

## NOTES

# 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

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## I. INTRODUCTION

The juvenile justice system rarely spends time in the national spotlight. Even when juvenile delinquents do make headlines, the stories usually refer to situations in which juveniles could potentially be tried as adults or where community members or victims feel that a punishment was too light.<sup>1</sup> Such concerns have little bearing on most of the approximately 1 million juvenile delinquency proceedings that happen annually.<sup>2</sup> For those youth, states operate a separate process based on the belief that juvenile offenders have less responsibility for their actions and a higher likelihood of rehabilitation.<sup>3</sup> Judges in the juvenile system determine culpability by finding juveniles “delinquent,” rather than guilty, to emphasize the

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1. See, e.g., Robert James Bidinotto, *More Juvenile Justice, Fewer Excuses*, VIEWPOINT ON PUB. (Oct. 7, 1996), [https://www.heartland.org/\\_template-assets/documents/publications/2221.pdf](https://www.heartland.org/_template-assets/documents/publications/2221.pdf) (“One thing is certain: Our present approach to juvenile crime hasn’t worked. It’s time to rethink the basic premise underlying our juvenile justice system. Young people are morally responsible for their acts, and therefore they should be held legally accountable as well. A rational juvenile justice policy would be the very opposite of much of what we have been doing. It would entail less therapy and swifter, more certain punishment; minimizing excuses such as ‘his environment made him do it’; and basing confinement on the seriousness of the crime, not the perpetrator’s age.”); Sara Glazer, *Lawmakers Pressured to Give Adult Terms to Juvenile Offenders: Perception That Youth Crime Is Becoming More Violent Borne Out in Statistics*, DALLAS MORNING NEWS, Mar. 13, 1994, at 6A (“[L]awmakers across the country are scrambling to respond to polls indicating that Americans see juvenile punishment as too short and too soft.”); Nancy Grace, *Fix Flaws in Juvenile Justice System*, CNN (Feb. 28, 2005), <http://www.cnn.com/2005/LAW/02/18/grace.juveniles/index.html> (“Prosecutors are left with the tough choice of sending a violent criminal to ‘juvey justice hall,’ where they may get a sentence as light as being forced to write an essay about what they did wrong, or sending a minor to jail for life.”); Kent Scheidegger, *Society’s Proper Defense*, Comment on *Young Offenders Locked Up for Life*, N.Y. TIMES: ROOM FOR DEBATE (Nov. 8, 2009, 7:00 PM), <https://roomfordebate.blogs.nytimes.com/2009/11/08/young-offenders-locked-up-for-life> (“[T]here is a hard core of life-course persistent offenders that is unlikely to desist. This group typically begins offending earlier, commits more violent offenses, and remains violent into adulthood. Our society can and should defend itself against them.”).

2. JULIE FURDELLA & CHARLES PUZZANCHERA, U.S. DEP’T OF JUST., OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, NCJ 248899, DELINQUENCY CASES IN JUVENILE COURT, 2013 1 (2015).

3. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 137–45 (1969) (discussing how judges often “approached their work in medical-therapeutic terms” in early juvenile courts); NAT’L RES. COUNCIL, *JUVENILE CRIME, JUVENILE JUSTICE* 157–159 (2001) (placing the creation of juvenile courts in a context of other Progressive Era reforms of the late 19th and early 20th century, including the establishment of kindergarten and the enactment of child labor laws); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. OF CLINICAL PSYCHOL. 459, 465, 471, 473 (2009) (arguing that “the lessons of developmental science offer strong support for the maintenance of a separate juvenile justice system in which adolescents are judged, tried, and sanctioned in developmentally appropriate ways”); see also Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909) (“It is apparent at once that the ordinary legal evidence in a criminal court is not the sort of evidence to be heard in such a proceeding . . . . The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench . . . can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.”).

rehabilitative, rather than judgmental, elements of the system.<sup>4</sup> Public polling supports this approach, with sixty-five percent of adults agreeing that the juvenile system should treat children differently than adults.<sup>5</sup>

For far too many, the system of juvenile corrections fails to act on that foundational belief. Studies find that the recidivism rate among youth who previously spent time in juvenile facilities is between fifty-five and seventy-five percent within three years.<sup>6</sup> At a cost of approximately \$90,000 per juvenile in a facility per year,<sup>7</sup> this is both a massive waste of taxpayer funds and an unconscionable waste of the potential of thousands of young people.

The problems involved in providing justice-involved youth with better opportunities are multi-faceted. The recurring and critical gap in the provision of education to juveniles, especially in “secure care” facilities, is one of the most nefarious of these interlocking problems. Those facilities have locks and other security measures or are, less frequently, secured through intensive staff supervision.<sup>8</sup> Both in secure-care facilities and in the transition from those facilities back to society, a complicated set of educational systems fail to provide youth with the educational opportunities they need to be successful and often further exacerbate existing gaps between justice-involved youth and their peers.<sup>9</sup> Juvenile justice facility educational programs are run by states with some federal funding support, as explored in more depth in Part II, *infra*, but are unsuccessful

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4. NAT'L RES. COUNCIL, *supra* note 3, at 154 (“The very language used in juvenile court underscored these differences [between juvenile and adult proceedings]. Juveniles are not charged with crimes, but rather with delinquencies; they are not found guilty, but rather are adjudicated delinquent.”).

5. See PEW CHARITABLE TRS., PUBLIC OPINION ON JUVENILE JUSTICE IN AMERICA (2014), [http://www.pewtrusts.org/~media/assets/2015/08/pspp\\_juvenile\\_poll\\_web.pdf](http://www.pewtrusts.org/~media/assets/2015/08/pspp_juvenile_poll_web.pdf).

6. RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 10 (2011), <http://www.juvenile-in-justice.com/wp-content/uploads/2011/10/NoPlaceForKids.pdf> (citing studies that show a seventy to eighty percent re-arrest rate and a forty-five to seventy-two percent rate of new adjudications within three years of being released from a juvenile facility); KATHLEEN SKOWYRA & JOSEPH J. COCOZZA, NAT'L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE, BLUEPRINT FOR CHANGE: A COMPREHENSIVE MODEL FOR THE IDENTIFICATION AND TREATMENT OF YOUTH WITH MENTAL HEALTH NEEDS IN CONTACT WITH THE JUVENILE JUSTICE SYSTEM 60 (2007), [https://www.ncmhjj.com/wp-content/uploads/2013/07/2007\\_Blueprint-for-Change-Full-Report.pdf](https://www.ncmhjj.com/wp-content/uploads/2013/07/2007_Blueprint-for-Change-Full-Report.pdf).

7. JUSTICE POL'Y INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 4 (2009), [http://www.justicepolicy.org/images/upload/09\\_05\\_rep\\_costsof\\_confinement\\_jj\\_ps.pdf](http://www.justicepolicy.org/images/upload/09_05_rep_costsof_confinement_jj_ps.pdf).

8. MENDEL, *supra* note 6, at 2 (“State juvenile corrections systems in the United States confine youth in many types of facilities, including group homes, residential treatment centers, boot camps, wilderness programs, or county-run youth facilities . . . . But the largest share of committed youth—about 40 percent of the total—are held in locked long-term youth correctional facilities operated primarily by state governments or by private firms under contract to states. These facilities are usually large, with many holding 200–300 youth. They typically operate in a regimented (prison-like) fashion, and feature correctional hardware such as razor-wire, isolation cells, and locked cell blocks.”).

9. MENDEL, *supra* note 6, at 11–12; see also JEFFREY A. BUTTS & DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIMINAL JUSTICE, RESOLUTION, REINVESTMENT, AND REALIGNMENT 3 (2011) (citing Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453 (2010); BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POL'Y INST., THE DANGERS OF DETENTION 5–9 (2006), [http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf) (“The best research shows that incarceration by itself does not reduce recidivism and it may exacerbate other youth problems, including poor educational outcomes, unemployment, and behavioral health issues.”).

in providing youth with the opportunities to develop skills or transition easily back to traditional schools. These programs, especially those in secure-care facilities, are often run by poorly trained educators, lack the resources to provide youth with proper special education services or learning materials suited to their needs, and rarely provide coursework aligned with public school curriculums.<sup>10</sup> For more than 50,000 youth who are held in those facilities daily,<sup>11</sup> these shortcomings have real consequences in the form of the education provided and the opportunities for re-entry into society.<sup>12</sup> At a policy level, those same shortcomings provide opportunities to re-evaluate and improve systems. This Note explores a variety of options for doing so.

The juvenile correctional system includes a large and complex web of juvenile facilities that includes pre-adjudication detention centers, group homes, and secure care facilities.<sup>13</sup> Youth who have been adjudicated delinquent—the juvenile system’s language for a determination of guilt—are often placed in secure care facilities, which have the longest average lengths of stay and the most structured educational programs.<sup>14</sup> This Note focuses on secure-care facilities, the provision of education within them, and the planning process for those youth as they transition back into society. Throughout the Note, the term “justice-impacted youth” will be used to broadly describe those individuals who have been part of this complicated web.

Part II details the provisions in both the Juvenile Justice Delinquency Prevention Act (JJDP) and the Elementary and Secondary Education Act (ESEA) that provide federal support to secure-care facilities. It finds that ESEA provides clear requirements for the programming that should exist within facilities and the transition planning prior to re-entry.

The current system fails to provide a meaningful education or sufficient support to youth within the facility setting or during the transition out. Part III reviews these weak points. The first issue is that existing educational programs in facilities do not meet the needs of the youth they serve. After youth are released, the transition process is plagued by inconsistent oversight and insufficient coordination between various agencies. This combination makes it difficult for youth to overcome schools’ institutional incentives to be wary of re-admitting returning students. Without robust supervision and coordination structures for that transition phase, those students never re-enroll in schools and often return to the criminal justice system.

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10. MENDEL, *supra* note 6, at 25.

11. Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement*, U.S. DEP’T. OF JUST., OFF. OF JUV. JUST. & DELINQUENCY PREVENTION (2015), <http://www.ojjdp.gov/ojstatbb/ezacjrp>. This number has fallen significantly from the peak of 105,055 juveniles in the 1997 facility census, but still presents a significant set of challenges that are spread widely across a range of systems. *Id.*; NAT’L RES. COUNCIL, IMPLEMENTING JUVENILE JUSTICE REFORM: THE FEDERAL ROLE 10–11 (2013), [http://www.nap.edu/catalog.php?record\\_id=18753](http://www.nap.edu/catalog.php?record_id=18753) [hereinafter IMPLEMENTING JUVENILE JUSTICE REFORM].

12. NAT’L EVALUATION & TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, TITLE I, PART D SUBPARTS 1 AND 2 ANNUAL PERFORMANCE OVERVIEW: SCHOOL YEAR 2012–13 1:2 (2015), [http://www.neglected-delinquent.org/sites/default/files/NDTAC\\_Ann\\_Perf\\_Ovw\\_508.pdf](http://www.neglected-delinquent.org/sites/default/files/NDTAC_Ann_Perf_Ovw_508.pdf) [hereinafter TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13]; *see infra* Part III.

13. MENDEL, *supra* note 6, at 2.

14. *Id.* at 3.

Part IV attempts to lay out the potential range of options available to advocates and policymakers for combatting myriad structural flaws. States and localities struggle to correct structural flaws largely because of the coordination required to properly supervise students. Because it is unlikely that states alone can address this concern, Part IV lays out four potential updates to the requirements attached to federal spending on juvenile facilities. Those options are to (1) change the requirements for which facilities can receive federal funding to include short-term facilities, thereby increasing federal oversight of a critical but under-regulated portion of the system; (2) require states to designate an individual or office that is responsible for justice-impacted youth transitioning out of facilities as a way to create clear lines of responsibility; (3) create statutory data collection requirements to better understand and identify the places where the transition process fails to provide necessary supports; and (4) ban states from automatically enrolling returning students in alternative schools, which often discourages those students from continuing their education. Part IV discusses the benefits and drawbacks of each proposal, though the purpose of this Note is not to determine the most effective path forward. In the midst of a continuing national dialogue about the implementation of the Every Student Succeeds Act, it is difficult to predict how the next reauthorization of the Elementary and Secondary Education Act will play out. There will be wide debate about almost every provision of the law prior to its reauthorization and many conversations about the proper way to oversee juvenile facilities and returning students. The analysis below demonstrates that the inadequacies of the juvenile justice system's education and transition programming must be addressed in that re-authorization. This Note argues for more specific requirements on states, districts, and all categories of juvenile facilities and lays out a series of proposals that would create stronger accountability systems for the federal money flowing to those facilities and being used to support youth in transition.

## II. FEDERAL ROLE IN EDUCATIONAL PROGRAMMING IN JUVENILE FACILITIES

The juvenile justice system sits at the intersection of education and criminal justice and is run almost entirely at the state and local level. However, two pieces of federal legislation provided federal grants to state and local juvenile justice programs that impacted their operations. This section establishes that neither the ESEA<sup>15</sup> nor the JJDPA<sup>16</sup> contained specific provisions regarding education in juvenile facilities.

