

JESSICA FEIERMAN, MARSHA LEVICK, AND AMI MODY

The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth

ABOUT THE AUTHORS: Jessica Feierman is a Supervising Attorney at Juvenile Law Center in Philadelphia, Pennsylvania. Marsha Levick is the Deputy Director and Chief Counsel at Juvenile Law Center. At the time of writing this article, Ami Mody was a Staff Attorney at the Education Law Center in Philadelphia.

I. INTRODUCTION

The school-to-prison pipeline does not run in only one direction. Ideally, children who find themselves in the juvenile justice system as a consequence of school-related conduct should easily make their way back to neighborhood schools upon their release from placement. The reality, however, is often far different. While much attention has been focused on increases over the last decade in school referrals to the juvenile justice system,¹ less attention has been paid to the obstacles children face when they exit the juvenile justice system and seek to return to their neighborhood public schools. Impediments to re-entry magnify the effects of the school-to-prison pipeline; they heighten the likelihood that children will find themselves returning to the justice system they just exited. On any given day, approximately 100,000 youth are in some form of juvenile justice placement nationally.² Research shows that when these children return from such placements to school, recidivism rates drop and their successful re-entry into the community becomes more likely.³

In this article, we consider the disturbing reluctance of schools to allow delinquent youth to continue their education and the high dropout rates for youth returning from juvenile justice placements. We discuss the strengths and weaknesses of current litigation strategies, with a focus on the importance of strengthening the due process protections available to delinquent youth returning to school. Given the limitations to litigation fully addressing the problem, we then highlight some policy recommendations, including amendments to the No Child Left Behind Act that could promote the integration of youth from juvenile justice placements back into school. Finally, we feature a few promising state models that specifically address the transition from juvenile facilities to schools.

II. THE PROBLEM OF SCHOOL EXCLUSION AND HIGH DROP-OUT RATES

School districts deny enrollment to students returning from the juvenile justice system for a variety of reasons. As a primary matter, schools may be concerned that students who have been in the juvenile justice system pose a safety threat to the

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1. See *Dismantling the School to Prison Pipeline* (NAACP Legal Defense and Educational Fund, Inc., School to Prison Pipeline Initiative, New York, N.Y.), 2005, available at <http://www.naacpldf.org/content.aspx?article=16> (scroll down to the link entitled “Dismantling the School to Prison Pipeline”); see also *Race & Ethnicity in America: Turning A Blind Eye to Injustice* (ACLU, New York, N.Y.), Dec. 2007, at 144, 146–47, available at http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf (noting the systemic policies through which the school-to-prison pipeline manifests itself).
 2. Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book, <http://ojjdp.ncjrs.gov/ojstatbb/corrections/qa08201.asp?qa-Date=2003> (last visited Mar. 30, 2009); see U.S. DEP’T OF JUST., OFF. OF JUV. JUST. AND DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 232 (2006), <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>; PAT ARTHUR, NAT’L CTR. FOR YOUTH LAW, ISSUES FACED BY JUVENILES LEAVING CUSTODY: BREAKING DOWN THE BARRIERS 2 (2007), http://www.youthlaw.org/events/trainings/juvenile_justice_training_materials/ (follow hyperlink to PowerPoint presentation).
 3. See Cora Roy-Stevens, *Overcoming Barriers to School Reentry*, OFF. OF JUV. JUST. & DELINQ. PREVENTION FACT SHEET (U.S. Dep’t of Justice, D.C.), Oct. 2004, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200403.pdf>.

school community.⁴ Schools may also feel pressure to exclude re-entering youth out of fear that they will perform poorly on standardized tests. As a result, schools may encourage youth to drop out or enroll in alternative education programs.⁵

A number of technical problems heighten school reluctance to re-enroll youth. First, a student's enrollment documents may be incomplete. For example, a school district's enrollment policy may require that a student produce multiple documents to enroll in school, including documents that will establish the student's residency, age, or immunization status. If the juvenile justice system does not forward the documents and the student cannot otherwise provide them, the student may be denied enrollment. At the same time, the authors have found anecdotally that some academic programs, including vocational programs, will not accept re-entering youth in the middle of the program—either midyear or after the student's freshman or sophomore year.⁶

Additionally, even when a school allows a student to re-enter, technical barriers may make completing school difficult. For example, some district schools fail to accept academic credits that the youth earned at the detention facility.⁷ This may result from districts refusing to accept partial credit or credits earned in a course with a different title, content, or structure than that of the school district's program, or from school districts' skepticism of the quality of the educational programs offered at detention facilities.⁸

As a result of these and other problems, dropout rates are extraordinarily high for youth returning from care. A national study reports that more than 66% of youth in custody drop out of school after they are released.⁹ Some jurisdictions show even

