition allows flexibility, but also makes it more difficult to assess appropriateness of changes to an IEP.[8]

Circuits are split on how to evaluate the appropriateness of an IEP, with particular contention surrounding whether or not to consider if there has been educational benefit after a new or altered IEP is put in place.[9] In determining appropriateness, it may be especially valuable to consider educational benefits for youth in adult correctional facilities. The consideration of educational benefits may also act as a check when IEPs are altered more radically because of "bona fide security" interests.

This Article will discuss the importance of court evaluation of a youth's academic progress to determine if an IEP is appropriate in an adult correctional facility, particularly the importance of the judiciary's power to evaluate the various exceptions to the IDEA that exist for that youth in an adult correctional facility. First, the Background will provide a brief history of juvenile justice and the history of the development of educational rights for youth with disabilities—focusing on the 1997 Amendment to the IDEA and the effect on youth incarcerated in adult facilities. Second, the Background will overview the circuit split on whether academic progress after altering an IEP should be used to evaluate whether the IEP is appropriate under the IDEA. Finally, the Analysis will look at which circuit is the closest to the Supreme Court's approach and why that method of evaluating the IEPs of benefits-eligible youth in adult correctional facilities is the most effective to ensure education benefit. If courts are able and willing to determine appropriateness by using academic progress as a factor, then courts can ensure better compliance with the spirit of the IDEA by correctional facilities.

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[6] Simoneau, *supra* note 1, at 89 (acknowledging that before the IDEA over half of disabled students were not getting services).

[7] *Id.* at 123-24.

[8] *See* 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, 18 (2010).

[9] Maggie Wittlin, Essay, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1386-87 (2016) (collecting cases).

BACKGROUND

I. HISTORY OF JUVENILE FACILITIES

A. *Early Steps in Juvenile Rehabilitation*

The juvenile justice system encompasses a wide array of facilities, housing juveniles in prisons, residential facilities like group homes, and state-run institutions.[10] Before juvenile courts were established, children appeared before adult courts until society's view of children and development shifted, creating the need for seperate juvenile courts to accommodate the differing needs of youth.[11] In these newly formed juvenile courts, new procedures placed the state in the role of the parent.[12] These procedures developed based on theories of rehabilitation, and the idea that the state has a right to intervene when parents have been negligent.[13] Out of these ideologies, three critical principles emerged: (1) incarceration should focus on rehabilitation rather than punishment; (2) as adjudicated youth were not being punished *per se*, formal due process protections were not applicable; and (3) the state had a legal obligation to protect children when parents were unable or unwilling to protect them.[14] However, these ideologies, particularly the parental role of the state had some negative effects on the rights of children because policies prioritized care over other rights.[15]

B. *Shifting Perspectives in the 1960s and 70s*

By the 1960s, critics of the juvenile justice system complained that the the informal, non-criminal procedures were ineffective rehabilitation and were doing more harm to juvenile defendants than the previ-

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[10] Lauren A. Koster, Note, *Who Will Educate Me? Using the American with Disabilities Act to Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 686 (2019).

[11] Simoneau, *supra* note 1, at 104.

[12] Moira O'Neill, Note, *Delinquent or Disabled? Harmonizing the IDEA Definition of "Emotional Disturbance" with the Educational Needs of Incarcerated Youth*, 57 HASTINGS L.J. 1189, 1192 (2006).

[13] Cate, *supra* note 8, at 4.

[14] O'Neill, *supra* note 12, at 1192.

[15] *See id.* at 1193.

ous system.[16] One of the criticisms was that juvenile courts did not measure up to the essential standards of due process and fair treatment.[17] This downfall began to change in 1967 with *In re Gault* when the Supreme Court held that juveniles had a right to due process of law in proceedings that could result in confinement.[18]

Following this decision, the federal government became more involved in the 1970s.[19] In an effort to oversee state juvenile justice facilities, Congress passed the Juvenile Justice Delinquency Prevention Act of 1974.[20] This act focused on diverting juvenile offenders from correctional facilities, and federal policy shifted to deinstitutionalization and decriminalization of status offenders.[21]

C. *"Recriminalization" and "Tough on Crime"*

Towards the end of the 1970s and in the 1980s, the decriminialization policy shifted as a result of the "tough on crime" movement to "recriminalize American juvenile justice."[22] This involved an increased focus on preventative detention, the transfer of violent juveniles to adult court, mandatory and determinate sentencing for violent juveniles, increased confinement of all juveniles, and enforcement of the death penalty for juveniles who committed certain kinds of murder.[23] Additionally, states enacted transfer statutes, which give prosecutors and judges broad discretion to sentence juveniles as adults.[24] States also enacted statutues that lowered the age at which youth could be tried as adults.[25]

In the 1990s, the juvenile justice system continued to emphasize crime eradication and public safety rather than juvenile rehabilitation.[26] The "tough on crime" attitude of the 1980s and 1990s shifted the emphasis of the juvenile justice system from rehabilitation services

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16 *Id.* at 1194.

17 *Id.* at 1196.

18 *See generally In re Gault*, 387 U.S. 1, 13-14, 30-31 (1967); *see also id.* at 1195-96.