The remainder of this section demonstrates Congress's more recent interest in those educational programs, starting with the 1994 ESEA reauthorization and continuing through further re-authorizations in 2001<sup>17</sup> and 2015.<sup>18</sup> The addition of statutory and regulatory requirements illustrates the federal government's increasing interest in the provision of education to youth in juvenile facilities.

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15. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

16. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. § 5601 (2012)).

17. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1401, 115 Stat. 1581.

18. Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1900.

Originally operated as a grant that disbursed funds to states based on the number of youth classified as neglected or delinquent, the 1994 changes added basic reporting requirements and parameters for how states should allocate funding.<sup>19</sup> The 2001 No Child Left Behind (NCLB) re-authorization added even more specific requirements to the program. NCLB expanded Title I, Part D to specifically include more robust transition services from facilities back to society.<sup>20</sup> In the most recent Every Student Succeeds Act (ESSA) reauthorization signed into law in December 2015, Congress included a number of small but impactful changes that expanded the reach of the mandate to provide transition services.<sup>21</sup> In a further sign that this is a critical issue worth broader attention, ESSA included a provision that is intended to relieve pressure on traditional high schools serving populations of students, including those who previously spent time in juvenile facilities, who take more than four years to graduate from high school.

*A. Early History of the Elementary and Secondary Education Act (ESEA)  
and Juvenile Justice and Delinquency Prevention Act (JJDP)*

In the mid-1960s, two new extensions of federal funding and attached requirements set the stage for broader intervention into the operation of state-run facilities. In 1965, Congress passed the ESEA, one of the centerpieces of President Lyndon Johnson's War on Poverty. That law did not include any mention of programs housing delinquent youth, but the 1966 ESEA Amendments did.<sup>22</sup> Those amendments expanded the law's reach in a number of ways, including the creation of a new federal appropriation for the education of youth in facilities for neglected or delinquent individuals.<sup>23</sup> A year later, the Supreme Court handed down a landmark ruling, *In re Gault*, applying constitutionally mandated due process procedures to juvenile court proceedings.<sup>24</sup> *Gault* set out clearly that rehabilitation is a critical goal of the juvenile court system.<sup>25</sup> In the wake of that decision,

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19. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191, 1194.

20. No Child Left Behind Act of 2001 § 1401, 108 Stat. 3591.

21. 20 U.S.C. § 6438 (2012 & Supp. IV 2016).

22. Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191, 1193-95.

23. *What Is Title I, Part D?*, NAT'L EVALUATION & TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, <http://www.neglected-delinquent.org/what-title-i-part-d> (last visited Apr. 20, 2018).

24. *In re Gault*, 387 U.S. 1, 14 (1967). These protections included adequate notice, right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses. *Id.* at 33, 40-41, 49-50, 56. In a case that followed soon after, the Court also determined that adjudications of delinquency determinations, like criminal convictions, requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 368 (1970). The rights established in these decisions are often unmet in the current system, though those considerations are outside the scope of this Note. See Joanna S. Markman, *In Re Gault: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 133-39 (2007) (finding that "although Gault declared that juveniles have the right to counsel, the counsel afforded juveniles is often ineffective due to the lack of experience and training geared toward the special needs of juveniles"). A similar pattern emerges when exploring the other rights declared mandatory by the *Gault* Court.

25. *In re Gault*, 387 U.S. at 15-16.

Congress passed the JJDP Act in 1974, which created the Office of Juvenile Justice and Delinquency Prevention at the U.S. Department of Justice.<sup>26</sup> Both the JJDP Act and ESEA provided, in their earliest iterations, basic formula funding grants to state agencies, where the state calculated the number of youth who met certain criteria and the federal government disbursed a set amount per qualifying individual.<sup>27</sup> JJDP Act required that states receiving funds move truant youth and other “status offenders” out of facilities and required those in facilities be separated from adults,<sup>28</sup> while ESEA required very little of programs receiving grants.<sup>29</sup> Though Congress had provided funding for states to create programs aligned with *Gault*’s rehabilitative goal, neither grant program outlined specific requirements for providing appropriate services to youth within those facilities.

For the JJDP Act, that remains true today. The law allocates \$270 million to states for programs aimed at developing “more effective juvenile delinquency programs and improved juvenile justice systems.”<sup>30</sup> These funds are connected to four core mandates: States must deinstitutionalize truants and other status offenders; must place juveniles in facilities in which they have no contact with adult inmates; cannot detain or confine juveniles in facilities intended for adults; and must show that they are “working to address the issue of disproportionate minority confinement within their juvenile justice systems.”<sup>31</sup>

In the education space, the 1994 ESEA re-authorization updated the original general grants to provide specific requirements for calculating the state’s population of neglected and delinquent youth and for the state’s documentation of how funding would be allocated and used. Congress incorporated those updated requirements into Title I, Part D, which funded “Prevention and Intervention Programs for Children and Youth Who are Neglected, Delinquent, or At Risk of Dropping Out.”<sup>32</sup> Those provisions specified how state agencies overseeing institutions for neglected or delinquent youth could receive funding and distribute that funding to facilities, including juvenile facilities.<sup>33</sup> The law also set out requirements for how agencies were required to describe their plans for the

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26. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 201, 88 Stat. 1109.

27. *Id.* at § 204; 80 Stat. at 1194.

28. See *Legislation/JJDP Act*, U.S. DEP’T OF JUST.: OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, <https://www.ojjdp.gov/about/legislation.html> (last visited Apr. 20, 2018).

29. 80 Stat. at 1194.

30. 34 U.S.C. § 11131 (2012); KRISTIN FINKLEA, CONG. RES. SERV., RS22655, JUVENILE JUSTICE FUNDING TRENDS 4, 8 (2016), <https://fas.org/spp/crs/misc/RS22655.pdf>. In fiscal year 2016, total juvenile justice appropriations at the Department of Justice were \$270 million. This is a significant cut from the early 2000s, when juvenile justice programs received over \$500 million in federal funding, including significantly more for grant programs aimed at helping systems ensure that they were being held accountable. *Id.*; Gary Gately, *Federal Juvenile Justice Funding Declines Precipitously*, JUV. JUST. INFO. EXCHANGE (Feb. 12, 2015), <http://jjie.org/2015/02/12/federal-juvenile-justice-funding-declines-precipitously>.

31. FINKLEA, *supra* note 30, at 1 n.5.

32. Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 1401, 108 Stat. 3518.

33. *Id.*; see also U.S. DEP’T OF EDUC., STUDY OF LOCAL AGENCY ACTIVITIES UNDER THE TITLE I, PART D, PROGRAM 1-2 (2000), <http://files.eric.ed.gov/fulltext/ED441920.pdf> [hereinafter STUDY OF LOCAL AGENCY ACTIVITIES].

funding.<sup>34</sup> That statute also, for the first time, created a consistent set of requirements for when states could count youth as part of a program or as a resident in a facility.<sup>35</sup> The statute then provided a formula for the federal government's allocation.<sup>36</sup> The law provided for federal funding at a level of forty percent of the state's per pupil allotment multiplied by the number of eligible youth.<sup>37</sup>

In the wake of that law's passage, the U.S. Department of Education (ED) promulgated regulations in the summer of 1995 stating that institutions were only eligible for this funding if they were residential and operated primarily for the care of youth who had been adjudicated delinquent.<sup>38</sup> In addition, the facility had to serve youth who "ha[d] an average length of stay in the institution of at least 30 days."<sup>39</sup> These statutory and regulatory changes set the stage for a much broader set of interventions and requirements in the next reauthorization during the first months of the George W. Bush Administration.

### *B. Title I, Part D and No Child Left Behind (NCLB)*

The 2001 NCLB reauthorization did not radically overhaul Title I, Part D, but it did make changes that pointed toward an increased focus on ensuring quality education in facilities and improving transition services. The NCLB additions included several references to "academic achievement" standards and one requirement that the state agency "encourage" coordination between facilities and schools on state achievement tests.<sup>40</sup>

More pointedly, Congress asked states to explain their plans for the transition of "children and youth from correctional facilities to locally operated programs" in their Title I, Part D state plan and laid out specific ways in which the state was expected to demonstrate a commitment to that goal.<sup>41</sup> Congress also required that

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34. Improving America's Schools Act § 1401; *see also* STUDY OF LOCAL AGENCY ACTIVITIES, *supra* note 33.

35. Youth eligible to be counted must be under the age of 20 and are in (1) state-operated adult correctional facilities and are enrolled in a regular program of education for 15 hours a week or (2) juvenile delinquency institutions or programs and are enrolled in a regular program of instruction for at least 20 hours per week. U.S. DEP'T OF EDUC., TITLE I, PART D: NEGLECTED, DELINQUENT, AND AT-RISK YOUTH NONREGULATORY GUIDANCE 4 (2006) [hereinafter TITLE I, PART D NONREGULATORY GUIDANCE].

36. 20 U.S.C. § 6432 (2012 & Supp. IV 2016) (originally enacted as Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 1412, 79 Stat. 27, *amended by* Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1401, 108 Stat. 3518, 3591); No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1401, 115 Stat. 1581 (current version in Every Student Succeeds Act of 2015, Pub. L. No. 114-95, § 1401(2), 129 Stat. 1900).

37. 20 U.S.C. § 6432 (2012 & Supp. IV 2016) (the 1994, 2001, and 2015 reauthorizations all included this provision, which also required that the forty percent state per-pupil funding must be between thirty-two and forty-eight percent of the average national per-pupil expenditure rate).

38. 34 C.F.R. § 200.90(b) (2018).

39. *Id.*

40. 20 U.S.C. § 1414(3)(c)(9) (2012 & Supp. IV 2016) was updated to require the state, as part of its Title I, Part D state plan, to describe how the State agency will encourage correctional facilities receiving funds under this subpart to coordinate with local educational agencies or alternative education programs attended by incarcerated children and youth prior to their incarceration to ensure that student assessments and appropriate academic records are shared jointly between the correctional facility and the local educational agency or alternative education program." No Child Left Behind Act § 1401, 115 Stat. 1581.

41. No Child Left Behind Act of 2011 § 1401, 108 Stat. 3591.



the state agency receiving funding under Title I, Part D reserve between fifteen percent and thirty percent of that funding to provide for transition services for youth in all juvenile facilities and youth incarcerated in adult facilities.<sup>42</sup> This represented a substantial increase over the previous requirement, which had capped state expenditures for the same purpose at ten percent of their total funding.<sup>43</sup>

### C. *Changes in Every Student Succeeds Act (ESSA)*

Congress passed the ESSA in 2015, which updated a series of requirements for the education for youth in facilities and the transition out. In Part D, Congress added additional reporting requirements intended to incentivize smoother transitions for students.<sup>44</sup> In addition, Congress expanded the focus of transition services from transitions “from State-operated institutions to schools served by local educational agencies”<sup>45</sup> to the broader mission of facilitating “the transition of children and youth between State-operated institutions, or institutions in the State operated by the Secretary of the Interior, and schools served by local educational agencies or schools operated or funded by the Bureau of Indian Education.”<sup>46</sup>

Most of the revisions involving justice-impacted youth were confined to Title I, Part D. There was, however, also an ancillary change with a direct impact on the incentives for schools receiving youth transitioning out of facilities. In Title I, Part A, which governs accountability for traditional schools, Congress provided states with the option to develop secondary measures of calculating high school graduation rates.<sup>47</sup> That change was intended to address problems associated with at-risk students being “counseled out” of high schools.<sup>48</sup> Because high school graduation rates were part of the accountability structure for schools, school administrators trying to increase those graduation rates were incentivized to counsel out homeless students, students in foster care, and other students who are statistically less likely to graduate on time.<sup>49</sup> Congress decided to provide states with the option to include a new graduation metric in their reporting to shift these incentives.<sup>50</sup> That metric, known as the “extended-year adjusted cohort graduation rate,” allows Local Education Authorities (LEAs) to better track students who, for a variety of reasons, take a non-traditional track toward high school graduation.<sup>51</sup>

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42. 20 U.S.C. § 1418 (2012 & Supp. IV 2016); TITLE I, PART D NONREGULATORY GUIDANCE, *supra* note 35, at 19–22. Those transition services can be provided both pre-release while still in facilities and post-release through funding for programs within or outside schools.

43. Improving America’s Schools Act of 1994, Pub. L. 103-382, 108 Stat. 3518, 3597.

44. 20 U.S.C. § 6438 (2012 & Supp. IV 2016).

45. No Child Left Behind Act of 2001 § 1401, 108 Stat. 3591.

46. 20 U.S.C. § 6438.

