

A black and white photograph of a person wearing a dark hoodie and light-colored jeans, sitting on a brick wall. The person is looking to the left. The background is a blurred brick wall.

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Representing Juvenile Status Offenders

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Edited by Sally Small Inada and Claire S. Chiamulera

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Preface


Each year hundreds of thousands of young people are arrested and many end up in court, although they have not committed any crime. These adolescents often come from families in crisis, feel unsafe in or alienated from their homes or schools, run away, skip school, or act out in other ways that involve them with the court system. They may be called “unruly teens,” “chronic runaways,” “truants,” “children in need of services” or any one of a dozen other terms. Their families are often labeled “dysfunctional” or “broken.”

The involvement of these youth and their families with the legal system represents a critical time. With effective advocacy and support, youth and families may receive the resources they need to address their underlying issues, heal and succeed. Without it, they may become involved more deeply with the juvenile justice system.

Representing youth who have engaged in noncriminal misbehavior (status offenses) gives attorneys a chance to have an enormous impact on their clients, including helping them avoid incarceration or further involvement in the juvenile justice system. Unfortunately, there are very few resources or supports available to help professionals do this work well. These practitioners are often challenged by overburdened court systems, scarce preventative and diversion services, and a “tough on crime” environment punishing youth who do not obey the rules, even if they haven’t committed a crime.

During my Presidency, the American Bar Association chose to focus its resources on vulnerable youth, creating the ABA Commission on Youth at Risk. One of the Commission’s top priorities during its initial year was to engage the legal community in finding better solutions to aid status offenders and to reduce the number of youth securely confined due to status offenses. As a result, the ABA and the Office of Juvenile Justice and Delinquency Prevention convened the first videoconference on improving responses to status offenses (available at: www.ncjrs.gov/App/Publications/abstract.aspx?ID=238511).

In 2007 the ABA’s policymaking body, the House of Delegates, passed a policy regarding status offenders, marking the first time in more than two decades the ABA officially addressed this population. That same year the ABA Center on Children and the Law received a grant to continue the ABA’s work on status offenses by publishing a book on legislation and policy reform for families in need of critical assistance. These efforts helped communities, courts, and legal professionals identify systemic changes that could help youth who run away, are truant,



or engage in other status offenses. But there was still little advice available for individual attorneys on day-to-day advocacy and representation of these youth. This book provides that guidance, through chapters written by experts in the field.

Representing youth who engage in status offense behaviors is challenging, but offers the possibility of rich rewards helping set a young person's life on the right path. I believe this book will support and aid you in the essential work you do each day on behalf of our nation's most vulnerable youth. Thank you for your efforts!

Karen J. Mathis
President and CEO, Big Brothers Big Sisters of America
Past President, American Bar Association

Introduction

There are few training resources for attorneys representing juvenile status offenders or youth who are truant, runaways, or beyond their parent's control. Yet representing this population of children, who often fall between the cracks of child welfare and juvenile justice, can be challenging. Often, few community or court resources are devoted to these families in crisis, making advocacy for appropriate services and alternatives to detention difficult.

This book is your guide to advocating for juvenile status offenders. They are an underserved group, yet thousands enter the court system every year. They face sometimes insurmountable obstacles: abuse, neglect, high family conflict and domestic violence; desperately poor and violent neighborhoods; serious mental health needs, learning disabilities, emotional or behavioral problems; gangs; bad peer group choices; and poor educational and employment options. They are in need of strong advocacy to help them avoid deeper juvenile justice system involvement and detention. They and their families need help mending dysfunctional relationships and accessing community assistance.

This book is your roadmap to representing status offenders. Each chapter, written by an expert in the field, gives you the tools to successfully engage and represent youth in status offense proceedings.

- **Chapter 1:** Shay Bilchik and Erika Pinheiro write about the critical provisions of the Juvenile Justice and Delinquency Prevention Act as they affect status offenders. They provide guidance to attorneys on how to use the federal law to advocate for status offense clients.
- **Chapter 2:** Claire Shubik explores status offender behaviors within the context of adolescent development and provides guidance to attorneys on how to use existing research to help forge relationships with youth clients.
- **Chapter 3:** Martha Stone and Hannah Benton offer tips to attorneys on ways they can access early intervention and diversion services for status offender clients.
- **Chapters 4 and 5:** Tobie J. Smith walks attorneys through the status offense court process from preadjudication through trial and disposition. He outlines strategies the attorney can use at trial, disposition, and if the youth is accused of violating a court order.

- **Chapter 6:** Joseph B. Tulman provides guidance to attorneys representing status offenders who also have special education issues.
- **Chapter 7:** Jana Heyd and Casey Trupin address how attorneys representing status offenders can navigate through other child-serving systems, such as child welfare and delinquency.

Complimenting these chapters is a Web site: www.abanet.org/child/jso.shtml with:

- accessible and printable PDF versions of each chapter;
- video interviews of legal and social service experts offering tips on representing status offenders;
- lists of state and national resources relating to status offenders, including information on policy reforms; and
- Web links to useful national and local programs.

Several states have recently taken a closer look at their status offender laws and instituted legal and policy reforms to better serve these youth and their families by promoting early interventions and limiting or prohibiting secure detention. This book is the first of its kind, a national resource, focusing exclusively on representing juvenile status offenders. It guides attorneys who represent these youth to empower their clients, foster better family relations, access intervention services early, and avoid deeper involvement in the court system.

Jessica R. Kendall and Lisa Pilnik
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ABA Center on Children and the Law

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A black and white photograph of a person wearing a dark hoodie and light-colored jeans, sitting on the ground against a brick wall. The person is looking to the left. The background is a textured brick wall.

CHAPTER ONE

What the JJDPA Means for Lawyers Representing Juvenile Status Offenders

By Shay Bilchik and Erika Pinheiro

What the JJDPDA Means for Lawyers Representing Juvenile Status Offenders

Use the federal law requirements to protect your client's rights.

- If your status offender client has not been accused of violating a valid court order (VCO), federal regulations, under the Juvenile Justice and Delinquency Prevention Act (JJDPDA), prohibit detention beyond a limited time period before and after an initial court appearance.
- If your status offender client has been accused of violating a VCO, determine whether the court followed the JJDPDA's due process requirements when issuing the order. For example, did the court:
 - give the youth adequate and fair warning of the consequences of violating the order?
 - provide the warning in writing to the youth and the youth's attorney and/or legal guardian?
 - include this warning in the court's record?
- If your status offender client has been detained, was he afforded post-detention safeguards under the Act?
 - Was he interviewed within the first 24 hours of being detained by someone who is not a part of the court or law enforcement agency?
 - Did the interviewer submit a report to the court that included an assessment of whether less-restrictive settings had been exhausted or were clearly inappropriate?
 - Did the court release the youth from detention pending the violation hearing, unless it was shown that continued detention was necessary for protective purposes, or to assure the youth's future court appearance?

Advocate for alternatives to detention.

- Cite JJDP's purpose of limiting the detention of juveniles to support your arguments against detention.
- Argue for services or a treatment plan that will better serve your client's needs as an alternative to detention. Use JJDP's underlying treatment and delinquency prevention purposes to support your argument.



In 2004, over 400,000 youth were detained by law enforcement because of a status offense. Many status offenses stem from academic difficulties, abuse and neglect in the home, substance abuse, or physical and mental health problems.¹ Girls and youth of color are disproportionately confined for status offense behavior.²

Although state laws most often dictate how a status offender will be treated by the court, federal laws also provide important tools to help attorneys advocate in their clients' best interests. The Juvenile Justice and Delinquency Prevention Act (JJDP A) contains provisions that limit detention, mandate service provision, and provide guidelines for status offenders who violate a valid court order (VCO). The JJDP A guidelines not only inform local and state practice, but represent aspirational, evidence-based standards that, if implemented on the state level, can help attorneys keep children safe and facilitate their future success. This chapter will outline provisions of the Act attorneys can use to promote interventions that serve the best interests of their young clients and their communities.

Attorneys representing status offenders must be familiar with state and federal laws that apply to their clients. This chapter briefly reviews the historical development of these laws, and details how they apply to state and local practice. Advocates must be familiar with community-based service options and other alternatives to detention in the status offender's jurisdiction. The chapter also outlines youth development research and program evaluation so practitioners can advocate for interventions that are effective in curbing future status offending and delinquency. Using the tips and tools described here can help readers more effectively argue for the most appropriate placement and disposition for status offending youth and prevent or limit the time their clients spend in secure facilities.

Requirements of the JJDP A

Congress passed the JJDP A in 1974 to combat the negative effects of placing youth in secure, often adult, facilities.³ The Act gave states access to federal grants to assist with delinquency prevention and intervention, but grant eligibility was contingent on states' compliance with four core areas, including prohibiting placing noncriminal status offenders in secure detention.⁴ Later reauthorizations of the JJDP A allowed status offender detention under a VCO exception. Specifically, adjudicated status offenders violating a VCO could be placed in a secure facility. The tension between deinstitutionalization and VCO provisions are of central concern to lawyers when crafting a response to troubling youth behavior.

Attorneys can use the deinstitutionalization provisions of the JJDP A to

prevent their clients from being detained and advocate for developmentally appropriate alternatives. Knowledge of the VCO requirements will help attorneys ensure adequate due process and quick release for clients detained under the exception.

Deinstitutionalizing Status Offenders through the JJDPA

Before the JJDPA, status offenders were often incarcerated by juvenile and family court judges exercising protective supervision over the child. Detained status offenders were frequently adjudicated and committed to an institution.⁵ Research on delinquency, however, showed consistently poor outcomes for institutionalized youth and identified secure detention as a risk factor for future delinquency.⁶ Status offenders coming from dysfunctional families or presenting mental health, behavioral, or educational challenges needed services generally unavailable in an institutional setting.

When enacted, the goals of the JJDPA were to preserve families, protect child well-being, improve community safety, and prevent youth from entering juvenile and criminal justice systems. Deinstitutionalizing status offenders (DSO) was meant to help by keeping youth with their families or in other appropriate settings within their communities.⁷ The JJDPA provides funding and training to state juvenile justice and related agencies in creating alternatives to detention or expanding existing detention reform plans.

Because the federal government may not dictate state treatment of juveniles, the JJDPA tied federal formula grants to provisions mandating the deinstitutionalization of status offenders. According to the 1974 JJDPA and subsequent reauthorizations, states must use their federal block grants to develop alternatives to detention. States are also encouraged to place status offenders in the “least restrictive setting” in reasonable proximity to family members.⁸ While some changed state legislation based on the Act, other states amended their status offender laws based on litigation extending due process and equal protection rights to juveniles in the court system.⁹

The VCO and its Effect on DSO

Between the 1974 reauthorization and 1980 revisions of the JJDPA, status offender referrals to juvenile court decreased by 21 percent and detention of status offenders fell by half.¹⁰ Despite this, juvenile and family court judges felt DSO provisions unduly hampered their ability to deal with chronic status offenders, like runaways. Judges and judicial advocacy organizations argued that:

Current Initiatives to Strengthen the JJDPA

Congress is currently considering changes to the JJDPA for the next reauthorization. In addition to strengthening the provisions relating to Disproportionate Minority Contact (DMC) and conditions of confinement, the newly reauthorized Act may contain changes to the DSO provisions. Child advocates are pushing for a three-year phase-out of the Valid Court Order (VCO) exception. Because many states no longer allow detention pursuant to a VCO exception, attorneys can use suggested amendments to the Act to argue that a national consensus exists against status offender incarceration. Advocates and congressional staff are also working to strengthen federal-state partnerships providing alternatives to detention and expansion of evidence-based programs and services.

- Detention might be the only option where in-home placement presented a danger to the child and appropriate out-of-home alternatives were unavailable. For example, detention could be an appropriate intervention for physically or sexually abused runaways where shelter space is lacking.
- Other causes of status offending, like poor family functioning, community disorganization, family dysfunction, or health problems, could not be addressed without resorting to out-of-home placement. Detention could help create eligibility for necessary services.
- Detention could be used as a tool to force chronic status offenders to comply with court orders.¹¹

In 1980, the JJDPA was revised to create the VCO exception. The DSO requirement remained intact, but courts could now place adjudicated status offenders in secure facilities if they violated a VCO. The VCO exception allows courts to hold juvenile status offenders in a secure juvenile facility without violating the DSO requirement, either under the traditional contempt authority of the court or if the state delinquency code allows judges to adjudicate a status offender as delinquent after he violates a VCO. This approach is commonly known as “bootstrapping,” as it takes what had been nondelinquent behavior, protected under the DSO requirement of the JJDPA, and converts it into a category of behavior that loses that protection. For example, a runaway ordered by the court to stay in her home could be placed in secure detention if she runs again. Because

many states did not increase services to address the underlying problems facing status offenders, repeat offending was common.

As a result, status offender detentions increased drastically and the number of incarcerated status offenders quickly doubled.¹² During the same time, a decade-long reduction in federal funding compromised the ability of the federal government to help states create alternatives to status offender detention.

Subsequent revisions of the JJDPa cut both ways for status offenders. The 1984 revisions reflected a national emphasis on crime control by suggesting tougher sanctions and mandatory sentencing for serious offenders. However, a 1992 amendment reconfirmed the legislative commitment to deinstitutionalization by revising the VCO definition to ensure due process protections. Unfortunately, many states continue to violate JJDPa deinstitutionalization provisions without necessarily adhering to VCO exception guidelines.

DSO and VCO on the State and Local Level

The JJDPa is more than a guideline for funding eligibility. Its requirements reflect decades of research and evidence-based programs demonstrating that status offenders do better outside secure detention. However, states make their own laws concerning status offenders. States with laws inconsistent with the federal statute may or may not lose federal funding, depending on how the Act is enforced.

Each state's penalties for status offenders are different. Some suspend rights, like driving privileges, or order restitution, while others may order parents to comply with a court order. The majority of states have a statutory category for status offenders, often referred to as youth in need of supervision, services, or care. A minority of states classify all status offenders as dependent or neglected children, putting them under the child welfare agency's jurisdiction.¹³ Some states have increased the age for status offense system eligibility, and others provide in-home and community-based services in lieu of bringing status offense cases into a formal court process.

Working with Status Offenders under the JJDPa: Tips for Practitioners

The DSO and VCO regulations provide guidance for judges, lawyers, and others working with status offenders. The federal law also outlines requirements for states receiving block grants under the JJDPa.¹⁴ Attorneys familiar with the federal requirements can use the Act to advocate for their clients throughout the court process.

Practitioner Tip

Creating good working relationships with agency professionals is essential in ensuring your client's rights are protected. Advocates and practitioners can work together to ensure that agency leaders and line workers are aware of the DSO provisions and the dangers of over reliance on detention.

Understand the Federal Law's Prohibition on Detaining Status Offenders

Begin your representation when your client has been detained for a status offense, but has not yet received a court order. If your client has not been accused of violating a VCO, current federal regulations prohibit detention beyond a 24-hour "grace period," exclusive of weekends and holidays. This period is used for identification, investigation, or release to family or an alternative placement. After an initial court appearance, status offenders may be held "for an additional twenty-four hours, exclusive of weekends and holidays."¹⁵

Attorneys may intervene to prevent a status offense hearing. Depending on the status offender's history, placement in the child welfare system may be more appropriate. Attorneys should review how the state defines status offenders and other youth and families in need to determine whether another agency, system, or program can better meet your client's needs. (See Chapter 7, *How Status Offenses Intersect with Other Civil and Criminal Proceedings*.)

Ensure Your Client's Due Process Rights Are Preserved if Detention is Threatened

Attorneys can use the JJDPa to determine what constitutes a VCO. When the court orders your client to refrain from status offending behavior, "the juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected in the court record and proceedings."¹⁶ Only a court order meeting these due process requirements is a valid basis for an exception to DSO safeguards.

Ensure the Court Follows JJDPA Prerequisites before Applying the VCO Exception

If your client is accused of violating a VCO and detained, actions taken during the first 24-hours of detention will often determine whether he or she will be subject to additional secure detention. Attorneys should ensure that court and agency representatives conduct a rapid assessment of their clients' needs while observing the Act's procedural safeguards.

Within the first 24 hours of detention, the juvenile must be interviewed in person by an appropriate official not belonging to the court or a law enforcement agency. This report "reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate."¹⁷

The official must submit her report to the judge before a reasonable cause hearing, which must also take place during the initial 24-hour detention. The interview requirement may push the hearing beyond the 24-hour limit the JJDPA places on the initial detention period. However, "in no event should detention prior to a violation hearing exceed 72 hours exclusive of nonjudicial days."¹⁸

The hearing will determine whether there is reasonable cause to support a finding that your client violated a VCO. The judge must consider the official's report when making her determination, and ensure the juvenile was afforded due process protections when he received the court order.

If the judge finds probable cause of a VCO violation, your client should be released pending her violation hearing. The judge can only order that your client remain in detention for protective purposes, or to assure her appearance at a violation hearing. Attorneys should ensure that these exceptions are used correctly. If your client does not need protection and has no history of failing to appear in court, cite DSO safeguards to argue against extended detention.

VCO regulations regarding the timing and requirements of an agency report and probable cause hearing do not apply to status offenders who violate state-specific juvenile criminal laws, such as possessing a firearm. These acts, which are classified as felonies or misdemeanors in state statutes, are only criminal if committed by a juvenile, but not criminal if committed by an adult. If state-specific juvenile criminal statutes are divisible, your client's actions may fall under a section or other statute still covered by the safeguards. Divisible statutes are those that contain more than one crime; most often, these group more serious and less serious crimes in a single statute. Less serious offenses included in the statute may

be covered by DSO and VCO safeguards, while actions constituting a more serious offense under the statute may not.¹⁹ Be sure to argue that the VCO safeguards should apply to your client, especially if a detention determination takes place before your client has had a chance to present her case.

Advocate for Alternatives to Detention at the Violation Hearing

Following the probable cause hearing, you should meet with your client and review the official's report. Determine whether your client has current or previous cases with the child welfare agency or a history of academic difficulties. The youth, attorney, and family, if appropriate, can review the official's report submitted during the initial detention period to determine whether any discrepancies exist. If necessary, enlist the help of other educational, health, or mental health professionals to assess your client's needs.

State law and local availability of services will largely dictate the options for status offenders at the violation hearing. Some states allow for youth placement in a secure facility under a VCO, some do not. Practitioners should know if their state allows placement in a secure facility. Even states that technically do not use the VCO may allow the court to use its contempt power to label a youth delinquent. In either case, practitioners can use the intent of the deinstitutionalization provisions of the JJDPa to argue that their clients should not be detained.

If state law allows for detention through the VCO exception, practitioners should be familiar with all detention alternatives within the jurisdiction. Establishing a good working relationship with service providers and a familiarity with available programs can bolster arguments that detention alternatives are more appropriate. Attorneys can contact service providers and caseworkers to help create a treatment plan that addresses mental health, behavior, family relations, and scholastic needs. While social service professionals will largely craft a treatment plan, attorneys should be able to speak to the specifics of the plan in court. The attorney should have a proposed treatment plan ready to present in court to improve chances for an alternative placement.²⁰

Alternative services must also exist for chronic status offenders. When identifying these services, practitioners can work with outside programs, such as the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI), which helps communities provide alternatives to secure confinement. Practitioners may also look to effective detention alternative programs in other jurisdictions, such as New York with the help of the Vera Institute of Justice, to determine how to best implement best practices in their own jurisdiction.

Practitioner Tip

If a juvenile client is a repeat status offender, his representative must assess the availability of necessary mental health, behavioral, and educational services in a secure institution, as well as whether secure confinement will hamper access to long-term treatment. Attorneys should present an alternative treatment plan combining services with accountability, which may include daily check-ins or another form of compliance monitoring.¹

Source:

1. National Juvenile Defender Center, *Achieving Excellence in Detention Advocacy: Guidelines for Juvenile Defenders to Provide Zealous Advocacy at Initial Detention Hearings* (2009) Available at www.njdc.info/pdf/njdc_tools/Guidelines.pdf.

When a judge seeks to invoke the VCO exception for dealing with a chronic status offender, practitioners may use the youth's needs as a way to demand services. However, cases where a judge seeks to detain a status offender for her own protection are more difficult. In these circumstances, the attorney should consider requesting rapid needs and risk assessments to identify appropriate services instead of detention.

Conclusion

Practitioners—including defense attorneys, judges, and prosecutors—have the same goal: ensuring the youth's well-being and supporting good outcomes while promoting community safety. The JJDPa seeks to facilitate youth's future success by promoting best practices. The resources and guidance provided through the Act can help advocates ensure that status offenders receive the services they need in an appropriate, community-based setting.

The overarching legislative intent of the JJDPa is to keep children and youth out of the justice system, and encourage community-based alternatives that effectively address youth and family needs without resorting to detention. Working together, practitioners, youth, and their families can achieve these goals.

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2. *Justice by Gender: The Lack of Appropriate Prevention, Diversion, and Treatment Alternatives for Girls in the Justice System*. Washington, DC: American Bar Association and the National Bar Association, May 1, 2001, available at www.abanet.org/crimjust/juvjust/girls.html; Gavazzi, Stephen M., Courtney M. Yarcheck, and Ji-Young Lim. "Ethnicity, Gender, and Global Risk Indicators in the Lives of Status Offenders Coming to the Attention of the Juvenile Court." *International Journal of Offender Therapy and Comparative Criminology* 49(6), 2005, 696-710.
3. The JJDP Act has been reauthorized several times with revisions. The most recent reauthorization was in 2002. 42 U.S.C. § 5633(a)(11) (2006). The 110th Congress introduced, but failed to pass, a more recent reauthorization in 2007.
4. The four core requirements of the JJDP Act, and the years they were passed, are as follows: Deinstitutionalization of Status Offenders (1974); Sight and Sound Separation for juveniles detained in adult facilities (1974); "Jail Removal," prohibiting detention of juveniles in jails and lockups for more than six hours (1980); and a requirement that states reduce Disproportionate Minority Confinement (DMC) in their juvenile systems (1988); 42 U.S.C. § 5633(a)(11) (2006).
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6. *Ibid.*; Mack, T.C. and J.A. Stookey. "Deinstitutionalization of Status Offenders in Arizona—State and Local Initiators of Policy Change." In *Neither Angels Nor Thieves—Studies in Deinstitutionalization of Status Offenders*, edited by Joel F. Handler and Julie Zatz, 1982, 255-295; "Juvenile Justice and Delinquency Prevention Act (JJDP Act) Recommendations and Background." *Act 4 Juvenile Justice*, 2-4, available at www.act4jj.org/factsheets.html. See research cited *infra*.
7. *JJDP Act Fact Sheet*. Washington, DC: Act 4 Juvenile Justice, citing Henry, K. and D. Huizinga, *Effect of Truancy on Onset of Drug Use and Delinquency*, presented at annual meeting of the American Society of Criminology, November, 2005.
8. *Participant Guide: Addressing the Needs of Juvenile Status Offenders and Their Families*, OJJDP Teleconference Series DVD. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2007.
9. *Kent v. U.S.*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970). Although these decisions do not specifically address whether constitutional protections extend to non-delinquent (status offender) cases, many states have incorporated constitutional protections into their own laws and regulations dealing with status offenders; Steinhart, David J. "National Measures of Status Offenses." *The Future of Children* 6(3), Winter 1996, 90.
10. Raley, Gordon A. "The JJDP Act: A Second Look." *Juvenile Justice* 2(2), Fall/Winter 1995, 14, available at www.ncjrs.gov/pdffiles1/jjjf95.pdf.

11. Steinhart, 1996, 86-96.
12. Puzzanchera, Charles. *Trends in Justice System's Responses to Status Offending: OJJDP Briefing Paper*. Pittsburgh, PA: National Center on Juvenile Justice, January 16, 2007, available at www.abanet.org/child/adolescent-15.pdf.
13. Snyder, Howard N. and Melissa Sickmund. *Juvenile Offenders and Victims: 2006 National Report*. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2006, available at <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf>.
14. Contact information for each state's Juvenile Accountability Block Grant Program coordinator can be found at <http://ojjdp.ncjrs.org/jabg/ResourceList.asp>.
15. 28 C.F.R. § 31.303(f)(2) (2006).
16. 28 C.F.R. § 31.303(f)(3)(iii) (2006).
17. 28 C.F.R. § 31.303(f)(3)(vi) (2006).
18. 28 C.F.R. § 31.303(f)(3)(iv) (2006).
19. This categorical approach was recognized in *Taylor v. United States*, 495 U.S. 575 (1990). *Taylor* limited the application of sentencing enhancements to formal statutory categories, mandating that the sentencing court consider only the "statutory definition of the predicate offense, rather than to the particular underlying facts." The *Taylor* analysis has been applied in a broad array of cases. Generally, a court may not impose enhancements or remove protections based on the facts of an underlying offense, but must limit its analysis to the elements of the statute under which the defendant was convicted. In the juvenile context, the *Taylor* analysis may be applied to demand that VCO protections apply if a status offender is detained before the state obtains a formal conviction under a juvenile criminal statute.
20. Calvin, Elizabeth. *Legal Strategies to Reduce Unnecessary Detention of Children*. Washington, DC: National Juvenile Defender Center, Fall 2004, 21, available at www.njdc.info/pdf/detention_guide.pdf.

A black and white photograph of a young man with dark hair, wearing a dark hooded sweatshirt and light-colored pants, sitting on the ground against a brick wall. He is looking off to the side with a serious expression. The background is a textured brick wall.

CHAPTER TWO

**What Social
Science Tells
Us about Youth
Who Commit
Status Offenses:
Practical Advice
for Attorneys**

By Claire Shubik

What Social Science Tells Us about Youth Who Commit Status Offenses: Practical Advice for Attorneys

Understand what social science research says about the causes of status offense behaviors.

- Learn about antisocial behavior in youth, adolescent development, and peer influences to provide a context to understand the causes of status offense behavior.
- Use research to focus system interventions on identifying and resolving the cause of the behavior rather than only focusing on the behavior itself.

Build a strong relationship with your client.

- Understand that some adolescents may have trouble conceptualizing future consequences of their behavior. Discuss what is important to the youth now, and focus on the immediate effects of her actions.
- Assess whether the youth's behavior is influenced by peers.
- Build trust by demonstrating that you are actively working for the youth.
- Keep conversations short and focused.
- Look for signs of abusive situations at or away from home and link your client with appropriate services or legal assistance, if appropriate.

Engage the youth in setting a realistic case plan.

- Choose concrete, achievable goals and make sure the client understands the consequences of noncompliance.
- Consider resolutions that end the proceeding quickly over rulings that prolong adjudication.

- Seek evaluations or treatments where needed to better address mental health, substance abuse, or domestic abuse issues.
- Suggest family mediation or counseling, or a family assessment to address problems in the family dynamic.

Use social science research to support in-court advocacy.

- Use existing literature to bolster arguments against secure detention, certain service types, or dispositional approaches.
- Cite research that puts your client's behavior in the larger context of adolescent development to decrease culpability.
- Demonstrate that punitive measures may be less effective than community-based alternatives.
- Advocate for age-appropriate programs that offer positive peer influences.
- Emphasize the importance of treatments and services that address underlying causes of behavior.