19 *See* O'Neill, *supra* note 12, at 1196.

20 Koster, *supra* note 10, at 688.

21 O'Neill, *supra* note 12, at 1196; Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 879 (2009/2010).

22 O'Neill, *supra* note 12, at 1196.

23 *Id.*

24 Cate, *supra* note 8, at 5.

25 *Id.*.

26 Koster, *supra* note 10, 689.

to crime eradication and public safety.[27] The reforms of the 1980s and 1990s, which emphasized the transfer of juveniles to the adult criminal court and mandatory sentencing for violent juveniles, "reflected an ongoing tension between retribution and rehabilitation within the juvenile justice system."[28] Throughout the 1990s, public fear of "child super predators" led to the prosecution of more juveniles in criminal court.[29] Some states allowed children as young as thirteen to be convicted as adults.[30] During this time, it became very difficult for prisoners, including those detained in juvenile facilities, to challenge the conditions of their confinement due to the Prison Litigation Reform Act of 1995, which heavily restricted inmates' ability to challenge prison conditions in the courts.[31] One example of such restriction is that an incarcerated juvenile must first pursue all facilities-based administrative procedures for remedying his or her cause of action before filing a lawsuit under federal law.[32]

D. *The Modern Juvenile Justice System*

In the 21st century, there has been some easing of the harsh rules leftover from the "tough on crime" era of the 1990s.[33] Reformers have made efforts to keep juveniles out of adult court and efforts to treat youths differently from adults.[34] The Court has also made efforts to ease the effects of the "tough on crime" era. The Court recently held in *Roper v. Simmons* that the death penalty for individuals who were under eighteen at the time the crime was committed is cruel and unusual punishment forbidden by the Eighth Amendment.[35] This case recognizes that children cannot be treated the same as adults; juveniles display a lack of maturity and an underdeveloped sense of responsibility, are more vulnerable and susceptible to negative influence, and have a less-formed character than adults.[36]

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27 *Id.*

28 O'Neill, *supra* note 12, at 1197.

29 Simoneau, *supra* note 1, at 105 (quoting Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1448-59 (2012).

30 *Id.* at 106.

31 *See* Koster, *supra* note 10, at 693.

32 *Id.*

33 *See* O'Neill, *supra* note 12, at 1197.

34 *See id.*

35 *See* Roper v. Simmons, 543 U.S. 551, 578 (2005); O'Neill, *supra* note 12, at at 1197-98.

36 O'Neill, *supra* note 12, at 1198.

II. THE PARTICULAR NEED FOR DISABILITY SERVICES FOR JUVENILES IN CORRECTIONAL FACILITIES

A. *Juvenile Justice System Demographics and Combined Barriers*

Disability services are especially important for juveniles in correctional facilities.[37] There is a larger percentage of youth with special needs who qualify for the IDEA services in juvenile facilities than in the typical public school population.[38] Many of these individuals suffer from emotional disturbances as well.[39] At least half of incarcerated juveniles may have a diagnosable emotional disability.[40] Some studies indicate the prevalence of emotional disabilities is over 60% in juvenile facilities.[41]

There are some discrepancies in the exact numbers, but multiple studies indicate that there is a large percentage of youth with some form of disability in the juvenile justice system and that this percentage is disproportionate to the public school population.[42] Many studies estimate that the prevalence of youth with disabilities in the juvenile justice system is between 30-70%.[43] Another study found that the prevalence of learning disabilities in juvenile detention was 17% to 53%, compared to a rate of 2% to 10% of children in public schools, and the same study found that 47% of youth in juvenile detention have an emotional disability, compared to a rate of 8% in children in public schools.[44] Yet another study found that between 65% and 70% of persons in the juvenile justice system could be eligible for protection under the Americans with Disabilities Act (ADA).[45]

Generally, these youths were having difficulty in school prior to entering the juvenile justice system.[46] According to the Survey of Youth in Residential Placements conducted by the Office of Juvenile

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37 *See id.* at 1189.

38 *Id.*

39 *See id.* at 1190.

40 Koster, *supra* note 10, at 673-74.

41 O'Neill, *supra* note 12, at 1199.

42 *See* Tulman, *supra* note 21, at 882; Koster, *supra* note 10, at 691-92.

43 Tulman, *supra* note 21, at 882.

44 Koster, *supra* note 10, at 691.

45 *Id.* at 691-92.

46 *See* Katherine Burdick, Jessica Feierman, & Maura McInerney, *Creating Positive Consequences: Improving Education Outcomes for Youth Adjudicated Delinquent*, 3 DUKE F. FOR L. & SOC. CHANGE 5, 7 (2011).