47. U.S. DEP’T OF EDUC., EVERY STUDENT SUCCEEDS ACT HIGH SCHOOL GRADUATION RATE NON-REGULATORY GUIDANCE 11–12 (2017), <https://www2.ed.gov/policy/elsec/leg/essa/essagraderateguidance.pdf> [hereinafter HIGH SCHOOL GRADUATION RATE GUIDANCE].

48. *Id.*

49. Jessica Feierman, Marsha Levick & Ami Mody, *The School-to-Prison Pipeline . . . and Back: Obstacles and Remedies for the Re-Enrollment of Adjudicated Youth*, 54 N.Y.L. SCH. L. REV. 1115, 1117, 1123 (2010).

50. 20 U.S.C. § 6311(c)(4)(B)(iii) (2012 & Supp. IV 2016).

51. HIGH SCHOOL GRADUATION RATE GUIDANCE, *supra* note 47.

For schools serving justice-impacted youth, this relieves some of the pressure associated with the traditional metric and allows youth to take additional time to graduate.

After the passage of ESSA, the Obama Administration's Department of Education passed regulations that, among many other topics, tried to create incentives for better information sharing between schools and juvenile justice facilities.<sup>52</sup> Those regulations have since been overturned by Congress pursuant to the Congressional Review Act.<sup>53</sup> The regulations included a provision that incentivized the timely transfer of student records, a key concern discussed in Part III, *infra*, from school districts to juvenile facilities.<sup>54</sup> The rule required school districts to count all students as part of the denominator for determining their graduation rate until the student was proven to be enrolled in a new program—be that in a new district, a new state, or a juvenile facility.<sup>55</sup> This policy would have had the effect of keeping students transitioning to the juvenile facilities in the denominator of the LEA's graduation rate calculation, but removing them from the numerator and lowering the LEA's overall rate.<sup>56</sup> The student would have been included in that denominator until he or she was enrolled in a program expected to provide a diploma. In any other case, the student would remain in the LEA's denominator. This policy created an incentive, but not a federal requirement, for LEAs to transfer records quickly. It also has the potential to spur LEAs to work closely with the state's correctional education programs to ensure that youth are provided with academic and other necessary support structures, since those students who are not enrolled in diploma-granting programs would have remained in the LEA's denominator.

Even through these programmatic changes that expand the scope of the program, the Title I, Part D grants remain a small piece of the overall federal investment in education. In fiscal year 2016, Congress allocated \$47,614,000 total for Subpart 1 of Part D, less than one percent of the Department's spending on K-12 educational programs.<sup>57</sup> This is also a tiny portion of the overall cost of the juvenile justice system. In 2009, the Justice Policy Center estimated that states spent \$240.99 per youth per day in a juvenile facility, for a total of \$5.7 billion.<sup>58</sup> Though small, this program continues to provide important funding for education

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52. Every Student Succeeds Act Accountability and State Plans, 81 Fed. Reg. 86,076 (Nov. 29, 2016).

53. H.R.J. Res. 57, 115th Cong., 163 CONG. REC. S1704 (2017) (enacted) (providing for Congressional disapproval of agency actions).

54. 34 C.F.R. § 200.34 (b)(i)(3)(iii) (2017).

55. The regulation promulgated by the Obama administration would have incentivized the timely transfer of records by keeping youth on a LEA's roster until the youth "is enrolled in an education program from which the student is expected to receive a regular high school diploma, or a State-defined alternate diploma for students with the most significant cognitive disabilities, during the period in which the student is assigned to the prison or juvenile facility." *Id.*

56. The other listed reasons that a district could remove a student from the graduation rate calculation denominator were a district transfer within a state, a move out of state, or death. This was intended, in other words, as a fairly contained list for when students could be removed from the denominator. Requiring that the student meet a specific set of conditions before they could be removed from the list is therefore a moderately strong tool for incentivizing districts to work with juvenile facilities to ensure that those conditions are met quickly. *Id.*

57. U.S. DEP'T. OF EDUC., FISCAL YEARS 2015–2017 STATE TABLES FOR THE U.S. DEPARTMENT OF EDUCATION (2017), <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

58. JUSTICE POL'Y INST., *supra* note 7.

within juvenile facilities and some of the only dedicated funds to support the critical moment where youth transition out of those facilities. In addition, these programs that receive federal funding become responsible for meeting any requirements attached to that funding. Those requirements allow for data collection and oversight that would otherwise be left entirely to states' discretion. However, as Part III *infra* explores in more depth, that oversight has done little to ensure that the education and transition services offered are adequate to meet the needs of the youth in facilities.

### III. PROBLEM: EDUCATION PROGRAMS IN JUVENILE FACILITIES ARE SET UP TO FAIL

The history of Title I, Part D shows a limited federal role in the education of youth in juvenile facilities. But the scope and scale of the juvenile correctional system is significant for the youth within it, the state officials who operate it, and the taxpayers who fund it. In their current form, the educational programs fail to provide entering youth with a real chance to rehabilitate and successfully re-enter schools or their communities. Data consistently demonstrate that youth are neither learning in facilities nor exiting with the support necessary to re-enter schools or find other opportunities.<sup>59</sup> Many states struggle with basic data collection on youth in facilities, leading the federal government to consider state reports unreliable.<sup>60</sup> This section begins by outlining these failings in more detail in Section A. Section B then turns to an analysis of the two causes: (i) inconsistent oversight and (ii) insufficient coordination. The lack of oversight in both facilities and transitions creates significant variations between and within states, leading to widely differing structures that allow students to be lost, underserved, and unlikely to rehabilitate and re-join society. At the same time, the insufficient coordination between facilities and different parts of state and local government leave students without the services they need in facility schools or the help they need as they leave.

#### *A. Outlining the Problem*

Though data is difficult to track and consolidate, it is clear that youth do not receive a quality education while housed in any type of juvenile facility. Some do not receive an education at all. Others receive an education but fail to earn any credits toward graduation. This is especially troubling because so many justice-involved youth are diagnosed with special needs, indicating that they should be receiving federally mandated individualized supports.<sup>61</sup> Unfortunately, most reporting indicates that these supports are not provided consistently.<sup>62</sup> Most troubling, however, is that many states report information to the federal government in a manner that makes it impossible to compare data across states or truly understand the scope of the problem.

The transition period is similarly fraught with both poor outcomes and incomplete data. Too few youths are provided with transition services before they

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59. *See infra* notes 72–74 and accompanying text.

60. *See infra* notes 68–71 and accompanying text.

61. *See infra* notes 75–81 and accompanying text.

62. *Id.*

exit facilities, and most never re-enroll in school. This lack of transition planning sets those youth up for failure, and too often leads them back to the criminal justice system. Both in facilities and in the months after individuals exit, the inability of state and local officials to provide support or even properly account for individual outcomes shows a troubling indifference to the dismal data presented here.

### 1. Problems in Facilities

In 2013, a one-day census of residential placement facilities indicated that 54,148 youth were incarcerated.<sup>63</sup> Those youth are spread across facilities that operate in totally different ways from state to state, and often transition from pre-adjudication facilities operated by an individual county or municipality to a post-adjudication facility operated by the state.<sup>64</sup> Moving between facilities creates significant variation in programming, reduces the likelihood of providing an individualized education, and introduces further complications for any potential oversight.

After a court adjudicates a juvenile delinquent, they can be sent to a variety of settings. Many of those facilities have considerable churn of short-term residents, meaning the average length of stay is less than 30 nights. Per ED's rulemaking on Title I, Part D, those programs are not eligible for funding.<sup>65</sup> Those programs, therefore, have no attached federal reporting requirements, and other efforts to collect data are unreliable and difficult. The Department of Justice reports indicate that eighty-seven percent of facilities claim to be providing an education to youth under their control.<sup>66</sup> However, the data collected is self-reported and asks only about the level of educational offerings provided, which sheds no light on the structure or quality of those programs.<sup>67</sup>

Other youth are sent to facilities with average lengths of stay that are longer than thirty days, making them eligible for Title I, Part D funding and the associated requirements from ED. However, the data on the education provided in those facilities is only marginally more informative. The data required as a condition of Title I, Part D funding are included in the Consolidated State Reports, which are submitted annually by each State Education Agency (SEA).<sup>68</sup> The National Evaluation and Technical Assistance Center for the Education of Children Who Are Neglected, Delinquent, or At-Risk (NDTAC), the federal agency that compiles information about Title I, Part D, reports that the data provided are woefully incomplete and inaccurate.<sup>69</sup> NDTAC calculated national data on the number of

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63. Sickmund et al., *supra* note 111.

64. NAT'L RES. COUNCIL, *supra* note 3, at 155.

65. Sickmund et al., *supra* note 111.

66. SARAH HOCKENBERRY ET AL., U.S. DEP'T. OF JUST., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE RESIDENTIAL FACILITY CENSUS, 2014: SELECTED FINDINGS 9 (2016), <https://www.ojjdp.gov/pubs/250123.pdf>.

67. *Id.*

68. See U.S. DEP'T. OF EDUC., APPROVED STATE ACCOUNTABILITY PLANS (2015), <https://www2.ed.gov/admins/lead/account/stateplans03/index.html>.

69. *Title I, Part D Data Context and Methodology*, NAT'L EVALUATION & TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILD. & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK (Mar. 2015), <http://www.neglected-delinquent.org/title-i-part-d-data-context-and-methodology>.

youth receiving high school credit, returning to school after leaving the facilities, and other metrics.<sup>70</sup> In doing those calculations, NDTAC had to throw out data from at least eighteen states—and often more—on each indicator.<sup>71</sup> Stated more simply, the federal government does not have an accurate picture of whether *the majority of states* are ensuring that justice-impacted youth receive an education.

To make matters worse, the data that is reported paints a dismal picture. Only fifty-eight percent of incarcerated youth received high school credit during their time in facilities.<sup>72</sup> A mere fifteen percent received a high school diploma or earned a GED during their time in the facility or in the ninety days after exiting.<sup>73</sup> While states reported improvements on assessments given to youth at the beginning and end of their time in a facility, a bare majority of youth were given both tests, making the data difficult to analyze.<sup>74</sup>

The youth in these facilities often enter with disabilities or significant academic gaps, which heightens the need for quality educational programming and implicates specific laws aimed at protecting those students. Approximately one-third are estimated to have a disability,<sup>75</sup> and most are at least a grade level behind in school.<sup>76</sup> Another fifty percent, or more, have also had contact with the foster care system, a strong indicator of disruption that often hampers academic success.<sup>77</sup> These youth are protected, to some extent, by both federal and state

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70. *Id.*

71. *Id.* Though some of the exclusions may have been due to a recent change in reporting requirements, lack of usable data on every indicator from more than a third of the jurisdictions submitting consolidated state plans indicates that collecting information about youth in juvenile corrections, or those who previously spent time in those facilities, is not a high priority of state governments. As an example of the breadth of states failing to report usable data, the states and territories were excluded from the reporting on whether students earned high school course credit: AL, AZ, AR, CA, CO, CT, GA, ID, IL, IN, KS, MA, MS, MO, NV, NJ, NY, NC, OH, OK, PR, RI, SC, SD, TN, TX, VT, WI. *Id.*

72. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 12.

73. *Id.*

74. *Id.* at 1:1.

75. *Id.* at 1:3; MINDEE O’CUMMINGS ET AL., NAT’L EVALUATION & TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILD. & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, THE IMPORTANCE OF LITERACY FOR YOUTH INVOLVED IN THE JUVENILE JUSTICE SYSTEM 2 (2010), [http://www.neglected-delinquent.org/sites/default/files/docs/literacy\\_brief\\_20100120.pdf](http://www.neglected-delinquent.org/sites/default/files/docs/literacy_brief_20100120.pdf); see SKOWYRA & COCOZZA, *supra* note 6 (citing a report that estimates the number at “3 to 5 times higher than the general youth population,” which would lead to an estimate in the range of thirty to fifty percent); Feierman et al., *supra* note 49, at 1123 (“Additionally, 35.6% of juvenile offenders have a learning disability and 12.6% are diagnosed with mental retardation.”).

76. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 12, at 1:1; Feierman et al., *supra* note 499, at 1123 (citing James Vacca, *Crime Can Be Prevented if Schools Teach Juveniles to Read*, 30 CHILD. & YOUTH SERVS. REV. 1055, 1056 (2008) (“Juvenile offenders on average have a reading level four to five years below grade level.”)); DAVID OSHER ET AL., AM. INSTS. FOR RESEARCH, SUCCESSFULLY TRANSITIONING YOUTH WHO ARE DELINQUENT BETWEEN INSTITUTIONS AND ALTERNATIVE AND COMMUNITY SCHOOLS 7 (2012), [https://neglected-delinquent.ed.gov/sites/default/files/docs/successfully\\_transitioning\\_youth.pdf](https://neglected-delinquent.ed.gov/sites/default/files/docs/successfully_transitioning_youth.pdf) (citing Mary Magee Quinn et al., *Students with Disabilities in Detention and Correctional Settings*, 71 EXCEPTIONAL CHILD. 339–45 (2005)).