Approximately 70 percent of status offense petitions involve youth between the ages of 14 and 16.¹ These youth are brought to court not out of concern for their safety at home (as in a dependency petition), or because they are an immediate threat to public safety (as in a delinquency petition). They come to court because their parents, schools, or communities cannot manage their behavior and are seeking support from social services, juvenile justice, or the family court. Often, these petitioners are not only looking for help in addressing current disruptive behavior, but are also concerned that status offense behavior today will lead to future criminal or destructive conduct.

Social science research indicates, however, that some status offense behavior is typical for adolescents and they will grow out of it as they mature.² Other longitudinal research indicates that when severe behavioral issues arise in early childhood they increase the child's risk for later difficulties, which may include status offense behavior.³ In either instance, status offense behavior should not be ignored—a truant youth is missing an opportunity for education that will affect his whole life, a runaway youth puts herself in great danger, a defiant and angry teen can have lasting impact on a family, and any of this behavior in a younger child may raise additional child welfare and/or juvenile justice concerns.⁴

This chapter puts adolescent status offense behavior in the larger context of adolescent and youth development by looking at social science research on anti-social behavior in adolescents generally and the underlying concerns and dynamics of various status offenses. It is not an exhaustive survey, but a primer translating research into practice tips for working with and advocating for your client.⁵

Adolescent Development

Over the past decade, juvenile justice advocates have used psychological and neurological research on youth development to advocate for a “developmental” approach to youth justice. This approach considers stages of human development to determine a youth's culpability. This research was effectively championed in *Roper v. Simmons*, a Supreme Court case banning the juvenile death penalty. In *Roper*, the Court cited psychological research showing adolescents, by virtue of their developmental stage, take more risks, are highly influenced by peers, and are more malleable.

The court reasoned that adolescents cannot be held to the same culpability standards as adults.⁶ The same research used in *Roper* is useful in the status offense context to put a client's behavior into perspective and to identify advocacy strategies and services that will help your client.

The research cited in *Roper* was compiled by law professor Elizabeth Scott and psychology professor Laurence Steinberg. Scott and Steinberg have recently synthesized much of the research in the field in their article, “Adolescent Development and the Regulation of Youth Crime.” This article outlines several characteristics of adolescent development that have bearing on building client relationships, case planning, and legal advocacy, specifically: lack of future orientation; propensity for reckless behavior; and the importance of peer influence.⁷

Lack of Future Orientation

Compared with adults, adolescents are more likely to focus on the present and less likely to think about the future consequences of their actions. When they do consider future consequences, they are likely to give greater weight to the immediate payoff.⁸ A truant/disruptive/runaway youth is more likely to focus on the immediate benefits of his actions and less on the long-term effects.

Building a Relationship with Your Client

Because adolescents may lack future orientation, do not be surprised if your client is not moved by arguments that he is impacting his safety or future opportunities. If this is the case, ask your client to identify the short-term consequences of his actions. Find out what is important to your client now. He may come up with things you haven’t thought of. For example, a client who does not believe or care that skipping school will impact his future employment opportunities may be concerned that excessive absences will exclude him from the sports team or other extracurricular activities. Long conversations and meetings about future events may not hold your client’s interest, so keep discussions short and focused on the present. It also helps to have a dialogue rather than lecture.

Case Planning

Lack of future orientation also impacts case planning. Your client may have difficulty helping you develop long-term goals in his case, choosing instead to focus on what is easiest right now. For example, a client may agree to conditions he cannot meet in the long-term, like returning home or attending school regularly, if by agreeing to these conditions the case will adjourn for the day.

The client may not readily comprehend how this decision will play out later. A client who agrees to attend school regularly but does not consistently follow through may be surprised to find months later that his “noncompliance” has prompted the court to order additional conditions and, in some jurisdictions, secure detention.⁹ Even an adolescent client who has been told by the court

repeatedly that noncompliance will result in detention or other measures may not fully understand this until he faces the consequences of his actions.

Consequently, be as concrete as possible when discussing long-range case planning and choose a strategy that includes achievable goals and clear consequences. Professor Jane Spinak, director of the Child Advocacy Clinic and Adolescent Representation Project at Columbia Law School explains, “As an advocate it just doesn’t pay to agree to unrealistic proposals for your client.” If you and your client are uncertain of your client’s ability to fulfill terms being discussed, she recommends working with your client to develop a counteroffer that is gradual and flexible. If a judge has conditioned a dismissal on your client achieving perfect attendance, counter by explaining that your client has to get used to going back to school and may not be able to go every day. Propose an alternate goal that your client not miss school more than once a week or that he participate in an alternative school program, such as afternoon or online classes.

Spinak advises, “Look for something that gives the client leeway and builds on his strengths. If the client is missing lots of school but he’s going to all his English and social studies classes, find a way to reward him for what he’s doing right. Make sure there is flexibility in whatever you agree to and that you’re not setting up your client for failure.”¹⁰

Advocating in Court

A judge, probation officer, or caseworker may view a client who is unmoved by the future consequences of skipping school or risk taking as a social outlier requiring social service or juvenile justice intervention. But, in the context of adolescent development, the same behavior appears more within developmental norms. At various stages in the case, and particularly at disposition, it may help to cite relevant social science research. By putting your client’s conduct in this larger, developmental context you may dissuade a court or a probation officer from setting unrealistic conditions, excessive services, or detention.

Reckless Behavior

Scott and Steinberg cite two factors that cause adolescents to take risks: (1) an imbalanced perception of risk—adolescents attach greater value to potential rewards over potential risks associated with attaining those rewards (e.g., in studies involving gambling games, teens place greater emphasis on potential gains relative to losses when compared with adults.);¹¹ (2) lack of impulse control—research shows that self-regulation increases as a child develops into an adult, and many adolescents have yet to master this skill.¹² These adolescent

perceptions also lead youth to take risks as they believe that bad things will not happen to them, even if they see them happening to peers (e.g., getting into a car accident if driving while under the influence).

Case Planning

These traits, combined with an adolescent's focus on the present may impact the client's response to threats of future consequences. The risk of future penalties, including court-ordered placement, may not occur to your client as significant when weighed with the present gain of cutting school or drinking with friends.¹³ Take this into account when contemplating a ruling that postpones final adjudication while the court has time to monitor your client's behavior—it may be in the best interest of your client to have a case resolved quickly with an okay outcome rather than prolong the case and risk a much worse outcome if the threat of sanction has not caused your client to change her behavior.

Discuss with your client whether she will be able to alter her behavior before the next court date. Listen to her answer. What challenges will she face? What supports and incentives will she have to improve her conduct? Has she committed to attending school or returning home in the past only to break her commitments? There is no silver-bullet way to know if your client can alter her behavior between court dates. Similarly, there is no way to know how the court will respond to a client's failure to change. Before agreeing to an adjournment, assess the likely outcome and whether it might be in the best interest of your client to end the proceedings earlier.

Advocating in Court

Some courts and agencies ratchet up punitive responses when they perceive that a young person is not responsive to an initial threat of more restrictive consequences. When faced with this mindset, cite the psychological research showing that punitive measures have little effect on this population and that developmentally appropriate programs are more successful. Discuss the underlying issues your client is dealing with and propose developmentally-informed, community-based interventions that focus on the behavior and its underlying causes. Examples are discussed below.

Remember, the educational, mental health, and child welfare systems are tasked with helping adolescents address educational, behavioral health, and family issues. If those supports do not exist or are not readily accessible, argue that these systems have a responsibility to help your client adjust his behavior.

Peer Influence

Several studies cited by Scott and Steinberg emphasize that adolescents are highly responsive to peer influence and, in some instances, may enjoy higher social status among peers for engaging in antisocial behavior.¹⁴

Building a Relationship with Your Client

In understanding your client's behavior, find out if your client acted alone, if her social standing benefited from the conduct, and how her conduct fit into that of her friends. A client whose peers reinforce her antisocial behavior is less likely to be influenced by adult authority.

Case Planning

A process or outcome that comes across as externally imposed by adults may have less impact on an adolescent concerned with peer standing than it would on a younger child seeking adult approval. Advocate for your client to be meaningfully engaged in creating a disposition plan. Be clear about what would help your client resolve the case. When possible, create opportunities for your client to have the court or agency listen to him.

Advocating in Court

Advocating for age-specific programming that offers positive peer influences and community-based programming allows youth to receive positive reinforcement while managing existing relationships. Many high schools use school-based youth courts to manage in-school disruptions and truancy. These programs keep youth connected to their communities and offer age-specific activities. Often youth courts involve adolescents who have been "defendants" in one matter as "judges" or "jurors" in subsequent proceedings.¹⁵

Be wary of plans that have adolescents participate in programming or counseling that is tailored to a younger or older age. Not only may the program not be sensitive to adolescent development, but placing an adolescent in a group of younger children, for example, may upset a teenager concerned about social standing among peers. (See *Over Age, Under Grade* box.)

In jurisdictions with limited resources for status offenders, adjudicatory outcomes may be confined to punitive measures or social welfare programming for younger children. Courts may be swayed to look beyond their standard responses when informed that those responses will not meet an adolescent's needs.

Taken together, what social science research tells us about adolescent development puts much status offense behavior in perspective.¹⁶ In commenting on

Over Age, Under Grade

Grade retention—holding a child back in school—often predicts a child's likelihood of dropping out of high school. Placing older children in educational settings with and for younger children is shown to negatively impact a student's self-esteem, socio-emotional adjustment, peer relations, and school engagement.¹ Research shows that strategies targeted and tailored for children who would traditionally be held back may have better outcomes. These strategies include summer and afterschool programs and classrooms with cognitive and behavioral health modification components.²

Sources:

1. Jimerson, Shane R., Gabrielle E. Anderson and Angela D. Whipple. "Winning the Battle and Losing the War: Examining the Relation Between Grade Retention and Dropping Out of High School." *Psychology in the Schools* 39(4), July 2002, 441 (review of dropout research as related to grade retention).
2. Jimerson, Shane R. et al. "Beyond Grade Retention and Social Promotion: Promoting Social and Academic Competence in Students." *Psychology in the Schools* 43(1), January 2006, 85, 90-93.

adolescent culpability in the delinquency context, Scott and Steinberg note that, "psychosocial and emotional factors contribute to immature judgment in adolescence and probably play a role in decisions teens make to engage in criminal activity. It is easy to imagine how an individual whose choices are subject to these developmental influences—susceptibility to peer influence, poor risk assessment, sensation seeking, a tendency to give more weight to the short-term consequences of choices, and poor impulse control—might decide to engage in criminal conduct."¹⁷

This point is even more prescient in the context of status offenses (i.e., disruptive but not criminal behavior); given the inherent traits of adolescents it is likely that many youth in this developmental stage will engage in conduct that falls under the status offense categories. To some extent, this behavior is normal, but in the context of a particular family or particular situation it can reach the edges of permissibility. Keeping this research in mind will help you understand your client and will be useful in focusing conversations with the court and other parties on what will help support your client through this difficult, temporary, life phase.

Ungovernable/Incorrigible

In many states caregivers can file a status offense petition when a youth is "unruly," "ungovernable," or "incorrigible." Behaviors in this category range from a child physically abusing a parent or refusing to consistently follow a parent-

imposed curfew, to prolonged verbal fighting between family members. Typically these cases involve a deeply strained underlying family dynamic that may feel unmanageable to the petitioner.

The petitioner, in most instances a parent or guardian, may request removing the child from the home, to have a break from the behavior. Or they may hope that additional threats or punishment will cause their child to be “scared straight.”¹⁸ This may be why youth alleged to be ungovernable are the most likely to be ordered to out-of-home placement.¹⁹

Building a Relationship with Your Client

Since your client and her guardians are, to some extent, legal adversaries, your client may feel abandoned and angry. These feelings can result in the sense that no one in the adult world is listening and understanding. Make sure you listen and find out your client’s needs and strengths and what supports she uses. You may also want to connect your client with a youth counselor, being aware that not everyone with the title “counselor” will be equally skilled at listening and connecting to your client. Your role as an advocate is to know who may be effective.

Ask colleagues for references and look for counselors who have experience and training helping individuals similar to your client. In a focus group of New York City youth whose parents filed status offender petitions, youth explained that the best part of their experience was getting to speak with a counselor who listened to their side of the story and was interested in helping, not punishing, them.²⁰

Spinak notes that a central finding of the Adolescent Representation Project is how much adolescent clients value feeling heard and having advocates who actively represent their interests. She comments that one major challenge to working with adolescents is “building their trust so that they think it’s worth continuing to talk about what’s going on in their lives. Until the client actually sees you do something more than just talk with them, there is a wall. Once you simply go to court with them or make a call on their behalf—do more than just talk—the relationship changes and they become more trusting. From the get-go it’s important to advocate for something that they’ve said or asked for. Even when it’s not going to work, the fact that they’ve seen you represent what they want makes a tremendous difference.”²¹

Case Planning

Watch for mental health, substance abuse, or domestic violence issues that may be feeding the family dynamic. The locus of these problems may lie with your

Professional Help for Status Offenders with Mental Health Issues

Mental Health Issues among Status Offenders

Many children in the status offense system may have relationship trauma issues or adolescent mental health issues, such as depression, post-traumatic stress disorder, anxiety disorder, or untreated attention deficit disorder, explains JoAnne Solchany, PhD, an infant, child, and adolescent psychiatric nurse practitioner in Seattle. The symptoms of these illnesses are often expressed as many of the behaviors classified as status offenses, such as disobeying rules at school or home, or running away.

Understanding Mental Health Problems

Although some status offenders will simply “grow out” of the behaviors that have gotten them involved with the system, others have mental health issues that require professional evaluation and treatment. “One simple way to think about it,” Dr. Solchany explains, “is if the child is having problems within the family/home then you look at what is going on within the family relationships and interactions, if they are having problems within the school, you need to assess for learning disabilities and other school-related problems, but if they are having problems across the board then you have to look at the underlying mental health issues.”

Testing and Treatment

A psychiatric evaluation is preferable to ordinary psychological testing because it will look at symptoms, trauma, family history, past relationships, and other relevant factors, says Dr. Solchany. The psychiatrist or psychiatric nurse practitioner would be able to diagnose the client and make recommendations for treatment, intervention, and possible medication. In determining whether your client may need mental health testing, be careful not to overlook things that may seem “typical” simply because you regularly work with youth involved in the dependency, delinquency, or status offense systems. If a young person seems to have issues that go beyond what a normal young person not involved in one of these systems experiences, err on the side of caution and request appropriate evaluations.

client, his guardian, or other family members. Some issues may have been present in the family for a long time but have now become unmanageable with changes in circumstances, including a child reaching adolescence.²² Don't go on a hunch that there may be some underlying mental health or substance abuse

issue. Identify a professional to evaluate the situation through a psychological, psychiatric, or substance abuse evaluation. (See *Professional Help for Status Offenders with Mental Health Issues* box.)

Ask up front to see copies of any family or youth assessments conducted as part of the status offense petition or previous dependency, delinquency, or behavioral health interventions involving your client; have a release of information form ready when you meet your client if your court order of appointment does not itself provide sufficient access to the records. Be sure to inform your client about what you are requesting and why.

Ask how your client views the underlying issues and her experience with prior interventions: What would your client find helpful? What are his concerns? If your client or your client's family has previously received assistance regarding these issues, you may want to request a meeting or a conference call with the different providers and agencies in your client's life. Ask your client what did and did not work with previous efforts. If your client and her family have not previously been assessed or provided services, request a family assessment as one of your first steps.

Be aware of any family dynamics. Just because a parent is advocating for placement or a punitive response does not mean such a response would help the family or the child. The most effective responses to ungovernable behavior tend to be immediate family crisis de-escalation interventions.²³ For example, family mediation or counseling may offer a structure for enhancing communication and working out issues that have brought the family to this point. Respite care may provide a needed cooling down period without separating the family for a longer stretch. (See discussion of crisis and respite care in Chapter 3, *Accessing Intervention Services for Status Offenders and Avoiding Deeper Involvement in the Court System*.)

A family assessment may help determine what is happening to cause these disruptions, and may reveal issues the parents need to address as well. In many jurisdictions, child welfare and probation agencies must provide these services to address family breakdowns. (See *Crisis Response* box.) In others, it may be incumbent on you to find private providers and advocate that these interventions be used and paid for by local juvenile justice, human services, or behavioral health agencies.

Advocating in Court

With any of these approaches, however, their efficacy may depend on how quickly they can be delivered. If a parent files a petition because she has reached the end

Crisis Response

Over the past decade several jurisdictions have moved to a crisis response model for responding to status offenders.

Cook County, Illinois contracts with Youth Outreach Services (YOS) to provide a 24-hour call-in line for status offense complaints. YOS respond to calls within 60 minutes and provides families immediate counseling. Following an initial counseling session, YOS staff remain in contact with the family for 30 days and connects them to services, including temporary foster care.

In **Florida**, a network of private providers under the umbrella of the Florida Network of Youth and Family Services staffs a 24-hour crisis mediation hotline that provides immediate telephone and drop-in intake and assessment. Based on the family's presenting needs, the family is connected to relevant services, including family counseling and temporary shelter care.

In **Orange County, NY**, a mainly rural county, once a status offense complaint is received, a counselor is dispatched into the field to meet with the family within 2 to 48 hours. The counselor, from a private provider, conducts an assessment and creates a voluntary service plan for the family. The provider then follows up with the family over the next two to three weeks. Based in part on the success of the Orange County model, New York State amended its status offense law in 2005 to include crisis intervention and respite care in the definition of diversion services.¹

Source:

1. N.Y. Fam. Ct. Act § 712 (2009).

of her rope and family mediation is set to begin three months later, the crisis that sparked the petition may have dissipated on its own, changed, or worsened by the time the intervention begins.

When you first get a case, identify the reason for the petition. Frequently, by the time a petition is in court and an advocate assigned, the family is exhausted by their conflict and the status offence process. If, by the time you meet your client, the urgent situation has blown over, explore having the case dismissed. If the precipitating event is still fresh, move quickly to have it addressed. This can be done through informal team meetings between parties (your client, her parent, and social service or law enforcement agencies), perhaps resulting in a plan to present to court. If you are in court already, request that any interventions ordered, such as mediation or counseling, occur on an expedited timeframe.

Truancy

Truancy is a symptom of a range of underlying issues. These issues often relate to academic achievement:

- a teenager held back in middle school who sees no point in attending;
- an undiagnosed or mishandled special education need;
- a child who is failing and sees no hope;
- a child who is bullied or sees no social value in attending school.

Or external barriers may block a child from attending:

- a lack of safe transportation to school or safety at school;
- the need to care for younger children or older relatives;
- asthma or other medical conditions that have resulted in an extended absence;
- a school that has not effectively communicated attendance policies and requirements with non-English speaking parents.

Finally, truancy may be a symptom of larger breakdowns in the youth's or family's life such as substance abuse, mental illness, or domestic violence.²⁴

Building a Relationship with Your Client

The key is to listen to your client about what in his life is contributing to this situation and what he would like to see happen. Chances are the school system has made some overtures to address your client's truancy. Ask what has already been tried and what aspects of the school's efforts were or were not effective.

Case Planning

Schools, school boards, departments of education, and child welfare agencies all have their own attendance requirements and protocols for working with truant youth. Consequently, the first step in representing a client before the family court for truancy is to become familiar with attendance requirements and protocols, not only for your state and county, but for the specific school and school system.

Make sure the school, child welfare, or probation department have exhausted their administrative requirements before filing or permitting a petition. Even if these requirements have been met, identify any deviations from stated policy. This may provide an opening to get the petition dismissed or to refocus the discussion on the failure of the government systems charged with educating and supporting your client.

Next explore what caused your client's truant behavior. In many cases the school system may be required to provide services and educational plans that

address your client's circumstances. For example, if transportation is the underlying concern, it may be that state law or local ordinances regarding bus service are not being followed. If language barriers are at the root of the problem, check if the school is complying with the federal mandate that schools communicate effectively with parents who speak limited English.²⁵ If there is reason to believe an inappropriate educational setting or plan is causing the behavior, advocate for assessment or reassessment of your client's educational needs in the context of the family court proceeding and, in some instances, bring a separate action against the school district for not meeting you client's educational needs.

Advocating in Court

Be aware of court orders that command school attendance but do not address the reasons for your client's absenteeism. While a court order may reduce absences in the short term, unless the underlying concerns are addressed it will have little impact in the long run. This sets your client up for a violation and exposes him to future punitive measures including placement or detention. Equally problematic are orders using out-of-home placement to resolve truancy. Though a foster care or institutional placement may provide a structure for compelling attendance, children removed from home generally perform worse in school and are more likely to have gaps in their educations because of school transfers.²⁶ Further, being removed from their families is extremely traumatic for children, and the psychological effects can affect school performance. While there are wonderful foster parents and residential programs, in general they do not magically solve the problems of a troubled teen or a child with special education needs who lacks an appropriate school placement.

Runaways

In 1999, nearly 1.7 million youth were runaways (youth who leave their home without permission) or throwaways (youth who are forced out of their homes or refused permission to return.)²⁷ Runaway youth often leave their homes because of "intense family conflict or even physical, sexual or psychological abuse."²⁸ Most of these children are youth aged 15 to 17. In many cases the youth's parent may know where the youth is staying—whether at a friend's, neighbor's, or relative's home. Frequently, the youth is only out of the home for a few days or hours.²⁹

When a caregiver seeks help in finding a runaway, they typically report the child missing to the police. Some also file a status offense petition either because they are seeking additional counseling support when they reunite with their child

or because they have been told, often inaccurately, that they must file a petition along with a missing persons report or that filing a petition will speed up their child's return.³⁰

Building a Relationship with Your Client

The primary concern in working with a runaway is safety, both the youth's safety at home and away from home. Ask your client where she has been and why she left. It may be that your client was staying with relatives and attending school, but needed a break from a tense family situation. Ask if your client told her parents of her whereabouts or if the guardian knew through other means. If your client was safe and attending school during her absence, consider obtaining school attendance records to attest to your client's responsibility.

At the other end of the spectrum, your client may be running from or to abusive relationships.³¹ Be sensitive and observant when asking your client about potential abuse at or away from home. Most runaway status offense cases involve young women.³² Two explanations are often given for why girls are more frequently the subjects of runaway petitions: (1) girls may be subject to more restrictive parental-imposed rules than boys, such as curfews or prohibitions on dating, and conflict with these rules may cause girls to leave the home;³³ and (2) the motivation for running may be tied to sexual abuse, a crime frequently targeted at girls.³⁴

Often, your client or the client's guardian will say the client ran away to join an older boyfriend, girlfriend, or friend. This is a red flag to dig deeper and listen closely. A young woman may leave a home she views as overly restrictive to join a more welcoming romantic partner. This dynamic can be a setup for intimate partner abuse and, in the extreme, sexual exploitation.³⁵ If your client has been staying with a boyfriend or girlfriend, ask what she likes and dislikes about the relationship. You may also want to ask a domestic violence provider in your area for advice in eliciting information from your client and the best ways to help her.

In some circumstances, orders of protection, dependency petitions, or criminal proceedings may be appropriate, but proceed with caution and with the input of someone versed in working with victims of sexual abuse and exploitation. Some jurisdictions have status offender programming for runaways, gender-specific programming for adolescent girls, or interventions for young women who have been targets of sexual abuse or exploitation. The more tailored the intervention, the more likely it will provide value to your client. If your community's status offense system does not provide gender-specific or sexual abuse-specific

options, you may find relevant programming from your local runaway and homeless youth shelters and programs, domestic violence service providers, or child welfare system.

A high proportion of runaway youth are gay, lesbian, transgender, or bisexual youth who are leaving homes or communities that do not tolerate homosexuality.³⁶ Your client and her guardian may not identify this issue so listen for signs that this factor may be at play (e.g., a parent complaining that her daughter has gone to live with a female friend who is a bad influence). Successful disposition of this type of case often hinges on two factors: (1) connecting the youth with community resources for counseling and peer support; and (2) family counseling to achieve some level of tolerance for the youth's identity and lifestyle.³⁷

Case Planning

A good early move when representing a runaway is to find out what the guardian or other petitioner hopes to achieve by filing a petition. You may find the guardian wants their child located and returned to them but has little interest in the other components of the status offender process, and would be open to dismissal.

Many guardians of runaway children are misdirected to the status offender system. This may account for the higher dismissal rate for petitions involving runaways than other status offenses.³⁸ Similarly, when probation or child welfare is bringing the petition, they may be under the impression that court involvement is the required or the best response to runaway behavior. Presenting other options to court involvement, such as reuniting the family or voluntary services, may change their mind.

Advocating in Court

Most runaways leave home more than once.³⁹ Physically leaving a difficult situation is a coping mechanism that some youth come to rely on. The habitual nature of runaway behavior can frustrate judges, service providers, and parents working with runaway youth, all of whom may hope that a one-time intervention will end the behavior. Research shows the most successful responses to runaway behavior are those that tackle the underlying issues motivating the youth to run, but these responses often require ongoing work.⁴⁰ It is important to set the expectation early in a case that if your client has an additional episode of running, it is not a failure of a particular approach, but a bump on the road to resolving the issues involved.

Establishing this understanding from the outset is vital in jurisdictions that

allow the secure detention of status offenders who violate court orders, a practice known as the valid court order (VCO) exception, to the federal ban on secure detention for status offenders.⁴¹ The VCO exception may be used to detain runaways who have run again after receiving court orders to return home or attend a nonsecure placement.⁴² When facing this situation, remind the court that incarceration will not address the underlying causes of runaway behavior. Emphasize that a commitment to treatment and services that tackle the underlying issues—be they sexual assaults, domestic violence, or neglect and abuse—is more likely to be effective, even if going down this road takes time and involves bumps.

Conclusion

The key to being an effective advocate for status offenders is understanding what is happening in your client's life and what is motivating her on the individual level and in the larger context of youth development. Listen to your client closely. Understand her family and peer dynamic. Your awareness of your client's circumstances coupled with a familiarity with the social science research on adolescent development and status offense behavior will allow you to successfully contextualize your client's circumstances for the court or other decision makers and to advocate for outcomes that will be of the greatest benefit (or the least harm) to your client.

Endnotes

1. Stahl, Anne L., Charles Puzzanchera, Anthony Sladky et al. *Juvenile Court Statistics 2001–2002*. Pittsburgh, PA: National Center for Juvenile Justice, 2005, available at www.ncjrs.gov/html/ojdp/216251/.
2. Moffitt, Terrie. "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy." *Psychological Review* 100, October 1993, 674-701.
3. Loeber, Rolf and David Farrington. "Young Children Who Commit Crime." *Development and Psychopathology* 12, 2000, 737-762. (This longitudinal study shows that a quarter to a half of persistently disruptive children under 12 become child delinquents and that child delinquents are more likely to become chronic offenders as adults).
4. Ibid.
5. As another chapter in this book discusses, only a fraction of all status offenders receive representation. Whether a young person receives counsel in a status offense case varies across jurisdictions, except when there is a threat of secure confinement.
6. *Roper v. Simmons*, 543 U.S. 551, 568-75, 2005 (citing Arnett, Jeffery. "Reckless Behavior in Adolescence: A Developmental Perspective." *Developmental Review* 12, 1992, 339; Steinberg, Laurence and Elizabeth Scott. "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty."