Justice and Delinquency Prevention, nearly one-half (48%) of youth in custody are functioning below the grade level appropriate for their age, compared to 28% of youth in the general population.[47] This disproportionate result may arise from the significant barriers delinquent youth face including higher rates of truancy, disciplinary action, need evaluation and remedial services, below grade level performance, and unperforming and underfunded schools.[48] These disproportionate effects may be compounded by universal challenges to providing special education, as students who struggle in school because of an education-related disability are more likely to be truant and unfortunately, schools are more likely to fail to identify students with poor school attendance as needing special education.[49] As a result, delinquent youth are likely to fall behind, and even youth that do progress academically while in the juvenile justice system face other problems or drop out upon their release, entrenching pre-existing problems.[50] Because of these disparities, some cities report dropout rates as high as 90% for youth who have been in the juvenile justice system.[51]

Evidence supports the causal link between poor academic performance, school dropout, unemployment, and law-violating behavior.[52] Providing the necessary support to receive an appropriate education ensures students are less likely to drop out of school, and, as a result, less likely to be involved with the juvenile justice system.[53] Researchers note that these factors may exacerbate one another and the school and juvenile justice system can fail to address the needs of youth at multiple points.[54]

B. *Structure of Education in Juvenile Justice System*

Unfortunately, multiple factors diminish the quality and consistency of education in juvenile facilities regardless of were the juveniles are held.[55] For example, while the typical school day is six to seven

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47 *Id.* at 9.

48 *Id.* at 6-7.

49 Tulman, *supra* note 21, at 883.

50 Burdick, *supra* note 46, at 7.

51 *Id.*

52 Sheldon-Sherman, *supra* note 3, at 228.

53 Lisa M. Geis, *An IEP for the Juvenile Justice System: Incorporating Special Education Law Throughout the Delinquency Process*, 44 U. MEM. L. REV. 869, 886 (2014).

54 Burdick, *supra* note 46, at 9.

55 *See id.* at 10.

hours, fewer than half (45%) of youth adjudicated as "delinquents" spend that amount of time in school.[56] This is counterintuitive to youth having a positive school experience, as delinquent youth who spend more time in school are more likely to characterize their school program positively.[57] Another factor is that education services vary among facilities, even within the same state.[58] Furthermore, educators providing services in juvenile facilities often lack proper special education material and are rarely aligned with public school coursework.[59] Juvenile facilities often face difficulty with budget shortages and staffing inadequacies, and lack of political will to improve.[60]

The federal and state governments support access to education in several ways.[61] First, roughly twenty states have declared the right to an education fundamental and nine state constitutions explicitly provide students with disabilities educational protections.[62] Although the Constitution does not explicitly guarantee any right to public education, Congress has tied federal funding grants to specific programmatic goals through the Spending Clause.[63] Additionally, the Supreme Court has required equitable access to educational opportunities under the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964, providing additional opportunities for students on the margins of society.[64] *Plyer v. Doe* held that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause."[65] The Court also has also held that any absolute deprivation of education should trigger strict scrutiny, signifying the importance education holds in our society.[66]

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56 *Id.* at 11.

57 *Id.*

58 Koster, *supra* note 10, at 686.

59 Carter, *supra* note 2, at 374.

60 Cate, *supra* note 8, at 3.

61 Koster, *supra* note 10, at 676-78.

62 *Id.*

63 *Id.* at 677.

64 *Id.* at 677-78.

65 Plyer v. Doe, 457 U.S. 202, 221-22 (1982); *see also* Cate, *supra* note 8, at 2.

66 *Plyer*, 457 U.S. at 209 (citing *In re Alien Children Education Litigation*, 501 F.Supp. 544 (1980)).

C. *Educational Considerations in Determining Juvenile Placement*

Most jurisdictions require that juvenile courts consider the academic or developmental needs of the youth when deciding the disposition of a delinquency case.[67] The State must consider the youth's emotional, educational, and developmental needs when considering placement.[68] An attorney may argue that a detention facility is unable to meet the objectives of a child's IEP, and possibly avoid detention by shifting the emphasis at the disposition of sentence from a youth's delinquency to his or her special education needs.[69]

III. THE DEVELOPMENT OF SERVICES AND ENTITLEMENTS FOR CHILDREN WITH DISABILITIES

A. *General Requirements: IDEA, Section 504, and Title II*

Juvenile detention facilities, and adult correctional facilities to a lesser extent, must comply with various disability-related statutes including the IDEA, Section 504 of the Rehabilitation Act of 1973, and Title II of the ADA.[70] Federal laws are applicable to state-run juvenile facilities because states operate educational programs with the assistance of federal funding.[71] Therefore, juvenile detention centers must follow the same laws as public schools.[72]

Education is considered "the foundation for rehabilitation in most juvenile institutions."[73] Responsibility for managing educational opportunities for incarcerated youth are split between local school systems, juvenile justice agencies, private contractors, and state education departments.[74] While varied state actors that have educational responsibilities in the juvenile justice system, Title II of the ADA prohibits all local and state governmental entities from excluding persons

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67 Geis, *supra* note 53, at 887.

68 *Id.* at 904.

69 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).

70 Cate, *supra* note 8, at 13.

71 Carter, *supra* note 2, at 373.

72 O'Neill, *supra* note 12, at 1198.

73 *Id.* (quoting Robert B. Rutherford, Jr., et al., EDUCATION, DISABILITY, AND JUVENILE JUSTICE: RECOMMENDED PRACTICES 15 (2002)).