77. DOUGLAS THOMAS ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, WHEN SYSTEMS COLLABORATE: HOW THREE JURISDICTIONS IMPROVED THEIR HANDLING OF DUAL-STATUS CASES 3 (2015), <http://www.ncjj.org/Publication/When-Systems-Collaborate-How-Three-Jurisdictions-Improved-their-Handling-of-Dual-Status-Cases.aspx>; *Dual Status Youth*, JUV. JUST. INFO. EXCHANGE: RESOURCE HUB, [http://jjie.org/hub/dual-status-youth/#\\_edn1](http://jjie.org/hub/dual-status-youth/#_edn1) (last visited Apr. 19, 2017).

laws. Particularly relevant are the requirements of the Individuals with Disabilities Education Act (IDEA), which requires that youth with disabilities be provided with an education regardless of their relationship with the juvenile justice system.<sup>78</sup> However, lawsuits brought under the IDEA, which includes a private right of action, are difficult to pursue, last for years, and are often settled out of court.<sup>79</sup> The combination of hurdles results in a dearth of published opinions about IDEA protections for youth in juvenile facilities and little chance to build on past successes.<sup>80</sup> This is especially concerning because of the consistent reporting that students with special education needs are not receiving services, which holds them back and frustrates the aim of ensuring that those youth have a chance at rehabilitation.<sup>81</sup>

## 2. The Problem in Transition

The transition from facilities to schools, or back to communities more broadly, comes with a separate set of concerns that persist even though transition services were given more funding and larger prominence in the 2001 NCLB reauthorization.<sup>82</sup> The first concern is that, according to state reports, only forty-eight percent of students receive *any* transition services addressing options for future schooling or employment.<sup>83</sup> The services those students receive have no meaningful impact.<sup>84</sup> The Title I, Part D state reports indicate that only eighteen percent of justice-impacted youth are enrolled in a school ninety days after exiting facilities.<sup>85</sup> However, as noted in the previous section, that data is notably incomplete. Other efforts to track similar populations suggest that up to one-third of justice-impacted youth return to school.<sup>86</sup> Many youth who leave facilities have

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78. 20 U.S.C. § 1412(a)(1)(A) (2012); 34 C.F.R. § 300.2(b)(1)(iv) (2017) (including “[s]tate and local juvenile and adult correctional facilities” among the state agencies subject to the provisions of the Individuals with Disabilities Education Act). *But 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, 19 (2010) (“Other provisions of IDEA remove incentives for states to educate incarcerated juveniles. School districts can opt out of providing special education to juvenile inmates in adult prisons without risking total loss of IDEA funds. School districts can transfer responsibility for providing special education for juvenile inmates to any other public agency. If the contracted agency does not comply with IDEA, the U.S. Department of Education does not have to completely withhold funding from the district, but can withhold only the proportion of IDEA funds equal to the proportion of children served by that other agency. This exception removes incentives for districts to ensure that marginalized students, including incarcerated juveniles, are receiving legally-sufficient special education. As a result, states may simply contract legal responsibility to other public agencies and wash their hands of the consequences.”).

79. Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 775–77 (2008).

80. *Id.*

81. SKOWYRA & COCOZZA, *supra* note 6, at 60; Feerman et al., *supra* note 49, at 1123; Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 508 (2009).

82. *See* Part II, *supra*.

83. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 122, at 1:3.

84. *Id.* at 1:2.

85. *Id.*

86. S. EDUC. FOUND., JUST LEARNING: THE IMPERATIVE TO TRANSFORM JUVENILE JUSTICE SYSTEMS INTO EFFECTIVE EDUCATION SYSTEMS 18 (2014) (citing Joseph C. Gagnon et al., *Juvenile Correctional Schools: Characteristics and Approaches to Curriculum*, 32 EDUC. & TREATMENT OF CHILD. 673–

no interest in returning to school or have reached the age at which they cannot return to school. Efforts to better integrate those youth into jobs or job training programs are outside the scope of this Note. With the rate of juvenile recidivism somewhere in the range it is clear that the existing range of programs aimed at reintegration in schools and communities are wasting resources and failing the youth they serve.<sup>87</sup>

### *B. Causes of the Problem*

The data above indicate that programs in juvenile justice facilities and those intended to support transitions are not sufficient to support the goal of rehabilitation or justify the costs associated. However, there is evidence that it is possible to lower the rate of recidivism by operating effective educational programs within juvenile facilities and arranging for a quick and smooth transition back to school.<sup>88</sup> To do that, policymakers must grapple with two related causes for the failures of both the system of education within facilities and the transition back to schools: The current systems lack consistent oversight, leading students to be underserved or lost, and the oversight that does exist is insufficiently coordinated to overcome institutional incentives that work against justice-impacted youth. The sections that follow will demonstrate that those two problems impact youth both while they are in juvenile facilities and as they transition back into schools.

#### 1. Inconsistent Oversight

The juvenile correctional structures in each state operate differently, with fifty different state-level structures that oversee 1,852 nationwide facilities.<sup>89</sup> In recent years, the population in local facilities has overtaken that in those that operate at the state level, creating further complication by adding even more levels of government with different incentives and priorities to the system of rehabilitating youth.<sup>90</sup> Operationally, there is little to no uniformity in how states and localities organize their juvenile corrections within larger bureaucracies.<sup>91</sup> Youth attempting to re-enter school have even less consistent oversight, as each school district has

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96 (2009)); Joseph C. Gagnon, *State-Level Curricular, Assessment, and Accountability Policies, Practices, and Philosophies for Exclusionary School Settings*, 43 J. SPECIAL EDUC. 206–19 (2010); Joseph C. Gagnon et al., *Secondary Psychiatric Schools: Characteristics and Approaches to Curriculum*, 55 PREVENTING SCH. FAILURE 42–52 (2010); Joseph C. Gagnon & Brian Barber, *Characteristics of and Services Provided to Youth in Secure Care Facilities*, 36 BEHAV. DISORDERS 7–19 (2010)); FED. INTERAGENCY REENTRY COUNCIL, *JUVENILE REENTRY 1* (2014), <https://csgjusticecenter.org/wp-content/uploads/2014/06/Juveniles.pdf>.

87. SKOWYRA & COCOZZA, *supra* note 6, at 60.

88. See CORA ROY-STEVENS, U.S. DEP'T. OF JUST., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *OVERCOMING BARRIERS TO SCHOOL REENTRY* (2004), <http://www.ncjrs.gov/pdffiles1/ojdp/fs200403.pdf>.

89. HOCKENBERRY ET AL., *supra* note 666, at 1–2; NAT'L CTR. FOR JUV. JUST., *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 84* (Melissa Sickmund & Charles Puzzanchera eds., 2015).

90. HOCKENBERRY ET AL., *supra* note 66, at 2–3.

91. S. EDUC. FOUND., *supra* note 86, at 5.

its own policies that are informed by state law, local practice, and the whims of the individual administrators or front office staff members who interact with the re-entering student.<sup>92</sup>

*i. Inconsistent oversight in facilities*

Nationwide, eighty-three percent of the 1,852 facilities that house youth overnight report providing some kind of educational programming.<sup>93</sup> Those programs are structured in widely disparate ways: seventeen states operate educational programs through the state education agency, sixteen use the state juvenile justice agency, eleven operate schools through the state social service agency, and six operate schools through the state correctional agency.<sup>94</sup> Across all four groups, fourteen states operate these schools as a separate “correctional school district,” which combine the facilities under the umbrella of a centralized office.<sup>95</sup>

Even within these four basic groups, there are significant distinctions. For example, In Colorado, which operates the facilities under the state social services agency, youth are exempt from the state’s compulsory education law, but “the intent of the general assembly [is] that the juvenile detention facility and school district in which the facility is located cooperate to ensure that each juvenile who is in detention is offered educational services.”<sup>96</sup> The law also requires the school board for the district in which the facility is located to provide teachers, books, and equipment at the request of the judge of the juvenile court.<sup>97</sup> In California, county school districts are required to operate “juvenile court” schools that house students as they go through the adjudication process,<sup>98</sup> but the state juvenile justice agency operates as a separate LEA that can issue high school diplomas for students who are confined to residential juvenile facilities.<sup>99</sup> In Maryland, the state education agency has spent a decade taking over the educational programming within facilities and overhauling the curriculum and instruction.<sup>100</sup> Each of those systems has developed over time in response to particular state-level considerations. Yet, they share common features: the oversight of youth within the state’s custody involves multiple agencies, many of which will provide separate educational programming to youth. This system creates bureaucratic headaches, significant variation in treatment, and a complete lack of a structured education. Part III Section A, *supra*, outlined the significant percentages of justice-involved youth

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92. See Jade Gary, *Education Connection: A Prison to School Pipeline: Preparing Incarcerated Youth for Reentry into Society and Public School*, 34 CHILD. LEGAL RTS. J. 241, 242 (2014); GEORGETOWN LAW HUMAN RIGHTS INST., KEPT OUT: BARRIERS TO MEANINGFUL EDUCATION IN THE SCHOOL-TO-PRISON PIPELINE 19–24 (2012), <https://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/KeptOut.pdf>.

93. HOCKENBERRY ET AL., *supra* note 666, at 8–9.

94. S. EDUC. FOUND., *supra* note 86, at 5.

95. *Id.*

96. COLO. REV. STAT. § 19-2-402 (2017).

97. *Id.*

98. CAL. EDUC. CODE § 48645.2 (2017).

99. CAL. WELF. & INST. CODE § 1120.2 (2017).

100. Erica L. Green, *Criticism Leveled at Schools for Maryland Juvenile Offenders*, BALT. SUN (Dec. 28, 2015), <http://www.baltimoresun.com/news/maryland/bs-md-juvenile-education-20151226-story.html>.



with disabilities or significant academic needs. The inconsistency in these changes makes it difficult to provide individualized programming, which is especially harmful to those youth with the greatest need for quality instruction.

*ii. Inconsistent oversight in transition*

Youth transitioning out of juvenile facilities often fall into a gray area where they are the responsibility of both no agency and multiple agencies at the same time. States vary in their methods for overseeing the transition out of facilities, with some leaving the correctional agency in charge of overseeing student transitions, others relying on state probation agencies, and still others relying on multiple agencies to address different parts of the transition.<sup>101</sup> When specifically discussing transitions back to schools, the oversight is even weaker; only eleven states have a requirement that a particular agency, usually the SEA, oversee the transition from a facility to a school in which the student is re-enrolling.<sup>102</sup> Significantly more states leave that process of re-enrollment entirely to the student, his or her family, and a patchwork of dedicated local community organizations.<sup>103</sup>

The lack of state oversight leaves local authorities with broad latitude, which they often use to pursue inequitable ends. Many of the specific concerns that flow from this inconsistency are documented in the discussion of schools' incentives Section III.B.2.ii, *infra*. It is worth highlighting here that this inconsistency leads especially to power devolving to local actors, from school district staff to school administrators and attendance secretaries. In the 2017 legislative session, California held hearings on a bill to require that the county board of education and county probation departments add new requirements, including an individualized transition plan, to the required "join transition planning policy."<sup>104</sup> During a hearing on the bill, an advocate testifying in favor noted:

“[W]e still see astonishing variance in policies and practices across the state: some counties are making remarkable efforts to ensure continuity of care and warm hand-offs. However [sic] the statutory clarity that SB 304 provides will support statewide progress and help to ensure that all students are prepared to return to their communities as full participants.”<sup>105</sup>

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101. SKOWYRA & COCOZZA, *supra* note 6, at 60.

102. COUNCIL OF STATE GOV'TS JUSTICE CTR., LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 11 (2015), [https://csgjusticecenter.org/wp-content/uploads/2015/11/LOCKED\\_OUT\\_Improving\\_Educational\\_and\\_Vocational\\_Outcomes\\_for\\_Incarcerated\\_Youth.pdf](https://csgjusticecenter.org/wp-content/uploads/2015/11/LOCKED_OUT_Improving_Educational_and_Vocational_Outcomes_for_Incarcerated_Youth.pdf) [hereinafter LOCKED OUT].

103. *Id.*

104. S.B. 304, 2017 Leg., Reg. Sess. (Cal. 2017).

105. Hailly Korman, *We Need Real Education Transition Policies for Incarcerated Students*, BELL-WETHER EDUCATION PARTNERS: AHEAD OF THE HEARD (Apr. 3, 2017), <https://aheadoftheheard.org/we-need-real-education-transition-policies-for-incarcerated-students/>.

Though her impressions are difficult to quantify or verify, they align with state reports showing the dearth of transition planning services<sup>106</sup> and describe a critical lack of consistency in how programs operate.