- American Psychologist* 58, 2003, 1009, 1014; Erikson, Erik. *Identity: Youth and Crisis*. New York: W.W. Norton & Company, Inc., 1968).
7. Scott, Elizabeth S. and Laurence Steinberg, "Adolescent Development and the Regulation of Youth Crime." *The Future of Children* 18, Fall 2008, 15.
 8. Ibid., 20 (citing Anita Greene. "Future-Time Perspective in Adolescence: The Present of Things Future Revisited." *Journal of Youth and Adolescence* 15, 1986, 99-133).
 9. A limited number of jurisdictions allow secure detainment for status offenders who violate court orders. This policy, known as the valid court order exception, is discussed in greater detail below.
 10. Telephone conversation with Professor Jane M. Spinak, April 14, 2009.
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 12. Scott and Steinberg, 2008, 21-22 (citing Ellen Greenberger. "Education and the Acquisition of Psycho-Social Maturity." In *The Development of Social Maturity*. Edited by D. McClelland. New York: Irvington, 1982, 155-89).
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 15. Schaefer, Mari A. "Youth Court Engages Teens With Law." *Philadelphia Inquirer*, April 8, 2009.
 16. This is not to say that adolescent development is the sole cause of status offense behavior. As discussed more fully below, different status offenses are triggered by different underlying concerns that can range from a temporary family fight or a lack of interest in school to long-standing family dysfunction and mental illness.
 17. Scott and Steinberg, 2008, 22.
 18. Shubik, Claire and Ajay Khashu. *A Study of New York City's Family Assessment Program*. Washington DC: Vera Institute of Justice, 2005, 18, available at www.vera.org/download?file=51/323_595.pdf (describing the responses given in a focus group of parents who filed status offense petitions against their children in New York City).
 19. Snyder, Howard and Melissa Sickmund. *Juvenile Offenders and Victims: 2006 National Report*. Washington DC: Office of Juvenile Justice and Delinquency Prevention, 2006, 192, available at www.eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/e3/da.pdf. (The rate for ungovernable placement is 160/1000 compared to 68/1000 for truant youth.)
 20. Shubik and Kashu, 2005, 18.
 21. Spinak, telephone conversation.
 22. Frank Cervone, Executive Director of the Support Center for Child Advocates, emphasizes the usefulness of having a good family assessment up front to help identify and respond to these concerns. He comments, "It is critical from the get-go that case planning

is driven by information and that any mental health, substance abuse, or domestic violence issues be rooted out professionally rather than only informally.” E-mail to author, March 30, 2009.

23. Chiu, Tina and Sara Mogulescu. *Changing the Status Quo for Status Offenders: New York State's Efforts to Support Troubled Teens*. Washington DC: Vera Institute of Justice, 2004, available at www.vera.org/download?file=265/IIB%2BChanging%2Bthe%2Bstatus%2Bquo.pdf; Mogulescu, Sara and Gaspar Caro. *Making Court the Last Resort: A New Focus for Supporting Families in Crisis*. Washington DC: Vera Institute of Justice, 2008, available at www.vera.org/download?file=1796/status_offender_finalPDF.pdf.

24. *Preliminary Assessment of New York State's Approach to Educational Neglect*. Washington DC: Vera Institute of Justice, 2008 (unpublished, on file with the author and the Vera Institute).

25. Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds, such as local and state educational agencies, from discriminating on the basis of race or national origin. The U.S. Department of Education's Office of Civil Rights has interpreted this to mean that school districts have a responsibility to adequately notify minority group parents of school activities and that, in order to be adequate, the notice may have to be provided in a language other than English. U.S. DOE Office of Civil Rights Memorandum, "Identification of Discrimination and Denial of Services on the Basis of National Origin," May 25, 1970.

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27. Hammer, Heather, David Finkelhor and Andrea J. Sedlak. *National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMArt)*. Washington DC: Office of Juvenile Justice and Delinquency Prevention, 2002, available at www.ncjrs.gov/html/ojjdp/nismart/04/index.html.

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29. Ibid.

30. Shubik and Khashu, 2005, 21-22.

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33. Bishop, Donna M. and Charles E. Frazier. "Gender Bias In Juvenile Justice Processing." *Journal of Criminal Law & Criminology* 82, 1992, 1161.

34. Molnar, B. et al. "Suicidal Behavior and Sexual/Physical Abuse Among Street Youth." *Child Abuse & Neglect* 22(3), March 1998, 213-22.

35. Safyer et al., 2004, 496-97.

36. Kruks, Gabe. "Gay and Lesbian Homeless/Street Youth." *Journal of Adolescent Health* 12, 1991, 515.

37. Cervone, e-mail to author.

38. Snyder and Sickmund, 2006, 191.

39. Safyer et al., 2004, 500. (On average, children who run away run 2.5 times.)

40. *Ibid.*, 510 (discussing how when family functioning is at the root of a runaway situation, the issue must be dealt with holistically, by the parent and the child, if reunification is to succeed).

41. The federal Juvenile Justice Delinquency and Prevention Act (JJDP A) bans placing status offenders in secure detention unless the juvenile has violated a court order. 42 U.S.C. § 5633(a)(11)(A)(ii).

42. Rothgerber, Harry J. "The Bootstrapping of Status Offenders." *Kentucky Children's Rights Journal* 1, July 1991, 1.



CHAPTER THREE

**Accessing
Intervention
Services for Status
Offenders and
Avoiding Deeper
Involvement in
the Court System**

By Martha Stone and Hannah Benton

Accessing Intervention Services for Status Offenders and Avoiding Deeper Involvement in the Court System

Use alternative dispute resolution (ADR).

- Consider mediation or family group conferencing. ADR gives parents and youth a voice in treatment decisions. This “buy-in” makes it more likely that treatment will start quickly and that families will comply with treatment programs. ADR is particularly well-suited to address power imbalances within the family structure and to empower the family to address future crises.

File pretrial motions.

- Several **pretrial motions** can be used to divert youth from court and obtain needed services. They include:
 - **Motion to Dismiss Due to Lack of Jurisdiction:** If statutory prerequisites to filing a petition are present, assess how thorough the efforts to connect the youth to community resources were and whether the agency was too quick to file a petition against the youth.
 - **Motion for Evaluations or Expedited Evaluations:** Weigh the pros and cons of requesting an evaluation of your client. The evaluation could help guide a pre-trial service plan or divert youth with treatment needs from the court system. However, be wary of the potential loss of confidentiality through court-ordered evaluations. If you request an evaluation, consider requesting that the court hold proceedings in abeyance pending completion of the evaluation.

- **Motion for a Continuance (Until Completion of Services):**
Continuing proceedings allows the youth to engage in community services. Request that the court do so if your client could benefit from a community intervention that would make further court involvement unnecessary.
- **Motion to Dismiss Based upon School District's Failure to Comply with Federal or State Laws Regarding Truant Youth:**
You can petition the court to dismiss the status offense petition when the youth's school disengagement is related to or has been fostered by the school district's failure to comply with federal or state law protections, such as those under the Individuals with Disabilities Education Act, Bilingual Education Act and/or McKinney-Vento Homeless Assistance Act.

If precourt efforts fail, prevent future court involvement by obtaining specific interventions under the court's jurisdiction.

- After adjudication, request that the court order specific, evidence-based interventions.
- Argue for the court to order interventions appropriate for your clients to address the causes of the status offense adjudication and to avoid future court involvement, such as Aggression Replacement Training, Brief Strategic Family Therapy, Functional Family Therapy, Multidimensional Family Therapy, Multisystemic Therapy, or Wraparound services.

Overcome barriers to accessing interventions.

- Long wait lists and geographic disparity often prevent prompt access to services. Overcome these barriers by seeking to obtain services under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions of Medicaid.

Status offender behavior often leads to further involvement in the juvenile justice system. Attorneys representing these youth must understand how to maneuver through the court system to protect their child clients from further adverse consequences. This chapter outlines ways attorneys can avoid court engagement through alternative dispute mechanisms or through filing pretrial motions. It will also discuss how attorneys can use violations of state or federal law as a basis for dismissing status offense petitions.

If these pretrial tactics are unsuccessful, attorneys can advocate for several postadjudication interventions to influence the disposition of the case. Many address the behavioral health needs of these youth, including Multisystemic Therapy or Functional Family Therapy. Others have a short-term residential component such as respite, host homes, or multidimensional treatment foster care. For any of these interventions, you must be mindful of how to address barriers such as wait lists or geographic disparity.

Pretrial Tactics

Use Alternative Dispute Resolution

A growing number of jurisdictions use some form of alternative dispute resolution (ADR) in status offense cases. Since ADR gives both parents and children a voice in treatment decisions, this “buy-in” makes it more likely treatment will start quickly and families will comply with treatment programs.¹ Generally, there are two main types of ADR used: mediation, where a mediator facilitates the exchange of information and guides discussion towards solutions, and family group conferences, where the family seeks solutions through its own and community resources.²

Mediation

Mediation functions through the guidance of a third-party neutral mediator who helps participants engage in constructive problem-solving and weigh their options.³ In a study by the Children’s Aid Society of New York City, mediation was shown to be well-suited to situations where problems involve an ongoing relationship, such as the parent-child relationship. Mediation allows both the parent and child to retain their dignity and open lines of communication. By doing so, mediation is more likely to result in a sustainable solution for the family.⁴

Mediation is particularly well suited to address power imbalances within the family structure and to empower the family to address future crises. A well-trained mediator can create an equal discussion field through targeted interventions in

Lucas County Mediation for Unruly and Truant Youth

One of the best-established models of mediation for status offenders is located in Lucas County, Ohio, where mediation for unruly youth began in 1991. The mediation program was expanded to include truant youth in 1995. Conducted by trained volunteers and located in the courthouse, the mediations seek to reach a binding written agreement to improve family relations. After mediation, a Family Outreach Counselor is available to educate families about specialized intervention services, including counseling, cognitive therapy, support groups, and tutoring.¹ Program staff also follow up with the family, and may require them to attend further mediation sessions.² The Lucas County program has effectively opened lines of communication within families, connected families and service providers, and reduced the number of youth adjudicated as status offenders.³

Sources:

1. Hurst, Jr., Hunter. "Planning Interventions for Unruly and Truant Youth." *Ohio Bulletin: Children, Families and the Courts* 1(3), Fall 2003 10-11.
2. Mogulescu, Sara and Gaspar Caro. *Making Court the Last Resort: A New Focus for Supporting Families in Crisis*. New York, NY: Vera Institute of Justice, December 2008, available at http://verastage.forumone.com/download?file=1796/status_offender_finalPDF.pdf.
3. Hurst, 2003.

power dynamics.⁵ Mediation also empowers families by engaging them in creating solutions, which creates a framework for future problem-solving.⁶ This skill building serves families well even after the court is no longer involved. Mediation can also be successful at breaking complex problems into smaller, more manageable issues.⁷ To be successful, a mediation session must rely on confidentiality: issues discussed in mediation are not admissible in court, and the mediator cannot be forced to testify.⁸ Except when there are threats of harm to an individual, issues discussed at mediation are not subject to discovery.⁹ (See *Lucas County Mediation for Unruly and Truant Youth* box.)

Family Group Conferencing

Pioneered in New Zealand, family group conferencing (FGC) brings together family members, friends, and community members to develop a plan for addressing the problems at the root of the youth's behavior. This model encourages the family to find solutions in the family's own and local community resources. FGC begins with a case summary presented by the referring worker, which defines

Maricopa County Community Justice Committees

One successful version of Family Group Conferences is Community Justice Committees in Maricopa County, Arizona. Community Justice Committees are family group conferences that allow family members and youth to discuss root causes of their problems. Resolutions may include restitution, community service, counseling, and educational services. Status offenders who participated in Community Justice Committees were more likely to complete their diversionary program successfully and less likely to recidivate than similar offenders who did not participate in Community Justice Committees.¹

Source:

1. de Beus, Kimberly and Nancy Rodriguez. "Restorative Justice Practice: An Examination of Program Completion and Recidivism." *Journal of Criminal Justice* 35, 2007, 337.

the issues facing the family. Family members can then ask questions about this presentation. Following these questions, other community participants provide family members information that may be used to form a plan. Traditionally, families work privately to shape a plan to address their issues.¹⁰ The family plan is then presented to the referring worker and service providers. If there are any dissenting views, the referring worker and community participants highlight areas of consensus and help the family reach consensus in other areas.¹¹

Be attuned to how to engage your client in the process of FGC while maintaining his or her emotional health. Involving children in FGC always requires comprehensive planning and preparation.¹² Traditionally, lawyers do not participate in the private family time stage of FGC; however, in some cases, you should request to participate as a support person for your client. A support person represents the voice and perspective of a child and ensures the child's emotional safety during the FGC, requesting breaks from the process if necessary.¹³

Oregon was one of the first jurisdictions in the United States to adapt this model for status offenders, in its Family Unity Meetings. The Family Unity Meetings differ from traditional FGC in that the plan is developed by all participants, rather than being developed during private family time.¹⁴ Given the success of this model in Oregon, other jurisdictions have begun to use family group conferencing for status offenders.¹⁵ (See *Maricopa County Community Justice Committees* box.)

Special Considerations for Lawyers When Using ADR in Status Offenses Cases

| Type of Status Offense | Question to Ask | Importance |
|------------------------|---|--|
| Truancy | Is the ADR program located in the school or the court? | States and localities host ADR in different locations. Depending on the youth's reason for disengaging from the school system, the location may affect the youth's participation. ¹ For some youth, having ADR located within the school may help to more fully include school staff in creating solutions. |
| Beyond Control/Unruly | How will the family's power dynamic be addressed through ADR? | Youth identified as being beyond control may benefit from ADR. ADR offers these youth and their families an opportunity to meet on neutral ground and address root causes of their conflicts and long-standing power imbalances. |
| Runaway | How immediately available is mediation? | In cases involving runaway youth, it is helpful if ADR is available immediately to address potential crisis situations. For example, in Vermont, a runaway youth can stay at a designated shelter for seven days while shelter personnel try to mediate the family's problems. ² This gives the family respite from the crisis situation while allowing them to address the root problems. |
| | Is the root cause of the youth's behavior likely to be discussed through ADR? | Depending on the root cause of the youth's behavior, ADR may be counterproductive or ineffective. For example, although many runaway youth have suffered sexual abuse, these issues rarely arise in mediated sessions, even when the mediator is aware of the abuse. ³ Deciding whether to remove a child from a home where he or she is being abused is usually an inappropriate topic for ADR. ⁴ In cases where the root cause of the runaway behavior is abuse or neglect, you may want to file a motion for an order to show cause and file an abuse, neglect, or uncared for petition. ⁵ |

Sources:

1. Minn. Stat. § 260A.07 (2007) (truancy mediation located within the court system); Cal. Educ. Code § 48263 (2009) (truancy mediation located within the school system).

2. 33 V.S.A. § 5510-12.

3. Merry, Sally Engle. *Alternative Dispute Resolution and Social Justice: The United States' Experience*. Madison, WI: National Association for Community Mediation, 1997, available at www.vuw.ac.nz/nzidr/Papers.htm; Sexual abuse is estimated to be the most common cause of runaway behavior. Hammer, Heather et al., *Runaway/Thrownaway Children: National Estimates and Characteristics*, NISMART, October 2002, at 8.

4. *Tools for Permanency: Tool #3*. New York, NY: National Resource Center for Foster Care and Permanency Planning, 4, available at <http://centerforchildwelfare.fmhi.usf.edu/kb/LglStFedStat/Child%20Welfare%20Mediation.pdf>.

5. See also Chapter 7 of this book, *How Status Offenses Intersect with Other Civil and Criminal Proceedings*.

File Pretrial Motions

Four pretrial motions are commonly used to divert youth from court and obtain services for youth involved in the status offense system.

Motion to Dismiss Due to Lack of Jurisdiction

In many states, statutory schemes limit when a status offense petition may be filed. Be aware of the statutory requirements and be prepared to raise any procedural deficiencies. For example, in New Jersey community resources should be exhausted before a status offense petition is filed.¹⁶ In Louisiana, the petition must include an informal services plan describing how the youth will access necessary services.¹⁷ A number of states require schools to implement interventions to address truancy before filing a status offense petition.¹⁸ Where such statutory prerequisites exist, little case law offers guidance about how thorough the efforts to connect children to community resources must be prior to filing a petition. If statutory prerequisites are vague, check the statute's legislative history for guidance. Be prepared to detail what services the youth should receive and their availability in the community.

Motion for Evaluations or Expedited Evaluations

You may want to request evaluations or expedited evaluations if your state laws permit and request that the court continue any proceedings while evaluations are completed. Common types of evaluations include psychological, psychiatric, and educational. Some states allow juvenile courts to order school districts to perform educational evaluations of youth referred to the court for truancy.¹⁹ These evaluations provide additional information to help guide a pre-trial service plan, but you should be wary of the potential loss of confidentiality through court-ordered evaluations. Reports from court-ordered evaluations may be available to probation officers and the prosecution. Additionally, evaluations may unduly delay proceedings.

Motion for Continuance to Complete Services

Some states allow status offense petitions to be continued until the youth completes community services. Request that the court do so if your client could benefit from a community intervention that would make further court involvement unnecessary. Two general approaches exist in state law: (1) proceedings must be held in abeyance until interventions have been implemented; or (2) proceedings may be held in abeyance while interventions are pursued if it is in the best interests of the child.²⁰ Regardless of the approach, in many states, you can petition

to have the court case continued for at least six months while community services are implemented. In some states, this time period can be extended up to a year.

Motion to Dismiss Based on School District's Failure to Comply with Laws Regarding Truant Youth

Federal and state laws provide a range of protections to truant youth.²¹ You can petition the court to dismiss the status offense petition when the youth's truancy is related to or has been fostered by the school district's failure to comply with these protections.

- ***Violation of the Individuals with Disabilities Education Act (IDEA)***

The failure of a school district to properly identify a student with special education needs and to provide appropriate special education services may be grounds for dismissing a status offense petition. Students with unidentified special education needs may become truant due to disengagement with inappropriate educational programs. Examine state laws and regulations implementing IDEA's "child find" requirement, since some states require school districts to conduct special education assessments for chronically truant children.²²

IDEA also requires school districts to provide an appropriate, individualized educational program (IEP) to any child with one of the listed disabilities that adversely affects the child's ability to learn.²³ If a truant child has been identified as needing special education services, ongoing truancy suggests the IEP does not meet the child's needs. File a motion asking the court to dismiss the petition because the court cannot properly assess a child's truant behavior in the absence of legally required special education services.²⁴ (See Chapter 6, *Using Special Education Advocacy to Avoid or Resolve Status Offense Charges*.)

- ***Violation of Section 504 of the Rehabilitation Act of 1974***

Section 504 of the Rehabilitation Act of 1974 requires that a child with a disability receive accommodations and modifications to ensure equal access to an education.²⁵ Section 504 does not require schools to provide an IEP to provide the child with educational benefit, but it does require that schools provide services that are equally effective as those provided to nondisabled students.²⁶

Equally effective services allow disabled students an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as other students.²⁷ If a school's failure to implement accommodations and modifications has denied a disabled student access to educational programs, file a

motion asking the court to dismiss the status offense petition on the grounds that the child's truancy was produced by the school's violation of Section 504.

- ***Violation of the Bilingual Education Act***

Ensure that school districts have complied with their responsibilities to provide language-appropriate educational programs. Under the Bilingual Education Act, English language learners (ELLs) are entitled to an instructional program: (1) based upon recognized educational principles; (2) implemented with sufficient resources and staffed by appropriately-prepared personnel; and (3) that produces evidence that students are overcoming their language barrier.²⁸

After students' eligibility for this instruction ends, in some states they remain eligible for support services, such as sheltered English programs, immersion tutoring, and homework assistance, if they have not met the English mastery standard.²⁹ When the absence of such services for an ELL student has fostered school disengagement, file a motion asking the court to dismiss the status offense petition.

- ***Violation of the McKinney-Vento Homeless Assistance Act***

Under the McKinney-Vento Homeless Assistance Act, homeless students have rights to stable educational services.³⁰ Students are defined as homeless if they do not have a fixed, regular, and adequate nighttime residence.³¹ For example, a student is considered homeless if he or she shares housing with others because of loss of housing or economic hardship, or lives in a motel, hotel or campground due to lack of alternative accommodations.

School districts are required to immediately enroll homeless students and provide them transportation to their local school, school of last enrollment, or the school they attended when they lost housing.³² If a district's refusal to enroll or provide transportation to a homeless student results in truancy, this violation can be grounds for dismissing the status offense petition.

- ***Violation of Other Enrollment Laws***

During the enrollment process, school districts cannot require a student to produce passports, visas, or other immigration paperwork.³³ If a student does not meet the McKinney-Vento definition of homeless, schools are nonetheless only allowed to require proof of age, local residency, and immunization records for enrollment.³⁴ If a youth is not attending school due to the school's requirements for proof of immigration status, file a motion asking the court to dismiss the status offense petition.

- ***Violation of Bullying Prevention Laws***

Be aware of state bullying prevention laws and assert the school's noncompliance when appropriate. Most states have enacted bullying protections enacted to respond to the estimated 160,000 students who skip school each day due to fears of bullying or harassment.³⁵ Some states require schools to create plans to prevent bullying,³⁶ or to protect students who are bullied.³⁷ Others require employee training on bullying prevention,³⁸ or require disciplinary action against bullies.³⁹ Encourage students to keep a log of interactions with bullies, since some state laws require that a pattern of behavior exist. State laws may allow a student to report bullying anonymously and may require school staff to investigate bullying without revealing the identity of the student.⁴⁰ Youth will often initially deny that they are being bullied.⁴¹ To encourage your client to discuss bullying honestly, ask indirect questions about your client's favorite and least favorite parts of the school day.⁴²

You may also be able to assert the school's noncompliance with protections in the No Child Left Behind (NCLB) Act for students who are victims of violence. Under NCLB, a student may be able to transfer to another school if: (1) the student was the victim of a violent crime committed by another student; (2) the student was physically injured; and (3) the crime was reported to the police.⁴³

Postadjudication Tactics

If pretrial tactics fail, and the court has adjudicated the youth as a status offender, seek to prevent future court involvement by obtaining specific interventions for your clients through the court's jurisdiction. (See Chapters 4 and 5, *Preadjudication and Postadjudication Strategies for Defending Juveniles in Status Offense Proceedings*.)

Seek Court Orders for Specific Interventions

Once a child is adjudicated as a status offender, request that the court order specific, evidence-based interventions. In many states, courts can make any order deemed to be in the best interests of the child.⁴⁴ Some states also allow courts to order parents to participate in social services and interventions.⁴⁵ Argue for the court to order interventions appropriate for your client to address the causes of the status offense adjudication and avoid future court involvement. (See *Seeking Interventions under the Adoption and Safe Families Act (ASFA) for Status Offenders* box.)

Seeking Interventions under the Adoption and Safe Families Act (ASFA) for Status Offenders

The federal ASFA and its implementing regulations provide additional protections for children committed to their state's child welfare agency as status offenders.

When does ASFA apply?

1. Child is placed in a Title IV-E eligible placement¹; and
2. State agency receives federal Title IV-B and IV-E matching funds to pay for placement.²

What protections does ASFA provide?

1. Preplacement, the judge must find that the agency made reasonable efforts to prevent removal from the home.³
2. Postplacement, a case plan must be developed within 60 days of placement.⁴

How can you access interventions for your clients under ASFA?

1. Advocate preventative and therapeutic interventions as part of preplacement "reasonable efforts." These interventions can include:
 - a. special education services;
 - b. programs such as restrictive day-schools or treatment centers, substance abuse treatment, job corps, special schools;
 - c. services such as role models, mentors, mentoring clubs, police activity leagues, community organizations; and
 - d. medical screenings and follow-up.⁵
2. Advocate for a postplacement case plan that includes therapeutic interventions, including:
 - a. services that improve the conditions in the parent's home, aid the child's safe return home, and address the needs of the child while in out-of-home care;
 - b. community resources that address the child's and family's needs; and
 - c. court diversion services.⁶

Sources:

1. 42 U.S.C. §§ 620-679. Eligible placements include regular foster care homes or child care institutions that do not house more than 25 children or operate for the sole purpose of detaining children adjudicated delinquent.
2. 42 U.S.C. §§ 620-679.
3. 42 U.S.C. § 671(a)(15).
4. 45 C.F.R. § 1356.21(g)(2).
5. Hemrich, Veronica. *Applying ASFA to Juvenile Delinquency Cases: A Guide for Iowa Juvenile Court Officers*. Washington, DC: ABA Center on Children and the Law, 2002, 7-8.
6. *Ibid.*, 9-10.

Intervention Types

Interventions for status offenders can be divided into two basic groups: community-based interventions and interventions with residential components. One model of intervention may not fit every child. Rather, a continuum of services—including community-based, outreach, and residential—designed to fit the needs of status offenders ensures these children receive appropriate interventions.⁴⁶ (See also, *Interventions Available without Court Involvement* box.)

Intervention Services with Residential Component

In some cases, placement outside of the home may allow the youth to obtain necessary interventions and eventually re-engage with his or her family.