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4. See Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure that Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1961 (2008) (providing a similar argument for students who are being denied reinstatement in school after a completed period of expulsion).
 5. *Id.* at 1954, n.272. For examples of alternative education programs, see Metropolitan Federation of Alternative Schools, <http://www.mfas.org/> (last visited Mar. 16, 2010); Mead School District: M.E.A.D. Alternative, <http://www.mead354.org/page.cfm?p=109> (last visited Mar. 16, 2010); MATCH Charter Public High School, <http://www.matcheschool.org/about/results.htm> (last visited Mar. 16, 2010); Alternative Education Resource Organization, <http://www.educationrevolution.org/aboutus.html> (last visited Mar. 16, 2010).
 6. See DAVID R. GILES, J.D., SCHOOL RELATED PROBLEMS CONFRONTING NEW JERSEY YOUTH RETURNING TO LOCAL COMMUNITIES AND SCHOOLS FROM JUVENILE DETENTION FACILITIES AND JUVENILE JUSTICE COMMISSION PROGRAMS 6 (2003), available at www.njisj.org/document/giles_report.pdf ("School officials refer to this as 'counseling' or 'signing out' students.").
 7. See DANIEL P. MEARS & JEREMY TRAVIS, URBAN INST., JUSTICE POLICY CTR., THE DIMENSIONS, PATHWAYS, AND CONSEQUENCES OF YOUTH REENTRY 34 (2004), available at http://www.urban.org/UploadedPDF/410927_youth_reentry.pdf; ASHLEY NELLIS & RICHARD HOOKS WAYMAN, JUVENILE JUSTICE AND DELINQUENCY PREVENTION COAL., YOUTH REENTRY TASK FORCE, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 18 (2009), available at http://www.sentencingproject.org/doc/publications/CC_youthreentryfall09report.pdf.
 8. See MEARS & TRAVIS, *supra* note 7; NELLIS & WAYMAN, *supra* note 7.
 9. ARTHUR, *supra* note 2.

more dismal statistics. In Philadelphia, for example, 90% of students who had a juvenile justice placement during high school ultimately dropped out of school.¹⁰

III. DUE PROCESS RIGHTS OF STUDENTS RETURNING TO SCHOOL

While far from foolproof, successful arguments can and have been made to support the right of students to re-enter school after placement in the juvenile justice system. As a starting point, it is worth noting that the importance of education is widely recognized in our legal system. As the Supreme Court observed in *Brown v. Board of Education*, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education.”¹¹ In a variety of cases, the Court has recognized the role of education in “prepar[ing] citizens to participate effectively and intelligently” in our society,¹² and providing “the basic tools by which individuals might lead economically productive lives to the benefit of us all.”¹³ While the Court has declined to declare that public education is a “right’ granted to individuals by the Constitution,”¹⁴ the Court has added that neither is it “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare.”¹⁵ Thus, in holding it unconstitutional to deny undocumented immigrant children access to public schools in violation of the Equal Protection Clause of the Fourteenth Amendment, the Court warned against “ignor[ing] 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.”¹⁶ Moreover, virtually every state requires its “state legislature to establish a free system of public [education] for children residing within its borders” pursuant to state constitutional provisions.¹⁷ These provisions typically require the establishment of a system of public education that is “efficient,”¹⁸

10. RUTH CURRAN NEILD, PH.D. & ROBERT BALFANZ, PH.D., PROJECT U-TURN, UNFULFILLED PROMISE: THE DIMENSIONS AND CHARACTERISTICS OF PHILADELPHIA’S DROPOUT CRISIS 2000–2005 5 (2006), available at http://www.projectuturn.net/downloads/pdf/Unfulfilled_Promise_Project_U-turn.pdf.

11. 347 U.S. 483, 493 (1954).

12. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

13. *Plyler v. Doe*, 457 U.S. 202, 221 (1982); see also *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (recognizing schools as important in preparation of citizens and in “preservation of the values on which our society rests . . .”).

14. *Plyler*, 457 U.S. at 221 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

15. *Id.*

16. *Id.*

17. Katherine Twomey, Note, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 788 (2008) (citing Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 103 n.161 (2003) (listing state constitutional provisions)).

18. ARK CONST. art. XIV, § 1; DEL. CONST. art. X, § 1; ILL. CONST. art. X, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; PA. CONST. Art. III, § 14; TEX. CONST. art. VII, § 1; W. VA. CONST. art. XII, § 1.