At a more local level, schools face inconsistent processes for receiving academic records from facilities. Some use these delays as a way of counseling re-entering students away from a certain school or into an alternative school, compounding the uncertainty of the re-entry period.<sup>107</sup> Though schools can request documentation and the facility is responsible for taking “reasonable steps to promptly respond” to a request for records,<sup>108</sup> both facilities and schools erect roadblocks that threaten to prevent those records from being effectively transferred. One of the most common concerns raised by facilities is whether the transfer of records without parental consent violates the Family Education Rights and Privacy Act (FERPA).<sup>109</sup> ED regulations regarding FERPA, however, explicitly state that transferring records between schools is an exception to the general rules requiring consent before educational records can be transferred.<sup>110</sup>

Inconsistency harms justice-impacted youth. Within the juvenile correctional system, constantly changing requirements lead to poorly tailored educational programming. Re-entering youth face a patchwork of support programs, inconsistent communication between facilities and schools, and misaligned incentives that do not encourage adults to rectify those issues. Those inconsistencies contribute in significant ways to the high rates of recidivism and low rates of successful re-entry for justice-impacted youth.

## 2. Insufficient Coordination

Oversight of youth in juvenile facilities and those who have transitioned out of those facilities involves several individuals who are part of different agencies and often have both conflicting missions and incomplete information. The specific problems are different for students in facilities than for those transitioning out, but the overall concern is similar: none of the agencies involved individually, nor any of the handoffs between individuals representing different agencies, have

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106. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 12, at 1:3; OSHER ET AL., *supra* note 76, at 1.

107. Feierman, et al., *supra* note 49, at 1117; NAT’L JUV. JUST. & DELINQUENCY PREVENTION COALITION, PROMOTING SAFE COMMUNITIES 17–19 (2015), [http://www.promotesafecommunities.org/images/pdfs/NJJDPC\\_Recs\\_to\\_114th\\_Congress.pdf](http://www.promotesafecommunities.org/images/pdfs/NJJDPC_Recs_to_114th_Congress.pdf); OSHER, ET AL., *supra* note 76, at 1, 11; *see also* U.S. DEP’T OF EDUC., YOU GOT THIS: EDUCATIONAL PATHWAYS FOR YOUTH TRANSITIONING FROM JUVENILE JUSTICE FACILITIES 6 (2017), <https://www2.ed.gov/students/prep/juvenile-justice-transition/pathways-transitioning-justice-facilities.pdf>.

108. 34 C.F.R. § 300.323(g) (2017).

109. 20 U.S.C. § 1232g(b)(1)(B) (2012 & Supp. IV 2016); Gary, *supra* note 922, at 242; *see also* 20 U.S.C. § 1232g(b)(1)(B); CATHERINE FEELEY & JESSICA FEIERMAN, JUV. LAW CTR., UNDERSTANDING FERPA: SHARING EDUCATION RECORDS OF CHILDREN IN THE JUVENILE JUSTICE SYSTEM 7–8 (2014), [http://jlc.org/sites/default/files/publication\\_pdfs/Understanding-FERPA-2-2015-FINAL.pdf](http://jlc.org/sites/default/files/publication_pdfs/Understanding-FERPA-2-2015-FINAL.pdf); FED. INTER-AGENCY REENTRY COUNCIL, REENTRY MYTHBUSTER ON STUDENT RECORDS 1 (June 2013), <https://csgjusticecenter.org/wp-content/uploads/2013/06/Student-Records.pdf>.

110. 34 C.F.R. § 99.31(a)(2), 99.34(a) (2017).

sufficient oversight from any body that ensures that the best interests of youth are represented.

*i. Insufficient coordination while youth are in facilities*

A particular youth who has been adjudicated delinquent and sent to a residential placement facility has, in many instances, already spent time in at least one short-term facility before being placed in a long-term secure care facility.<sup>111</sup> That path often includes some combination of pre-hearing detention facilities and short-term facilities while sentencing and placement was being determined. Those short-term facilities, as discussed in Part III Section A, *supra*, often fail to meet the minimum thirty night average required to be eligible for Title I, Part D funding.<sup>112</sup> Those transitions between facilities pose specific concerns because the transfer of academic records between facilities is especially difficult when the facilities are operated by different agencies or entities.<sup>113</sup> This slow record transfer reduces the probability of students with specific academic needs receiving a quality education from the staff at their new facility.

The involvement of multiple agencies means that records about a youth are often slow to arrive, slow to be shared, and slow to be incorporated into the youth's educational program.<sup>114</sup> Upon arrival in a residential placement facility, this problem has two components: first, 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 being given proper support.<sup>115</sup> Second, for the high percentage of youth in the juvenile justice system with disabilities, the slow record transfer makes it difficult to comply with the Individual Education Plans (IEPs) of students with disabilities who enter those facilities.<sup>116</sup> IDEA, the law that governs the provision of education to youth with disabilities, requires that, "A free appropriate public education is available to all children with disabilities" between the ages of three and twenty-one, including "children with disabilities who have been suspended or expelled from school."<sup>117</sup> When educators are not given access to academic records in a timely fashion, they

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111. S. EDUC. FOUND., *supra* note 86, at 20; SKOWYRA & COCOZZA, *supra* note 6, at 28, 51.

112. 34 C.F.R. § 200.90 (2017); SKOWYRA & COCOZZA, *supra* note 6, at 51.

113. S. EDUC. FOUND., *supra* note 866, at 5–6; PETER LEONE & LOIS WEINBERG, CTR. FOR JUV. JUST. REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 17 (2012 ed.), [https://cjjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeedsOfChildrenandYouth\\_May2010.pdf](https://cjjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeedsOfChildrenandYouth_May2010.pdf); U.S. DEPT. OF EDUC. & U.S. DEPT. OF JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 22–23 (2014), <https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf> [hereinafter GUIDING PRINCIPLES FOR HIGH-QUALITY EDUCATION].

114. LEONE & WEINBERG, *supra* note 113, at 17; GUIDING PRINCIPLES FOR HIGH-QUALITY EDUCATION, *supra* note 113, at 22–23.

115. MENDEL, *supra* note 6, at 10.

116. Twomey, *supra* note 809, at 775–76; LEONE & WEINBERG, *supra* note 113, at 17; GUIDING PRINCIPLES FOR HIGH-QUALITY EDUCATION, *supra* note 113, at 22–23.

117. 20 U.S.C. § 1412(a)(1)(A) (2012); *see also* 34 C.F.R. § 300.2(b)(1)(iv) (2017) (including "[s]tate and local juvenile and adult correctional facilities" among the state agencies subject to the provisions of the Individuals with Disabilities Education Act).

are forced to provide instruction without knowing the academic achievement levels, previous course history, or specific needs of students—whether explicitly described in an IEP or derived from reading the various documents contained in a student’s file.<sup>118</sup> That is, simply put, a system that makes effective or targeted instruction all but impossible.

Though Title I, Part D requires states to document how they plan to assess the youth in eligible facilities, states do not provide meaningful data regarding those assessments.<sup>119</sup> Only fifty-four percent of youth who spent ninety or more days a facility were given both an initial test upon entry and a test before exiting the facility.<sup>120</sup> There is no indication that the tests given were generally aligned to the state’s general academic standards.<sup>121</sup> Since the tests are neither meaningfully connected to state academic standards nor consistently administered, it is difficult to determine how they function as assessments or what purpose they serve.

Whether they are provided with that assessment or not, youth who are incorporated into the educational curriculum at a facility face a series of structural problems that often hinder their chance to access a quality education. Facilities often employ teachers with only minimal credentials, and many never receive specialized training on how to approach the varied and complex issues facing the population of youth who are in residential placement facilities.<sup>122</sup> In addition, though juvenile facilities are required to provide twenty hours of education to qualify for federal funding,<sup>123</sup> there are often other considerations that reduce the number of hours that youth spend in the classroom.<sup>124</sup> Even when youth are in class, educators are often absent, classrooms lack the resources necessary to provide differentiated and individualized instruction, and class selections are limited for students attempting to pursue education beyond a high school diploma.<sup>125</sup> Those features of correctional education are especially harmful for the significant percentage of incarcerated youth with disabilities, who often need additional supports that the facility educators fail to provide.<sup>126</sup>

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118. Mendel, *supra* note 6, at 10.

119. 20 U.S.C. § 6434(c)(1) (2012 & Supp. IV 2016) (requiring states to submit plans regarding how they plan to “assess the educational needs of the children to be served under this subpart”).

120. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 122, at 1:1; S. EDUC. FOUND., *supra* note 86, at 16–17.

121. See LOCKED OUT, *supra* note 1022, at 5–6 (recommending that states adjust their curriculum and assessments to align to the “college- and career-ready standards” being adopted by the majority of states). In Maryland, when the state education agency was tasked with reforming the education in detention centers and treatment facilities, aligning content to state standards was considered one of the first priorities. See Green, *supra* note 100.

122. Jennifer A.L. Sheldon-Sherman, *The Idea of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J. L. & EDUC. 227, 236 (2013).

123. 20 U.S.C. § 6432 (2012 & Supp. IV 2016).

124. Sheldon-Sherman, *supra* note 122, at 243 (including considerations such as security issues that cause lockdowns, students in solitary confinement or administrative segregation being unable to attend class, and teachers being absent); Soler et al., *supra* note 81, at 508.

125. OFF. OF CIV. RTS., U.S. DEP’T. OF EDUC., PROTECTING THE RIGHTS OF STUDENTS IN THE JUVENILE JUSTICE SYSTEM 2 (Dec. 2, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-juvenile-justice.pdf>.

126. LEONE & WEINBERG, *supra* note 113, at 13, 16–17.

*ii. Insufficient coordination during the transition out of facilities*

As students exit juvenile facilities, they face a new set of challenges. Youth are sometimes given some guidance about their path upon re-entry, but the time immediately after release is often filled with uncertainty.<sup>127</sup> There are two major factors that create the insufficiency of oversight: in most states, there is no one who is responsible or accountable for the oversight of re-entering youth, and across all states, there are significant institutional incentives for schools to make the process of re-enrolling difficult for those youth.

*a. No one is responsible*

As a condition of Title I, Part D funding, states must submit a plan outlining how they intend to use the funding they receive.<sup>128</sup> There is not, however, a requirement that the state follow through on that plan.<sup>129</sup> One of the requirements is that states must outline a plan for ensuring cooperation between residential facilities and school districts.<sup>130</sup> Though most state plans indicate that they ensure coordination and encourage information sharing, only eleven states have dedicated education transition liaisons appointed to facilitate the transition, while the remaining states have significantly less clear lines of authority for ensuring that students re-enroll.<sup>131</sup> A review of state plans submitted to ED in April 2017 found that many state plans were vague or non-committal about their plans to create transition opportunities for youth in juvenile facilities.<sup>132</sup> These plans, the first submitted under the new ESSA regime, indicate that state agencies continue to place little emphasis on transition planning.<sup>133</sup>

More than a third of states have little need to create specific transition plans, because, by law or practice, youth leaving secure care facilities are automatically enrolled in alternative schools rather than being given the opportunity to re-enter traditional schools.<sup>134</sup> Research indicates that students in alternative schools have

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127. TITLE I, PART D ANNUAL PERFORMANCE OVERVIEW 2012–13, *supra* note 12, at 1:2.

128. 20 U.S.C. § 6434.

129. 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, 597 (2009) (noting that “in Philadelphia, 90 percent of students who had a juvenile delinquency placement during high school ultimately dropped out of school”).

130. 20 U.S.C. § 6434 (requiring the state to describe “how the State agency will encourage correctional facilities receiving . . . to coordinate with local educational agencies or alternative education programs attended by incarcerated children and youth prior to and after their incarceration” to ensure records are transferred and to facilitate the transition between those programs).

131. LOCKED OUT, *supra* note 102, at 11.

132. Hailly Korman, *Will Educators Lead Incarceration Reform?*, BELLWETHER EDUCATION PARTNERS: AHEAD OF THE HEARD (May 8, 2017), <https://aheadoftheheard.org/will-educators-lead-incarceration-reform/> (“Of the plans submitted so far, most describe goals and strategies for transition plans that are cursory and vague (or both). One describes a committee that is planning to develop a plan . . . Almost all describe a lack of good assessment tools to properly track achievement.”).