- *Crisis and Respite Care*

Crisis shelters and respite care can be very effective in breaking negative family dynamics and laying the groundwork for further interventions. Although these programs vary, they rely on the premise that a cooling-off period allows youth to obtain necessary assessments and connect to follow-up services. Usually, the youth lives at the crisis shelter or respite center for no more than a few days to two weeks. Crisis and respite staff may provide the youth with assessments to determine psychological and social needs, engage the family in short-term therapeutic counseling, and create a family reunification plan, based on discussions with the entire family about sources of conflict and how to prevent future crises.⁴⁷

- *Host Homes*

The host home model provides short-term shelter to status offenders within host family settings. Host home families access services through their coordinating service provider, including crisis intervention, case management, individual and family counseling. Host homes can be effective for some children because they may provide a setting that is less likely to overstimulate an easily agitated child and they may allow for more individual support than a congregate shelter. Additionally, host homes give youth the opportunity to observe another family and learn problem-solving strategies within the family setting.⁴⁸

- *Multidimensional Treatment Foster Care*

For other youth, multidimensional treatment foster care (MTFC) may be an effective intervention. MTFC places youth with specially trained foster parents who implement a structured, individualized program for the youth.⁴⁹ MTFC foster parents provide daily updates to a case manager, who coordinates the youth's treatment plan. The youth's treatment team meets weekly to evaluate the youth's

Community-Based Interventions for Status Offenders¹

| Intervention | Structure | Appropriate For | Outcomes |
|--|--|--|--|
| Aggression Replacement Training (ART) | Incorporates three interventions: (1) <i>skill-streaming</i> , which uses modeling, role-playing and transfer training to increase prosocial skills; (2) <i>anger-control training</i> , which trains youth to respond to actual anger-arousing situations; and (3) <i>training in moral reasoning</i> , which teaches youth to imagine others' perspective in a variety of situations. ² | <ul style="list-style-type: none"> Youth who exhibit early onset of aggression and/or violence Youth who have experienced victimization and exposure to violence Youth with mental health disorders, particularly conduct disorders³ | <ul style="list-style-type: none"> Increases interpersonal skills Improves prosocial community functioning Reduces future court-involvement⁴ |
| Brief Strategic Family Therapy (BSFT)⁵ | Family-based intervention, where the therapist uses three main strategies: <i>joining</i> , engaging the family system; <i>diagnosing</i> , identifying family strengths and maladaptive structures; and <i>restructuring</i> , building upon strengths and transforming maladaptive interactions. ⁶ | <ul style="list-style-type: none"> Truant youth Youth with little parental supervision Youth who exhibit antisocial behavior and alienation⁷ | <ul style="list-style-type: none"> Improves self-concept and family functioning Reduces substance abuse, conduct problems, emotional problems, and association with antisocial peers⁸ |
| Functional Family Therapy (FFT)⁹ | Family-based prevention and intervention, where the therapist engages in: <i>motivation</i> , decreasing the intensity of family negativity; <i>behavior change</i> , eliminating the problem behaviors and their associated family relational patterns, and <i>generalization</i> , increasing the family's capacity to use community resources and to avoid relapse. ¹⁰ | <ul style="list-style-type: none"> Youth who exhibit antisocial behavior and alienation Youth with little parental supervision Families with family management problems or patterns of family conflict¹¹ | <ul style="list-style-type: none"> Reduces future contact with court system by up to 60% Reduces the potential for court involvement of youth's siblings¹² |

Community-Based Interventions for Status Offenders (continued)

| Intervention | Structure | Appropriate For | Outcomes |
|--|--|---|---|
| Multidimensional Family Therapy (MDFT) | Family-based treatment and prevention program, which uses multiple assessments and interventions to: improve youth functioning in key domains; facilitate parental commitment and investment; and enhance family relationships. Also focuses on helping the youth achieve an attachment bond to family and durable connections to pro-social influences. ¹³ | <ul style="list-style-type: none"> Youth with low school engagement Youth with early alcohol or drug use or sexual involvement Youth who have experienced erratic family discipline practices¹⁴ | <ul style="list-style-type: none"> Greatly reduces substance abuse and behavior problems Creates consistent improvements in family competence and school performance Is effective as a preventative service¹⁵ |
| Multisystemic Therapy (MST)¹⁶ | Based on a family-therapist collaboration where the family sets treatment goals and the therapist identifies family strengths, develops natural support systems and reduces family stressors to achieve those goals. ¹⁷ | <ul style="list-style-type: none"> Youth with low academic achievement Youth with mental health disorders Families with low levels of bonding/attachment¹⁸ | <ul style="list-style-type: none"> Reduces future contact with court system Increases family cohesion Decreases youth aggression¹⁹ |
| Wraparound services (including access to psychiatric care)²⁰ | Team of individuals provide comprehensive assessments, case management, individual and family treatment, and crisis intervention. ²¹ | <ul style="list-style-type: none"> Youth at risk of institutionalization Youth with psychiatric needs Youth whose psychosocial environment inhibits effective treatment²² | <ul style="list-style-type: none"> Decreases problem behaviors Improves child functioning²³ |

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Community-Based Interventions for Status Offenders (continued)

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19. Ibid.; Curtis, Nicola M. and Kevin R. Ronan. "Multisystemic Treatment: A Meta-Analysis of Outcome Studies." *Journal of Family Psychology* 18, 2004, 411.
20. For more about the wraparound process, see Storandt, 2007, 24-27, note 79, Step 4.
21. Ibid., 24; *The National Wraparound Initiative*, available at www.rtc.pdx.edu/nwi/.
22. "Helping Youth with Severe Emotional Disturbances at Risk of Institutionalization." *Psychiatric Services* 58, October 2007, 1369.
23. Ibid.

progress and adjust the treatment plan accordingly. Additionally, the youth's birth family receives family therapy and parent training.⁵⁰

MTFC is most appropriate for youth from families with high levels of conflict, who have mental health or cognitive disorders, and who exhibit antisocial attitudes and early onset of aggression.⁵¹ In addition to reducing future court contact, MTFC has been shown to reduce problem behaviors, improve school adjustment, and increase self-reports of happiness.⁵²

Addressing Barriers to Accessing Interventions

Two barriers often prevent prompt access to intervention services: long wait lists and geographic disparity in access to services. Under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions of Medicaid, you may be able to reduce these two barriers to services. Federal law requires every state

Interventions Available without Court Involvement

Federal law creates legal entitlements to other interventions that can benefit status offenders. Although your client may or may not be able to enforce these entitlements privately, you should be aware of their availability in the community.

For Truant Youth

Whether or not a student's learning is impacted by a disability, a period of truancy may be self-reinforcing because the student will be reluctant to return to class after falling behind academically. For such children, the No Child Left Behind Act (NCLB) may provide access to educational services to help them transition back to school and improve academically. Under NCLB, students are eligible for supplemental educational services if they: (a) are eligible for free or reduced-price lunch; and (b) are enrolled in Title I schools that have been placed on the state's "in need of improvement" list for two or more years.¹ Supplemental educational services may include services such as one-on-one tutoring or computerized instruction.² Encourage parents to meet with school district staff and the supplemental educational service provider to develop appropriate goals for the student's progress.³

Students may also be able to access transfers to better schools under NCLB. Schools that fail to meet their adequate yearly progress goals for two consecutive years must provide children with the option of transfers to a nonfailing school in the district.⁴ The school district is required to pay for transportation to the new school; however, it can limit the amount of transportation money available and give preference to the lowest-achieving children from the lowest income families.⁵ A child who transfers to a nonfailing school may stay there until he or she has completed the highest grade in that school.⁶

For Runaway Youth

Be aware of additional state services available to runaway youth under the Reconnecting Homeless Youth Act of 2008. The Reconnecting Homeless Youth Act was the 2008 reauthorization of the federal Runaway and Homeless Youth Act (RHYA).⁷ It expanded services to better serve runaway youth. RHYA's Basic Center Program provides grants to community-based organizations to support counseling, services for families with children at risk of separation from the family, and emergency and respite shelter of up to 21 days. RHYA's Transitional Living Program provides grants to community-based organizations to support residential

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services for up to 21 months, and life skill supports to youth ages 16 through 21 who are unable to return home safely, including maternity group homes for pregnant and parenting youth.⁸

Sources:

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2. Title I status is determined by the percentage of students under the federal poverty level; www.ed.gov/parents/academic/involve/suppservices/index.html.
3. 20 U.S.C. § 6316.
4. 20 U.S.C. §6316(b)(1)(E). If all schools in a district fail, transfers should be made to another school district.
5. *Ibid.*
6. 20 U.S.C. § 6316 (b)(13).
7. 42 U.S.C. § 5701 *et seq.*
8. www.nn4youth.org/news.aspx#reconnecting; www.serve.org/nche/states/state_resources.php (state-by-state resources for homeless youth).

to provide EPSDT services to all Medicaid-eligible children, even if they are not provided to adults.⁵³ EPSDT services include case management, psychiatric services, home and community-based preventative and rehabilitative services.⁵⁴ Under EPSDT, states are obliged to actively arrange for treatment, by providing the service themselves or by referral to appropriate community providers.⁵⁵ You can use this obligation to argue that long wait lists for services violate Medicaid law. Additionally, the Medicaid Act requires that programs be available statewide: a state Medicaid plan must “provide that it shall be in effect in all political subdivisions of the State.”⁵⁶ Consequently, if a Medicaid-eligible status offender does not receive necessary services due to geographic disparities, you can argue that the state is violating Medicaid law.

Conclusion

Status offenses are a clear indication that a child’s basic needs are not being met, in the home, at school, or in the community.⁵⁷ Moreover, status offenses are a strong predictor of juvenile delinquent behavior, educational failure, substance abuse, and teen pregnancy.⁵⁸ For example, truant children are 12 times more likely to be involved in the juvenile justice system than nontruant children.⁵⁹ Because status offenses serve as a gateway to the juvenile justice system, attorneys

must seek services for their status offender clients to help them avoid future court involvement.

Alternative dispute resolution can divert youth from formal court engagement and can empower families to reach creative solutions. Pretrial motions, which are often overlooked, can result in the dismissal of the status offense petition through the court's lack of jurisdiction or through violations of state or federal law.

If pretrial tactics are unsuccessful, postadjudication interventions support successful outcomes for youth. Interventions along a continuum of services—community-based, outreach, and residential—help ensure youth receive appropriate services. Ensuring your client receives appropriate and targeted services can help avoid future court involvement and improve life outcomes.

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CHAPTER FOUR

**Preadjudication
Strategies for
Defending
Juveniles in
Status Offense
Proceedings**

By Tobie J. Smith

Preadjudication Strategies for Defending Juveniles in Status Offense Proceedings

Demand strict proof of elements that define the status offense in statute.

- Find bright-line rules in statutes and chip away at them. For example, if the truancy statute requires 10 unexcused absences, look at each one and see if the youth was in fact out of school without permission. Such clear requirements provide an obvious defense when they are not satisfied.
- Identify other statutory requirements that lend themselves to varying interpretations. For example, the statute may define running away to occur when youth are “persistently” running away “without good cause.” This definition may furnish multiple defenses relating to how the terms “persistent” and “without good cause” are defined.

Frame the facts in the broader context of the youth’s home environment and the parent-child relationship.

- Assess whether some of the responsibility should be allocated to the parent. Focus the case on the root cause of the behavior and family functioning, and not the behavior itself.

Weigh the pros and cons of contesting the adjudication after the fact.

- Be aware that many courts do not appoint counsel for the youth unless or until they face incarceration for contempt or violating a valid court order. If appointed at this stage, consider:
 - whether correcting the uncounseled adjudication may, in fact, pave the way for securely detaining the youth;

- the relative importance, to the juvenile, of avoiding adjudication and avoiding secure custody;
- the probability that a challenge to the underlying adjudication would succeed;
- the probability that the juvenile would be placed in secure custody if the challenge were to fail;
- the collateral consequences of adjudication as a status offender;
- the applicable laws regarding confidentiality and sealing or expunging juvenile records;
- the judge's views and sympathies regarding status offense cases; and
- how long the juvenile might remain in secure custody in the event of an unsuccessful challenge.



Representing a child charged with a status offense differs sharply from representing a child in a delinquency proceeding. The nature of the substantive laws defining status offenses (differences from state to state notwithstanding), the family problems that often underlie the offending conduct, and the vast discretion juvenile court judges have in such proceedings make these cases unique. If you are the attorney for the child in a status offense case, these features create challenges that can complicate your job. With the proper perspective, though, they also provide opportunities for advocacy that are not available in other cases. This chapter examines the distinguishing features of status offense proceedings involving truant, ungovernable, and runaway youth. It attempts to illuminate both the challenges you should anticipate as counsel and how to use these cases' unique features to your (and your clients') advantage.

Preadjudication Defense

Statutes defining status offenses frequently use terms that leave room for interpretation. Often, there is little case law interpreting these statutes. That distinguishes status offenses from the criminal offenses in most juvenile delinquency proceedings. Nevertheless, status offenses are not devoid of objective standards. In defending a status offense prosecution, it is important to:

- identify and demand strict proof of every objective element in the statute defining the offense; and
- frame the facts in the broader context of the child's home environment and the parent-child relationship, to the extent that the outcome will turn on subjective determinations.

The term "status offender" is defined by federal law as "[a] juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult."¹ Although any offense consisting of such conduct is a status offense, truancy, ungovernability, and running away are some of the most common:

- **Truancy**—Representative statute: "[A]ny family whose juvenile . . . [is] habitually and without justification absent from school while subject to compulsory school attendance" is a "[f]amily in need of services . . ."²
- **Ungovernability**—Representative statute: "A child who . . . has committed a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian or other

custodian and who is ungovernable and found to be in need of care, treatment or supervision”³

- **Running away**—Representative statute: A child’s “voluntary absence . . . from the child’s home without the consent of the child’s parent or guardian for a substantial length of time or without intent to return” is “[c]onduct indicating a need for supervision”⁴

Some officials in the juvenile justice system may conceptualize these offenses in overly simplistic terms: *If the youth misses school without an excuse, then he is truant. If the parent reports that the youth is disobedient, then he is ungovernable. If the youth stays away from home overnight without his parent’s permission, then she is a runaway.* Those characterizations may carry over into court if you, as the youth’s attorney, do not insist that the court weigh all words of the applicable statute. (See *Look for Opportunities to Appeal* box.)

At a recent juvenile law conference, a public defender said, “Juvenile court is the hardest place to be a good lawyer, and it’s the easiest place to be a bad lawyer.” It is easy to see the latter part of that statement borne out in court on any given day. Status offense proceedings provide fertile ground for tepid advocacy because there usually is no risk that the juvenile will be placed in secure custody, at least not at the time of adjudication. However, an attorney who wants to put on a vigorous defense may be able to find assistance as well as challenges from the language of status offense statutes. (See *Don’t Presume Compliance* box.)

Truancy

Truancy statutes contain, either expressly or by reference, some clear bright-line rules. For example, by requiring that the child be “subject to compulsory school attendance,” Arkansas’s statute applies only to youth whose birth dates fall within a certain range.⁵ Some states also include clear, objective standards as to the threshold number of absences that can support a truancy charge. Connecticut law, for instance, provides that to be adjudicated a “youth in crisis” for truancy, a youth must, “within the last two years, . . . [have] four unexcused absences from school in any one month or 10 unexcused absences in any school year”⁶ Such clear requirements provide an obvious defense when they are not satisfied. Because of their clarity, though, they are rarely at issue in a pending case; even if a charge is somehow filed against a youth who is not of compulsory attendance age, the prosecutor will surely drop the case once the mistake is brought to light.

But other statutory requirements, though objective, are worded in ways that

Look for Opportunities to Appeal

If you cannot get the judge to construe the objective elements of a status offense statute to have any real meaning, and cannot find any case law on point in your jurisdiction, then consider appealing the matter. If you succeed, not only will you provide new guidance to other judges throughout your state, you will find that getting reversed will cause the judge to pay more attention to your arguments in future cases. Even if you fail, your client should not be worse off for your effort (unless you were retained rather than appointed). Still, from a policy perspective, be aware of the possibility of creating bad precedent. Before charging headlong into an appeal, consider:

- **How do other judges in the state construe the statute?** If other juvenile court judges in the state interpret the statute the same way you do, and your judge is an exception, then that might bode well for your chances on appeal, especially if the appellate judges are familiar with practice throughout the state. This also raises the risk that if you lose on appeal, other judges will modify their approach to more closely resemble the less desirable exception.
- **Is the issue discretionary?** Judges often have broader discretion in juvenile proceedings than in other types of cases. Sometimes that leads judges to treat objective matters as discretionary. Appealing an inappropriate exercise of discretion can reign in this practice. But before you file a notice of appeal, make sure your appeal will be reviewed *de novo* rather than under an abuse-of-discretion standard. To do that, first make sure your appeal is based on language in the statute that creates an objective standard. Second, do not muddle the issue by arguing that the judge misinterpreted the evidence or believed the wrong witness, unless the judge's interpretation is altogether unsupported by the evidence. Instead, be prepared to show that the judge misapplied the statute *even if* all of the evidence against the child is true.
- **Can you get the judge on the record?** Most states do not have jury trials for juveniles. No jury trials mean no jury instructions. Without jury instructions, the judge might not say what standard she is applying—at least not on the record. But you can try to draw her out. Simply by arguing the issue, you may elicit a counterargument from the judge when she rules against you. Another option is to ask the judge to instruct herself as she would a jury, since she occupies the jury's role as trier of fact. Of course, the only reason to do that is to get the judge's legal standard on the record, presumably for appeal. A judge that wants to appeal-proof her judgment is not going to play along. But keep in mind that even the shrewdest judge cannot hide from the facts.

- **Do the facts favor your position?** No matter how wrong the standard applied by the juvenile judge may be, if the facts of your case do not clearly put your case on the other side of the *correct* standard, you probably should look for a better case in which to raise your argument on appeal. The decision to appeal is ultimately the client's, and the child probably does not have any personal interest in the fact that an unsuccessful appeal could create bad precedent. But it is your role to advise the client about the likelihood of success and other factors that affect the decision to appeal. Do not discourage the client from appealing simply because of the potential negative consequences for other cases, because that does not implicate the client's own interests. However, it is appropriate to encourage an appeal if your client's case is a good one for creating some positive precedent. As long as the client will not bear the costs of appeal, losing is unlikely to harm your client.

may lend themselves to varying interpretations. Again, the Arkansas truancy statute serves as an example. Like the Connecticut statute, it requires a threshold level of absenteeism to support a truancy adjudication, but unlike the Connecticut statute, Arkansas does not put a specific number on that threshold, requiring instead that the youth be “habitually and without justification absent”⁷ The question of when a youth accumulates a critical mass of absences that amount to evidence of a habit is left by statute to the courts. Both the “habitually” and the “without justification” elements establish subjective standards, furnishing two possible strategies for defending the case:

- **Don't automatically accept the school's or the prosecution's assertion that the child's absences are so numerous as to be habitual.** “Habit” is a strong word with varied meanings. Often, it means a behavior is almost compulsive, or a person behaves in a certain way more often than not in a particular set of circumstances.⁸ Whether that was the Arkansas legislature's intent is an open question, because the statute's text does not indicate one way or the other.
- **Don't look at the alleged number of absences as all-or-nothing.** For example, the Arkansas statute, by focusing on whether absences were justified rather than whether they were excused at the time, creates an opportunity to defend absences after the fact. Even if some were not justified, others may have been. Chip away at the total number of absences enough, and what remains might not look so habitual.

Don't Presume Compliance

When assessing an accused status offender's prognosis under supervision, avoid getting into a position where noncompliance can lead to deeper trouble. Probation might not seem like a harsh consequence for adjudication, but if the child does not comply with the court-ordered terms, then the consequences may get much harsher. Status offenders may fare worse under court supervision than juveniles who have committed more serious offenses. Two main factors contribute to their difficulties complying with probation:

- **Disorder at home.** A child who is not used to submitting to parental authority may also have difficulty with other authorities, including the court. A parent who has trouble getting his child to school may also have trouble getting her other places, such as counseling appointments, drug tests, and meetings with her juvenile probation officer (JPO). Simply put, much court supervision is about the child's ability to jump through hoops. Calling a JPO to check in once a week does not directly promote public safety, but failing to do so might show how out-of-control the child's life is, raising a red flag. (On the other hand, it might show nothing more than that the child is a forgetful teenager.) Ultimately, complying with court supervision is largely a matter of discipline and structure, and many status offenders lack both.
- **Parents' complaints.** Many children charged with running away or being ungovernable are in juvenile court because of a complaint filed by their parents. Don't expect the parents to suddenly take a more charitable view of their children's behavior once the court is involved. Perhaps the parent filed the charge because she felt overwhelmed and was seeking help. She is not going to feel any more confident in her ability to control the child simply because he is on probation. If anything, having sought the court's assistance, she will expect the court to act when the child misbehaves. Many JPOs express exasperation with parents who call them several times a day to report misdeeds as mundane as refusing to wash dishes. Those JPOs recognize what is going on: the parents want the court to do something it is in a poor position to do—help raise their children. But JPOs are human. After enough calls from a parent saying "You're going to have to pick him up," the JPO might start looking for a reason to pick the youth up, if only to make the phone stop ringing.

In short, do not assume the adjudication itself is no big deal because it cannot lead to secure confinement. Avoid adjudication if possible, particularly if the child's case is assigned to a judge or JPO whose actions may be influenced by parental complaints and who is unlikely to view the child's actions through the prism of the chaotic home environment.

Another possible defense in a truancy proceeding is to show the parent is at fault. In some jurisdictions, such a defense is formally recognized by statute⁹ or case law.¹⁰ Even where there is no direct, explicit authority in state law, the principle that parents are responsible for their children's attendance is widely supported. For example, Alabama's compulsory attendance law contains strong language regarding parents' accountability for school attendance.¹¹ A parent's failure to secure his child's regular school attendance is a basis for a dependency finding in many states. And basic notions of culpability suggest that a child should not be held responsible if her parent fails to enroll her or take her to school.

Sometimes it can be difficult to allocate responsibility for a youth's nonattendance; the decision to stay home from school ordinarily is made in the privacy of home. But even a cursory investigation by the school, such as asking the parent why the youth has been absent, can shed light on the cause. If the school did not investigate, the youth's attendance history may be telling. Truancy problems rarely arise out of nowhere. Often, there is a history dating back to elementary school. Even if a youth becomes unruly enough that his parent simply cannot make him go to school, that is usually not the case during the child's elementary school years. If the attendance problems date to a point when the parent was responsible, and the attendance has not changed over the years, then the responsible party probably has not changed. Likewise, truancy by the youth's siblings may provide evidence of a pattern, suggesting the problem lies with the parent rather than each child.

Ungovernability

Truancy is not the only status offense that may contain some elements that could form the basis for a defense. Take for instance the Pennsylvania ungovernability statute, which requires proof that the child "has committed a specific act or acts of *habitual* disobedience of the *reasonable and lawful* commands of his parent, guardian or other custodian *and* who is ungovernable and found to be in need of care, treatment or supervision"¹² The word "habitual" lends itself to varying interpretations in this context, just as in the truancy context. The requirement that the parent's commands be reasonable and lawful also suggests some possible defenses.

First, a parent's (or judge's, for that matter) personal assessment that a child is not "acting right" is not enough to satisfy the statute; whether the child "should have known better" is beside the point. The child's behavior must violate explicit—and reasonable ("lawful" is less likely to be in dispute)—instructions from the parent.

Second, even where the parent has given commands, the commands from an ungovernable youth's parent may be more contradictory than most parents' commands. The fact that a youth cannot be governed by his parent says something about the youth, but also says a lot about the parent. A parent with a mental illness or a substance abuse problem may send mixed messages so her commands are inherently unreasonable. Even if the parent does not have a clearly defined pathology, the fact that she cannot control the child warrants some inquiry into the parent's relationship with and behavior toward the child. Does the youth understand his parent's expectations? Does the parent respond consistently to a behavior, or does she ignore it sometimes and threaten to disown the youth other times? A judge in an ungovernability proceeding might determine it is not reasonable to expect a youth to comply with inconsistent or unclear commands, making the commands themselves unreasonable. If not, such evidence still might help at disposition.

In addition to those elements, the Pennsylvania statute requires that the youth be "ungovernable," which suggests that the youth's disregard for parental authority must not only be habitual but must pervade the parent-youth relationship. No parent can control everything her youth does all the time; it is normal and healthy for teenagers to test boundaries. The "ungovernable" element contemplates something more—that the parent cannot control the youth's behavior in the way a typical parent can control the typical youth.

Running Away

Texas's runaway statute contains several requirements: "voluntary absence," "without the [parent or guardian's] consent," "for a substantial length of time or without intent to return . . ." ¹³ As to the "substantial length of time" element, the Texas Court of Appeals has rejected the argument that it is reducible to a specific period such as 24 hours. ¹⁴ Instead, the court held the determination whether a period is "substantial" must involve:

many factors, including the duration of the child's absence, the time of day, the intent of the child in returning, . . . the authorization, if any, for the child's absence[,] . . . the child's age, the child's motive for running away, the child's activity during the absence, the child's distance from home, and the number, age, maturity, and experience of the persons, if any, accompanying or assisting the child during the absence. ¹⁵

Such a long list of factors makes it more difficult to predict whether a court will find a particular length of time to be substantial, but it helps identify possible arguments.

The “voluntary absence” and “without . . . consent” elements raise some of the same issues that arise in ungovernability cases. There is often a very active parental role in a child’s running away. In many cases where a child is alleged to have stayed away from home overnight or longer—i.e., to have run away—the youth has a very different take on the events that caused her to leave, insisting that she was actually “put out of the house” by the parent. Many cases involve an argument between the parent and youth that eventually escalates to the point that the parent insists the youth leave the house. Rather than back down or lose face by apologizing, the youth leaves angrily. Most kids don’t wander the streets. Usually the parent knows exactly where the youth went—to a relative, neighbor, or friend’s home.

Such a scenario creates some possible defenses no matter how the runaway statute is worded. Ideally, you can base your argument on an element of the statute, but also be creative.

- Did the parent breach a legal obligation to the child, and if so, is that a basis for an affirmative defense?
- Did the child really do anything culpable, or simply respond poorly when placed in a bad situation by the person who is supposed to care for her?

Some states’ runaway statutes contain stronger wording that presents other defenses. For example, Florida’s statute requires proof that the youth has “*persistently* run away,”¹⁶ a requirement that presents some of the same issues as the “habitual” element in some truancy and ungovernability statutes. Perhaps even more significant, though, is Florida statute’s requirement that the youth’s behavior continue “despite reasonable efforts of the child, the parents or legal custodians, and appropriate agencies to remedy the conditions contributing to the behavior.”¹⁷ A youth can only be said to run away “despite” such efforts if she continues to run away—“persistently”—after the efforts are undertaken.

Therefore, in defending a runaway charge under the Florida statute, counsel should insist that attempts to show a persistent pattern of running away focus exclusively on the youth’s conduct after reasonable efforts to intervene have taken place. Also, note that the statute requires reasonable efforts by “the child, the parents or legal custodians, *and* appropriate agencies”;¹⁸ the fact that the youth has not made reasonable efforts will not excuse the others from their obligation to do so, although the child’s noncooperation may frustrate their efforts.

Even if you cannot find a way to prevail on the merits, you may be able to shift the focus from the youth to the parent, or at least away from adjudication. (See *Good Cause Exceptions in Runaway Statutes* box.) For a parent to put his child out of the house to fend for herself endangers the child’s welfare. Most

Good Cause Exceptions in Runaway Statutes

Some runaway statutes include “good cause” requirements. In Arkansas, running away consists of “absent[ing] himself or herself from the juvenile’s home *without sufficient cause, permission, or justification . . .*”¹ Connecticut’s statute proscribes “*without just cause* run[ning] away from the parental home or other properly authorized and lawful place of abode”² Likewise, Virginia includes a “without reasonable cause” provision in its runaway statute.³ Such language creates a defense that may be available in many cases.

Occasionally, kids run away from stable, healthy homes to wander the streets in search of drugs or to pursue a romantic relationship that their parents forbid. In many instances, however, children’s actions are justified. The desire for a safe, loving home is innate. Under normal circumstances, obstinacy alone will not motivate a child to leave her home and fend for herself. If she does, she may be running away *from* something with good cause.

Terms such as “sufficient cause, permission, or justification,” “just cause,” and “reasonable cause” are worded so generally that judges may construe their scope differently. Certainly, abuse or neglect by another household member should be sufficient in most cases, provided you can show some nexus between the abuse or neglect and the child’s decision to leave. Some judges also might find good cause where a parent has kicked the child out of the home, or even in cases of persistent, but nonviolent, parent-child conflict. A “good cause” defense might also be worthwhile even in states whose statutes do not expressly provide for it, depending on the judge who hears the case. (For more on abuse and neglect issues in status offense cases, see Chapter 7, *How Status Offenses Intersect with Other Civil and Criminal Proceedings*.)

Sources:

1. Ark. Code Ann. § 9-27-303(24)(C) (2008) (emphasis added).
2. Conn. Gen. Stat. § 46b-120(3)(A) (2008) (emphasis added).
3. Va. Code Ann. § 16.1-228 (2008).

juvenile court judges are not going to simply dismiss a case, and thereby relinquish any jurisdiction to monitor and provide services to the family, after hearing such facts. But some might be persuaded that the true cause of the problems is the parent’s conduct and the more appropriate court intervention is a dependency proceeding or some diversionary approach that avoids adjudication.