“high quality,”¹⁹ “uniform,”²⁰ or “thorough.”²¹ Other state constitutions “simply require that the legislature establish public schools.”²²

The most successful constitutional arguments to promote school reintegration for youth in the juvenile justice system have relied on the Due Process Clause. While the Supreme Court has explicitly held that education is not a fundamental right,²³ it has recognized that state constitutional provisions requiring the establishment of statewide systems of public education create a property interest.²⁴ Residents of any school district, including school-age youth returning from detention,²⁵ have a property interest in their education and a liberty interest in their reputation and future opportunities.²⁶ Thus, the government cannot deprive students of their schooling without due process,²⁷ including adequate notice, an opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction of the case.²⁸ Therefore, a student denied enrollment without notice or a hearing because of his or her prior involvement in the juvenile justice system may bring a claim for violation of the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause requires that the interests of the individual student be balanced with those of the school community and the probable value of any procedural

19. ILL. CONST. art. X, § 1; VA. CONST. art. VIII, § 1.

20. ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; N.C. CONST. art. IX, § 2; OR. CONST. art. VIII, § 3; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

21. Twomey, *supra* note 17, at 788 (citing IDAHO CONST. art. IX, § 1; MD. CONST. art. VIII, § 1; PA. CONST. art. III, § 14; W. VA. CONST. art. XII, § 1).

22. *Id.* (citing CONN. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1; HAW. CONST. art. X, § 1; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MISS. CONST. art. VIII, § 201; N.Y. CONST. art. XI, § 1; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3).

23. *See San Antonio Indep. Sch. District*, 411 U.S. at 35.

24. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

25. The age at which children are required to attend school varies by state. In a survey done by the Education Commission of the States in 2005, the minimum school-age was as follows: Children are of school-age at age five in eleven states; age six in twenty-four states; age seven in seventeen states; age eight in two states. Children are required to remain in school until age sixteen in twenty-eight states; age seventeen in nine states; age eighteen in seventeen states. Note that the survey includes the District of Columbia, the U.S. Virgin Islands, Puerto Rico, and American Samoa. Compulsory School Age Requirements, <http://www.ecs.org/clearinghouse/50/51/5051.htm> (last visited Mar. 16, 2010).

26. *See Goss*, 419 U.S. at 574 (noting the liberty and property interests implicated by school discipline decisions); *see also Defeo v. Rose Tree Media Sch. Dist.*, No. 06-744, 2007 WL 576317, at *4 (E.D. Pa. Feb. 20, 2007).

27. *See Toth v. Bd. of Educ.*, No. 07-CV-3239, 2008 WL 4527833, at *4 (E.D.N.Y. Sept. 30, 2008) (plaintiffs argued that deciding admission by a secret lottery without consideration of the prospective students' application and interviews amounted to a due process violation); *cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (discussing due process rights more generally); *Mertik v. Blalock*, 983 F.2d 1353, 1364 (6th Cir. 1993) (holding that an ice skating teacher could not be summarily excluded from teaching because it would amount to a violation of her due process rights).

28. *See generally Defeo*, 2007 WL 576317 (discussing plaintiff's argument that the right to education is a property right, thereby entitling plaintiff to protection under due process).

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safeguards.²⁹ Students returning from detention have an individual interest in attending school and in a smooth re-entry process.³⁰ However, the re-entering student's interest must be balanced with the interest of the school community to maintain a safe learning environment for all students.³¹ The precise procedural protections owed a re-enrolling student to meet this balancing test vary from jurisdiction to jurisdiction; a patchwork of due process protections has emerged as case law has developed. For example, students in New Jersey who are denied enrollment must receive the school's decision in writing³² and be informed of the reasons for the denial.³³ Students in Pennsylvania are entitled to an informal hearing before they can be transferred to an alternative program.³⁴ If the student's presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, then the student may be immediately removed from the regular education classroom with an informal hearing to follow as soon as is practical.³⁵ The informal hearing provides the student the opportunity to tell his or her side of the story or explain why he or she does not meet the definition of a disruptive student. The Pennsylvania Commonwealth Court reasoned:

[P]rotected due process interests are involved in the decision that a particular student who wishes to return to the regular classroom may not do so. Although a hearing is not required in all cases before a student may be assigned to an alternative education setting, in those cases where a student seeks to challenge the assignment there must be available some opportunity to do so.³⁶

In a similar vein, courts in Connecticut have held that a school district's requirement that students denied re-enrollment be provided with notice and a pre-deprivation hearing satisfied the requirements of procedural due process.³⁷

Strengthening procedural due process protections for youth returning from juvenile placements is crucial as such protections prohibit schools from automatically

29. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (instructing consideration of private interest, risk of erroneous deprivation, and value of additional safeguards).

30. *Roy-Stevens*, *supra* note 3.

31. *Carroll*, *supra* note 4, at 1961.

32. *See* *T.C. v. Bd. of Educ. for the Dist. of South Orange and Maplewood*, 723 A.2d 1270, 1277 (N.J. Super. Ct. App. Div. 1999); *see also* *Takeall ex rel. Rubenstein v. Ambach*, 609 F. Supp. 81, 87 (S.D.N.Y. 1985) (where a child in New York was denied admission to public school because of a residency dispute, the court held that he was entitled to written notice of the school system's decision, including a statement of reasons and available administrative remedies).

33. *See T.C.*, 723 A.2d at 1276-77; *Rubenstein*, 609 F. Supp. at 87.

34. *D.C. v. Sch. Dist. of Phila.*, 879 A.2d 408, 420 (Pa. Commw. Ct. 2005).