133. *Id.*

134. LOCKED OUT, *supra* note 102, at 11.

lower academic achievement results and higher drop-out rates.<sup>135</sup> While this evidence is not specific to youth returning from juvenile facilities, the differential rates of academic achievement indicate that this practice is harmful to the educational prospects of those youth. During the public comment period on regulations for implementing the school accountability provisions of ESSA, a letter jointly submitted by many civil rights organizations and advocates for justice-involved youth suggested new federal regulations to end this practice.<sup>136</sup>

b. Schools have (often unchecked) institutional incentives that weigh against enrolling justice-involved youth

Once students begin to interact with the public school system, they run into new problems that stem from a lack of oversight. Even when records are transferred quickly and completely, youth often face two forms of skepticism from school district officials, school administrators, or front desk staff when they arrive at a school and attempt to enroll. The most common practice involves a variety of methods intended to “counsel out” students who are attempting to enroll or re-enroll in a traditional school.<sup>137</sup> This practice is generally intended to either address safety concerns associated with a student returning from a residential placement facility<sup>138</sup> or to ensure that a student with low academic achievement scores does not enter and lower the school’s testing averages.<sup>139</sup> In both cases, the counseling

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135. Jo Ann Beken, et al., *At-Risk Students at Traditional and Academic Alternative School Settings: Differences in Math and English Performance Indicators*, 3 FLA. J. EDUC. ADMIN. & POL’Y 49, 56 (2009), <http://files.eric.ed.gov/fulltext/EJ903005.pdf>; see Klehr, *supra* note 1299, at 595–96; BETSY BROWN RUZZI & JACQUELINE KRAEMER, NAT’L CTR. ON EDUC. AND THE ECON., *ACADEMIC PROGRAMS IN ALTERNATIVE EDUCATION: AN OVERVIEW* 4–6 (Apr. 2006), [https://www.doleta.gov/youth\\_services/pdf/ae\\_overview\\_text.pdf](https://www.doleta.gov/youth_services/pdf/ae_overview_text.pdf). Brown Ruzzi and Kraemer’s literature review discusses the difference between three types of alternative educational programs: (1) those that are voluntary and allow students to take classes in a setting that might be more conducive to learning, (2) those that are not voluntary and are usually reserved for students with demonstrated behavior problems, and (3) those that are therapeutic and aim to support students with social and emotional problems that are creating barriers to academic success. *Id.* at 4–8. The students returning from juvenile facilities are generally being placed in the second type, which do not produce quality academic results. *Id.* at 28–33.

136. Robert F. Kennedy Juv. Just. Collaborative, Comment Letter on Proposed Rule Regarding Elementary and Secondary Education Act of 1965, As Amended By the Every Student Succeeds Act: Accountability and State Plans 15 (Aug. 1, 2016), <https://www.regulations.gov/document?D=ED-2016-OESE-0032-19871>.

137. See, e.g., 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*, N.J. INST. SOC. JUST. 4 (2003), <http://www.njisj.org/publications> (search for “Giles”).

138. Feerman, et al., *supra* note 49, at 1116–17; see also Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1254–55 (2014).

139. 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, 1929 (2008) (“NCLB creates the risk that schools will . . . compet[e] to educate high-performing students while simultaneously trying to push out low-performing students, who would otherwise drag down schools’ reported performance.”).

often involves encouraging the re-enrolling student to instead go to an alternative school or to a program where the student can earn a GED.<sup>140</sup>

The second form of skepticism greets students who are not counseled out of schools and enroll without incident. Those students occasionally face concerns about whether the academic work they did in the facility is sufficiently rigorous, which leads to schools refusing to grant credits based on the work done in those facilities.<sup>141</sup> This discourages students and forces them to re-take credits that they believe they have already completed, which does not improve the likelihood of them completing high school.<sup>142</sup>

Schools engage in both forms of counseling based, in part, on the accountability requirements set out in ESEA's amendments and the state laws and local policies that flow from those federal requirements. High schools in particular must focus on both state test results in certain subjects and graduation rates, among other metrics.<sup>143</sup> Schools faced with the prospect of a student enrolling from a juvenile facility must grapple with concerns about the student's likelihood of graduating. That concern leads some administrators and staff members to consider counseling those students out.<sup>144</sup>

For a subpopulation of students who are, on average, multiple years behind in school,<sup>145</sup> these fumbled handoffs between agencies and periods of time when no one is accountable for ensuring their success only create more uncertainty and discomfort. The litany of challenges identified above points toward a system with misaligned incentives that fails justice-impacted youth without providing the opportunities necessary to promote rehabilitation.

#### IV. PROPOSED SOLUTIONS

The inconsistency between states and devolution of oversight to local levels described above are features, not bugs, of the broader American educational system. With the passage of ESSA, Congress took steps to remove the federal government from the role of dictating how states should operate in an effort to allow local actors to more effectively craft local solutions.<sup>146</sup> However, the

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140. Feierman, et al., *supra* note 49, at 1122, 1124.

141. Gary, *supra* note 922, at 242.

142. Feierman, et al., *supra* note 49, at 1123; Soler et al., *supra* note 81, at 523–24 (citing MARSHA WEISSMAN ET AL., THE RIGHT TO EDUCATION IN THE JUVENILE AND CRIMINAL JUSTICE SYSTEMS IN THE UNITED STATES 8–12 (2008) (For those youth enrolled in school, incarceration represents a break in their education continuity. Although “[t]here is little information about the quality of education provided in juvenile justice facilities,” information from litigation against juvenile justice agencies and reports from non-profit organizations document the poor quality of education in many institutions. Facilities may make it hard for youth to receive credit for their work while incarcerated, failing to transfer records to youths’ home school systems or forcing them to complete remedial work rather than progress in their coursework toward a high school diploma.”).

143. Carroll, *supra* note 139139, at 1945.

144. *Id.*

145. Feierman, et al., *supra* note 499, at 1123.

146. See Derek Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 101, 127–29 (2017); see also Grace Tatter, *Sen. Lamar Alexander on the Nation’s New Education Law, and How It Could Shape Tennessee Schools*, CHALKBEAT (Apr. 25, 2016), <https://www.chalkbeat.com/story/2016/04/25/tennessee-education-law-alexander/>.

problems confronting justice-impacted youth derive from serious communication and accountability breakdowns between various local and state actors. The gaps between those entities ultimately lead to additional costs as poorly served youth return to the juvenile or criminal justice systems rather than academic settings or job opportunities.<sup>147</sup> When states are spending almost \$90,000 annually per juvenile offender and are seeing recidivism rates that top fifty-five percent while only nine percent receive a GED or diploma, there are both fiscal and moral reasons to prioritize improving educational outcomes of justice-involved youth.<sup>148</sup> Evidence indicates that providing programming to juveniles while they are in facilities,<sup>149</sup> and ensuring that they are given sufficient support before and during the transition out of the facility,<sup>150</sup> can help to reduce that rate of recidivism and help support the rehabilitative goal of the juvenile justice system.

This section considers local and state solutions, but ultimately determines that federal incentives and requirements in ESEA must change for oversight of juvenile facilities and youth in transition to be effective. This section proposes four changes to the ESEA in the next reauthorization: (1) change the types of facilities that can receive federal funding; (2) require states to designate someone with responsibility for the transition process; (3) require the collection of specific data on juvenile facilities; and (4) outlaw policies that send students directly to alternative schools without an individual determination of the proper placement.

### A. State and Local Solutions

States have long-standing traditions of running educational systems that are uniquely structured to meet the needs of their states, and state and local funds make up approximately ninety percent of total government funding on education nation-

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[chalkbeat.org/posts/tn/2016/04/25/sen-lamar-alexander-on-the-nations-new-education-law-and-how-it-could-shape-tennessee-schools/](http://chalkbeat.org/posts/tn/2016/04/25/sen-lamar-alexander-on-the-nations-new-education-law-and-how-it-could-shape-tennessee-schools/).

147. S. GONSOLIN & N.W. READ, NAT'L EVALUATION AND TECH. ASSISTANCE CTR. FOR THE EDUC. OF CHILD. AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS THROUGH INTERAGENCY COMMUNICATION AND COLLABORATION 1 (2011), [http://www.neglected-delinquent.org/sites/default/files/docs/NDTAC\\_PracticeGuide\\_InteragencyCommunication\\_2011.pdf](http://www.neglected-delinquent.org/sites/default/files/docs/NDTAC_PracticeGuide_InteragencyCommunication_2011.pdf).

148. JUSTICE POL'Y INST., *supra* note 7, at 4; S. EDUC. FOUND., *supra* note 86, at 15–16; MENDEL, *supra* note 6, at 10–11.

149. Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Young Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 640 (1999) (finding that programs for juvenile offenders can, in some circumstances, reduce recidivism rates by twenty to twenty-five percent through academic skill development and counseling). In addition, some states have found successful models, though most suffered during the recession. Missouri, which moved to a system based on smaller facilities in the early 2000s, found that only eight percent of offenders were reincarcerated within three years, a marked contrast to the fifty to seventy percent rate of recidivism cited elsewhere. Soler et al., *supra* note 81, at 523–24.

150. Michael Bullis et al., *The Importance of Getting Started Right: Further Examination of the Facility-to-Community Transition of Formerly Incarcerated Youth*, 38 J. SPECIAL EDUC. 80, 89–91 (2004) (finding that youth are significantly more likely to be engaged in school or work if they have received support from community agencies and more likely to be successful if they received in-facility educational or job-training services).



wide.<sup>151</sup> The data above makes clear that this system does not properly support the interests of justice-impacted youth. The overlapping processes involving multiple agencies and officials result in poorly designed policies for the adjudication, incarceration, transition, and education of justice-impacted youth.<sup>152</sup> This situation creates a clear set of problems: even if each of the officials involved is working with the best interests of incarcerated juveniles in mind, the sheer number of individuals and agencies involved makes it difficult to ensure that justice-involved youth receive the services and support they need.<sup>153</sup>

There are some state-level efforts to address systemic issues with juvenile facilities that draw support from a broad range of interest groups and politicians. Some states have policies in place that require the home district to keep academic records up-to-date for when a student returns.<sup>154</sup> Others require the district to convene a transition team that develops a plan for re-enrollment.<sup>155</sup> For other state officials, the American Legislative Exchange Council (ALEC), a conservative think tank, produced model legislation that created a program for tracking “the number of juveniles the county avoids sending to the state for secure confinement, as well as the state expenditures saved as a result.”<sup>156</sup> This model program would align incentives for counties by returning some percentage of the savings to “community-based juvenile justice programs” and ultimately help states reduce costs on juvenile incarceration.<sup>157</sup> Other solutions focus on diversion programs for first-time and non-violent offenders<sup>158</sup> and on breaking up the “school-to-prison

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151. *The Federal Role in Education*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (last modified July 21, 2016).

152. See ELIZABETH SEIGLE, ET. AL., COUNCIL OF STATE GOV’TS JUST. CTR., CORE PRINCIPLES FOR REDUCING RECIDIVISM AND IMPROVING OTHER OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM 3 (2014), <https://csgjusticecenter.org/wp-content/uploads/2014/07/Core-Principles-for-Reducing-Recidivism-and-Improving-Other-Outcomes-for-Youth-in-the-Juvenile-Justice-System.pdf> (“Further complicating these challenges, recidivism reduction efforts are rarely coordinated across government agencies, local juvenile justice systems, or multiple service systems. For example, up to two-thirds of all youth in the juvenile justice system have had contact with the child-welfare system. Yet a probation officer might require a youth to participate in multiple service programs, while that same youth’s child welfare caseworker might provide services that involve only the youth’s family members. As a consequence, the two systems can unintentionally undermine each other’s efforts, with the result often being higher recidivism rates for youth involved in both systems rather than the systems working together to achieve better outcomes than one system could have accomplished alone.”).

153. See NAT’L EVALUATION & TECHNICAL ASSISTANCE CTR. FOR THE EDUC. OF CHILD. AND YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT-RISK, IMPROVING EDUCATIONAL OUTCOMES FOR YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS THROUGH INTERAGENCY COMMUNICATION AND COLLABORATION 1–3 (2011), <http://files.eric.ed.gov/fulltext/ED533050.pdf>; PETER LEONE ET AL., COLLABORATION IN THE JUVENILE JUSTICE SYSTEM AND YOUTH SERVING AGENCIES 22–25 (2002), <http://files.eric.ed.gov/fulltext/ED471210.pdf>.

154. Feerman, et al., *supra* note 49, at 1127–28 (citing Florida, West Virginia, and Virginia as examples of states with that requirement).

155. Feerman, et al., *supra* note 49, at 1128–29 (discussing laws in Virginia and Maine).

156. Jeanette Moll, *Juvenile Justice: An Often Overlooked Opportunity for Saving Taxpayer Dollars and Protecting Communities*, AM. LEGAL EXCHANGE COUNCIL (Feb. 3, 2012), <https://www.alec.org/article/juvenile-justice-an-often-overlooked-opportunity-for-saving-taxpayer-dollars-and-protecting-communities/>.

157. *Id.*

158. See generally *Juvenile Justice Reform and Reinvestment Initiative*, GEORGETOWN UNIV. CTR. FOR JUV. JUST. REFORM, <http://cjjr.georgetown.edu/our-work/jjsip/> (last visited Apr. 15, 2018).

pipeline” that escalates many school-based altercations and offenses to juvenile court.<sup>159</sup>

While these efforts to resolve broader concerns with the juvenile justice system likely have some impact on the provision of education, they also reveal the same set of problems: short-term facilities are expected to provide educational programming without the benefit of a full academic record to youth who are likely to leave quickly. In the realm of educational programming, those are significant roadblocks.