74 *Id.*; Koster, *supra* note 10, at 690.

with disabilities from participation in or the benefits of services, programs, or activities, if the exclusion is because of the disability.[75]

B. *The IDEA: Guarantees, Standards, and Judicial Decisions*

The most specific education protections for youths with disabilities come from the IDEA.[76] It guarantees youth with disabilities the right to attend public schools, receive free services designed to meet their needs, and learn in a regular classroom to the greatest extent possible.[77] The two main standards of the IDEA are free, appropriate public education ("FAPE"), and education in the least restrictive environment ("LRE").[78] The goal of the IDEA is to make certain that disabled youth receive "special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[79] Another goal from these two standards is to identify those youth who may need special education.[80] These standards are tied to federal funding.[81]

The IDEA defines FAPE as (1) having been provided at public expenses under public supervision and direction without additional charge, (2) meeting the standards of the State educational agency, including an appropriate preschool, elementary, or secondary school education in the state, and (3) conforming to the individual's IEP.[82] The Local Education Agency is responsible for ensuring that FAPE is provided.[83] While the no-cost aspect is straightforward, the appropriate aspect is harder to define.[84] In 1982, the Supreme Court held in *Board of Education v. Rowley* that FAPE is an education "reasonably

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75 Burdick, *supra* note 46, at 19.

76 *See* O'Neill, *supra* note 12, at 1200 ("IDEA focused on the educational needs of children with disabilities.").

77 *Id.*

78 20 U.S.C. § 1412(a)(1), (5); Koster, *supra* note 10, at 679.

79 20 U.S.C. § 1400(d)(1)(A); O'Neill, *supra* note 12, at 1200.

80 Burdick, *supra* note 46, at 17.

81 O'Neill, *supra* note 12, at 1190; Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 Dick. L. Rev. 613, 616 (1999) (local school districts receiving federal funds under the IDEA are required to provide a "free and appropriate education in accordance with specific procedures and civil rights protections").

82 20 U.S.C. § 1401(9)(A-D); Eyer, *supra* note 81, at 616-17.

83 Simoneau, *supra* note 1, at 99.

84 Tulman, *supra* note 21, at 886.

calculated to enable the child to receive education benefits."[85] Support services and instruction must be individualized to the child's unique needs to ensure the child benefits.[86] However, under the IDEA, instruction is not required to maximize educational benefit.[87] In 1997, the IDEA was amended partially because of officials' desire to move away from the standard from *Rowley*.[88] Nevertheless, the Supreme Court returned to the *Rowley* standard in 2017, in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*.[89]

The first step for the IDEA is identifying youths who may be eligible for special education services.[90] The IDEA acknowledges multiple means of identification.[91] Due toconcern about schools purposely not finding students in need of services, the IDEA drafters included the "Child Find" provision to ensure student identification, which created an affirmative duty to identify struggling students who may have disabilities.[92]

The IDEA also requires all juvenile justice programs to continue providing updated IEPs to youths who have them, including detention centers and adult correctional facilities that may also have disabled youth.[93] An appropriate IEP, regardless of whether the IEP is created in a juvenile justice setting, must address the youth's unique needs and related services, as well as the youth's annual academic goals.[94] IEPs are usually developed with parents, general teachers, special education teachers, and school representatives.[95] These requirements prevent administrations from making unilateral decisions without the cooperation of parents and special education experts.[96] The IEP must be reviewed annually.[97] The IDEA also requires transition planning to help children move toward higher education, vocational training, and other post-secondary goals.[98] Accorgingly, IEP teams must create

85 Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982); Koster, *supra* note 10, at 684.
86 Tulman, *supra* note 21, at 886-87.
87 *Id.*
88 *See* Eyer, *supra* note 81.
89 Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 991 (2017).
90 Simoneau, *supra* note 1, at 100.
91 *Id.*
92 *Id.* at 100-01.
93 O'Neill, *supra* note 12, at 1200.
94 Annino, *supra* note 5, at 126; Geis, *supra* note 53, at 917.
95 Cate, *supra* note 8, at 15-16.
96 Annino, *supra* note 5, at 125-26.
97 Cate, *supra* note 8, at 16.
98 Burdick, *supra* note 46, at 18.

a transition plan by the time the student is sixteen.[99] IDEA requires that each student receive services intended to assist the transition out of high school, as students may need additional skills or support to succeed after high school.[100] However, this requirement is excused when a child is convicted as an adult or leaves the detention facility as an adult, as "any youth leaving prisons after age twenty-one will be barred from receiving any transition services."[101]

C. *Barriers to Services*

Unfortunately, the barriers for incarcerated juveniles to receive disability services also increase the difficulty for youths in the correctional system to receive a quality education.[102] To receive services, students must be (1) diagnosed with a disability outlined in IDEA, (2) found in need of "special education and related services" after an evaluation, and (3) have a current IEP in an adult correctional facility or, if in a juvenile facility, a facility that is willing to construct one.[103] In order for any of the above to happen, a child would have to be previously identified through Child Find.[104] Multiple factors limit the ability to determine an accurate number of incarcerated individuals with disabilities.[105] First, poor educational models prevent teachers and staff from effectively utilizing Child Find.[106] Identification of youth with disabilities may also be problematic within juvenile facilities, as many youths in this population did not attend school regularly prior to entering the juvenile justice system.[107] This results in many juvenile offenders remaining undiagnosed or untreated.[108] Secondly, the movement of prisoners makes obtaining and continuing services difficult.[109] Distance from home limits parent involvement in the IEP process.[110] In addition, distance contributes to poorly developed links