In short, the broad wording of status offense statutes does not have to be an unqualified negative for the youth. The statutes' vague standards do not make them standardless, or require that the vagueness be resolved in the prosecution's favor. If the statute's text is no help, focus instead on the case facts. The parent's version may not cast the child in a very good light, but the parent's version does not have to be all the court hears. A status offense essentially involves a breakdown in fundamental aspects of a child's life: her home, her school, her relationship with a parent. The fault will never exclusively be the child's.

Likewise, it is unlikely the child's behavior will change by imposing court orders and threatening incarceration if they are not obeyed. Some officials reflexively shake their heads at status offenders' behavior. Yet while they may consider the child's behavior unacceptable, by focusing on the behavior rather than its roots, they allow the behavior to persist. Perhaps the most important task in defending an accused status offender, regardless of the offense or the statute, is to challenge that approach.

Contesting Adjudication After the Fact

Sometimes, you may not have the opportunity to defend a status offense case until after it has been adjudicated. Because status offenders usually cannot, by law, be placed in secure custody at adjudication, many courts do not appoint counsel for the child at the adjudicatory stage. Yet the youth may eventually face incarceration for contempt or violating a valid court order (VCO). At that point, the child clearly is entitled to counsel, and most courts will appoint a lawyer if they have not already. The first questions you should ask if you are appointed at that stage are: *Can* you contest the underlying adjudication? *Should* you do so?

Whether a court will allow a child to attack an uncounseled adjudication after the fact may turn on whether the court treats a probation order for a status offense like a suspended or probated sentence in a criminal proceeding.¹⁹ In *Alabama v. Shelton*,²⁰ the United States Supreme Court held that a criminal defendant who was denied counsel at the adjudicatory stage could not be given a suspended sentence of imprisonment,²¹ stating, "A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense."²² The Alabama Supreme Court had reached the same conclusion in Shelton's case,²³ relying in part on *United States v. Reilly*,²⁴ in which the court stated, "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid.

Know the Judge

“A good lawyer knows the law. A great lawyer knows the judge.”

—Well-worn lawyer joke.

In many jurisdictions, juvenile proceedings are characterized by broad judicial discretion, particularly at nonadjudicatory stages. In status offense proceedings, although judges ordinarily have more limited discretion at the dispositional stage, the substantive offenses are often defined in such subjective terms that a judge’s personal world view may significantly impact the case’s outcome. If you represent a child charged with a status offense before a judge you’re not familiar with, getting to know the judge is an important part of preparing your case. Here are some things to look for:

- **Is the judge receptive to “equitable” arguments at the adjudicatory stage?** Truancy, running away, and ungovernability can all involve children who are beyond their parents’ control in some way. Even when a child’s conduct clearly violates the black-letter law, the parent’s poor guidance or ineffectiveness may be as much to blame as the child’s behavior. To some judges, this will not matter, either because they will stick to the strict statutory language or because they believe it is best to hold children to a high standard, by which the children are expected to make mature, responsible decisions even if their parents don’t or have done a poor job showing them how. Other judges consider it unfair to punish a child for failing to obey parental boundaries that were never clear to begin with.
- **What are the judge’s opinions about the parent-child relationship?** Are parents always right, even when they’re wrong, or is the judge more likely to excuse disobedience if the parent is unreasonable, inconsistent, or ineffective? More fundamentally, is the judge’s first focus on a parent’s duty to care for a child, or on a child’s duty to obey a parent? The deciding factor may be as simple as whether the judge hears mostly delinquency cases or dependency cases, or whether he has a background in law enforcement or child welfare.

Some judges feel that finding fault with the parent will undermine the parent’s authority with the child, thereby making the child even less likely to obey. That is not a legally valid reason to adjudicate a child a status offender if the evidence is not sufficient, of course. But that alone is unlikely to change the judge’s mind if he considers the consequences unacceptable.

Consider a child accused of running away who says he was kicked out of the house by his parent because of his disobedient behavior. Upon hearing the child’s side of the story, a judge might take the position that

since the alternative to leaving was simply to obey to the parent, a reasonable expectation, the child ultimately bears responsibility for leaving home. That approach evaluates the child's conduct against the standard of ideal behavior. But other judges—perhaps after a well-presented case on the child's behalf—will view the incident in light of the realistic premise that most adolescents disobey household rules or speak disrespectfully to their parents from time to time. However, most do not leave home, or are not told to leave home, as a result. A judge who adopts that view might conclude the child would never have left home if the parent had responded to the inappropriate behavior by imposing constructive, not destructive, consequences.

- **Is the judge a “fixer”?** Does the judge consider it her job to fix families, even if it means intervening where the legal justification is questionable? For that matter, does she believe it is possible for a judge to fix a family from the bench, or does she have a healthy skepticism concerning the efficacy of court-as-parent? Consider these questions when deciding whether to try to shift the focus on the parent. A “fixer” judge is unlikely to acquit a child even if you convince her the real problem is poor parenting, because by doing so she would lose jurisdiction to try to fix the family. Even a successful defense might simply find your client adjudicated a dependent child instead of a status offender.
- **When it's “he said, she said,” does the judge care about what he said *and* what she said?** Would the judge be open to testimony by the child that impugns or contradicts the parent's testimony, or will the judge disregard anything the child might say as self serving? If the judge always accepts the parent's account over the child's, then it probably is best not to put the child on the stand and instead focus on cross-examining the parent. When a child defends his actions, it can have the unintended effect of changing the focus of the discussion from “Does this behavior really warrant court intervention?” to “Is this behavior okay?”—a much harder argument to win. You do not want your client to find himself before a judge who has decided she must send him a message about his behavior. Not every judge will let her approach to a case be transformed so easily, but some will. This is why it is important to get to know the judge.

Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity.”²⁵

That statement has implications for violations of court orders by status offenders. A court's authority to impose conditions on adjudicated status offenders

derives from the adjudication. Arguably, if a child is subject to incarceration for violating such a condition, the incarceration, like a suspended sentence that is activated, “is . . . not for the probation violation, but for the underlying offense.”²⁶ Indeed, the Alabama Court of Civil Appeals relied on that language in reversing what was in effect a suspended order for a status offender to be placed at a juvenile boot camp.²⁷ Appointing counsel at the time of contempt or VCO violation proceedings does not necessarily cure the underlying, uncounseled adjudication and may simply clear the way for secure custody as a sanction.²⁸

A retroactive challenge to an uncounseled status offense adjudication is not always the right strategic decision, however. Some cases addressing this subject focus on whether the status offender may be placed in secure custody at all, not merely whether she must be allowed to challenge the uncounseled adjudication before she may be locked up.²⁹ If the denial of counsel at the adjudicatory stage will serve as an absolute bar to secure custody at later stages of the proceeding, then the juvenile may be better off not challenging the adjudication after the fact. Although a successful challenge could relieve the juvenile of court involvement, an unsuccessful challenge would simply cure the deficiency in the underlying adjudication, clearing the way for secure custody as a dispositional option. Therefore, deciding whether to challenge the adjudication should turn on three considerations:

- the relative importance, to the juvenile, of avoiding adjudication and avoiding secure custody;
- the probability that a challenge to the underlying adjudication would succeed; and
- the probability that the juvenile would be placed in secure custody if the challenge were to fail.

Many factors will bear on these considerations:

- the collateral consequences of adjudication as a status offender;
- the applicable laws regarding confidentiality and sealing or expunging juvenile records;
- the judge’s views and sympathies regarding status offense cases;
- how long the juvenile might remain in secure custody in the event of an unsuccessful challenge.

How these factors affect the case will vary widely throughout the country, depending on local law and practice. If a challenge to the underlying adjudication is likely to avert secure custody—and in the process to clear the child’s record—then it might be the right strategic decision.

Conclusion

Successfully defending a status offense allegation is not easy. The language defining status offenses often leaves much room for judges' interpretations. In many states, case law does little to create or clarify objective standards that provide the basis for a defense. However, if you know what to look for, you may find you have more to work with than you initially thought.

By getting to know your client and his family, you will learn things about the child's circumstances that may give you an argument under some objective requirement in the statute. Many judges also will be receptive to arguments that are not rooted in specific statutory language. The key is to be creative, seek to understand the reasons for the child's behavior, and then present the case in a way that helps the judge understand these reasons. If you succeed in doing that, you may also succeed in avoiding adjudication. Even if you do not, you may still help your client's chances of a favorable disposition.

Endnotes

1. 28 C.F.R. § 31.304(h) (2008).
2. Ark. Code Ann. § 9-27-303(24)(A) (2008).
3. 42 Pa. Cons. Stat. § 6302 (2008).
4. Tex. Fam. Code Ann. § 51.03(b)(3) (2008).
5. *See* Ark. Code Ann. § 6-18-201(a) (2008) (prescribing compulsory attendance requirements based on age).
6. Conn. Gen. Stat. § 46b-120(3) (2008).
7. Ark. Code Ann. § 9-27-303(24) (2008).
8. *See, e.g.*, Fed. R. Evid. 406.
9. *See, e.g.*, Ala. Code § 12-15-102(4) (2009) (stating that “a child shall not be found in need of supervision [for truancy] if the juvenile court determines that the parent, legal guardian, or legal custodian of the child was solely responsible for the nonattendance of the child”).
10. *See, e.g.*, *Simmons v. State*, 371 N.E.2d 1316, 1322 (Ind. Ct. App. 1978) (holding that truancy must involve “defiance of parental authority,” and citing decisions from other jurisdictions that reached the same conclusion).
11. *See* Ala. Code § 16-28-2.1 (2008) (“Parents shall be held accountable . . . for the failure of the child who is of compulsory attendance age to attend either public, private or church-school.”).
12. 42 Pa. Cons. Stat. § 6302 (2008) (emphasis added).
13. Tex. Fam. Code Ann. § 51.03(b)(3) (2008).
14. *Urbanski v. State*, 993 S.W.2d 789, 794 (Tex. App. 1999).
15. *Ibid.*

16. Fla. Stat. § 984.03(9) (2008) (emphasis added).
17. *Ibid.*
18. *Ibid.* (emphasis added).
19. *See City of Urbana v. Andrew N.B.*, 813 N.E.2d 132, 153-158 (Ill. 2004) (Freeman, J., dissenting); *In re J.D.G.*, No. COA03-1306 (N.C. Ct. App. Sept. 7, 2004) (unpublished decision).
20. 535 U.S. 654 (2002).
21. Note that *Alabama v. Shelton* was decided by a bare majority of five justices, two of whom, Justices Sandra Day O'Connor and David Souter, have since left the Court. However, the dissenters in *Shelton* did not disagree that the uncounseled conviction could not support subsequent incarceration, but they contended that the majority was premature in striking down a suspended sentence and should have left the door open for curative measures at a probation-revocation proceeding. 535 U.S. at 676-78 (Scalia, J., dissenting).
22. *Alabama v. Shelton*, 662.
23. *Ex parte Shelton*, 851 So. 2d 96, 102 (Ala. 2000).
24. 948 F.2d 648 (10th Cir. 1991).
25. *Ibid.*, 654.
26. *Alabama v. Shelton*, 662. A counterargument, at least in jurisdictions in which status offense proceedings are treated as civil actions in which defendants are not entitled to the same rights as criminal and delinquency defendants, is that the potential for incarceration as a sanction for contempt of a court order in a civil proceeding does not entitle every civil defendant to counsel. *See Bellevue School District v. E.S.*, No. 60528-3-I, 2009 WL 80289, at *3 (Wash. Ct. App. Jan. 12, 2009) (acknowledging, but ultimately distinguishing, case law holding that “[t]he mere possibility that an order in a hearing may later serve as a predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance”). That argument did not prevail in *E.S.*, because the court in that case found that the controlling distinction between a truancy proceeding and other civil proceedings is that “[i]n a truancy proceeding, . . . the respondent is a child, who may be as young as eight years old.” *Id.*, 2009 WL 80289, at *4.
27. *A.C. v. State*, 888 So. 2d 518, 522 (Ala. Civ. App. 2004). Although *A.C.* did not involve denial of counsel at the adjudicatory stage, by holding that the juvenile court could not enter even a suspended boot camp order as a disposition for truancy the court necessarily rejected the argument that the requirement of an intervening violation of probation was sufficient to break the link between the status offense adjudication and incarceration.
28. *See Lana A. v. Woodburn*, 116 P.3d 1222, 1226 (Ariz. Ct. App. 2005) (holding, on state statutory grounds, that a status offender who was adjudicated without counsel or valid waiver thereof could not be detained for violation or alleged violation of probation).
29. *Ibid.*; *C.M. v. State*, 855 So. 2d 582, 586 (Ala. Crim. App. 2003) (affirming an uncounseled *delinquency* adjudication but stating, in dicta, that “by denying C.M. counsel during the guilt phase of the proceedings, the juvenile court has foreclosed its option of later placing C.M. in a youth detention facility”).



CHAPTER FIVE

**Postadjudication
Strategies for
Defending
Juveniles in
Status Offense
Proceedings**

By Tobie J. Smith

Postadjudication Strategies for Defending Juveniles in Status Offense Proceedings

Contest allegations of a valid court order (VCO) violation.

Assess:

- **Was there a VCO?** There may not be if:
 - the VCO violation is filed after earlier proceedings resulted in a deferred adjudication (the terms the youth allegedly violated may not be part of a VCO);
 - the order was issued by a hearing officer whose directives do not have the effect of court orders;
 - the order exceeds the court’s lawful authority.
- **Did the order give fair notice of the conduct prohibited?** If an order is too broad and vague it could offend due process (e.g., if it requires the youth to “act properly” or “obey the reasonable commands of a parent”).
- **Was the youth able to comply?** Contest allegations of a VCO violation if the youth could not reasonably comply or his noncompliance is due to circumstances outside his control.
- **Did the youth’s alleged conduct clearly violate the order?** Just because the youth’s probation officer or prosecutor believes a court order prohibits certain conduct does not mean it does. If the court ordered the youth to attend school and he is suspended, did he violate the order? Reject attempts to argue that the suspension was due to the youth’s misconduct. Argue that the conduct itself did not violate the court order, so neither should the suspension.

Avoid secure detention.

- Show alternatives to secure custody will reduce future law-breaking.
- Argue that secure custody is more likely to harm than benefit the youth.
- Show that alternatives to secure custody are more likely to benefit the youth.
- Present effective alternatives to secure custody that are available in the community.
- Do not oversell and create unrealistically high expectations, especially in the short term where unhealthy family dynamics are entrenched and can take time to resolve.



As an attorney for a youth in a status offense proceeding, your representation of the youth may begin after adjudication. Federal law requires states to limit juvenile courts' authority to place a status offender in secure custody except for a violation of a valid court order (VCO).¹ Therefore, the immediate stakes may be greater in contempt or VCO-violation proceedings after adjudication. Avoiding adjudication is the surest way to avoid secure custody, but if your client is adjudicated a status offender, you should not view that as the end of your representation. The proceedings that follow adjudication may require just as much preparation.

Defending Alleged Contempt or VCO Violations

One of the most challenging tasks in a status offense proceeding is defending against an alleged VCO or contempt violation. Usually, the evidence of the alleged violation will be difficult to dispute. But that does not mean there will never be a defense. When presented with an alleged VCO violation, ask the four questions below. The answers to some questions may be an obvious yes. But you might answer “no” more often than you expect, which could provide the basis for a successful defense. An allegation of a VCO violation may be filed hastily in some cases because of parental complaints to the probation officer, or a prosecutor's restrictive view of what the youth is permitted to do. Even when that is not the case, an alleged VCO violation still warrants scrutiny. *Ask these questions:*

Assessing an Alleged VCO Violation

Was There a VCO?

This *should* never be an issue. It would be careless, at least, for a juvenile probation officer (JPO) or prosecutor to file a VCO-violation allegation without first verifying that it is based on something that constitutes a VCO, and failing that, the oversight should be detected by a court clerk or intake official. But it can happen; indeed, the Supreme Court of Illinois concluded that it happened to a pair of juveniles, one of them a status offender, in *City of Urbana v. Andrew N.B.*² After the juveniles entered uncounseled guilty pleas to the charges against them, the juvenile court ordered them to comply with “supervision,” defined by the Illinois supreme court as “similar to a continuance, with a dismissal of the charge against the defendant conditioned upon compliance with the terms of release set by the court.”³

When the juveniles violated the terms of supervision, the prosecution brought contempt proceedings against them.⁴ But the Supreme Court of Illinois held that they could not be held in contempt, because under Illinois law, supervision is comparable to “pretrial probation,” in which adjudication is deferred and the sanction for noncompliance is adjudication, not contempt.⁵ In other words, the juveniles’ supervision was more akin to a revocable agreement with the court than to a court order.

If a VCO violation is filed after earlier proceedings resulted in deferred adjudication, the terms the youth allegedly violated may not be part of a valid court order. The validity of a court order may be vulnerable to attack in other circumstances as well. For example, some juvenile cases may be heard by hearing officers who are not technically judges and whose directives do not have the effect of court orders until they are ratified by a judge—much like magistrate judges in United States District Court. If the purported VCO that the youth allegedly violated was entered by such a hearing officer, make sure it was validly ratified at the time of the alleged violation before assuming that it actually was a VCO.

The other potential issue focuses on the word “valid” rather than the word “order.” Even if the procedural requirements for a court order are satisfied, the order may not be valid, such as if it exceeds the court’s lawful authority. An obvious example of an order that exceeds the court’s authority is one that is unconstitutional—for example, an order to attend religious services. But there are other ways in which an order may exceed the court’s authority. State law may define a juvenile court’s dispositional powers in finite terms, e.g., by providing that the court may enter orders of certain types or for certain purposes. Watch for orders that appear to go too far.

Did the Order Give Fair Notice of the Prohibited Conduct?

Some juvenile probation orders include terms such as “Properly conduct yourself” and “Obey the law.” The former contemplates obedience to some less-explicit standard of conduct than the latter. It can fairly be characterized as a catchall term, intended to allow a judge to punish behavior that he disapproves of but has not explicitly prohibited elsewhere in the order. It could be argued that such an order is so broad and vague as to offend due process. “Proper” suggests a much more subjective judgment than a word such as “lawful” or a requirement to obey household rules, either of which incorporates by reference an explicit standard.

Arguing that a court order does not provide fair notice may be best done when the order is entered. At the VCO-violation stage, the no-fair-notice defense may be less compelling—unless you can also offer a reasonable argument regarding the next question.

Was the Youth Able to Comply?

This may be the most common flaw in allegations of VCO violations. The fact that a youth has been ordered to do something does not mean he can do so simply by making a reasonable effort. Kids have limited financial resources. Many do not have a vehicle or a driver's license. They may be unable to comply with some court orders without assistance from someone else, if at all.

If a youth faces a VCO violation because of something like missed drug tests or counseling appointments, was his own unwillingness the problem, or was he unable to get a ride from his parent or someone else? If he has not paid restitution or court fees, was he spending his money on other things or failing to look for a job, or did he simply not have enough money despite his own best efforts? If he failed to enroll in school, was it through some fault of his own, or did his parent fail to take the necessary steps or get caught in red tape?

Indeed, as in the school example, the problem may be that the youth has not been given enough time to comply. If attempts to enroll in school have stalled because of school processes outside the youth's control, the fact that the youth has not enrolled does not mean he will not do so. Drug testing requires patience. If a youth tests positive a week after the court order, it might mean that she used drugs after the order was entered, but it also might be due to something she did before the order. Different substances take different amounts of time to pass out of the body. A urine test may be positive for marijuana for weeks after use; other tests, such as hair-follicle tests, can look even further back into the youth's substance-abuse history.

Did the Youth's Alleged Conduct Clearly Violate the Order?

Just because a JPO or prosecutor believes a court order prohibits certain conduct does not necessarily mean it does. For instance, if a youth ordered to "attend school daily" gets suspended, has she violated the order? True, she did not attend school on the days that she was suspended, but she also did not attend on the preceding Sunday. It's hard to imagine that weekend absences violate the order, so why do absences because of suspension? In either instance, she would not have been able to attend school, no matter how hard she tried. The counterargument

may be that the suspension was due to the youth's misconduct, but if the conduct itself did not violate the court order, then why should the suspension?

In addition to these questions, familiarize yourself with the laws governing VCO-violation proceedings and how they compare to adjudicatory proceedings. If the rules of evidence and the burden of proof are the same at a VCO-violation hearing as they are in a delinquency trial, then that may affect how you prepare for the hearing. Your chances of having drug test results excluded rise significantly if they will be held to the same standard as other scientific evidence. Likewise, a JPO may be able to testify to very little if hearsay is inadmissible. So although defending against a VCO violation can be difficult, it is not hopeless, particularly if you know what to look for.

Avoiding Secure Custody

Defending against a VCO violation is simply a means to an end. The bottom line, however, is to avoid secure confinement. The formal finding of a VCO violation is not significant by itself; what matters is its potential to result in some new action by or requirement from the court. The most significant consequence is the most onerous: incarceration. With some judges, secure custody for a VCO violation may be a foregone conclusion. If not, then preparing for the dispositional phase of the hearing can be as important as preparing to defend against the VCO violation itself.

Despite differing opinions about such things as secure custody, parent-youth relationships, and the efficacy of court intervention, judges, prosecutors, and JPOs should all have the same fundamental objective: to reduce the likelihood of future unlawful conduct by the youth in the short term and in adulthood. Personal agendas and prejudices may sometimes distract from that focus, but if you can persuasively show alternatives to secure custody will reduce future law-breaking, then the judge, prosecutor, and JPO will be hard-pressed to oppose you. That argument can be broken down into two interdependent components:

Secure Custody is More Likely to Harm than Benefit the Youth

Every juvenile judge—indeed, every person who has contact with the juvenile justice system—has opinions about placing youth in secure custody and when it is appropriate. You probably cannot shake their convictions, but that does not mean that you should assume that their attitudes are immutable. A growing body of research on the effects of juvenile detention shows that being placed in secure

Effects of Juvenile Detention

Resources:

Justice Policy Institute

Barry Holman and Jason Ziedenberg. *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 2006.

www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf

Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative

Offers a number of publications and reports on its Web site:

www.aecf.org/Home/MajorInitiatives/JuvenileDetentionAlternativesInitiative/Resources.aspx

custody does not benefit kids and actually hurts them. (See *Effects of Juvenile Detention* box and Chapter 3, *Assessing Intervention Services for Status Offenders and Avoiding Deeper Involvement in the Court System*.)

No amount of evidence is likely to convince a judge that detention is always inappropriate, but you don't have to win that argument when the youth is a status offender rather than a violent delinquent with a history of failing to appear in court. Status offenders will almost never merit incarceration on the most compelling ground, namely public safety. Whatever they have done would be legal if they were adults. The most likely justification for placing a status offender in secure custody is to prevent him from harming himself. In that context, evidence that the experience itself would be harmful is cogent—especially if it is presented with effective alternatives.

Secure Custody Alternatives are More Likely to Benefit than Harm the Youth

You should rarely, if ever, accept that there is no less-restrictive alternative to secure custody. The presence of less-restrictive alternatives is itself an argument against placement in detention. But if your objective is to persuade the court, as it should be, then arguing that there are less-restrictive alternatives will be less compelling than arguing that there are more-effective alternatives.

What are the Alternatives?

That depends on the youth. The better question is *What are the problems?* or *What are the needs?* If the youth is truant, what is keeping her from getting to

Should You Go After the Parent?

You may have a lot of ammunition, but don't shoot yourself in the foot. Many status offenders' behavior is directly traceable to things their parents do. It can be tempting—and perhaps even strategically advantageous—to shine a light on a parent's conduct and shift the blame from the youth. But doing so can have undesirable effects.

By taking an adversarial stance toward a parent, you may make it harder to get the parent's cooperation when you need it. Then again, the battle lines may already be clearly drawn, and it might be apparent that the parent will not help your client anyway. You will have to assess that on a case-by-case basis.

Another risk in going after a parent is the child welfare system may get drawn into the case. Even if you feel that would be in the youth's best interests, if you are acting as a youth's attorney rather than a guardian ad litem, you must be guided by the youth's wishes. Going after the parent may land the youth in foster care instead of secure custody—and probably for longer, too. Many kids have no more desire to be in foster care than to be incarcerated. So be sure you advise your client of the risks, and the likelihood that they will come to pass, before deciding to take on a parent.

school? If she will not get out of bed in the morning, perhaps she has unmet mental health needs. Propose an assessment, or if she has a diagnosed mental illness that has gone untreated, services to help her obtain treatment. Is she running away because of conflict at home? Ask for services to help the family members defuse the conflict themselves. Also, find out where the youth goes when she leaves. If it is not safe, talk to the youth, her parents, the JPO, and others about alternate safe destinations. On the other hand, if she heads to the home of a relative or friend and it is safe, propose removing the taboo and reconceptualizing her actions as something more benign than “running away.”

In looking for alternatives, do not focus only on the youth and her needs, especially if it is clear that the problems are not limited to the youth. (See *Should You Go after the Parent?* box.) No matter how poorly they may handle it, status offenders' parents often have stress that affects their parenting. Some courts focus exclusively on the youth's behavior and overlook the parents' behavior. But the corollary of that myopia is that courts often will overlook parents' needs as well. If part of defending the youth is to show how a parent's conduct contributes to the youth's behavior, then your responsibility at the dispositional stage is to

propose measures to go beyond disapproving of the parent's conduct to correcting it. Those measures may include substance abuse and mental health assessments to determine whether the parent needs treatment. It may also be appropriate to ask that the state or local child welfare agency investigate the youth's home if you have legitimate safety concerns. (See Chapter 7, *How Status Offenses Intersect with Other Civil and Criminal Proceedings*, for more guidance.) However, in doing so, consider your ethical duty to your client and the possibility that the request may lead to dependency proceedings, which your client may prefer to avoid.

A major obstacle to constructively addressing parent-youth conflict in status offenders' families is that the parent and youth may view the relationship as adversarial, where one party has to lose for the other to win. If a juvenile court approaches the family from the same zero-sum perspective, it may fail to recognize win-win solutions that address the parent's needs as well as the youth's. If the court moves beyond finding fault with the actions of the parent or the youth—for example, when an argument escalates to the point that the parent tells the youth to obey or leave and the youth chooses to leave—and can recognize that legitimate needs underlie those actions, then it can help the family find less dangerous solutions.

Status offenders' parents often need a break—from conflict, from parenting responsibilities, from teenage boundary-pushing. This need may lead a parent to kick his youth out of the house or to pester the JPO to lock up the youth. The lack of effective coping skills may reflect poorly on the parent, but simply blaming the parent is no solution. If the parent continues to feel overwhelmed, the destructive pattern will endure unless it is replaced. In looking for alternatives to secure custody, consider ways to give the parent—and in the process, the youth—a break without the harmful effects that come from incarceration.

Respite care is one such measure, and it need not be limited to formal arrangements through a public agency. Again, the solution may be as simple as destigmatizing the youth's getaway destination. If the youth is already seeking respite in a safe place on her own, ask the court to approve the destination for that limited purpose. If respite seems to be a need but the youth has not been leaving home—or if she does leave, but goes someplace the parent or someone else is concerned about—then try to identify a respite location that is acceptable to the youth, parent, and judge.⁶

Presenting effective alternatives to secure custody requires knowing the available options. The type, quality, and variety of programs and services available differ from state to state and county to county. Familiarize yourself with the

programs and services in your area. Talk to people who work with juveniles to find out what is available and which specific services are effective. This will help you identify possible measures to propose, but it probably will not be sufficient. There is no single prescription for what ails status offenders and their families. Many will share common characteristics, but when it comes to specifics, there may be as many alternatives to secure custody as there are status offenders. Getting to know the family and its problems and needs may be the most important part of developing a plan to avoid incarceration.