Even where states’ political actors pursue carefully considered reforms to the systems of providing education within juvenile facilities, those reforms are difficult to sustain. In Maryland, a reform effort beginning in 2003 gave control of juvenile facility education programs to the Maryland State Department of Education.<sup>160</sup> That transition aligned the standards in juvenile facilities to those in the rest of the state, ensured that youth had access to internet-connected computers to do online coursework for credit recovery and other computer-based learning, and lengthened the school day to six hours in every facility.<sup>161</sup> The facilities still face significant challenges, however.<sup>162</sup> Although the transition had some initial success, there appears to be little interest at the state legislature for further steps that would resolve the continued challenges.<sup>163</sup> For other states in the midst of pursuing reform efforts, the example of Maryland’s decade-long struggle provides reason to believe that these efforts may require significant investments of time and money and still face significant hurdles down the road.

The same concern regarding state-level sustainability applies to a prospective argument, advanced persuasively by Katherine Twomey, that states’ education clauses could be used to create a judicially mandated set of reforms.<sup>164</sup> However, even if a court read the state’s education clause as requiring a higher quality education for youth in facilities, the legislature would still be required to appropriate funding and incorporate the Court’s requirements into future efforts.<sup>165</sup> Ultimately, Twomey’s argument, while widely cited in academic literature, has not yet been cited in court filings, indicating that advocates have not adopted this strategy as a way to press for better education in facilities.<sup>166</sup> Without state level traction in legislatures or courts, a new approach aimed at utilizing the power of the federal government may help energize further discussions about the best ways to improve the quality of education for justice-involved youth.

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159. GEORGETOWN LAW HUMAN RIGHTS INSTITUTE, *supra* note 92, at 62–65; *see generally* Garrett Lyons, *Zero-Tolerance for Broken Discipline Systems: How Congress Can Change the Way Public School Districts Discipline Children* (Apr. 21, 2017) (unpublished manuscript) (on file with the author).

160. Green, *supra* note 100.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See generally* Twomey, *supra* note 79.

165. *Id.* at 772. It is worth noting that after *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996), in which the Connecticut Supreme Court mandated a desegregation plan for Hartford schools, there have been very few copycat cases—indicating that even successful litigation strategies are hard to duplicate in other state contexts.

166. Twomey, *supra* note 79. Neither WestLaw nor Lexis search tools show any opinions or court filings that cite this note.

### *B. Elementary and Secondary Education Act (ESEA) Solutions*

ED's role in ensuring accountability for youth in juvenile facilities and those transitioning back to school has expanded in the 1994 (Improving America's School Act (IASA)), 2001 (NCLB), and 2015 (ESSA) reauthorizations of ESEA. The ESSA reauthorization only includes funding authorizations through fiscal year 2020,<sup>167</sup> giving states and federal officials a set date to determine whether provisions should be tweaked or reconsidered. As laid out above, the system of overseeing education in juvenile facilities is broken and should be restructured in the next reauthorization. More specifically, to resolve the inconsistency and insufficiency problems, there are four solutions worth pursuing: (i) changing the types of juvenile facilities that can receive Title I, Part D funding to incorporate those mainly for short-term incarceration; (ii) creating a requirement that each state designate one individual or office to oversee the transition process for youth exiting facilities; (iii) codifying the data collection scheme for Title I, Part D funded programs; and (iv) prohibiting state laws or district policies that automatically enroll youth in transition in alternative schools.

#### 1. Average length of residency

The next ESEA re-authorization could systematically address problems with the continuum of education in all juvenile facilities, both those that are long-term secure-care facilities and those short-term detention facilities that do not currently receive Title I, Part D funding. Removing restrictions on the types of facilities that are eligible to receive Title I, Part D funding would allow funding and oversight to cover facilities that house students for shorter periods of time. Though the Obama-era accountability regulations have been invalidated, the regulations that existed at 34 C.F.R. § 200.90(b)(2) prior to the passage of ESSA defined "institution for delinquent children and youth" as a facility that, among other requirements, served children with "an average length of stay in the institution of at least 30 days."<sup>168</sup> This excludes both local and state-run facilities that do not meet the minimum average length of stay, which dis-incentivizes states to pursue plans intended to reduce incarceration periods and ensures that ED cannot collect data or exercise other forms of oversight over those programs.<sup>169</sup> To ensure that student needs are being met at all stages of their process through the juvenile correctional system, not just once they have been adjudicated delinquent and placed in a long-term facility, ED could remove this 30-day average requirement and allow both funding and oversight to cover a broader range of facilities.

The scope of this change's potential impact would be limited by whether states choose to incorporate those facilities in their applications. The youth incarcerated in long-term secure care facilities are a much more stable population of individuals than those who have short stays in detention facilities, and programs aimed at

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167. REBECCA R. SKINNER & JEFFREY J. KUENZI, CONG. RES. SERV., R44297, REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUC. ACT: HIGHLIGHTS OF THE EVERY STUDENT SUCCEEDS ACT (2015).

168. 34 C.F.R. § 200.90(b)(2) (2017).

169. Robert F. Kennedy Juv. Just. Collaborative, *supra* note 1366, at 13, 16–17.

providing education to the two populations are by nature quite different. By way of example, in Mississippi, the average length of stay in a detention facility is less than five days, making it nearly impossible to provide any sort of normal instruction to those youth.<sup>170</sup> Instead, the state has determined that “it is worthwhile to have a short-term curriculum designed to address major/core skill areas aligned to the sponsoring school curriculum.”<sup>171</sup> Providing federal oversight of, or even collecting data on, the educational programs provided in short-term detention facilities might prove to involve different challenges and necessitate a more significant shift in the Title I, Part D program’s orientation.

Though the challenges to the program’s core focus could potentially cause difficulty in providing effective oversight, the opportunity to provide at least some federal funding to those programs could both help improve the level of education provided and allow ED to better support and oversee educational programming provided at various stages of the juvenile justice system.

This change is limited by states having the choice of which programs they decide to fund through their Part D funding.<sup>172</sup> While some states have, or are creating, collaborative data-sharing relationships between state and local agencies,<sup>173</sup> that is not true nationwide.<sup>174</sup> This proposal, then, likely has a limited impact in terms of the number of states that are likely to make the choice to include state and local facilities in the program. It also, by its very nature, proposes to make more facilities Title I, Part D eligible, which creates additional concerns about diluting the amount of money available to each program.

These concerns are outweighed by the program’s limited scope and significant potential. Since this program would allow, but not require, states to include a wider range of facilities in their Title I, Part D state plan, it is unlikely that most or all states would choose to incorporate many new facilities into their current plans. However, regardless of the number of states that choose to include their short-term facilities, if even a single state chooses to include those facilities, it would provide ED with an entirely new avenue into understanding the quality of educational programming provided at various stages of the juvenile justice system. Giving ED a better understanding of the continuum of services within systems of facilities, regardless of the length of time that youth spend in each facility, can help inform both state and federal policy moving forward.

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170. MISS. DEP’T OF EDUC., EDUCATING JUVENILES IN DETENTION CENTERS 2 (2016), <http://www.mde.k12.ms.us/docs/dropout-prevention-and-compulsory-school-attendance-library/educating-juveniles-in-detention-revised-2016.pdf?sfvrsn=2>.

171. *Id.*

172. COUNCIL OF STATE GOV’TS JUST. CTR., THE SECOND CHANCE ACT: JUVENILE RE-ENTRY 1 (Jul. 18, 2016), [https://csgjusticecenter.org/wp-content/uploads/2016/07/6.19.16\\_SCA\\_Juvenile\\_Reentry.pdf](https://csgjusticecenter.org/wp-content/uploads/2016/07/6.19.16_SCA_Juvenile_Reentry.pdf) (discussing the increasing shift away from placing youth in centralized state facilities and toward a broader range of local, private, and smaller facilities).

173. S. EDUC. FOUND., *supra* note 866, at 20.

174. Cheryl Graham Watkins, *A Study of the Transition of Youth from a Detention Center Education Program to a Standard School Education Program in Selected Southeastern States* 65 (Nov. 16, 2007) (Unpublished Ed.D. thesis, Virginia Polytechnic Institute and State University (“Virginia Tech”)), <https://techworks.lib.vt.edu/handle/10919/29898>.

## 2. Ensure There is a Single Office or Individual Accountable for the Transition of Students from Secure-Care and Detention Facilities to Schools

As noted in Part II Section B, the elements of Title I, Part D that relate to transitioning students from facilities to schools have been expanded significantly in recent years. These provisions have even come with increased funding in the form of the requirement that fifteen to thirty percent of Part D funding be reserved for transition services.<sup>175</sup> That funding change has not fixed the basic problem: there is a murky gray area of accountability when students transition from being supervised in either a state-run secure-care facility or a local detention facility to being overseen by a state educational agency. Adding an office or individual within the state educational agency with responsibility for overseeing that transition and connecting the youth to a school district could potentially clear up some of the murkiness.<sup>176</sup> That office could be tasked with the facilitating of records transfers, helping youth choose a proper educational program, and ensuring that faculty at the youth's eventual receiving school are given any transition planning documents completed during the youth's time in a facility.<sup>177</sup>

Some states have already established this position or created a structure for ensuring a state agency official has oversight over the transition process.<sup>178</sup> Others, however, may find that creating new bureaucracy could potentially add complexity rather than clarifying lines of accountability. However, there are too many situations involving justice-impacted youth where no one has direct responsibility, and a clear delineation of authority and accountability would present a strong opportunity to resolve some of that confusion.<sup>179</sup>

This approach is intended to remedy the problem inherent in the lack of oversight in the transition period, but does so in a way that avoids shifting the burden entirely to the LEAs. One approach, adopted in 2014 by California, states that “a pupil who has had contact with the juvenile justice system shall be immediately enrolled in a public school,” which creates a burden on schools to ensure that justice-impacted youth are enrolled in schools.<sup>180</sup> This policy would create massive additional administrative problems for LEAs, especially those with limited resources. An alternate structure might involve creating a transition coordinator position at the LEA level, whereby each LEA would have a designated person for overseeing these transitions.<sup>181</sup> However, many districts do not have any students currently enrolled who previously spent time in a secure-care facility, and requiring those districts to have a point person in case that changes is an overly burdensome and likely unnecessary waste of resources. Requiring the identification of an office or individual at the SEA level with that responsibility,

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175. 20 U.S.C. § 1418 (2012 & Supp. IV 2016).

176. LOCKED OUT, *supra* note 1022, at 11–12.

177. *Id.* at 12.

178. *Id.* at 11.

179. *Id.* at 11–12.

180. CAL. EDUC. CODE § 48645.5(c) (2017).

181. See Jesse Hahnel & Caroline Van Zile, *The Other Achievement Gap: Court-Dependent Youth and Educational Advocacy*, 41 J.L. & EDUC. 435, 440 (2012) (advocating for a new district-level foster youth education liaison position).

then, strikes a balance of ensuring that the transition period has some accountability and oversight from a state actor without overly burdening LEAs.

### 3. Title I, Part D Data Program

The first proposal considered here would build a strong baseline of data that could better inform future policy decisions. The best approach would place a statutorily required data collection program in Title I, Part D, which would provide information on the youth who are involved with the justice system both during and after their contact with that system.