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99 *Id.*
100 Simoneau, *supra* note 1, at 118.
101 *Id.* at 119-20.
102 Koster, *supra* note 10, at 698.
103 *Id.*
104 *Cf. id.*
105 Simoneau, *supra* note 1, at 109.
106 *Id.*
107 Sheldon-Sherman, *supra* note 3, at 236.
108 Peikin, *supra* note 69, at 139-40.
109 Simoneau, *supra* note 1, at 109.
110 Sheldon-Sherman, *supra* note 3, at 237.

between the school district and institutional settings.[111] The lack of quick access to general academic records means that it is difficult to know much about any youth's educational needs and abilities and to ensure that students are generally given proper support.[112] Lastly, short-term facilities face challenges providing a sufficient and individualized education without the benefit of a full academic record.[113]

IV. THE 1997 AMENDMENTS

The 1997 IDEA Amendments arose from extensive discussions about proper discipline for students with disabilities, the ineffective use of special education funding, and high rates of litigation between parents and educational agencies.[114] The 1997 Amendments reauthorized the IDEA and reached multiple areas of special education, and were a successful result of the joint effort of school administrators, teachers, and advocates for parents and children with disabilities.[115]

There are exceptions specifically regarding incarcerated youth from the 1997 amendments to the IDEA.[116] For example, Child Find does not apply to incarcerated individuals over the age of 18 who have not previously been identified as eligible for the IDEA.[117] The argument for this exception is that individuals are unlikely to make it to 18 without being identified.[118] However, this assumption is often incorrect because individuals involved in the criminal justice system often come from failing school districts less likely to identify eligibility for services.[119] This means that, under the 1997 Amendments, states are allowed to refuse to provide free, appropriate education to incarcerated individuals between ages eighteen and twenty-one, who would otherwise qualify for services.[120]

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111 *Id.* at 238.

112 Carter, *supra* note 2, at 389-90.

113 *Id.* at 396.

114 *See* Eyer, *supra* note 81, at 626; *see also* Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 78 (2000).

115 Seligmann, *supra* note 114, at 79.

116 Simoneau, *supra* note 1, at 113.

117 *Id.* at 115.

118 *Id.* at 116.

119 *Id.*

120 *Id.* at 90.

Youth placed in adult facilities face great restrictions on their rights under IDEA.[121] Particularly, youth in adult prisons are specifically excluded from general assessments and transition planning for when they leave.[122]

A particularly concerning part of the 1997 Amendments allows prison officials to bypass requirements of the IDEA if there is a "bona fide security" or "penological interest" for a youth in an adult facility.[123] Without a definition, a "bona fide security" interest could include a broad array of possibilities justified by a vague improvement to security.[124] Regulations do not provide a specific definition of "bona fide security or compelling penological interest," but do emphasize that the determination is fact-specific and excludes pure cost justification.[125] Despite the clarification, a "bona fide security" or "penological interest" can seriously weaken IDEA requirements with little to no accountability for officials in the prison environment.[126]

The failure to define the term "bona fide security" interest is particularly problematic because a wide variety of circumstances may fall under the interest.[127] In response to comments on the proposed rule, the Department of Education determined that a specific definition for "bona fide security or compelling penological interest" was not appropriate, given "the individualized nature of the determination and the countless variables that may impact on the determination."[128] However, there is some guidance from the Department of Education. In general, states must accommodate the costs and administrative requirements of IDEA, thus a state's interest in a complete lack of special education or avoidance of administrative responsibilities would be insufficient as a compelling penological interest.[129]

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121 *Id.*; Burdick, *supra* note 46, at 17 (noting that there is not a similar exception in juvenile facilities).

122 Cate, *supra* note 8, at 16; Simoneau, *supra* note 1, at 90.

123 20 U.S.C. § 1414(d)(7)(B); Simoneau, *supra* note 1, at 91.

124 *See* Cate, *supra* note 8, at 18; Simoneau, *supra* note 1, at 134.

125 34 C.F.R. 300.324(d)(2)(i); Cate, *supra* note 8, at 18.

126 Cate, *supra* note 8, at 18.

127 Simoneau, *supra* note 1, at 124 ("it is difficult to imagine what circumstances would fail to qualify as a "bona-fide security . . . interest.").

128 Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12577 (March 12, 1999) (codified at 34 C.F.R. pt. 300.325).