35. *Id.* at 415, 419.

36. *Id.* at 420.

37. *See Dunbar v. Hamden Bd. of Educ.*, 267 F. Supp. 2d 178 (D. Conn. 2003) (holding that school district's provision of notice and a pre-deprivation hearing satisfied the procedure requirement where children were denied enrollment in public school because of residency dispute).

denying school re-entry to youth. Due process protections alone, however, cannot suffice; although they grant students the right to notice and an opportunity to be heard, they do not provide the right to enroll in school. As a result, broader policy changes are also needed to support the re-enrollment of youth returning from juvenile justice placements.

IV. POLICY RECOMMENDATIONS TO HELP YOUTH RETURN TO SCHOOL

A. Amending the No Child Left Behind Act

Amending the No Child Left Behind Act (“NCLB” or the “Act”)³⁸ to minimize incentives to push returning youth out of school could make a significant difference in the experiences of youth returning to school from juvenile justice placements. NCLB fuels the reluctance of schools to re-enroll youth returning from juvenile justice placements for a number of reasons. Under NCLB, schools are held accountable for the percentage of their students who attain proficient scores on state standardized tests.³⁹ Because youth returning from detention frequently experience academic difficulties, many schools fear that if they enroll these youth, the percentage of their students who achieve proficiency will decrease.

NCLB requires that 100% of students achieve proficiency in reading, math, and science by 2014.⁴⁰ The Act allows states to define their own standards for proficiency and to administer their own standardized tests to determine whether students are proficient.⁴¹ Under the Act, students must be tested every year in grades three through eight, and once in grades nine through twelve.⁴² The Act also requires schools to make “adequate yearly progress” (“AYP”) toward the 100% proficiency goal by ensuring that an increased percentage of students reach proficiency each year leading up to 2014.⁴³ It is up to each state to set its own AYP targets by determining the percentage of students who must attain proficient scores each year on the state’s standardized tests.⁴⁴ NCLB requires schools to reach their state’s AYP targets not only for their students in the aggregate, but also for each subgroup targeted by NCLB.⁴⁵ These subgroups include low-income, minority, and disabled students, and students with limited English proficiency.⁴⁶

38. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

39. 20 U.S.C. § 6311(b) (2006).

40. *Id.* at § 6311(b)(1)(C), (b)(2)(F).

41. *See id.* at § 6311(b)(2)(G); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 941–42 (2004).

42. 20 U.S.C. § 6311(b)(3)(C)(v), (b)(3)(C)(vii).

43. 20 U.S.C. § 6311(b)(2)(B), (b)(2)(C).

44. 20 U.S.C. § 6311(b)(2)(B), (b)(2)(C), (b)(2)(F).

45. 20 U.S.C. § 6311(b)(2)(C)(v), (b)(2)(I)(i).

46. 20 U.S.C. § 6311(b)(2)(C)(v)(II).

Schools receiving Title I funds⁴⁷ that fail to make AYP face significant sanctions. Over time, these sanctions grow increasingly severe.⁴⁸ A school that fails to make AYP for two consecutive years must develop a plan for improvement and provide students with the option of transferring to a different school within the district.⁴⁹ When students transfer, the school forgoes the funding it would otherwise receive for those students. After three consecutive years of failing to make AYP, the school must also provide students with tutoring.⁵⁰ After four consecutive years, the school must choose one of several “corrective action” steps, including replacing school staff, adopting a new curriculum, or appointing outside experts to advise the school.⁵¹ A school that fails to make AYP for five consecutive years must engage in major “restructuring,” which can involve replacing the school’s principal and staff, reopening the school as a charter school, contracting with an outside entity to operate the school, or turning control of the school over to the state.⁵²

Education scholars Linda Darling-Hammond and James Ryan have noted that the performance measures and sanctions imposed by NCLB create strong incentives for schools to exclude low-scoring students.⁵³ As they explain, schools can increase their percentage of students who reach proficiency and thereby avoid NCLB sanctions by excluding low-scoring students.⁵⁴ It is therefore in the interest of schools to exclude low-scoring students by refusing to enroll them, expelling them, or encouraging them to drop out or obtain a GED.

Darling-Hammond and Ryan have further observed that the adverse incentives created by NCLB disproportionately impact minority and low income students.⁵⁵ Because minority and low-income students tend to score lower on standardized tests than their non-minority and higher-income peers, schools have an incentive to target them for exclusion.⁵⁶ Moreover, because schools must have a minimum number of minority and low-income students to be held accountable for their disaggregated

47. Title I funds are distributed by the federal government to local education authorities; the purpose of these funds is to improve the performance of students in economically disadvantaged areas so that those students meet educational standards. *See* 20 U.S.C. § 6312 (2006); *see also* The U.S. Department of Education, Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A), <http://www.ed.gov/programs/titleiparta/index.html> (last visited Mar. 16, 2010).