Currently, Title I, Part D requires states to explain, in detail, their plans to provide access to high school diplomas and credit-bearing coursework, help students re-enroll in school quickly, and meet the individual needs of each student. As noted in the introduction, the reporting on how that money is used is inconsistent and inadequate. A statutory requirement that the data be reported in consistent fashion would force states to develop tools by which they could effectively report the number of students receiving high school course credit, the number returning to local education agencies, and the number who graduate or receive a GED, among other categories of data.<sup>182</sup>

A robust regime of data collection serves dual purposes. In the shorter term, it provides an accurate depiction of the facts on the ground, and allows for a diverse set of advocates to use specific information in public information campaigns and meetings with policymakers. As the recent debates over ESSA accountability indicated, there are numerous civil rights organizations deeply committed to data transparency in large part because that public data gave them insights into the true scope of the achievement gaps between white students and many students of color.<sup>183</sup>

On a longer time horizon, a statutorily required data collection regime under the next reauthorization could set the stage for a much broader set of reforms in the future that included more significant data about the most critical problems. There are, for example, no easy answers on whom to hold accountable for ensuring that youth are being given an education, including the accommodations they are owed under IDEA, when they are in a short-term detention facility awaiting

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182. *Title I, Part D Data Context and Methodology*, *supra* note 699. The list of data points that states were asked to submit as part of the Consolidated State Plan in 2012–13 includes: the number of students who (1) earned high school course credit, (2) enrolled in a GED program, (3) enrolled in a local district school, (4) were accepted or enrolled in post-secondary education, (5) enrolled in job training courses/programs, (6) obtained employment, (7) obtained a high school diploma, (8) earned a GED. It also asked facilities to report, for youth who were incarcerated for longer than 90 days, the results of reading and math tests administered when the youth entered and exited the facility (commonly referred to as “pre-” and “post-” tests). Those tests are chosen by the facilities, which makes it difficult to make comparisons with that data. *Id.* Beginning in 2012–13, states were asked to submit information on the number of youth served in Title I, Part D facilities with disabilities, the number with limited English proficiency, and the number receiving transition services. *Id.*

183. See Education Trust, *Business Civil Rights Coalition Statement on the Every Student Succeeds Act of 2015* (Dec. 1, 2015), [https://edtrust.org/press\\_release/business-civil-rights-coalition-statement-on-the-every-student-succeeds-act-of-2015](https://edtrust.org/press_release/business-civil-rights-coalition-statement-on-the-every-student-succeeds-act-of-2015); see generally *Every Student Succeeds Act (ESSA) Guide for Advocates*, LEADERSHIP CONF. EDUC. FUND 1, 10–11 (Ellen Buchman et al. eds., 2d ed. Dec. 2016).

adjudication.<sup>184</sup> There are also complicated questions of records transfer that arise when a justice-involved youth exits a facility and moves to a different state. A robust data collection system could help policymakers determine if these issues are significant or minor, and how to address them within a broader statutory scheme that is informed by data analysis.

A new data collection regime provides for rigorous data collection without creating negative consequences. Another data collection proposal, proposed by the NAACP Legal Defense Fund, among others, would involve creating a “justice-impacted” subgroup that would be included in all accountability data collections across schools.<sup>185</sup> That proposal would implicate data collection across all parts of the education system and require all schools to disaggregate data for those youth who had previously spent time in a juvenile facility. In the context of school accountability data, the term “subgroup” is used to pull out specific students meeting a set of criteria; since the NCLB era, ESEA has required the disaggregation of data by subgroup so that schools, LEAs, and SEAs were reporting test scores and achievement gaps between various racial, ethnic, and socioeconomic groups.<sup>186</sup> Though this proposal would provide information on how justice-involved youth were doing compared to their peers at various stages in their educational careers, it would be monstrously difficult to implement nationwide. In addition, this would likely create a new incentive for school administrators to counsel out justice-impacted youth to ensure that the student’s data does not impact both on the school’s overall record and also the much smaller subgroup, whose data is collected and published as a separate category on reports to district leaders and outside advocates.

The collection of increased amounts of data is not likely to independently solve any of the problems identified above. However, incomplete and inaccurate data stymie attempts to understand or address the juvenile justice system’s educational failings. A report from the Southern Education Foundation, referenced heavily herein, included an appendix entitled “A Void and Confusion of Data in Juvenile Justice Systems” that ended with a straightforward statement, “the students and the juvenile justice schools they attend operate essentially as off-the-book enterprises where standard public reporting and common rubrics of educational assessment do not apply.”<sup>187</sup> Mandating data collection would help bring those programs onto the books. However, though shining a spotlight on the problems faced by youth in facilities and in transition is critical to changing the structure, the creation of an additional subgroup does little to aid that goal and creates strong incentives for schools to continue the practice of counseling students out.

In addition, this proposal would give policymakers a clearer view of the disparities in educational quality and life outcomes for youth from different types of programs. That data could inform research and future policy-making about how to re-orient incentives and spend limited resources. This program is important to

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184. See S. EDUC. FOUND., *supra* note 86, at 19–20; MISS. DEP’T OF EDUC., *supra* note 170, at 2.

185. NAACP LEGAL DEF. & EDUC. FUND, *Comment Letter on Proposed Rule Regarding Elementary and Secondary Education Act of 1965, As Amended By The Every Student Succeeds Act: Accountability and State Plans 7* (Aug. 1, 2016), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-OESE-0032-19875&attachmentNumber=1&contentType=pdf>.

186. Black, *supra* note 1466, at 13.

187. S. EDUC. FOUND., *supra* note 86, at 39.

establish so that data collection is routinized, and any effort to extend Title I, Part D to programs with shorter average lengths of stay would rely heavily on the required data collection efforts to establish whether those programs are providing a sufficient education. A more routinized data collection also provides an assurance that any future decisions, whether they restrict local decision-making or shift autonomy back to local authorities, are based on more concrete understandings of the problem and the ways in which different jurisdictions are approaching educating youth in the juvenile facilities.

#### 4. Ensuring Students Are Not Automatically Assigned to Alternative School

Rather than pursuing data collection or additional subgroups, policymakers and advocates could choose to focus on re-structuring incentives and accountability for school districts tasked with re-integrating justice-impacted youth back into school. The most significant reform aimed at school districts would be to require states receiving federal funding to ban the practice of sending students directly to alternative school when they leave juvenile facilities.

State laws, school district policies, and informal practices push re-entering youth to alternative schools, which report lower rates of student achievement and are often characterized as unsafe and unserious institutions of learning.<sup>188</sup> There may be legitimate reasons for determining that some youth would be better suited in a disciplinary alternative school, and those reasons should be considered as part of the transition plan for that student.<sup>189</sup> However, blanket policies that send all justice-involved youth to alternative schools without any form of individual determination undermines the effectiveness of transition planning by limiting the youth's options and decreasing the likelihood that the youth will be engaged in an effective classroom quickly after transitioning out.<sup>190</sup> Some states lean heavily toward letting students re-enroll in traditional schools, providing evidence that blanket alternative school policies are not required to ensure student safety. New Jersey requires that students be issued a written rationale from the school if they are denied entry, and Pennsylvania requires an informal hearing before students can be transferred to alternative schools.<sup>191</sup>

Title I, Part D already includes prohibitions on the types of facilities that can receive funding, and Congress could add a similar requirement that states must prohibit blanket policies that place all re-entering students in alternative school

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188. Klehr, *supra* note 129, at 595–96.

189. OSHER ET AL., *supra* note 76, at App'x 6; *see also, e.g.*, Emmanuel Felton, *9 in 10 Calif. Teachers Say They Need More Training on New Discipline Methods*, EDUCATION WEEK: TEACHER BEAT (May 10, 2017 12:13 PM), [http://blogs.edweek.org/edweek/teacherbeat/2017/05/california\\_teachers\\_discipline\\_survey.html](http://blogs.edweek.org/edweek/teacherbeat/2017/05/california_teachers_discipline_survey.html) (“Educators . . . say they aren’t getting the support they need to manage their classrooms without employing exclusionary discipline,” a concern that is often heightened regarding students who have previously spent time in secure facilities).

190. OSHER ET AL., *supra* note 76, at 2 (noting the importance of having youth “engaged within 6 months after release” because of the strong correlation between receiving appropriate services in that window and remaining engaged in society one year after release).

191. Feierman, et al., *supra* note 49, at 1120.



before receiving Title I, Part D funds.<sup>192</sup> A proposal to prohibit those policies would also build on the precedent set by the four core mandates laid out by OJJDP to receive funding.<sup>193</sup>

This is a strong example of when federal intervention is necessary because the needs of young people are misaligned with the incentives for LEAs and the elected school boards that oversee the LEAs. Schools have multiple reasons to avoid admitting students who have previously caused trouble, had poor academic records, or—even if neither of those descriptors apply—have been exposed to low-quality education in a juvenile facility and would require remediation.<sup>194</sup> Automatic enrollment in alternative school seems to have little positive benefit for the re-entering youth. It does, however, provide the district with a form of safe harbor by giving administrators a chance to determine what to do with a returning student.<sup>195</sup> That delay might allow records to be transferred or plans to be created in a way that is intended to serve the student. It comes at a critical time for students, as some research indicates the importance of positive engagement within a short time frame after a student's release.<sup>196</sup>

The balance of those considerations should tilt against blanket policies that do not effectively serve students in the critical moments of their transition. The lack of state action to move toward individualized placement determinations indicates that the federal government should, as it has done with the OJJDP funding requirements, set boundaries that require states to conduct an individualized process in order to receive federal funding. Student placement decisions should not assume that the rehabilitative opportunities provided in juvenile facilities have failed before making an individualized determination, and Congress should use its spending power to prohibit blanket policies regarding assignment to alternative schools.

This proposal also strikes a balance between those national concerns and local and state policies. There are some advocates who have proposed that Title I, Part D should explicitly define the process by which districts should determine the best placement for each individual student.<sup>197</sup> That more extensive strategy would potentially combat not just formal state or school district policy, but also close off some of the avenues by which informal counseling results in students moving to alternative schools. However, it would also restrict the ability of state and local officials to create plans that fit into the needs of their system. A blanket restriction on these automatic enrollment policies would at least provide the necessary space to encourage individualized transition planning.

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192. Robert F. Kennedy Juv. Just. Collaborative, *supra* note 1366, at 15; JUV. LAW CTR., RECOMMENDATIONS TO IMPROVE CORRECTIONAL AND REENTRY EDUCATION FOR YOUNG PEOPLE 9 (2014), <http://www.modelsforchange.net/publications/644>.

193. FINKLEA, *supra* note 30, at 1 n.5.

194. Feerman et al., *supra* note 499, at 1122–24.

195. S. EDUC. FOUND., *supra* note 86, at 14; Robert F. Kennedy Juv. Just. Collaborative, *supra* note 1366, at 15.

196. OSHER ET AL., *supra* note 76, at 2 (noting that receiving services in the first six months after release leads to a higher likelihood of engagement at one year after release).

197. Robert F. Kennedy Juv. Just. Collaborative, *supra* note 126, at 15; *see* OSHER ET AL., *supra* note 76, at 9–11 for a research-based set of recommendations on how states and municipalities should implement individualized transition plans.

## V. CONCLUSION

The juvenile justice system is intended to act as a rehabilitative space for youth who have not yet developed the maturity to be considered truly guilty for the actions they committed. Yet, that system has a clear record of providing insufficient educational opportunities to some of the neediest youth in the nation. Those youth leave those facilities without the tools they need to successfully re-enter society, and instead re-enter the same facilities at an alarming rate and at significant cost to taxpayers.

Crafting solutions to those problems requires threading a series of needles. The programs are run by local and state-level officials, with oversight from a patchwork of agencies, and with some federal funding support. The approach that this Note advocates for is intended to clarify lines of responsibility and accountability through the mechanism of conditions on federal funding. This approach does not require massive additional federal oversight, nor does it upset local and state efforts to reform existing programs.

The four proposals outlined here provide strong opportunities to improve systems within that existing framework. Increasing data collection ensures that programs in the future are built on better and more complete knowledge about both what works and what does not at the state level. Ensuring that decisions about re-enrollment are made on an individual, rather than systematic, basis will help remove one barrier to rehabilitation for many students in states with these policies. Requiring an individual to be accountable at the state level for transitions is an important way to further emphasize that one of the crucial goals of Title I, Part D funding is to support transitions back to traditional educational programs. With many states still providing only minimal thought to those transition programs, it is clear that the federal government needs to find ways to make sure that states are supporting youth during that crucial time, and designating an individual or office within a state agency is one way to create those clear lines of accountability. Finally, removing the restrictions on the types of facilities that Title I, Part D applies to can help to ensure that a greater number of youth in detention and secure facilities are provided with the education they need so they do not fall further behind.

While states should and will continue to make progress on improving their own systems for educating youth in juvenile facilities, federal policymakers must play a stronger role in making those youth a priority. Like so much of American education policy, creating conditions on federal money can play an important role in improving outcomes but cannot proscribe exactly what happens within a classroom, whether that classroom is in a traditional public school or a juvenile facility. There are reasons to believe that progress is happening at the state level, including efforts in Kentucky to develop integrated data systems to encourage the timely sharing of records,<sup>198</sup> and in Massachusetts to connect youth in facilities to a non-profit service provider that helps ensure a smooth transition out of a facility.<sup>199</sup> However, those programs, though they show signs of promising impact,

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198. S. EDUC. FOUND., *supra* note 86, at 20.

199. LOCKED OUT, *supra* note 102, at 13.

are likely to need further institutional support that helps to shift incentives for schools and juvenile facilities in order to succeed.

As federal policymakers turn to considerations of how to ensure that the next ESEA re-authorization works to provide federal support for pressing national problems, they should consider incorporating some of these recommendations to ensure that states' incentives and data collection are aligned with the interests of youth in juvenile facilities. Allowing the current system, marked by inconsistent oversight and insufficient coordination, to govern juvenile facilities is a recipe for continued recidivism and wasted chances at rehabilitation. Lawmakers should recognize that addressing this toxic brew of issues would both extend ESEA's legacy and produce positive societal results by allowing individuals opportunities to rehabilitate and become more productive members of society.