129 *Id.*

The legislative history demonstrates two primary concerns: (1) "the reasonable limitation of services to this population in order to allow States to balance bona fide security interests and compelling penological concerns against the special education needs of the individual in the interest of safety," and (2) to prevent a state from being threatened by the federal government withholding their entire education funding for a failure to serve the population.[130] While considerations of "bona fide security" interests were not intended to be a complete exception to the state's obligation to provide FAPE to all youth, it can result in states manipulating special education provisions to avoid obligations.[131] In respect to funding concerns, the regulations interpret the statutory provisions in a way that grants the Secretary of Education to use alternative enforcement options authorized by the law if they believe that withholding funds is not the appropriate means to ensure compliance.[132]

Without clear guidance, there are still concerns that these exceptions may lead to abuse.[133] Although the IEP Team is tasked with ultimately making this determination based on the prison official's request for a change in placement, an inmate may fear reprisals if they argue against the prison official's recommendation.[134]

V. CIRCUIT SPLIT ON THE EVALUATION OF IEPS

The federal appellate courts in the different circuits across the United States have different standards for how IEPs should be evaluated, creating confusion and different standards for youths depending on where they are incarcerated. A major difference between the circuits when evaluating whether or not an IEP is appropriate is whether or not the court considers hindsight evidence of academic progress after the new IEP is put in place.[135] While courts generally agree that an IEP should be judged prospectively, courts differ in their consideration of the implications of hindsight evidence.[136] Hindsight evidence

130 *Id.* at 12644 (codified at 34 C.F.R. pt. 300.197).

131 Cate, *supra* note 8, at 18.

132 Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12644 (March 12, 1999) (codified at 34 C.F.R. pt. 300.197).

133 Simoneau, *supra* note 1, at 124.

134 *Id.*

135 Wittlin, *supra* note 9, at 1386-87.

136 *Id.* at 1386.

occurs when parties attempt to prove the IEP was either ineffective or effective through the amount of progress the student has made, and parties may attempt to introduce this evidence at either the administrative level or district-court level.[137]

The Second Circuit is the most restrictive towards the use of hindsight evidence and has discussed that a court "cannot use evidence that the child did not make progress under the IEP in order to show that [the IEP] was deficient from the outset."[138] Although not to the same extent as the Second Circuit, the Seventh and Ninth Circuits have also limited the use of hindsight evidence, with the Ninth Circuit stating that determinations should be assessed "at the time of the child's evaluation and not from the perspective of a later time with the benefit of hindsight."[139]

The First Circuit allows evidence of progress to be used to demonstrate an IEP is appropriate, but a failure to progress, on the other hand, cannot be used to show an IEP is inappropriate.[140] The First Circuit held that the courts are entrusted with ascertaining the adequacy of an IEP's educational components, but not to weigh the comparative merits when stacked against other heuristic methods.[141] In the Third Circuit, courts may consider progress after the creation of the IEP only to determine whether the IEP was reasonably calculated to afford some benefits.[142] However, a finding that no progress was made does not necessarily render the IEP inappropriate.[143]

The Sixth and the Eighth Circuits take a more liberal view.[144] The Eighth Circuit recognizes that academic progress should be an important factor in determining whether a disabled student's IEP was reasonably calculated to provide educational benefits, while also acknowledging the reality that IDEA does not require schools to max-

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137 *Id.* at 1385.

138 Wittlin, *supra* note 9, at 1386; R.E. v. N.Y.C. Dep't of Educ., 694 F3d 167, 187 (2nd Cir. 2012) ("In determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision").

139 *See* Wittlin, *supra* note 9, at 1387; L.J. by & through Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017).

140 Wittlin, *supra* note 9, at 1387.

141 Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008).

142 Wittlin, *supra* note 9, at 1387.

143 Carlisle Area Sch. v. Scott P. by & Through Bess P., 62 F.3d 520, 530 (3rd Cir. 1995).

144 Wittlin, *supra* note 9, at 1387.

imize the student's potential.[145] The Eighth Circuit will look at hindsight evidence of academic progress to determine if an educational benefit was provided and recognizes academic progress as an important factor in evaluating if the IEP was appropriate.[146] The Sixth Circuit finds that evidence of progress itself does not establish that the student received adequate or appropriate education under IDEA, but is an important factor nonetheless.[147] This reasoning tries to avoid upholding an inappropriate IEP in such cases where a child progresses in spite of the inappropriate IEP, observing that educational progress as determinative would make decisions based on the "mere happenstance of whether a child 'did well.'"[148] Similiarly, the Fourth Circuit considers the amount of progress a student has made as part of the larger picture, but it is not dispositive.[149]

The Fifth Circuit utilizes demonstrated benefit by hindsight evidence the most, referring to it as a critical factor.[150] The Fifth Circuit uses a four-factor test to determine the appropriateness of a child's IEP: (1) the program is individualized based on the student's assessment and performance, (2) the program is administered in the least restrictive environment, (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders," and (4) positive academic and non-academic benefits are demonstrated.[151] This factor test specifically includes considering the individual's academic progress. In this circuit, objective indications of educational benefit and progress are significant.[152]

ANALYSIS

There is a tension in correctional facilities between balancing safety and ensuring youth held there receive an appropriate education. A similar tension exists broadly in society when making determinations that involve both public safety and rehabilitation of individuals in correctional facilities. The provision of the 1997 IDEA

145 CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 638, 642 (8th Cir. 2003).

146 *See id.* at 642 (citing *Rowley*, 458 U.S. at 202).

147 Berger v. Medina City Sch. Dist., 48 F.3d 513, 522 (6th Cir. 2003).

148 *Id.* at 522 n.6.

149 Wittlin, *supra* note 8, at 1387.

150 *Id.*

151 Houston Indep. Sch. Dist. v. VP, 582 F.3d 576, 584 (5th Cir. 2009); Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997).