Finally, a note of caution: In presenting the anticipated benefits of your proposal to the court, be careful not to oversell and create unrealistically high expectations, especially in the short term. Reversing unhealthy family dynamics can be like turning a train around. Progress may be slow and halting. If you persuade the judge to accept your plan by convincing her you have found the silver bullet, then you likely will only delay incarceration, not avoid it. Instead, sell the long view. A plea for patience is more likely to work if you make it at disposition than if you wait until the VCO violation that comes shortly after your plan hits its first snag, at which point it will seem like a toothless request for “one more chance.”

Conclusion

Helping a status offender safely navigate the juvenile court process and avoid secure confinement presents challenges. Doing it well requires practice, dedication, and hard work. Be familiar with the procedural and substantive law, the judge, the youth and his family, and the available programs and services. Beyond that, be passionate about persuading others not to throw the youth away instead of finding real, lasting solutions to his problems. In doing so, you may annoy a parent, the judge, the JPO, or the prosecutor—or all of the above. And you may find yourself annoyed by others involved with the case, including your client.

In short, defending status offenders is not glamorous, and it is not for everybody. It is a specialized area of practice. Doing it well, however, can be extremely rewarding, for you and your client.

Endnotes

1. 28 C.F.R. § 31.304(o) (2008).
2. 813 N.E.2d 132 (Ill. 2004).
3. *Ibid.*, 141.

4. *Ibid.*, 136.

5. *Ibid.*, 142-43.

6. For more information about respite care, see Quraishi, Fiza, Heidi J. Segal and Jennifer Trone. *Respite Care: A Promising Response to Status Offenders at Risk of Court-Ordered Placements*. New York, NY: Vera Institute of Justice, 2002, available at www.vera.org/publication_pdf/188_356.pdf.

A black and white photograph of a person wearing a dark hoodie and light-colored jeans, sitting on a brick wall. The person is looking to the right. The background is a textured brick wall.

CHAPTER SIX

Using Special Education Advocacy To Avoid or Resolve Status Offense Charges

By Joseph B. Tulman

Using Special Education Advocacy To Avoid or Resolve Status Offense Charges

Identify whether your client has special education needs.

Look for:

- cognitive, physical, and verbal processing issues exhibited during lawyer-client interactions;
- relationship problems with parents, siblings, teachers, and schoolmates;
- chronic behavioral disruptions or emotional withdrawal at school;
- pending suspensions or expulsions from school;
- low achievement in school;
- repeating one or more grades in school;
- significant school attendance problems.

Pursue special education services to circumvent status offense system involvement.

- Work with intake and probation officers early in the court process to ensure they have properly investigated the reasons why the proceeding was brought against the youth.
- Seek to dismiss the status offense charge if a school has failed to comply with federal law requirements regarding special education.
- Start the special education hearing process or identify an attorney who can on the youth's behalf.
- Negotiate continuances of status offense matters to pursue the special education matter. Use that time to line up appropriate services for the youth and family that will supersede the need for the status offense proceeding.

Consider whether your client's rights under the Americans with Disabilities Act or Rehabilitation Act were violated.

- Assess whether your client was referred to the status offense system because of behavior that stems from a disability.



Youth with undiagnosed and unmet special education needs are disproportionately represented in juvenile courts and secure juvenile facilities.¹ A juvenile defense attorney using special education law for clients facing status offense charges can implement useful problem-solving strategies and advance legal arguments to better represent clients' interests. This chapter examines how juvenile defense attorneys can use special education law to keep youth out of the status offense system.²

State and federal law favor keeping youth with their families,³ mainstreaming special education students with nondisabled peers,⁴ and deinstitutionalizing status offenders.⁵ Prevention and early intervention are better approaches than prosecution and the threat of incarceration. Special education law establishes rights to prevention and early intervention services. Youth receiving special education services can avoid the behaviors—unruliness in school and ungovernability at home—that lead to status offense charges.

Youth facing status offense charges often were not provided appropriate special education services in their schools. Their parents are increasingly frustrated. An attorney representing a youth facing status offense charges should determine whether the charges arise from the failure of school personnel to provide appropriate special education services. If so, the attorney should use that failure as a key component of the defense strategy.

The defense attorney should offer to help the youth and the youth's parents obtain special education services to address the youth's needs, stabilize the family, and remove the youth from the status offense system. Another, more literal, payoff is that a prevailing parent in a special education matter is entitled to attorneys' fees at a reasonable rate.⁶ Court-appointed attorneys representing low-income clients in status offense cases might find special education advocacy better serves their clients' interests, as well as their own.

Substantive and Procedural Rights under the Individuals with Disabilities Education Act

What follows is a whirlwind tour of special education rights. This summary is no substitute for reading and digesting the federal statute (20 U.S.C. §§ 1400-1490) and regulations (34 C.F.R. pt. 300), your state and local special education laws, and case law. To represent parents and students effectively, an attorney also must learn how to conduct and win administrative due process hearings against the school system. An attorney who does not provide special education representation should be able, nonetheless, to recognize when special education

Identifying Whether Your Client has Special Education Needs

To identify a child with undiagnosed or unmet special education needs, an attorney should look for:

- cognitive, physical, and verbal processing issues that the child presents within the lawyer-client relationship;
- relationship problems for the child with parents, siblings, teachers, and schoolmates;
- chronic behavioral disruptions or emotional withdrawal by the child at school or at home;
- pending suspensions or expulsions from school, or a history of school exclusion;
- low achievement on standardized tests and other measures;
- repeating one or more grades in school; and
- significant school attendance problems.

issues arise within a status offense case. If the client is interested in pursuing special education rights, the attorney should help locate an attorney to provide that representation.

Eligibility

A youth with a disability, between the ages of three and 21, is eligible for special education services if due to the disability the youth requires special education and related services.⁷ Eligibility explicitly “include[s] children with disabilities who have been suspended or expelled from school.”⁸ The “child find” provision of special education law mandates that the school district administrators and personnel identify, locate, and evaluate all children and youth with disabilities, including homeless youth and children who are wards of the state.⁹

Generally, the IDEA covers students until they graduate from high school or until they turn 22, whichever occurs first; obtaining a high school equivalency degree does not terminate eligibility.¹⁰ A child advancing from grade to grade who is not failing can be, nonetheless, a “child with a disability” covered under the IDEA.¹¹ For a youth with a disability that does not affect academic performance

Finding an Education Attorney

To find a special education attorney to whom you can refer parents, the defense attorney should:

- contact legal services and legal aid attorneys, or other nonprofit legal services offices that may provide special education representation;
- identify local special education lawyers who are willing to represent low-income and indigent parents based upon the possibility of prevailing and receiving attorneys' fees from the school system;
- locate or start a special education unit within the public defender office;
- contact the Protection and Advocacy Center in the state (find the P&A office through www.NDRN.org);
- search the Council of Parent Attorneys and Advocates' listings (www.COPAA.org);
- look for a special education clinic at local law schools; and/or
- help set up special education advocacy training for status offense, delinquency, and child welfare attorneys.

and adjustment in school—a youth, for example, with a physical disability or with a chronic illness—Section 504 of the Rehabilitation Act¹² likely protects the youth from discrimination and affords the youth a right to reasonable accommodations in the school setting.¹³

The IDEA covers any disability that substantially affects a youth's learning and adjustment in school.¹⁴ The disabilities that a defense attorney will likely find within a status offense caseload include learning disabilities (e.g., dyslexia), speech or language impairments, and emotional disturbance. Attention deficit hyperactivity disorder (ADHD) is also common and is covered under the IDEA's definition of "Other Health Impairment."¹⁵

Evaluation

To determine whether the student has an education-related disability, the law provides for an evaluative process¹⁶ that addresses "all areas of suspected disability."¹⁷ The parent can initiate an evaluation by requesting it, or a state or local education agency, or other state agency, may initiate a request for an initial evaluation.¹⁸ A state court meets the criterion of "other state agency," so a judge may

request an evaluation. An evaluation requires both written notice to and informed consent from the parent to conduct the evaluation.^{19 20}

Generally, the initial evaluation must be completed within 60 days of parental consent.²¹ Following an initial evaluation and eligibility determination, the school system must reevaluate the youth—referred to as a “triennial evaluation”—every three years.²² A reevaluation must occur sooner if school district personnel determine the youth’s educational or related service needs require reevaluation, or if the parent or teacher requests reevaluation.²³ A parent has a right to obtain an independent educational evaluation (IEE) of the child,²⁴ and the parent has a right to an IEE at public expense if the parent disagrees with an evaluation conducted by the school system.²⁵

Free Appropriate Public Education (FAPE)

The central entitlement in the IDEA is the right to a free appropriate public education (FAPE).²⁶ FAPE means “special education and related services” that meet state standards, in an appropriate school setting, and in accordance with the child’s individualized education program.²⁷ The word “free” means that the parent does not pay for the child’s services.²⁸ The word “appropriate” is more difficult to define and is the focus of a key Supreme Court case, *Board of Education v. Rowley*.²⁹ According to the Court, the instruction must be individualized to meet the youth’s unique needs with supportive services necessary to ensure that the youth benefits,³⁰ but “appropriateness” does not require maximizing the youth’s educational opportunities.³¹ In assessing educational benefit, the inquiry should include not only academic progress, but also the youth’s adjustment and preparation for life after high school.³²

Individualized Education Program (IEP)

An IEP is a blueprint of the specialized instruction and other services—e.g., related services, transition services, assistive technology, program modifications—that are appropriate for a particular special education student.³³ The IEP must present the youth’s current academic levels and functional performance, include annual goals, and specify how the youth’s progress toward the goals will be measured.³⁴ An IEP Team consists of the child’s parents, the child’s regular education teacher and special education teacher, a school district representative, a person qualified to interpret evaluation results, other individuals invited by the parents or school system representatives, and, whenever appropriate, the child.³⁵ The IEP Team must review and revise the IEP at least annually.³⁶

Notably, the law specifically charges the IEP Team with considering services

to address a child's disruptive behavior: "The IEP Team shall . . . in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior . . ." ³⁷ The IEP Team must also consider strengths of the child, evaluations of the child, concerns of the parents, and, of course, "the academic, developmental, and functional needs of the child." ³⁸

Least Restrictive Environment (LRE)

Special education law emphasizes keeping youth in, or returning youth to, the educational mainstream. ³⁹ The IDEA's emphasis on placement in the least restrictive environment recognizes that education is meant to integrate students and, ultimately, to prepare students to graduate from high school and enter mainstream society through post-secondary education or the work world. ⁴⁰ Ideally, therefore, IEP Teams should place students in integrated schools and in mainstream, regular education classes, and may only remove a child from regular education settings "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." ⁴¹ Placement should be as close as possible to the child's home and ordinarily should be in the school that the child would attend if not disabled. ⁴² The school district must also have available a "continuum of alternative placements" that includes special classes, special schools, home instruction, and the like. ⁴³ In addition, extended school year services must be available, when necessary, as part of a FAPE. ⁴⁴

Related Services

A related service is "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education," ⁴⁵ and includes anything that supports the student's ability to learn and to benefit from education. The federal regulations specifically identify, among other things, speech-language pathology ⁴⁶ and audiology services, ⁴⁷ and physical ⁴⁸ and occupational therapy. ⁴⁹

Supplemental Aids and Services; Assistive Technology

The IDEA requires the provision of supplemental aids and services, ⁵⁰ as well as assistive technology devices and services when appropriate to increase, maintain, or improve the child's functional capabilities. ⁵¹

Services Available for Status Offending Youth and Families through Education Laws

Youth and their families facing status offenses may benefit from the following services:

- **Recreation**—assessing leisure function; providing therapeutic recreation services; providing recreation both in schools and arranging recreation through community agencies; and educating the child regarding appropriate leisure activity.¹
- **Counseling Services**—providing services from “qualified social workers, psychologists, guidance counselors, or other qualified personnel”²
- **Parent Counseling and Training**—helping parents understand their youth’s special needs; informing parents about child and youth development; and helping parents acquire skills to support implementing the IEP.³
- **Psychological Services**—evaluating the youth; planning and managing a program of counseling for the youth and parents; and helping to develop positive behavioral intervention strategies.⁴
- **Social Work Services in Schools**—studying the youth’s social or developmental history; conducting group and individual counseling with the youth and family; addressing, along with the parents and others, all aspects of the youth’s life that affect performance in school; engaging school and community resources to enhance the youth’s ability to benefit from the educational program; and helping develop positive behavioral intervention strategies.⁵

Under special education law, any services that are appropriate for a particular youth with a disability must be provided, at no charge to the parent, by or through the public school system.

Sources:

1. 34 C.F.R. § 300.34(c)(11).
2. 34 C.F.R. § 300.34(c)(2).
3. 34 C.F.R. § 300.34(c)(8).
4. 34 C.F.R. § 300.34(c)(10).
5. 34 C.F.R. § 300.34(c)(14).

Transition Services

For students turning 16 years old and above, the IEP Team must consider and include transition services in the IEP.⁵² Special education law requires school personnel to prepare students with disabilities for success after completing high school,⁵³ and, by definition, “transition services” must be “a coordinated set of activities . . . within a results-oriented process . . . focused on improving the academic and functional achievement . . . to facilitate the child’s movement from school to post school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation”⁵⁴ Further, transition services must be individualized according to the child’s needs and in consideration of “the child’s strengths, preferences, and interests”⁵⁵

School personnel must facilitate the development of work and other post-school objectives, and must provide specialized instruction, related services, and community experiences that facilitate the transition objectives.⁵⁶ Accordingly, although school personnel can engage other agencies to provide transition services, the school personnel must reconvene the IEP Team to develop alternative strategies if other agencies fail to provide transition services.⁵⁷

Parent’s—and Youth’s—Right to Participation, Notice, and Consent

The IDEA requires parental involvement in decision making regarding the youth’s identification, evaluation, placement, and services. The Supreme Court warned that school administrators who exclude the parents are bound to lose on procedural grounds: “[T]he importance Congress attached to these procedural protections cannot be gainsaid. . . . Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard.”⁵⁸ Parents have the right to receive—from school administrators—notice of the law’s procedural safeguards.⁵⁹ In addition, parents have the right to examine educational records regarding the youth⁶⁰ and, of course, the right to participate in meetings pertaining to identification, evaluation, placement, and the provision of a FAPE.⁶¹

Parents also have the right to “prior written notice”—that is, notice in writing a reasonable amount of time before school administrators take action or refuse to comply with a parent’s request—in connection with the identification, evaluation, educational placement, or the provision of a FAPE.⁶² Notice from the school administrators must contain an explanation of the reasons for the

Who is the Client?

Ordinarily, the parent is the client in a special education matter. Special education rights afforded under the IDEA benefit the youth with a disability, but the parent of a youth with a disability has independent, enforceable rights and is empowered under the statute to enforce those rights.¹ Regarding who can make special education decisions and pursue special education rights on behalf of a child, the presumption is that the biological or adoptive parent is the parent for purposes of enforcing special education rights unless that person “does not have legal authority to make educational decisions for the child.”²

The IDEA regulations also recognize the authority of a state court judge to determine who has the authority to make educational decisions for a youth.³ A juvenile or family court judge, therefore, can designate a foster parent or other surrogate as the “parent” for educational purposes. The IDEA’s definition of “parent” also recognizes that persons other than a biological or adoptive parent (i.e., foster parents, guardians, other relatives, and surrogate parents) may function as the primary parent and should be recognized as the “parent” for the purpose of participating in the special education process.⁴ The public agency must ensure that a surrogate parent is appointed for a child with no identified parent; for a child whose parent the agency cannot locate; for a child who is a ward of the state; and for a child who is an unaccompanied homeless youth.⁵ A state court judge is also empowered to appoint a surrogate parent for a child who is a ward of the state.⁶

Each state may provide that the right to enforce provisions of the IDEA transfer from parent to child (student) at the age of majority, unless the student is legally incompetent.⁷ For students under the age of majority, however, the level of the child’s participation—e.g., whether the child attends the IEP meeting—is a decision for the parent to make.⁸ Because the IDEA supports students becoming self-sufficient, the parent ordinarily should include the child in IEP meetings and other special education decision making.

Sources:

1. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526-33 (2007).
2. 34 C.F.R. § 300.30(b)(1).
3. 34 C.F.R. § 300.30(b)(2) (parent by “judicial decree”).
4. 20 U.S.C. § 1401(23); 34 C.F.R. § 300.30(a)(1)-(5).
5. 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.519(a)-(h).
6. 20 U.S.C. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c).
7. 20 U.S.C. § 1415(m)(1)(A)-(D).
8. Education of Children with Disabilities Rule, 71 Fed. Reg. 46671 (Aug. 14, 2006) (“Generally, a child with a disability should attend the IEP Team meeting if the parent decides that it is appropriate for the child to do so.”); *see also* 20 U.S.C. § 1414(d)(1)(B)(vii) and 34 C.F.R. § 300.321(b)(1).

proposed action or the refusal to grant the parent's request, as well as a description of the information (e.g., "evaluation, procedure, assessment, record, or report") upon which the school administrators relied.⁶³

In a status offense matter, the attorney represents the youth. To initiate a special education defense, the attorney must advise the client (i.e., the youth facing the status offense charges) regarding the advantages, as well as any potential disadvantages, in pursuing the special education matter. Further, the attorney must discuss the need to bring in the parent as a client in the special education matter. If the child agrees to pursue the special education strategy, then the attorney will have to create an alliance with the child's parent and help the parent recognize that appropriate special education and related services can change the child and family's circumstances. The defense attorney can help the youth's parent locate a capable special education attorney who is willing to provide the representation. The defense attorney, though, should strive to coordinate defense of the status offense matter with the special education legal strategy.

Alternatively, the youth's defense attorney could represent both the youth and the parent jointly in the special education matter.⁶⁴ However, the facts underlying a status offense charge—whether truancy from school, running away from home, or unruliness at school and at home—provide fertile ground for an ethical conflict of interest for an attorney seeking to represent both the parent and the youth in a special education matter.

For example, a youth facing truancy charges might be missing school at the parent's direction to care for younger siblings. A youth's alleged refusal to obey parental commands may stem from domestic violence between the parents or from direct abuse of the youth. A child and parent also might disagree about the objectives of the special education representation. For example, a parent may believe that the child requires placement in a residential treatment center, and the child may vehemently oppose any out-of-home placement. On the other hand, by providing joint representation in the special education matter, the attorney can assist the youth and parent address and solve the problems that may have led to the status offense charges.

Right to a Due Process Administrative Hearing

A parent who disagrees with any aspect of the identification, evaluation, or educational placement of the child, or believes the child is not receiving a FAPE, can file a complaint and request an administrative due process hearing.⁶⁵ The complaint must describe the problem and propose a remedy.⁶⁶ The other party—the school system—must respond within 10 days and must address issues raised in

the complaint.⁶⁷ Unless the school system personnel interfered with the parent's complaint by misrepresenting or withholding information, the parent is bound by a two-year statute of limitations.⁶⁸

The statute requires that mediation be available, but because mediation is a voluntary process the parent is not required to engage in it.⁶⁹ In the 2004 IDEA amendments, Congress provided for a "resolution session" to be held ordinarily within 15 days of filing a complaint.⁷⁰ After a 30-day period for resolving the dispute after filing the complaint, a hearing must be scheduled.⁷¹ The hearing must occur and a hearing officer must return a decision within 45 days from the end of the 30-day resolution period after filing.⁷² Regarding a due process hearing, parents and other parties are entitled to have an impartial hearing officer.⁷³ Further, the parties have a right to be represented by counsel and advised and accompanied by persons with special knowledge or training;⁷⁴ rights to present evidence and confront, cross-examine, and compel witnesses to attend;⁷⁵ rights to an electronic or written record of the hearing, as well as to the findings of fact and decisions of the hearing officer.⁷⁶ The IDEA contains a mutual discovery rule, often called the "five-day rule," under which the parties must exchange documents and evidence at least five business days before the hearing.⁷⁷

The IDEA is silent regarding the burden of proof, but the U.S. Supreme Court ruled that the burden of persuasion is on the party seeking relief.⁷⁸ Under the so-called "stay put" rule, the parent has a right to maintain the child in the current educational placement while an administrative or judicial proceeding is pending.⁷⁹ The IDEA also requires, regarding children who are homeless, compliance with the McKinney-Vento Homeless Assistance Act.⁸⁰

Remedies

The parent can seek relief from an impartial hearing officer on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child . . ." ⁸¹ In an appeal of a hearing officer's decision, a court can provide relief it determines to be appropriate.⁸² A hearing officer or court can order the school district to reimburse a parent whose child was not receiving a FAPE in the public school if the parent unilaterally places the child in an appropriate private school.⁸³

Low-income parents typically cannot afford to place a child unilaterally in a private school before the due process hearing. Before placing the child, a low-income parent must secure a hearing officer's determination that the public school placement is not appropriate and that, conversely, the parent's proposed private placement is appropriate. Another useful special education remedy is compensatory

Attorneys' Fees and Expert Costs in Special Education Hearings

The IDEA provides for attorneys' fees for a parent who prevails in a special education administrative hearing or court action.¹ To obtain attorneys' fees in a special education matter ordinarily requires prevailing at a due process hearing or in court.² Congress in 2004 also added the possibility of the state or school district recovering attorneys' fees for a complaint or cause of action that is "frivolous, unreasonable, or without foundation" or that was brought for an "improper purpose."³

Awarding attorneys' fees to a prevailing parent does not include expert witness fees.⁴ Parents' attorneys can obtain expert evaluations by using the right under the IDEA to an independent educational evaluation.⁵ In addition, parents can obtain evaluations (and a source of expert witnesses) through private medical insurance or Medicaid. Defense attorneys also have access through the juvenile court to court-ordered evaluations and the experts who conduct them, as well as rights (at no charge for indigent clients) to *ex parte* evaluations that are, as a matter of due process, germane to the defense.⁶

Sources:

1. 20 U.S.C. § 1415(i)(3)(B)-(C); 34 C.F.R. §§ 300.517(a)(1)(i), 300.517(c); *Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598, 605 (2001) (to prevail requires alteration of legal relationship of parties, not just voluntary change of behavior).
2. *Bingham v. New Berlin School Dist.*, 550 F.3d 601, 603 (7th Cir. 2008) (*Buckhannon* applies to special education cases).
3. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III); 34 C.F.R. § 300.517(a)(1)(ii)-(iii).
4. *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 293-94, 300-304 (2006).
5. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.
6. *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985).

education. This is an equitable remedy, created in the case law, through which the child receives services to make up for the previous denial of FAPE.⁸⁴

Discipline Protections

Even a short suspension from school of 10 days or less requires some due process protection.⁸⁵ Removal of a child from school for more than 10 days constitutes a "change in placement" under special education law⁸⁶ that triggers procedural protections⁸⁷ to ensure the authorities are not removing a child with a disability in a discriminatory manner⁸⁸ or for behavior that is a manifestation of the disability.⁸⁹ If the behavior is not a manifestation of a disability, school authorities

may discipline a child with a disability as they would a nondisabled child,⁹⁰ except that the child nevertheless maintains the right to participate in the general education curriculum and progress toward meeting the IEP goals, although perhaps in a different setting.⁹¹ In other words, a child with a disability does not lose the entitlement for special education and related services, even if excluded from school.⁹²

If the behavior is a manifestation of the child's disability but the behavior was having a weapon or illegal drugs in school or if the behavior caused serious bodily injury to another person in school, school authorities may remove the child to an interim alternative educational setting for no more than 45 days.⁹³ A child with a disability sent to an interim alternative education setting or a child with a disability suspended or expelled for conduct that was not a manifestation of the disability has a right, as appropriate, to a functional behavioral assessment and behavior intervention plan, as well as a right to modifications in the IEP to address the behavior that led to the disciplinary exclusion from the current educational placement.⁹⁴

Of course, the IEP Team can decide to include appropriate behavioral interventions in the IEP at any time to prevent or address behavioral problems. For a child with serious behavioral concerns, the parent and the attorney should work with the IEP Team to develop and adopt a protocol of individualized, positive behavioral interventions and supports. The protocol should contain an explicit agreement to avoid, except in extreme circumstances, calling the police and referring the child to the juvenile court.

School officials have authority under the IDEA to consider the circumstances of a special education student on a case-by-case basis when addressing a violation of school discipline.⁹⁵ Defense attorneys should remember this case-by-case authority, as well as other IDEA procedural protections in the federal law in circumstances when school officials attempt to apply a state or local zero tolerance discipline policy.

For a child not previously identified as eligible for special education and facing suspension or expulsion, a parent can successfully assert rights to procedural protection under the IDEA if school personnel "had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred."⁹⁶ The school personnel are deemed to have had knowledge if the parent previously raised concerns about the child's need for special education; if the parent previously requested an evaluation; or if the child's teacher or other school personnel expressed concerns about the child's pattern of behavior to supervisors.⁹⁷

Regarding a child not previously identified and for whom school personnel did not have knowledge that the child has a disability, a parent requesting a special education evaluation has a right to an expedited evaluation if the child is being disciplined.⁹⁸ If the team determines, based on the expedited evaluation and other input, that the child has an education-related disability, then the child is protected under the IDEA (including its discipline protections) and school system personnel must provide special education and related services.⁹⁹ For challenges to special education decisions that involve a disciplinary change in placement, including a challenge to a manifestation determination, the law provides for an expedited hearing.¹⁰⁰

Rights to Special Education Services for Incarcerated Youth

Nothing in the IDEA excludes from coverage, or diminishes the rights of, youth with education-related disabilities who are detained or incarcerated in delinquency facilities. A person under age 22, identified as eligible under the IDEA, retains eligibility and a right to services during a period of incarceration in an adult prison, as well.¹⁰¹ A state is not required, on the other hand, to provide FAPE to a student between the ages of 18 and 21 if the student was not identified before sentencing or did not have an IEP prior to adult incarceration.¹⁰² In addition, the IEP Team of an eligible student incarcerated in an adult prison may modify the IEP based upon a “bona fide security or compelling penalogical interest that cannot be otherwise accommodated.”¹⁰³ An eligible student incarcerated in an adult facility for a period of time that will extend beyond the end of IDEA eligibility loses the right to transition services.¹⁰⁴

Using Special Education Advocacy on Behalf of Alleged Status Offenders

Advantages of the Special Education Approach

The IDEA applies in every school district and every public school in the United States. As detailed above, children with education-related disabilities are entitled to an array of individualized services. In most cases concerning children with education-related disabilities, appropriate IDEA services should be available to address the conditions that lead to a status offense referral for truancy or for unruliness or disruptiveness at school.¹⁰⁵ A youth receiving appropriate individualized instruction and related services—including individual or group counseling,

speech language therapy, recreation or therapeutic recreation services—is getting as much or more than what a juvenile court typically would be able to provide for status offender treatment.