48. *See* 20 U.S.C. § 6316 (2006).

49. *Id.* at § 6316(b)(1)(A), (b)(1)(E).

50. 20 U.S.C. § 6316(b)(5), 6316(e).

51. 20 U.S.C. § 6316(b)(7)(A), (b)(7)(C).

52. 20 U.S.C. § 6316(b)(8)(B).

53. Linda Darling-Hammond, *Race, inequality, and educational accountability: the irony of ‘No Child Left Behind,’* 10 RACE ETHNICITY & EDUC. 245, 252 (2007); Ryan, *supra* note 41, at 934.

54. Darling-Hammond, *supra* note 53, at 252–55; Ryan, *supra* note 41, at 969.

55. Darling-Hammond, *supra* note 53, at 252–55; Ryan, *supra* note 41, at 961–70.

56. Darling-Hammond, *supra* note 53, at 252–55; Ryan, *supra* note 41, at 961–70.

scores under NCLB,⁵⁷ schools have an added incentive to keep their number of minority and low-income students low by excluding some of these students.⁵⁸

This same reasoning applies to youth returning from juvenile justice placements, as they also tend to underachieve academically. Juvenile offenders on average have a reading level four to five years below grade level.⁵⁹ Additionally, 35.6% of juvenile offenders have a learning disability and 12.6% are diagnosed with mental retardation.⁶⁰ There are several reasons why youth returning from detention tend to underachieve in school. First, these youth may have been underachieving prior to their juvenile justice placement. Indeed, difficulties with school may have contributed to their involvement with the justice system.⁶¹ Poor academic performance and failure to provide appropriate behavioral interventions often lead youth to engage in delinquent behavior.⁶² Students who struggle academically may disengage from school and act out in class.⁶³

Additionally, the justice system itself may contribute to or cause academic problems.⁶⁴ Youth placed in juvenile correctional settings lose valuable time in school.⁶⁵ Moreover, although they are entitled to receive an education in such settings, the academic instruction in juvenile facilities is often of low quality.⁶⁶ As a result, students' existing academic difficulties are likely to be exacerbated by juvenile placement.⁶⁷

For all of these reasons, youth returning to school from juvenile facilities are often at a significant academic disadvantage.⁶⁸ Schools may therefore fear that these students will score below the proficiency level on state tests, and thereby increase

57. Under No Child Left Behind, a state receiving Title I funds must require its schools to track the progress of certain categories of students, including students from "major racial and ethnic groups" or those who are "economically disadvantaged," unless there are so few students in any of the categories that tracking their progress would reveal the identities of individual students. 20 U.S.C. § 6311(b)(2)(C)(v)(II).

58. See Ryan, *supra* note 41, at 962.

59. See James Vacca, *Crime can be prevented if schools teach juveniles to read*, 30 CHILD. AND YOUTH SERVICES REV. 1055, 1056 (2008).

60. Pamela Casey & Ingo Keilitz, *Estimating the Prevalence of Learning Disabled and Mentally Retarded Juvenile Offenders: A Meta-Analysis*, in UNDERSTANDING TROUBLED AND TROUBLING YOUTH 82, 89, 93 (Peter E. Leone ed., 1990); see also Johanna Wald & Daniel Losen, *Defining and redirecting a school-to-prison pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9, 11 (estimating that 70% of juvenile offenders have learning disabilities).

61. See Roy-Stevens, *supra* note 3.

62. Wald & Losen, *supra* note 60, at 12–13.

63. See Deborah Gordon Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students*, 16 GEO. J. ON POVERTY L. & POL'Y 585, 589 (2010) (on file with the Education Law Center) ("Research indicates that academic performance is a strong predictor for school behavior and vice-versa.").

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

their risk of being sanctioned under NCLB. As a result, schools have an incentive to divert these students to alternative schools, or encourage them to drop out or obtain a GED.⁶⁹

The problem is exacerbated as a disproportionate number of minority and low-income youth are placed in juvenile facilities.⁷⁰ When these students attempt to return to school, they may face the added disadvantage of being stereotyped as low-achieving by their school not only because of their status as juvenile delinquents, but also as a result of their race and income. Because these students may be viewed as a threat not only to their school's ability to make AYP for their student body as a whole, but also for their minority and low-income subgroups, NCLB provides particularly strong incentives to exclude these students.