152 *Cypress-Fairbanks*, 118 F.3d at 253.

Amendments, which created exceptions for juvenile facilities and youth in adult correctional facilities, increased these tensions.[153] The authors had the goals of practicality and safety over rehabilitation in mind when drafting the provisions.[154] By prioritizing safety, some exceptions create a risk of correctional facilities failing to provide an appropriate education.[155]

It is very difficult to balance the priorities of safety and rehabilitation. A major change from the 1997 IDEA Amendments that pushed the scale in favor of safety over education is that an individual's IEP may be changed because of an undefined "bona fide security" or "penological" interest.[156] Although this was supposed to allow for flexibility, as a wide variety of unpredictable situations could present a safety issue, it could potentially also be used nefariously to avoid the IDEA requirements.[157] If a "bona fide security" interest has no definition given by the statute or regulation then theoretically it can be anything a correctional facility official says it is. Thus, if left unchecked, a "bona fide security" interest can be used to violate the IDEA and make it difficult for an individual to challenge in court. Because there is no "easy" definition, a decision to alter an IEP, justified by a "bona fide security" interest, could be especially difficult to challenge in court because there is no standard for IEP alterations to be held to.

IEPs may more easily be altered inappropriately and fail to address a juvenile's needs because of lacking standards to evaluate a "bona fide security" interest or a "penological interests." Prior to the 1997 IDEA Amendments, the Supreme Court in *Rowley* found that an IEP properly provides FAPE if it is "reasonably calculated to enable the child to receive education benefits."[158] This standard was rephrased in 2017, in *Endrew*, finding an IEP is appropriate if the "IEP is reasonably calculated to enable a child to make progress

153 Simoneau, *supra* note 1, at 90; Koster, *supra* note 10, at 698.

154 Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12644 (March 12, 1999) (codified at 34 C.F.R. pt. 300.197).

155 Simoneau, *supra* note 1, at 124.

156 20 U.S.C. § 1414(d)(7)(B); Simoneau, *supra* note 1, at 91.

157 Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities, 64 Fed. Reg. 12406, 12577 (March 12, 1999) (codified at 34 C.F.R. pt. 300.325).; Cate, *supra* note 8, at 18.

158 Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982).

appropriate in light of the child's circumstances."[159] This standard indicates that an individual's ability to make progress is an important aspect of an appropriate IEP; therefore, an indication of academic progress should be important when courts make a judgment regarding if an IEP is appropriate and compliant with the IDEA. Knowing that academic progress is an important factor used to determine if an IEP is appropriate may encourage challenges to an inappropriate IEP where an individual is not progressing, even if the IEP was justified by a "bona fide security" interest.

Courts have different methods of evaluating whether an IEP is appropriate depending on the circuit.[160] The largest difference is whether the courts consider the student's academic progress after the new or altered IEP was put in place when determining whether the new IEP or the alterations were appropriate.[161] This leads to a wide range of analysis, from not allowing the hindsight consideration of academic progress to using academic progress as a critical factor.[162]

The courts are faced with two extremes. When evaluating the appropriateness of IEP, particularly for youth in adult correctional facilities where priority is given to safety, the decision of whether or not to look at post-altered IEP academic progress can make a significant difference to ensure compliance with the IDEA. Evaluating an IEP through hindsight evidence of academic progress can be a judicial check to account for the fact that decision-makers have a great deal of room and incentive to prioritize safety over academic progress. Knowing that a court will be looking at academic progress as a critical factor when evaluating whether an IEP was appropriate would motivate administrators to consider educational priorities, even when granted the broad power to alter IEPs for an undefined "bona fide security" interest. On the other hand, if academic progress does not matter when evaluating whether an IEP is appropriate where there is no standard definition for "bona fide security" interests, administrators can practically make unchecked decisions. In this case, an IEP could be altered beyond the individual's abilities to make progress and receive an educational benefit, but remain in place if justified by a "bona fide security" interest. This goes against one of the main goals

159 Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 991 (2017).

160 Wittlin, *supra* note 9, at 1386-87.

161 *Id.*

162 *Id.* at 1387.

of IDEA to provide appropriate education and enable educational benefit.[163]

Between the two extremes of the federal courts, there are multiple other ways courts view academic progress when evaluating IEPs. But, which is correct? The Supreme Court has declined to endorse a specific method to determine whether an IEP is appropriate.[164] However, the Eighth Circuit's stance seems the closest to *Endrew* and *Rowley*, and goes as far as to cite *Rowley* specifically.[165]

The Eighth Circuit views academic progress as an important factor in evaluating an IEP's appropriateness, and creates an evaluation standard that ensures that an IEP must be responsive to an individual's academic and behavioral needs.[166] Specifically, the Eighth Circuit's use of academic progress focuses on looking at hindsight evidence of academic progress for evaluating if it enabled educational benefit.[167] This goes a step beyond other circuits that just consider whether the IEP could have been calculated for educational benefit.[168]

The Eighth Circuit also recognizes that the Supreme Court has held that enabling benefit is required, but obtaining the maximum educational benefit is not.[169] Although the Eighth Circuit looks to *Rowley* in its opinions, *Rowley* was decided pre-IDEA when the relevant statute was the Education of the Handicapped Act.[170] However, this standard has remained controlling through the adoption of IDEA and its 1997 amendments.[171] In 2017, the Supreme Court in *Endrew* held that the FAPE requirement is satisfied if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits," citing *Rowley*.[172] In recognizing *Rowley*, the Supreme Court stated that typically an appropriate IEP is

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163 See *Rowley*, 458 U.S. at 207; Koster, *supra* note 10, at 684.