Decision making in the status offense system tends to be hierarchical; in contrast, special education decision making is collaborative.¹⁰⁶ Status offense services tend to be undifferentiated; special education services are individualized. In status offense matters, the parent is either a complainant or has no formal role. In a special education matter, the parent and child (at the parent’s discretion) are members of the IEP Team. Status offense decision making features a one-time disposition hearing, with the subsequent possibility of probation revocation. In special education matters, the team develops a new IEP at least once a year. At any time, the parent or school system representatives can request that the team reconvene to review and modify the child’s program. The IEP Team can act, therefore, whenever the student requires different or additional services.

Obtaining Appropriate Special Education and Related Services for a Child Who is Emotionally Disturbed

The disability emotional disturbance (ED) illustrates the problems and opportunities for attorneys representing children in status offense cases.¹⁰⁷ The definition of ED is a functional definition that requires chronic and intense emotional problems manifesting in one or more of five characteristics that affect educational performance.¹⁰⁸ Excluded from the definition of ED, however, is a child who is “socially maladjusted” but who does not manifest one or more of the five characteristics. School administrators tend to over-identify minority and poor children as requiring special education, unfairly and inaccurately labeling them as emotionally disturbed or mentally retarded.¹⁰⁹

On the other hand, children with unmet special education needs are dramatically overrepresented in the juvenile system.¹¹⁰ The strategic choices include using the ED label as a way of avoiding the status offender label and getting special education services. However, the ED label often covers another trap. A child who has an unaddressed learning disability, hearing impairment, or other education-related disability might develop over time a tendency to act out in school, as well as at home. If teachers and school administrators convince parents to label the child as emotionally disturbed without identifying and addressing the underlying learning problems, they might be condemning the child to a downward spiral.

If the child’s disabilities and behavioral issues affect relationships and performance at home and at school, the IEP should include such services as family counseling and parent training and the myriad other services contemplated under

What is an Emotional Disturbance?

34 C.F.R. § 300.8(c)(4)(i) provides:

Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- an inability to learn that cannot be explained by intellectual, sensory, or health factors;
- an inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- inappropriate types of behavior or feelings under normal circumstances;
- a general pervasive mood of unhappiness or depression; and
- a tendency to develop physical symptoms or fears associated with personal or school problems.

Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

“counseling services,” “parent counseling and training,” “psychological services,” “social work services.” and “therapeutic recreation.”¹¹¹ The IEP Team can order a functional behavioral assessment (FBA), then design and implement a behavioral intervention plan (BIP).¹¹²

If done correctly, the BIP should cover the child's behavior at home and at school, and teachers, school counselors, and parents should coordinate how they implement their behavioral interventions. If appropriate, the IEP can include training the parent to implement the BIP during nonschool hours. The team can prescribe one-on-one services for the youth. Transition services, as outlined above, address the student's needs to prepare for the work world, postsecondary education, and living independently.

In addition, each local education agency must have available a continuum of placements, keeping a special education student in the least restrictive environment that facilitates the student's learning. Although, if the child is not progressing academically and socially, the parents, school teachers and administrators, and other members of the IEP Team can place the child in a more intensive and more segregated setting, including, in extreme cases, placement in residential

treatment facilities or mental hospitals. Under the principle of placing the child in the least restrictive environment, the IEP Team can prescribe wraparound services—like Multisystemic Therapy and Functional Family Therapy—to avoid placing the child in a residential treatment facility or mental hospital. Moreover, the IEP Team can bring in service providers from other agencies (e.g., mental health, vocational rehabilitation).

Based on a past denial of a FAPE, a parent can secure additional services for the youth through a compensatory education agreement or hearing officer's order. If the youth is not receiving appropriate services in the public school, the parent is entitled to services in an appropriate private school at public expense. If, in such circumstances, the IEP Team members refuse the parent's request for private services or for placement in a private school, the parent can seek an administrative hearing to determine if a private placement at public expense is required.

Alternatively, the parent can notify school administrators and then unilaterally place the child in a private school (or in private services) and then seek reimbursement through a due process hearing. Considering this array of special education rights, one might conclude the only placement not available through special education is incarceration and that the only "service" not available through special education is the threat of incarceration.

Disability and the Defense of Status Offense Charges

In passing the IDEA, Congress intended to ensure schools provide educational services to children with disabilities, and Congress intended, as well, to stop schools from using allegations of disruptive or even dangerous conduct to exclude children with disabilities. Accordingly, the court noted, "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school."¹¹³ Against this backdrop, one can interpret cases where school administrators have referred children to juvenile courts.

Dismissing the Status Offense Charge and Using the Special Education Process in Its Place

In some states, a juvenile court judge can grant a motion to dismiss in the interest of justice and in the best interest of the child, assuming that the judge finds that the dismissal does not jeopardize the safety of the community.¹¹⁴ In

Primary Problem-Solving Strategies and Legal Theories for Status Offense Cases

- Obtain agreement from the child and parent to investigate and to enforce their special education rights. Substitute special education and related services for “treatment” through the juvenile court. Explore the broad definition of related services (for the child and parents) and transition services, as well as the availability of discipline protections and positive behavioral interventions. Consider obtaining private services for the child, at public expense, if public school officials refuse to provide appropriate services. Seek compensatory education services for past violations of the IDEA. Stick with the special education advocacy until the youth and family have stabilized and the youth is making appropriate academic and emotional progress.
- Move to dismiss the status offense case “in the interest of justice” or “for social reasons.”
- Move to dismiss the status offense case based on a violation of the intake process and a failure to exercise discretion by the intake officer.
- In some jurisdictions, the government must establish in a truancy case that school personnel made adequate efforts to serve the child’s needs before referring the matter to the juvenile court.¹ Based on this kind of statutory language, the defense can show that the government has not met its burden.
- In a special education case, argue that the status offense petition was an “end run” around special education responsibilities and was intended to “change the educational placement” without due process, and move for an order that school officials withdraw the status offense petition.

Source:

1. Tenn. Code Ann. § 49-10-1304(b)(3)(B) (2009); *Defending Youth in Truancy Proceedings: A Practice Manual for Attorneys*. Seattle, WA: ACLU of Washington & TeamChild, September 2008, 72, available at www.teamchild.org/pdf/Truancy%20Manual%202008.pdf (pointing out Washington statute that requires school personnel to address reasons for truancy prior to filing truancy petition in court).

addition, the defense attorney has a better chance of blocking a prosecution if the child is young¹¹⁵ and if the child has no prior record with the juvenile court. One might also find a judge sympathetic to dismissal if the school should have identified the child (under the IDEA’s “child find” requirement), and especially

if the parents were requesting an evaluation that school personnel ignored over a long time.

In a small number of status offense and delinquency cases, attorneys have argued school personnel used charges against the youth to circumvent or “end run” their obligations to serve the child under special education law.¹¹⁶ Because the IDEA requires exhausting administrative remedies before appealing to a state or federal court,¹¹⁷ the juvenile court should not be the correct forum in which to litigate IDEA eligibility and denial of a FAPE, as well as the propriety of suspending and expelling students with disabilities. Accordingly, an attorney should use a special education hearing to challenge a school administrator who fails to comply with the IDEA and then files a status offense petition against a child. *Morgan v. Chris L.* is such a case.¹¹⁸

In the 1997 IDEA amendments, Congress clarified that the IDEA does not constrain schools from referring alleged criminal activity by a child with a disability to proper authorities, nor does the law keep police and courts from handling such matters:

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.¹¹⁹

A small number of courts and commentators have interpreted the above quote as overturning *Morgan v. Chris L.* and similar cases,¹²⁰ but “[t]he Act does not address whether school officials may press charges against a child with a disability when they have reported a crime by that student [and] school districts should take care not to exercise their responsibilities in a discriminatory manner.”¹²¹ The section “does not authorize school districts to circumvent any of their responsibilities under the Act.”¹²² Fair interpretation of section 1415(k)(6) is that a special education hearing officer can not prohibit a school from referring a child to the juvenile court, but the hearing officer may be authorized to order school officials not to press charges.¹²³

In passing the IDEA, Congress also did not intend to supplant the states’ “general welfare and supportive services for children.”¹²⁴ Recognizing that Congress sought to protect children with disabilities from school removal, the court in *In re Beau II*, using a four-part test, found no evidence that school authorities sought to change the child’s placement by pursuing the status offense matter; rather, they sought to reinforce his participation in the school program.¹²⁵ The

court found that, regarding the child's special education needs, the status offense action was "compatible and supportive."¹²⁶ The prohibition in New York against incarcerating children in status offense matters provides a significant backdrop to the rulings in *Beau II* and *Charles U.* (discussed in endnote 126). Because children in New York status offense cases are not facing incarceration, the interests of justice do not weigh as strongly in favor of dismissal.

Working with Intake and Probation Officers Early in the Court Process

Attorneys should consider whether school administrators are attempting an end run of special education responsibilities at the "investigative and referral levels" of the juvenile court process. This is when decisions are made regarding "whether the case belongs in the juvenile system in the first instance...."¹²⁷ The *Trent M.* court found that one should not assume intake probation officers and prosecutors will rubber stamp a referral by school authorities.¹²⁸ If intake probation officers and prosecutors misuse their discretion, the court can use its supervisory authority to correct the error.¹²⁹

An intake probation officer typically is empowered by statute to investigate and examine complaints to consider whether to proceed against a child.¹³⁰ Recognizing this authority, Congress provided that agencies referring children to the juvenile court should transmit special education and disciplinary records.¹³¹ At intake, state law—requiring probation officers to screen out inappropriate cases¹³²—meshes with the congressional mandate that school authorities provide relevant school records to the court.

If an intake officer fails to investigate properly and fails to recognize the significance of special education violations by school personnel, the attorney can provide school records and explain to the intake officer—and subsequently, if necessary, to the prosecutor—that the case is really an unfair attempt by school officials to transform a failure to evaluate and to provide special education services into a dispute in the juvenile court. Furthermore, an intake probation officer who is fully informed of special education entitlements should rarely recommend petitioning a status offense case against a child who is eligible for special education. Nevertheless, the defense attorney must be prepared to challenge the decision making of, or failure to exercise discretion by, the intake officer.¹³³ The attorney can file a motion to dismiss the petition based on violations of the statutory intake process.

Advancing Arguments under Section 504 of the Rehabilitation Act

If evidence shows school officials are referring children with disabilities to the juvenile court for behavior for which nondisabled children are not being referred, the defense attorney should consider advancing an argument, under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, that the status offense prosecution is discriminatory: “Of course, it would be a violation of Section 504 of the Rehabilitation Act of 1973 if a school were discriminating against children with disabilities in how they were acting under this authority (e.g., if they were only reporting crimes committed by children with disabilities and not [those] committed by nondisabled students).”¹³⁴

Negotiating Continuances of Status Offense Matters

The defense attorney typically is appointed to represent the child *after* filing a status offense petition (which also may be after the child has failed a status offense diversion program). To negotiate a dismissal of the petition or to effectively challenge the intake process, the attorney must rapidly uncover the facts and legal claims that are germane to both the status offense matter and the parallel special education case. The special education advocacy process, however, often will require several months, particularly if the child was not previously evaluated and identified as eligible for special education. For this reason, the defense attorney is not usually in a position early in the defense of a status offense case to present to the juvenile court a hearing officer’s determination establishing a denial of a FAPE.

Given these time constraints, a more manageable strategy is to negotiate a continuance of the status offense matter to help the parent use special education processes—e.g., an IEP meeting or a due process hearing—to line up appropriate services for the child and for the family that will supersede the need for the status offense proceeding.¹³⁵

Advocating for Clients’ Special Education Rights

Like probation officers and prosecutors, judges must determine whether a child—even if unruly or truant—is “in need of treatment or rehabilitation.”¹³⁶ Representing a child who has access to appropriate and comprehensive services within the special education system, a defense attorney may be in a strong position to rebut the presumption that the child is in need of treatment from the juvenile court. On this basis, the attorney can move at any point during the proceedings to dismiss the petition or move at trial for a judgment of acquittal.

Additional Arguments Defense Attorneys Can Make in Status Offense Cases

The defense attorney might argue that school officials failed to inform the parent of the child's possible special education needs and also failed to get the parent's consent to an evaluation. In this light, school officials may have failed to exhaust their administrative remedies through the special education system before referring the alleged truancy to the juvenile court.

The evidence may support a claim that school officials and prosecutors pursue status offense charges against children with disabilities (and the child in the individual case, particularly) that they would not and do not pursue against nondisabled children. If so, move to dismiss the status offense case as a violation of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act's prohibition against discriminating against people with disabilities.

Some children develop school-avoidance behavior or school phobia over time as a result of not being appropriately identified and not receiving appropriate special education and related services. The situation for them is embarrassing, painful, and increasingly untenable. Teachers and expert evaluators can be witnesses to help establish that a child was "constructively evicted" from school and did not have the necessary *mens rea* to be guilty of truancy.

For children who allegedly violate pretrial or probationary orders to attend school regularly, an attorney can argue that, by failing to comply with "child find" and failing to provide appropriate services, school officials have interfered with the child's ability to comply with the court's order. In theory, a court can assert jurisdiction over a nonparty that interferes with a party's ability to comply with a court order.

A defense attorney can request that a court's order contain appropriate accommodations for a child with a disability. If the child, for example, has a disability that affects receptive and expressive communications, an appropriate accommodation may be appointing a probation officer who is trained and qualified to communicate with a child with this disability.

As a protective measure, an attorney for parents of a child with a disability should suggest that IEP Team members write into the IEP that school officials will not refer the child to the juvenile or criminal court for minor behavior that is a manifestation of the child's disability.

If the status offense case is in court, the defense attorney is almost certainly confronting parents who claim to be properly rearing the child or school administrators who claim to be providing appropriate opportunities for the child. These adults will say that the child's alleged out-of-control behavior is attributable primarily, if not exclusively, to the child. To convince a probation officer or, subsequently, a prosecutor or a judge, that the status offense referral reflects special education violations, a defense attorney typically must file for, and then prevail in, a special education due process hearing.

A defense attorney can accomplish two central objectives by winning a due process hearing. First, the attorney can obtain appropriate services for the child and perhaps for the parents, as well. Second, the attorney can use the findings of fact and conclusions of law from the special education matter to obtain a dismissal of the status offense charges (or a termination of a diversion or probation period). One might think of this strategy as turning a defendant into a plaintiff.¹³⁷ To address the underlying problems effectively and to serve these children properly, attorneys must maintain the special education representation until the child is receiving appropriate services and has stabilized in school and at home.

Based upon success in the special education case, one can anticipate the prosecutor or judge will agree to dismiss the status offense matter. If not, the defense attorney can introduce into the status offense proceeding the findings of fact and conclusions of law by the special education hearing officer, demonstrating that school personnel have violated the IDEA, that the child's behavior underlying the status offense charge arises from the child's disability, and that the hearing officer has ordered appropriate services for the child. If the juvenile court judge maintains, in the face of the special education findings, that the child is guilty of the status offense charges and needs treatment and rehabilitation from the juvenile system, the defense attorney—having introduced the special education findings and order—will be in a strong position to appeal.

Conclusion

A status offense charge suggests the child is in a crisis situation at school, at home, or both. For children with disabilities that affect education, IDEA services should be sufficient to address the conditions that lead to a status offense referral for truancy or disruptiveness at school. Further, for a child whose education-related disabilities also affect relationships at home, special education services should be in place to address behaviors underlying a status offense referral for ungovernability. A juvenile defense attorney who provides special education representation

can obtain appropriate services for clients and often extract those clients from the juvenile system. Problems developed over years will not dissipate immediately. The attorney should maintain the special education representation until the youth is making satisfactory progress academically and emotionally.

Endnotes

1. Rutherford Jr., Robert B. et al. *Youth with Disabilities in the Corrections System: Prevalence Rates and Identification Issues*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention, July 2002, 7-19, available at <http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf> (describing the prevalence of disabilities in detained youth); *Addressing the Needs of Youth with Disabilities in the Juvenile Justice System: The Current Status of Evidence-Based Research*. Washington DC: National Council on Disability, May 1, 2003, 49-71, available at www.ncd.gov/newsroom/publications/pdf/juvenile.pdf (discussing the link between disability and delinquency); Tulman, Joseph B. "Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System." *Whittier Journal Children & Family Advocacy* 3(2), 2003, 4 (describing how to use special education law to address disproportionate representation).
2. For a detailed description of how the failure to follow special education law leads to the disproportionate representation of children with disabilities in the delinquency system, see Tulman, 2003, note 12; Rivkin, Dean H. "Legal Advocacy and Education Reform: Litigating School Exclusion." *Tennessee Law Review* 75, 2008, 265, 266-69.
3. The Uniform Law Commissioners' Model Juvenile Court Act of 1968, the blueprint for state laws on child welfare, delinquency, and status offense matters, requires "achiev[ing] the . . . purposes [of the Act] in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety." § 1(3).
4. 20 U.S.C. § 1412(a)(5).
5. 42 U.S.C. § 5633.
6. 20 U.S.C. § 1415(i)(3)(B)-(C); 34 C.F.R. §§ 300.517(a)(1)(i), 300.517(c).
7. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a); see also 20 U.S.C. § 1412(a)(1)(B) and 34 C.F.R. § 300.102.
8. 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a).
9. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1).
10. 34 C.F.R. § 300.102(a)(3)(i)-(iv) (describing specific exception).
11. 34 C.F.R. § 300.101(c).
12. 29 U.S.C. § 794.
13. 34 C.F.R. §§ 104.31-39.
14. A "child with a disability" is a child with "mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A)(i)-(ii).

15. 34 C.F.R. § 300.8(c)(9)(i)-(ii).
16. 20 U.S.C. § 1414(a)-(c); 34 C.F.R. §§ 300.300-.311.
17. 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4), § 300.304(c)(6) (evaluation must be comprehensive), § 300.304(c)(1)(i) (nondiscriminatory), § 300.304(c)(1)(iii)-(v) (properly administered), § 300.304(c)(1)(ii) (in the child's native language or mode of communication), §§ 300.307(a)(2), 300.309(a)(2)(i), 300.311(a)(7) (response-to-intervention approach for determining learning disability).
18. 20 U.S.C. § 1414(a)(1)(B).
19. 20 U.S.C. § 1414(b)(1).
20. 20 U.S.C. § 1414(a)(1)(D)(i)(I).
21. 20 U.S.C. § 1414(a)(1)(C)(i)(I)-(II).
22. 20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).
23. 20 U.S.C. § 1414(a)(2)(A)(i)-(ii); 34 C.F.R. § 300.303(a)(1)-(2); 20 U.S.C. § 1414(b)(1) (prior written notice); § 1414(c)(3) (informed consent).
24. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502.
25. 34 C.F.R. § 300.502(b), § 300.502(b)(2).
26. 20 U.S.C. § 1401(9) (defining free appropriate education).
27. 20 U.S.C. § 1401(9)(B)-(D).
28. 20 U.S.C. § 1401(9)(A).
29. 458 U.S. 176 (1982).
30. 485 U.S. at 188-89.
31. 485 U.S. at 198-201.
32. 20 U.S.C. § 1400(d)(1)(A).
33. 20 U.S.C. §§ 1401(14), 1414(d).
34. 20 U.S.C. § 1414(d)(1)(A)(i).
35. 20 U.S.C. § 1414(d)(1)(B).
36. 20 U.S.C. § 1414(d)(4); § 1414(d)(2)(A) (requiring that an IEP be in place at the start of the school year).
37. 20 U.S.C. § 1414(d)(3)(B)(i).
38. 20 U.S.C. § 1414(d)(3)(A)(i)-(iv).
39. 20 U.S.C. § 1412(a)(5).
40. 20 U.S.C. § 1400(d)(1)(A) (requiring that special education students be prepared for “further education, employment, and independent living”).
41. 20 U.S.C. § 1412(a)(5)(A).
42. 34 C.F.R. § 300.116(b)-(c).
43. 34 C.F.R. § 300.115.
44. 34 C.F.R. § 300.106.
45. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (specifying further “related services”). The requirement to provide related services includes medical services by a licensed physician only for purposes of diagnosis or evaluation; *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891-92 (1984).

46. 34 C.F.R. § 300.34(c)(15).
47. 34 C.F.R. § 300.34(c)(1).
48. 34 C.F.R. § 300.34(c)(9).
49. 34 C.F.R. § 300.34(c)(6).
50. 20 U.S.C. § 1401(33); 34 C.F.R. §§ 300.42, 300.107, and 300.117.
51. 34 C.F.R. § 300.324(a)(2)(v); 20 U.S.C. § 1401(1)-(2).
52. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); 34 C.F.R. § 300.320(b) (mandating IEP Team to include transition services for children younger than 16, if appropriate).
53. 20 U.S.C. § 1400(d)(1)(A).
54. 34 C.F.R. § 300.43(a)(1).
55. 34 C.F.R. § 300.43(a)(2).
56. *Ibid.*
57. 34 C.F.R. § 300.324(c)(1).
58. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982). In the 2004 amendments, Congress reinforced the substantive focus on FAPE and prohibited hearing officers from granting victory to parents based solely on *de minimis* procedural violations. 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III) (indicating when procedural violations violate the right to a FAPE). Subsection (f)(3)(E)(ii) contains a three-part, disjunctive test for whether a procedural inadequacy is sufficient to constitute a basis for a hearing officer to rule in favor of the parent. The procedural violation must impede the child's right to FAPE; significantly impede the parent's opportunity to participate in decision making; or cause a deprivation of educational benefits. The parallel regulation is 34 C.F.R. § 300.513(a)(2).
59. The law specifies that the parent must receive notice of rights once per year, as well as when triggered by other specified events. 20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. §§ 300.504(a)(1)-(4).
60. 34 C.F.R. §§ 300.501(a), 300.613-300.621.
61. 34 C.F.R. § 300.501(b)-(c). Parents have a right to participate, with a team of qualified professionals, in the determination of whether their child is eligible for special education, 20 U.S.C. § 1414(b)(4)(A), as well as in the placement decision, § 1414(e).
62. 20 U.S.C. § 1415(b)(3)(A)-(B); 34 C.F.R. § 300.503(a)(1)-(2).
63. 20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b).
64. The retainer agreement probably should contain an explanation regarding the potential conflict of interest between the parent and the child, including the possibility that they might disagree on the objectives of the special education representation. An irresolvable and unwaivable conflict likely would lead to the withdrawal by the attorney from the representation.
65. 20 U.S.C. § 1415(b)(6)(A). The regulations also require each state education agency to adopt procedures for receiving, investigating, and addressing complaints regarding the failure to provide appropriate services under the IDEA. 34 C.F.R. §§ 300.151-300.153.
66. 20 U.S.C. §§ 1415(c)(2)(A), 1415(b)(7)(A).
67. 20 U.S.C. § 1415(c)(2)(B)(ii); § 1415(c)(2)(B)(i).
68. 20 U.S.C. § 1415(f)(3)(C)-(D).
69. 20 U.S.C. § 1415(e); 34 C.F.R. § 300.506.

70. 20 U.S.C. § 1415(f)(1)(B); § 1415(f)(1)(B)(i)(IV) (parties may waive resolution session).
71. 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.515(a); § 300.510(b)-(c) (exceptions and adjustments to 30-day period).
72. 34 C.F.R. § 300.515(a).
73. 20 U.S.C. § 1415(f)(3)(A).
74. 20 U.S.C. § 1415(h)(1); 34 C.F.R. § 300.512(a)(1).
75. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2).
76. 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(4)-(5), § 300.512(c)(3).
77. 20 U.S.C. § 1415(f)(2); 34 C.F.R. §§ 300.512(a)(3), 300.512(b).
78. *Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005).
79. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).
80. 20 U.S.C. §§ 1412(a)(11)(A)(iii), 1401(11); 34 C.F.R. §§ 300.149(c), 300.19.
81. 20 U.S.C. § 1415(b)(6)(A).
82. 20 U.S.C. § 1415(i)(2)(C)(iii).
83. 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(c); *Burlington v. Dept. of Educ.*, 471 U.S. 359, 369-70 (1985); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 9-10 (1993); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2488 (2009).
84. *Bd. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 316 (6th Cir. 2007) (“An award of compensatory education is an equitable remedy that a court can grant as it finds appropriate.”).
85. *Goss v. Lopez*, 419 U.S. 565, 577 (1975). Some kind of notice and hearing also is required, as well as an explanation of the evidence and an opportunity to be heard. *Ibid.*, 579, 581.
86. 20 U.S.C. § 1415(k); 34 C.F.R. § 300.536(a)(1) (removal for more than 10 consecutive days), § 300.536(a)(2) (removal for more than 10 days that are not consecutive but that constitute a pattern creating a change in placement).
87. *E.g.*, 20 U.S.C. § 1415(k)(1)(H); 34 C.F.R. § 300.530(h).
88. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).
89. 20 U.S.C. § 1415(k)(1)(E)-(F); 34 C.F.R. § 300.530(e)-(f); *see also* 20 U.S.C. § 1415(K)(1)(E)(i)(I)-(II); 34 C.F.R. § 300.530(e)(1)(i)-(ii) (noting that conduct is a manifestation if the disability caused, or substantially and directly related to, the conduct; or the conduct is a manifestation if it directly resulted from failure to implement child’s IEP).
90. 20 U.S.C. § 1415(k)(1)(C); 34 C.F.R. § 300.530(c).
91. 20 U.S.C. § 1415(k)(1)(D)(i); 34 C.F.R. § 300.530(d)(1)(i).
92. *Ibid.*
93. 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).
94. 20 U.S.C. § 1415(k)(1)(D)(ii); 34 C.F.R. § 300.530(d)(1)(ii).
95. 20 U.S.C. § 1415(k)(1)(A); 34 C.F.R. § 300.530(a).
96. 20 U.S.C. § 1415(k)(5); 34 C.F.R. § 300.534.
97. 20 U.S.C. § 1415(k)(5)(B)(i)-(iii); 34 C.F.R. § 300.534(b)(1)-(3).
98. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(i).
99. 20 U.S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. § 300.534(d)(2)(iii).