Two strategies that have been used to counteract the Act's exclusionary impact on minority and low-income students involve shifting to a value-added system of accountability and strengthening NCLB's graduation requirement.⁷¹ These strategies would also decrease the incentives of schools to exclude youth returning from placement. Shifting from the current system of school accountability to a value-added system would produce more accurate measures of school performance, and decrease incentives to exclude low-scoring students.⁷² Under the current system, schools are primarily held accountable based on the student test scores. Student test scores are influenced by a variety of school-related factors, such as teacher quality, as well as external factors, such as innate ability and socioeconomic status. Schools therefore have an incentive under the current system to exclude students based on external factors correlated with low test scores, such as students' status as low-income or involvement in the juvenile justice system.⁷³

In contrast, under a value-added system, schools would be held accountable for the achievement gains of the same group of students from year to year.⁷⁴ Focusing on achievement gains rather than static test scores provides a more accurate measure of the contribution of schools to student performance. Because the external factors that impact the scores of the same group of students remain essentially the same from year to year, their effect is largely canceled out when the scores of these students are compared from year to year.⁷⁵ In theory, the differences in their scores from year to year should then be attributable to their schools, rather than to external factors, such

69. See GILES, *supra* note 6, at 4; cf. Carroll, *supra* note 4 (providing a similar argument regarding the incentives of schools to prevent expelled students from returning to school).

70. See CARL E. POPE ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 8 (2002), available at http://ojjdp.ncjrs.org/dmc/pdf/dmc89_01.pdf.

71. Ryan, *supra* note 41, at 978; Carroll, *supra* note 4, at 1945. A "value-added" system is a means of assessing a school's performance based on its own internal growth. See Ryan, *supra* note 41, at 982.

72. See Ryan, *supra* note 41, at 978.

73. See *id.* at 978–79.

74. See *id.* at 981.

75. *Id.*

as race and income.⁷⁶ Thus, under a value-added system of accountability, schools should have less of an incentive to exclude students based on external factors.

The truth, however, is more complicated. External factors such as income impact not only the static scores of students, but also their rates of progress.⁷⁷ Yet, as Ryan explains, it is possible to use effective, though imperfect, statistical methods to control for external factors when measuring school performance on the basis of student gains. This can be done, for example, by identifying normal rates of progress for the student group at issue, or by controlling for external factors, such as income, which may affect rates of progress.⁷⁸ Thus, a well-designed value-added system with appropriate controls would provide a far more accurate measure of the contribution of schools to student achievement than the current system.⁷⁹ In other words, a well-designed value-added system would more effectively measure school performance based on each school's actual contribution to student learning, rather than external factors. Such a system would reduce or eliminate the incentives to exclude students based on external factors associated with poor academic performance, such as a student's status as a youth returning from a juvenile placement.

Strengthening NCLB's graduation requirement would also address the push-out phenomenon—and could even create incentives for schools to proactively support re-entry for students perceived to be poor academic achievers.⁸⁰ Holding schools accountable for their graduation rates would help counteract the incentive that test score accountability creates to exclude low-scoring students. For each low-scoring student that a school counsels to leave or drop out, the school's graduation rate would decrease. Similarly, the school's graduation rate would decrease for each student returning from detention that the school refuses to re-enroll. Thus, if schools were held accountable for their graduation rates to the same extent they are held accountable for test scores, they would be reluctant to exclude students perceived to be low achievers—including youth returning from placement—in order to raise their test scores.⁸¹

NCLB already requires graduation rates to be considered as part of the AYP determination. However, the requirement as it was interpreted in U.S. Department of Education regulations in 2002 is too weak to counteract the incentives created by NCLB to exclude low scoring students.⁸² While the regulations require states to set a graduation rate goal, they neither specify how high that rate must be set, nor require states to specify targets for yearly progress toward the graduation rate goal.⁸³ Moreover,

76. *See id.*

77. *Id.*

78. *See id.* at 981–82.

79. *See id.* at 982.

80. *See* Carroll, *supra* note 4, at 1945–51.

81. *See id.* at 1945–50.

82. *See id.* at 1945–46.

83. *Id.* In July of 2005, for instance, Nevada, New York, Colorado, Alaska, Virginia, Georgia, Maine, Washington D.C., Washington, Illinois, Oregon, and Oklahoma had graduation rate targets below 70%.

the regulations do not require states to disaggregate graduation rates for each subgroup targeted by NCLB.⁸⁴ It is therefore not surprising that many states have set weak graduation rate requirements, which do little to counteract NCLB's exclusionary incentives.⁸⁵ Strengthening these requirements could help significantly in reducing some of the push-out problems youth face when attempting to return to school after placement.

B. Instituting State Policies on School Re-Entry

A number of state statutes show potential for addressing the problem of school exclusion for youth returning from the juvenile justice system. While this article does not provide a comprehensive examination of such policies, we do highlight some promising models that specifically address the transition to and from juvenile facilities and schools.

Interestingly, while there is an array of literature about school re-entry programs following medical procedures,⁸⁶ relatively little has been written about successful programs for school re-entry following incarceration. However, existing research does suggest that the following elements, captured in many of the model policies below, are best practices in school re-entry: (1) re-entry planning that begins coordinating the transition while youth are in juvenile justice placements; (2) communication and collaboration between the educational and correctional systems, youth, and families; and (3) inter-agency transition teams that have clear roles and responsibilities to facilitate enrollment immediately and in an appropriate educational setting.⁸⁷ Additionally, strong education programs within juvenile facilities can promote a student's academic progress, and will likely help reduce both school drop-out and school push-out upon the youth's return.