164 *Endrew F.*, 137 S. Ct. at 991.

165 CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 642 (8th Cir. 2003)(citing *Rowley*, 458 U.S. at 202).

166 *Id.*

167 *Id.* at 638, 642.

168 *Id.* at 642.

169 *Id.*

170 *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

171 *See* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 991 (2017) (citing *Rowley*, 458 U.S. at 207).

172 *Id.*

"reasonably calculated to enable the child to achieve passing makers and advance."[173]

Other circuits, like the Second Circuit, forbid courts from looking at a lack of progress made by the child as a reason to find an IEP inappropriate.[174] This is inappropriate. In *Endrew,* the Supreme Court held that an IEP "enable[s] a child to make progress appropriate in light of their circumstances" and rejected the idea that the progress need only be more than *de minimis*.[175] Potentially, allowing an IEP to be deemed appropriate despite lack of any progress at all would set a standard even lower than more than *de minimis*. Not considering lack of progress at all is counterintuitive if the purpose of an IEP is to convey some academic benefit. Under this standard, a court is expected to defer completely to administrative determination of educational methodology, which prevents the court from determining reasonableness.[176] This conflicts with subsequent dicta in *Endrew*, which states that the "reasonably calculated" qualification requires not just the judgement of school officials, but also the child's parents or guardians.[177]

Standing alone amongst its peers is the Fifth Circuit, which considers academic progress post-IEP a critical factor in its four-factor test.[178] The Fifth Circuit has ignored the Supreme Court's decision to hold that an IEP must be reasonably calculated to make progress by instead demanding that progress is actually made. Additionally there could be some unintended consequences of depending too much on a child's actual progress in evaluating an IEP. A child could manage to improve under an inappropriate plan, so it is also potentially dangerous to make academic progress too strong of a factor. It would be harmful to a child for an inappropriate IEP to remain in place, even if they are progressing in spite of it, because it could prevent the IEP from being altered to support more progress or progress in a different area. The Sixth Circuit, aligned with other circuits, has declined to follow the Fifth Circuit's lead to make academic progress post-IEP a

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173 *Id.* (citing *Rowley*, 458 U.S. at 204 (1982)).

174 Wittlin, *supra* note 9, at 1386 (citing R.E. v. N.Y.C. Dep't of Educ., 694 F3d 167, 187 (2nd Cir. 2012)).

175 *Endrew*, 137 S. Ct. at 999.

176 Wittlin, *supra* note 9, at 1389

177 *Endrew*, 137 S. Ct. at 999.

178 Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997).

critical factor test in every case.[179] The Sixth Circuit explains that they are trying to avoid making the decision based on the happenstance that the child improved.[180] However, it still allows evidence of progress or lack there of to be considered by the court.[181]

Because of the undefined factors that can go into determining or altering an IEP for a youth in an adult correctional facility, taking into account academic progress made on the IEP to determine if it is appropriate can act as a check to ensure some educational benefit is provided. Ensuring some educational benefit, in turn, ensures compliance with the IDEA. One way this may happen is by the court requiring a re-evaluation of the IEPs when a youth does not make progress on their current IEP, to be sure that the IEP enables the individual benefit. Another possibility is that administrators will be more likely to keep in mind the necessity of enabling educational benefit, even when prioritizing safety, if they know demonstrable academic progress will be a factor in evaluating the IEP. Thus, by following the Eighth Circuit precedent, to allow consideration of academic progress made on an IEP when evaluating if the IEP is appropriate, courts will ensure more consistent compliance with the IDEA for youth with disabilities in correctional facilities.

CONCLUSION

Juvenile justice has always been a delicate balance of what is best for the individual and what is necessary for the security of them and of those around them. This balancing act becomes all the more difficult when involving youth in adult prisons and especially youth with disabilities. In this case, failing to define what constitutes a "bone fide security interest" leaves facilities open to respond to individual circumstances, but also creates the potential for abuse and further restricts the already limited access youth in adult prisons have to disability services. Allowing judges to consider evidence of academic progress as a factor when deciding if the IEP in place was appropriate could act as a check against undefined powers to alter IEPs. Furthermore, failing to follow the Supreme Court precedent that emphasizes enabling educational benefit correctional facilities are in danger of

179 *See* Berger v. Medina City Sch. Dist., 48 F.3d 513, 522 n.6. (6th Cir. 2003).

180 *Id*.

181 CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 642 (8th Cir. 2003)(citing *Rowley*, 458 U.S. at 202).

violating the IDEA. Therefore, if courts consider academic progress as a factor in evaluating whether an IEP is appropriate, then correctional facilities may be more likely to comply with the IDEA or individuals with inappropriate IEPs may be more likely to bring a challenge in court to force a facility to comply.