Inter-agency teams and strong communication between stakeholders can be particularly useful in addressing school push-out; the team itself can work to ensure that students return to appropriate education placements. Additionally, the team can

Nevada's target graduation rate was only at 50%. U.S. GOVT. ACCOUNTABILITY OFFICE, GAO-05-879, NO CHILD LEFT BEHIND ACT: EDUCATION COULD DO MORE TO HELP STATES BETTER DEFINE GRADUATION RATES AND IMPROVE KNOWLEDGE ABOUT INTERVENTION STRATEGIES 20 (2005), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/af/3b.pdf.

84. Carroll, *supra* note 4, at 1946.

85. *See id.* at 1945–47.

86. *See, e.g.*, Constance M. Well & S. Rodgers, *School re-entry of the pediatric heart transplant recipient*, 10 PEDIATRIC TRANSPLANTATION 928, 928–33 (2006).

87. *See* Maryland Department of Juvenile Services, *Maryland Best Practices in School Re-entry for Youth in State-Supervised Care* (2008), <http://www.djs.state.md.us/edu/best-practice-school-re-entry.ppt> (last visited Mar. 16, 2010) [hereinafter *Maryland Best Practices*]; National Center on Education, Disability and Juvenile Justice, *Transition planning and services*, www.edjj.org/focus/TransitionAfterCare/transition.html (last visited Mar. 16, 2010); Laura Love & Katie Barclay, *Mobilizing your community presentation*, <http://www.edjj.org/focus/TransitionAfterCare/mobilizingComm.html> (last visited Mar. 16, 2010); Youth Transition Funders Group, *A Blueprint to Juvenile Justice Reform*, http://www.ytfg.org/documents/Platform_Juvenile_Justice.pdf (last visited Mar. 16, 2010).

work to prevent school districts from automatically placing youth returning from detention in alternative education programs.⁸⁸ These teams can also help coordinate the educational programs of the juvenile justice placement and the regular classroom, promote the flow of information about the individual child, and acquaint educators with the youth.⁸⁹ Moreover, beginning the transition planning process early allows a team to be more proactive, coordinating educational services during placement rather than simply addressing transfer problems after the fact.

Similarly, while further research is needed, high quality education in juvenile justice placements will likely assist with the transition back to school. There is evidence that competency in reading and writing assists youth with transitioning back into the community and reduces recidivism.⁹⁰ While the research doesn't specifically consider school re-entry rates, it stands to reason that if lower literacy levels pose a barrier to school re-entry, improved literacy skills will help with the transition. Therefore, if re-entry into the community is served by reading and writing competence, school re-entry would be particularly well-served.⁹¹ As a result, policies that focus on ensuring high standards for education in juvenile facilities and address the transfer of credits and records when a student returns to school may play a vital role in helping to keep a student on target toward grade promotion or graduation, thereby alleviating student frustration and reducing drop-out rates for returning youth. The following statutory models incorporate some or all of the best practices described above.⁹²

Florida statutorily provides broad protections to ensure that youth receive appropriate education while in juvenile justice facilities and to facilitate their transition back to school. Florida law holds the Department of Education accountable

88. See *Maryland Best Practices*, *supra* note 87. In Maryland, for instance, an inter-agency team consists of personnel from Lutheran Social Services Special Education, Department of Juvenile Services, community service agencies, as well as the child and parent(s). *Id.*

89. See *id.*

90. Michael Rozalski & Suzanne Engel, *Literacy Education in Correctional Facilities: The "Hope" for Technology*, 21 *READING & WRITING Q.* 301, 302 (2005); see David Houchins et al., *A Multi-State Study Examining the Impact of Explicit Reading Instruction with Incarcerated Students*, 59 *J. CORRECTIONAL EDUC.* 65 (2008).

91. See generally John S. Platt et al., *The Need for a Paradigmatic Change in Juvenile Correctional Education*, 51 *PREVENTING SCH. FAILURE* 31 (2006). Some researchers argue that education in juvenile correction facilities should be focused on preparing youth to transition into the workplace, since most youth exiting these facilities do not return to a traditional academic setting. Data shows that only about 20% of offenders released from academic-oriented programs designed to enable them to return to their high school and continue toward graduation actually return to complete high school. *Id.* at 32. Because this article is focused on addressing systemic barriers to school return, however, we do not consider in depth the relative advantages or disadvantages to career and technical training programs.

92. Most of these policies, as well as a host of other promising practices geared toward easing the transition of youth back to school, were first identified and compiled by the Virginia Legal Aid Justice Center. See JUSTCHILDREN, LEGAL AID JUSTICE CENTER, *A SUMMARY OF BEST PRACTICES IN SCHOOL REENTRY FOR INCARCERATED YOUTH RETURNING HOME* (2004), available at <http://www.justice4all.org/files/Reenrollment%20--%2004%20Best%20Practices%20with%2006%20Preface.pdf>.

for the education of children in juvenile justice placements.⁹³ The statute also requires a juvenile’s home school district to maintain an academic record for the student while he or she is in custody, and to recognize full and partial credits when a student transfers back.⁹⁴ Additionally, the home school district must develop a transition plan with the Department of Juvenile Justice for the transition from school to detention and back.⁹⁵ The statute also creates a “Coordinator” position to address school re-entry issues with the Department of Juvenile Justice, local school boards, educational providers, and juvenile justice providers.⁹⁶ By placing significant responsibility on the home school district, the statute engages the school in working toward positive outcomes for the student.

West Virginia law also addresses both the standards of education for incarcerated youth and the systems needed to help them return to school after release. The law requires school districts to cooperate with the State Department of Education “in providing an adequate and appropriate education for incarcerated juveniles and adults.”⁹⁷ It also requires that each school district cooperate to transfer educational records and accept credits earned toward graduation by youth re-entering from placement.⁹⁸ Regulations further require the creation of an “aftercare plan,” containing a comprehensive description of the education, counseling, and treatment that the juvenile received while in detention, any problems the juvenile has, the source of those problems, and a proposed approach to address them on discharge.⁹⁹ The multi-disciplinary treatment team must provide a copy of the plan to the juvenile’s parent or guardian, lawyer, probation officer, the prosecuting attorney, and the principal of the receiving school.¹⁰⁰ Any of these parties can submit adverse written comments to the court that committed the juvenile and a hearing will be held to consider the plan and objections.¹⁰¹ Theoretically, at least, this allows for schools to play a role in ensuring that the youth is receiving an appropriate education while incarcerated by verifying that the educational goals of the treatment plan are adequate for the particular needs of the youth. It also promotes the student’s education by encouraging involvement by multiple stakeholders.

Virginia regulations help ease the transition between placement and school by focusing on re-enrollment planning. Virginia regulations require that the home school district maintain the student’s academic record,¹⁰² and require a coordinated

93. See FLA. STAT. § 1003.52(1) (2009).

94. *Id.* at § 1003.52(8)–(9).

95. *Id.* at § 1003.52 (13)(i).

96. *Id.* at § 1003.52(1).

97. W. VA. CODE R. § 126-7-6 (2009).

98. *Id.*

99. W. VA. CODE R. § 49-5-20(b) (2009).

100. *Id.* at § 49-5-20(a).

101. *Id.* at § 49-5-20(e).

102. 8 VA. ADMIN. CODE § 20-660-40(C) (2009).

transition team to oversee the development of a re-enrollment plan during a youth's incarceration¹⁰³ so that youth are re-enrolled in school and receiving instruction within two days after release.¹⁰⁴ Virginia also mandates increased family and youth involvement in the re-enrollment process by requiring the transition team to consult the student in the development of a plan best suited to the needs of the individual student.¹⁰⁵ The transition team must invite the student's parent or guardian to attend the meeting in which the final re-enrollment plan is developed.¹⁰⁶ The regulations also require that the student be provided with weekly counseling for an appropriate period of time, and direct the receiving school district to protect the confidentiality of the student's record.¹⁰⁷ Like West Virginia's law, Virginia assists students not only by providing substantive entitlements, such as counseling, but by engaging family members and youth in the process.

Maine law focuses on alleviating the transition from placement to school by requiring that the superintendent of the home school district (to which the student will ultimately return) convene a reintegration team consisting of a school administrator and teacher, a parent or guardian, and a guidance counselor within ten days after receiving notice from the juvenile justice system.¹⁰⁸ Maine law also establishes that education in juvenile justice facilities must conform to the standards set forth for all public schools.¹⁰⁹ Again, the engagement of multiple stakeholders, paired with substantive entitlements, holds promise for promoting positive school re-entry experiences for students.

V. CONCLUSION

Serious obstacles stand in the way of successful school re-entry for many youth returning from juvenile justice placements. These obstacles often heighten the likelihood that these youth will end up back in the delinquency system that they just exited. As discussed in this article, strategies designed to address this problem include enforcing the due process rights of youth returning to school. Further strategies include amending the No Child Left Behind Act to minimize the incentives to push youth returning from delinquency placements out of school, and developing state statutes or regulations to support school re-integration for youth returning from the juvenile justice system. Such litigation and policy advocacy can help youth overcome the obstacles to educational access and achievement that they face. The subsequent reforms can pave the way to smoother re-entry, better school success, and, hopefully, better life outcomes for youth.

103. *Id.* at § 20-660-30(A) (2009).

104. *Id.* at § 20-660-30(C)(1).

105. *Id.* at § 20-660-30(A)(4).

106. *Id.*

107. *Id.* at § 20-660-30(C)(4).

108. ME. REV. STAT. ANN. tit. 20-A, § 1055(12) (2009).

109. *Id.* at § 4502(1).