100. 20 U.S.C. §§ 1415(k)(3), 1415(k)(4)(B); 34 C.F.R. §§ 300.532(a), 300.532(c)(2). School officials can seek an expedited hearing to seek to exclude from the current educational placement a child with a disability whom they allege to be a danger to self or others. 34 C.F.R. § 300.532(c)(2).
101. 20 U.S.C. § 1412(a)(1)(B)(ii).
102. *Ibid.*
103. 20 U.S.C. § 1414(d)(7)(B); 34 C.F.R. § 300.324(d)(2)(i).
104. 20 U.S.C. § 1414 (d)(7)(A); 34 C.F.R. § 300.324(d)(1)(ii).
105. The same is true with regard to minor delinquency matters that arise at school (e.g., fighting, disorderly conduct, making threats, destruction of property, and drug possession).
106. *Schaffer v. Weast*, 546 U.S. at 53 (“The core of the [IDEA] is the cooperative process that it establishes between parents and schools.”).
107. Because the IDEA requires developing an individualized program, a child’s disability category does not limit what particular services are appropriate. So, for example, a child may need positive behavioral interventions and supports or psychological counseling even though the child is not identified as “emotionally disturbed.”
108. 34 C.F.R. § 300.8(c)(4)(i).
109. *Tulman*, 2003, 31 note 140 (citing authorities).
110. *Ibid.*
111. 34 C.F.R. § 300.34(c).
112. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (IEP Team shall consider positive behavioral interventions and supports); 20 U.S.C. § 1415(k)(1)(D)(ii) (FBA and behavioral intervention services for child removed to interim alternative educational setting); § 1400(c)(5)(F) (whole-school approaches, including positive behavioral interventions and supports, improves effectiveness of education for children with disabilities).
113. *Honig v. Doe*, 484 U.S. 305, 323 (1988).
114. In *re Robert T. Doe*, 753 N.Y.S.2d 656, 660 (Fam. Ct. 2002) (relying upon juvenile court’s inherent authority to dismiss status offense matter in the interest of justice). In *re Trent M.*, 569 N.W.2d 719, 725-26 (Wis. Ct. App. 1997) (recognizing in dictum that trial court could have dismissed the petition in the best interest of the child but holding that trial court ruled on legal grounds instead).
115. In *re Ruffel P.*, 582 N.Y.S.2d 631, 632 (Fam. Ct. 1992) (dismissing status offense matter in the interest of justice, emphasizing that the child was eight and a half at the time of petitioning).
116. In *re Trent M.*, 569 N.W.2d at 724.
117. 20 U.S.C. §§ 1415(i)(2), 1415(l); 34 C.F.R. §§ 300.516(a), 300.516(e).
118. *Morgan v. Chris L.*, 927 F. Supp. 267 (E.D. Tenn. 1994) (upholding rulings by an administrative law judge and a district court that school administrators who failed to identify and serve Chris L. under the IDEA had attempted improperly to change his educational placement by petitioning a delinquency matter for behavior that was a manifestation of the student’s disability), *aff’d*, 106 F.3d 401 (6th Cir. 1997) (unpublished opinion), cert. denied, 520 U.S. 1271 (1997). A distinguishing feature of *Morgan v. Chris L.* is that Tennessee’s statutes authorize school-initiated petitions in the juvenile court; In *re Trent M.*, 569 N.W.2d at 725; *Commonwealth v. Nathaniel N.*, 764 N.E.2d 883, 886-87 (Mass. App. Ct. 2002); In most states, school officials must rely upon juvenile

court personnel to file a petition. Beginning in January 2009, Tennessee prohibits school officials from filing a petition against a special education student unless they first find that the alleged behavior was not a manifestation of the child's disability. Tenn. Code Ann. § 49-10-1304(b)(3)(B) (2009).

119. 20 U.S.C. § 1415(k)(6)(A)(2005) (originally codified, following the 1997 amendments, at 1415(k)(9)(A)). One might presume that Congress meant for subsection 1415(k)(6)(A) to cover “delinquent acts” and “status offenses,” as well as “crimes.” Whether to argue that the omission of these terms is significant, on the other hand, is a matter left to the judgment of the individual attorney.

120. *Commonwealth v. Nathaniel N.*, 764 N.E.2d at 887 (*citing* Seligmann, Terry Jean. “Not as Simple as ABC: Disciplining Children with Disabilities under the 1997 IDEA Amendments.” *Arizona Law Review* 42, 2000, 77, 115 note 211.

121. 64 Fed. Reg. 12631 (March 12, 1999).

122. *Ibid.*

123. Congress has not retreated fundamentally from its intention to prohibit school administrators from unilaterally excluding children with disabilities. The Gun-Free Schools Act, 20 U.S.C. § 7151(b)(1) requires states that receive federal education money to have a state law requiring LEAs to expel any student bringing a firearm to school or possessing a firearm in school. The state law, however, can allow the chief of each LEA to modify expulsion on a case-by-case basis. Subsection 7151 (b)(1); Subsection 7151(c), furthermore, is a “special rule” providing that “[t]he provisions of this section shall be construed in a manner consistent with the Individuals with Disabilities Education Act”

124. *In re Beau II*, 738 N.E.2d 1167, 1170 (N.Y. 2000) (habitual school tardiness).

125. *Ibid.*

126. *Ibid.*; *In re Charles U.*, 837 N.Y.S.2d 356, 359 (App. Div. 2007) (determining that status offense case not an improper effort to change suicidal child's educational placement where there was an IEP meeting to evaluate placement needs).

127. *In re Trent M.*, 569 N.W.2d at 724.

128. *Ibid.*

129. *Ibid.*

130. Model Juv. Ct. Act § 6 (1968) (specifying that the “[p]owers of the probation officer” include “mak[ing] investigations, reports, and recommendations to the juvenile court; receiv[ing] and examin[ing] complaints and charges of delinquency, unruly conduct or deprivation of a child for the purpose of considering the commencement of proceedings . . . [and] mak[ing] appropriate referrals to other private or public agencies of the community if their assistance appears to be needed or desirable...” D.C. Code § 16-2305 (requiring that intake probation officer recommends whether to file petition; notifies complainant of recommendation not to file, and that complainant may appeal to the prosecutor). Thus, the intake probation officer can delay, block, or divert a complaint and, essentially, refer the matter to the public agency—the school system—that sent it to the court.

131. Under 20 U.S.C. § 1415(k)(6) (“Referral to and action by law enforcement and judicial authorities”), subsection (B)—concerning “[t]ransmittal of records”—provides: “An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.” The transfer of records is subject to protections of the Family Educational Rights and Privacy

Act (FERPA). *Commonwealth v. Nathaniel N.*, 764 N.E.2d at 888 (holding also that transfer is permitted by FERPA).

132. *Schall v. Martin*, 467 U.S. 253, 284 (1984) (illustrating the intake process).

133. Tulman, Joseph B. "The Role of the Probation Officer in Intake: Stories from Before During and After the Delinquency Initial Hearing." *D.C. Law Review* 3, 1995, 235, 235-50. (discussing responsibilities of an intake officer).

134. 64 Fed. Reg. 12631 (March 12, 1999).

135. *Defending Youth in Truancy Proceedings: A Practice Manual for Attorneys*. Seattle, WA: ACLU of Washington & TeamChild, September 2008, 75, available at www.teamchild.org/pdf/Truancy%20Manual%202008.pdf (recommending that defense counsel file motion for stay or seek a joint request for continuance of status offense matter to address reasons for truancy). *In re Ruffel P.*, 582 N.Y.S.2d at 632 (continuing twice a hearing on defense counsel's motion to dismiss to await special education decision making by the IEP Team). *But cf.* *In re C.S.*, 804 A.2d 307 (D.C. 2002) (noting that trial court that first ordered and awaited submission of IEP did not abuse its discretion by conducting disposition hearing without receiving or considering the IEP).

136. Model Juv. Ct. Act § 2(4)(iv) (1968). The definition of "unruly child" (like the definition of "delinquent child") requires both the deviant conduct and a separate finding of a "need for treatment and rehabilitation." *Ibid.* The definition is conjunctive, and the prosecutor must prove both elements. *In re M.C.F.*, 293 A.2d 874, 877 (D.C. 1972) (finding rebuttable presumption that delinquency adjudication establishes need for care and rehabilitation).

137. Tulman, Joseph B. "The Best Defense is a Good Offense: Incorporating Special Education Law into Delinquency Representation in the Juvenile Law Clinic." *Washington University Journal of Urban & Contemporary Law* 42, 1992, 223 (discussing the change in relationship needed to advocate through special education law).



CHAPTER SEVEN

**How Status
Offenses
Intersect with
Other Civil
and Criminal
Proceedings**

By Jana Heyd and Casey Trupin

How Status Offenses Intersect with Other Civil and Criminal Proceedings

Choose the type of proceeding that best advances your client's interest.

- Avoid proceedings that will result in your client receiving a criminal record or requiring him to register as a sex offender.
- Examine the causes of the youth's behavior.
- Look for signs of abuse or neglect or coordinate with a professional who can recognize those signs.
- Involve the youth in the decision-making process.
- Coordinate with the youth's counsel in other proceedings to address the consequences of each proceeding and avoid duplicating services.

If the youth has been abused or neglected, weigh the pros and cons of child welfare system involvement.

- The youth may have access to more agency placements in the child welfare system.
- The youth may be able to access more informal placement arrangements through the status offense system.
- The youth may have access to greater public benefits through the child welfare system.
- The youth may have greater access to legal assistance in one system over another.

Avoid delinquency proceedings.

- If the youth is already involved in the status offense system, urge the delinquency court to set aside proceedings in favor of treatment or services already being offered through the status offense (and/or child welfare) system.

Weigh the pros and cons of a family law proceeding versus a status offense case.

- If the youth is subject to both status offense and custody proceedings, there may be an opportunity to dismiss one case over the other or obtain concurrent jurisdiction. Consider:
 - The family court may be better suited to respond to abuse or neglect issues.
 - The youth will be party to a status offense proceeding, but not likely to a custody case.
 - The different financial and educational benefits that each proceeding offers.
 - The youth's opinion.



Status offenders may face issues that bring them into the delinquency, child protective, and/or status offense court system. Overlapping judicial systems can cause serious consequences for youth. Often these systems do not effectively address youth's issues and overpenalize their behavior, resulting in confusion and frustration for youth and their families. If the youth is also involved in delinquency proceedings, both systems may attempt to serve the youth. If the systems coordinate, the youth's needs are more likely to be met. If they are divided, the response is likely to be punitive, which can deepen the youth's underlying issues.

This chapter:

- examines proceedings that overlap with the status offense system, including child protection, family law actions, juvenile delinquency proceedings, and civil legal proceedings that affect placement or control of the child;
- discusses potential consequences or outcomes when a child is the subject of two or more proceedings;
- provides recommendations for working with youth who are involved in multiple proceedings.

Evaluating Crossover Status Offense Cases

As an attorney representing youth in possible “crossover” status offense cases, it is important you assess the factual and legal effects of pursuing (or opposing) another legal proceeding. Choosing or defending against one juvenile legal proceeding over another could have immediate and/or long-term consequences. A number of general rules apply to possible crossover situations.

- **Will the youth have a criminal record?** If a proceeding will result in the youth receiving a criminal record (or require registering as a sex offender), make every effort to avoid it, especially if services could be provided for the youth through an alternative proceeding.
- **What is causing the youth's behavior?** If a civil status offense proceeding is being pursued, examine whether the behavior is solely the youth's responsibility, or whether it is due to other circumstances, such as an unsafe foster care placement.
- **Watch out for abuse or neglect.** Abuse and neglect allegations may arise either as the primary reason the case came to the authorities or as a secondary issue revealed later. Be aware that the youth may

not reveal her history until she has a comfortable working relationship with the attorney. Lawyers who represent youth should ensure they have appropriate training or access to social workers who recognize signs of abuse and neglect. Abuse and neglect issues may be masked as running-away behavior, thus you should thoroughly examine the reason the child is running away.¹ If the proceeding for which you are providing representation allows the youth to address placement, then finding a safe place may address the running-away behavior.

- **Involve the youth in the decision-making process.** If you can choose or advocate for one proceeding over another, involve the youth when deciding which proceeding to pursue or which defense(s) to present. This is especially true when there are possible collateral consequences as a result of the proceeding. If services or benefits are offered in one proceeding as opposed to another, inform the youth and discuss which proceeding would best fit the youth's situation.
- **Consult with other counsel.** In many jurisdictions, the youth may have different counsel appointed for each proceeding, which may be a disadvantage if the strategy calls for dismissal or transfer of your case to another docket and you have established a rapport and good working relationship with your client. If the youth has more than one attorney, consult the other attorney while including the youth. Consultations address the consequences of each proceeding and coordination to avoid duplicating services for the youth and/or family. In a jurisdiction with a unified family court system, the court may consolidate the proceedings, providing you the opportunity to request a dismissal of the proceeding with the more severe consequences. (See *Benefits of Unified Family Courts* box.)
- **Ensure you understand the various legal proceedings.** A thorough knowledge of the proceedings is important to fully advocate for your client—especially if the most advantageous route for the youth is to avoid the proceedings altogether. If services are available without court involvement, especially for status offenders, identify alternatives to the court process. Despite the best intentions, involving court and legal interventions may only worsen the family's issues.²

The Benefits of Unified Family Courts

In a unified family court system (UFC), one judge hears all cases relating to one family. Generally any party can refer a case to a UFC. A party could also write a letter opposing the referral. A youth may prefer to have one judge handling the family's cases, rather than appearing in multiple courtrooms for similar issues. One benefit of a UFC is to ensure there aren't conflicting court orders in a case, or to ensure comprehensive court orders are entered that impact the family.

Moving from Status Offense to Child Protective Proceedings

For many families who find themselves in status offense proceedings, abuse, neglect, or abandonment may not be an issue. Status offense proceedings often include nonabusive parents of adolescents with substance abuse or mental health issues, or adolescents who are truant or runaways.

However, abuse and neglect and status offense proceedings can involve the same families. Why one family ends up in a status offense proceeding versus a child protection proceeding varies. Some state statutes specifically limit status offense proceedings to families in conflict (as opposed to families where abuse, neglect or abandonment has taken place). Despite those statutory prohibitions, status offense proceedings still often involve adolescents who have been abused or neglected. The court and/or child welfare agency may provide services to the youth and family within the context of the status offense proceeding, unless very serious abuse is involved. However, the courts and child welfare system are often criticized for overlooking abuse in older children, especially adolescents.

Abused adolescents end up in the status offense system instead of the child protection system for various reasons:

- Adolescents are at less risk for serious injury and thus their cases do not meet the criteria for protective intervention.
- There are few foster placements for adolescents.
- There is a belief that:
 - adolescents can protect themselves by running away or fighting back;
 - a status offense proceeding will give the family more control; or
 - adolescents are solely or largely responsible for the family dysfunction.

These policies and attitudes may push abusive families inappropriately towards status offense proceedings. Be sure to thoroughly investigate the youth's living circumstances so you can adequately understand the situation, advocate for the best solution, and ensure appropriate services are provided. Assess whether the case involves abuse or neglect, and, if so, advocate for appropriate interventions. If the youth is being abused, ensure he is not further victimized by being held responsible for the parents' actions. For example, an abused youth who gets into a fight with a parent should not necessarily be referred for anger management or perpetrator's counseling.

Some youth resist admitting abuse or neglect because of shame, guilt, distrust of adults or the system, or even concern about immigration consequences for the parents. Be vigilant about inconsistent versions of what is happening with the youth, the youth's unwillingness to answer questions about what is occurring, signs of depression or hopelessness, missing school when the youth usually attends, or the youth blaming himself for what has occurred with his family. Develop a good rapport and have consistent contact to get an accurate picture of what is occurring in the youth's life.

Choosing One System over Another

When a child can access either a status offense or child protection proceeding, there may be significant advantages to choosing one system over the other.

Access to Placement Options

Child protection proceedings, while harder to access, get higher priority over and access to open child welfare beds, foster homes, and group homes. A youth in a status offense proceeding who needs to be placed out-of-home may have to come up with her own placement. However, it is more likely the placement may only need to be with a "suitable person." This allows the youth to be placed with a teacher, family friend, or neighbor instead of a relative or licensed foster care provider—generally required in a dependency case. This significantly expands scarce placement options. When choosing between status offender proceedings and abuse/neglect proceedings, attorneys should take into account any possible effect of a child being labeled a status offender. However, when a status offense proceeding is the only way to secure a safe placement for a child, the decision is more straightforward. In addition, in some jurisdictions and with some proceedings, the status offender "label" is nonexistent or minimal.

Public Benefits

Certain public benefits for adolescents in foster care can exceed those offered through status offense cases. For example, status offenders cannot access federal foster care payments or post-majority care (such as Medicaid coverage until age 21) that may be available through the state. An exception is Supplemental Security Income (SSI), which states generally take from foster youth to use for foster care maintenance purposes. A status offender who is disabled and eligible for SSI would be able to access those funds for direct support.

Circumstantial Benefits

Some benefits and disadvantages may appear only under certain circumstances or at specific junctures. For example, status offenders pursuing higher education are not automatically exempt from reporting parents' income on financial aid applications, as are foster youth who age out of care.³ For undocumented youth seeking adjustment of status (lawful permanent residency) through a Special Immigrant Juvenile Status (SIJS) petition, in some jurisdictions placement or eligibility for long-term foster care and a dependency finding are required for this proceeding. However, in other jurisdictions, placement through a status offense proceeding may suffice.

Access to Counsel

Depending on the state, an attorney may not be appointed (or appointed late) for the youth in a status offense proceeding. In other jurisdictions, counsel may always be offered to status offenders but not always for foster youth or vice versa. Access to counsel in either situation is an integral step in protecting the legal rights of children. At least one court has recognized that even a status offense adjudication may have long-term legal consequences if competent counsel is not provided for the youth.⁴ Like status offense orders, child protection dispositional orders generally require children to attend school, remain in and follow the rules of their placement, and attend counseling. In some states, these orders are under penalty of contempt, carrying the possibility of detention if violated.⁵ Thus, as the youth's attorney, it is important that you attend all stages of the proceeding and advise your client on ways to avoid contempt. (See Chapter 5, *Postadjudication Strategies for Defending Juveniles in Status Offense Proceedings*.)

- ***Questions to consider when navigating between child protection and status offense systems:***
 - What is the client's preference between systems?
 - Has the client fully explained her background (including abuse/neglect) so that you have a good understanding of the client's circumstances?
 - If either the youth or parent has mental health or substance abuse issues, which proceeding is more likely to address them? What kind of extended family or community support does the client have or need?
 - What are the client's educational strengths and needs?
 - If the client is likely to run from home or placement, which proceeding will be less punitive?
 - How long might the client need services or oversight from the court? (Will the proceeding remain in effect throughout the youth's minority, if needed?)
 - Is the youth's behavior a manifestation of other issues in the home?
 - Has the youth had a previous positive or negative out-of-home placement?
 - Which system provides more public benefits and services?
 - Does the youth have the capacity to know the behavior would result in her being declared a status offender or dependent youth?
 - If the child protection system is not involved, does your state have a protocol for requesting voluntary services from that system?
 - Does the youth or parent know how to access the child protection system, if requesting to do so voluntarily?
 - As an attorney, do you know how to weigh the benefits versus consequences of one system over another?

- ***Legal issues to address when moving between abuse/neglect and status offense systems:***
 - Does the client have immigration issues and does either proceeding offer an opportunity to resolve (or place at risk) the child's immigration status?
 - Who has custody of the youth? Does the petitioning parent have standing to bring the case? Can another parent take custody away?
 - What are the legal and/or collateral consequences of being a status offender versus being in the child protection system?
 - Will the client lose his attorney if the case is transferred to another type of proceeding?

Moving Between Status Offense and Delinquency Proceedings

The line between status offenses and juvenile offenses is often blurred. In some states youth can find themselves in detention under both proceedings (for status offenses through contempt, and for delinquency through adjudication or conviction). To further complicate the issue, the term “status offense” includes not only proceedings involving family issues but also infractions such as alcohol possession or curfew violations. Probation departments often handle both dockets.

Choosing One System over Another

Despite the overlap, the differences between delinquent and status offenses are greater than the similarities—and there is rarely (if ever) a good reason to advocate for your client’s status offense case to be handled as a criminal offense.

Collateral Consequences of a Juvenile Offense Record

Abusive and nonabusive parents often attempt to deal with family conflicts or adolescent mental illness or substance abuse by urging that their child be charged with a crime.⁶ With abusive parents, assaults by them against their adolescent children sometimes result in an assault charge against the child. A nonabusive parent who is struggling to find services for a youth with serious mental health or substance abuse issues may be told the only way to access those services is through the delinquency system. That parent may have been told, sometimes correctly, that status offense proceedings lack substantial service options for youth and that these proceedings sometimes rely solely on the power (or fear) of the gavel to bring results. While juvenile justice agencies are not known for providing quality mental health or substance abuse services, parents may feel it is better than doing nothing.

The problem with using the delinquency system to address mental health issues is the collateral consequences of a juvenile offense often outlast any positive effects of treatment received while in custody.⁷ While some states seal juvenile offense records at age 18, some states make these records public long into the youth’s adult years. This means the young adult, who has addressed her mental health or substance abuse issues, will face the debilitating effects of a criminal record.

If a youth is facing any offense (but especially a sex offense or one that involves chemical dependency or mental illness) in a delinquency proceeding, the parents, service providers, and legal authorities may be convinced to pursue treatment and placement for the youth through the status offense system or through

a child protection action, rather than a criminal prosecution. Involving the delinquency system may result in a criminal record and sex offender registration that follows the youth for life. If the authorities and/or the court can be convinced that the youth (especially for young offenders or offenders who are themselves victims) would receive more therapeutic services and support in the child protection or status offense system, it would be critical for the youth to avoid the delinquency system. Mediating or negotiating a case from the delinquency system to another proceeding generally involves exceptional circumstances. There are legal hurdles to overcome, especially if the prosecutor or state child welfare attorney believes the youth is attempting to avoid incarceration or responsibility for his actions.⁸

- ***Questions to ask to help your client navigate between status offense and juvenile delinquency proceedings:***
 - What is the youth's preference in how the case(s) should be handled? What services and resources does the court system offer that would benefit the youth?
 - Is the status offense the least restrictive proceeding to address the youth's behavior?
 - Does the youth have mental health or substance abuse issues or other special needs?
 - What is the youth's home situation like?
 - Does the youth have a prior criminal history? Immigration issues?
 - Is the family supportive or does the youth have community support?
 - Can the youth's behavior be addressed outside of the court system?
 - Is the youth motivated to change his behavior?
 - Which proceeding has collateral consequences and what are they?
- ***Legal issues to address when moving between delinquency and status offense systems:***
 - Did the youth have the capacity to commit an offense?
 - Can the youth assist counsel in his defense?
 - Is there a defense to the offense?
 - Does the court have jurisdiction over the youth?
 - Can the offense be handled through a diversion program, rather than a status offense or delinquency court system?
 - Is this case more appropriately handled as a child protection proceeding rather than a delinquency matter?

Moving Between Family Law and Status Offense Proceedings

Youth who commit status offenses also may end up in family law (custody) proceedings. A family law proceeding may be the best way to resolve the underlying issues in the case. For example, a youth who enters the status offense system, despite being abused or neglected, may have already identified an appropriate alternative caregiver who could petition for custody. In that case, the status offense may be dismissed (or concurrent jurisdiction may be sought) while the custody action is pursued.

Occasionally, a parent will agree to give primary custody either to a noncustodial parent or to a third party in a status offense proceeding. Or, the noncustodial parent may file an action to remove primary custody from the custodial parent. This may convert the status offense proceeding into a custody proceeding. Again, depending on state law and practice, either concurrent jurisdiction will result or the status offense proceeding may be dismissed to allow the custody action to proceed.

Choosing One System over Another

Judicial Authority to Make Placement Decisions

One advantage of family law proceedings is that many judicial officers are more comfortable dealing with placement decisions in family court instead of status offense proceedings. The law and procedure around custody is more complete in family law proceedings (thus, custody decisions are more common) as opposed to status offense proceedings. On the other hand, a family law court's ability to place the youth is generally limited to choosing between the two parties before it, whereas a status offense court may place the child in another out-of-home setting. (A family law judge could, however, request a guardian ad litem to be appointed to investigate the youth's circumstances that could lead to an out-of-home placement through the child protection authorities.)

Ability to Deal with Abuse and Neglect

Unlike family law proceedings, status offense proceedings may be legislatively designed to ignore abuse or neglect (with the intention of ensuring that such cases are handled in more appropriate proceedings). Family law proceedings are specifically designed to address abuse and neglect issues, even if there was never any finding by the child welfare agency. Family courts may restrict the amount of time the child spends with a parent depending on the impact and severity of the

abuse or neglect. The court can also use findings of abuse or neglect that are made during a child protective services investigation, or make its own abuse or neglect findings to require services for the child and/or parent, or to structure the parent's contact with the child.

Child's Legal Standing

A disadvantage of proceeding under a family law action is that a youth rarely has standing to initiate a custody proceeding and instead must rely on a parent or third party to bring the action (often without benefit of counsel). If the parent/caregiver's interests are consistent with the youth's, the youth's attorney (in the status offense matter) may be able to assist the parent or caregiver file and prosecute the action, assuming appropriate waivers are executed. Additionally, in converting from a status offense proceeding to a family law proceeding, the youth may lose the right to counsel, status as a party in the proceeding, and access to the court. Declarations or testimony by a youth in a family law proceeding are often disfavored. Thus, the opinions of the youth and the chance to directly protect the youth's legal rights may be lost.

Access to Financial and Educational Benefits

Another disadvantage of converting to a family law proceeding is access to benefits provided through the status offense proceeding may be lost. The proceeding itself may provide some direct benefits (a caseworker, access to beds, mental health or substance abuse services). A status offender may also have an easier time qualifying as a homeless student under federal homeless education law,⁹ providing continued education stability. On the other hand, a family law proceeding may provide the opportunity to access (or modify) child support payments, whether or not the new custodian is a parent. Additionally, child support payments can, unlike most state or federal benefits, continue into the child's 20s.

- ***Questions to ask your client to help navigate between status offense and family law proceedings:***
 - What is the youth's preference between proceedings? Will the youth's wishes be represented best in family court or in the status offender proceeding?
 - Is the youth living with the parent who offers the most support to the youth?
 - How will the youth's health, education, and welfare be impacted by changing placements?

- Could a unified family court provide better court oversight and handling of the two cases, rather than have each case handled by two distinct courts?
 - Can the youth's counsel request to move the cases to unified family court? (In some states, any party to a case may request transfer of cases to unified family court.)
 - Does the youth have mental health or substance abuse needs (or other special needs) that need to be addressed?
 - Is there a risk that the youth will lose contact with siblings in one proceeding versus another?
- *Legal issues to address when moving between family law and status offense systems:*
- Who has custody of the youth?
 - Is the status offense issue being raised by a noncustodial parent who may not have the authority to raise it?
 - Is there a change of circumstance and is it in the youth's best interest to raise the status offense issue in family court?
 - Is there a unified family court that can take jurisdiction of the case, and should the youth's counsel submit a referral for unified family court jurisdiction after consulting with the youth?
 - Does the youth have different behavior expectations from each parent?

Moving Between Status Offense and Civil Emancipation Proceedings

Unlike most actions that rely on someone other than the child to bring the proceeding, youth who persevere despite family conflict, and have reached a certain age, may be able to resolve underlying issues through a full or limited emancipation. A full emancipation is a legal process by which minors can attain legal adulthood at an earlier age than the age of majority. A partial emancipation gives minors only some of the rights provided to adults under state law, such as the right to consent to health care but not the right to contract. Emancipation is available in only about half the states.¹⁰ Once emancipation is granted, the youth should not be subject to any noncriminal status offense proceeding, though emancipation would not allow the youth to avoid a criminal status offense proceeding, such as a minor-in-possession of alcohol. The fact that a minor was emancipated might be used as evidence of the minor's capacity or to determine whether he should be tried as an adult.

Adolescent Victims of Maltreatment

While infant victims account for most homicides, a study in the *Journal of the American Medical Association* reported, “Adolescents experience maltreatment at rates equal to or exceeding those of younger children.” The study noted, “Recent increases in reported cases of maltreatment have occurred disproportionately among older children and adolescents. However, adolescents are ... more likely to be perceived as responsible for their maltreatment.”¹ The report also noted that the consequences of ignoring this maltreatment are high:

A wide range of serious adolescent risk behaviors is associated with maltreatment. These include increased risk of premature sexual activity, unintended pregnancy, emotional disorders, suicide attempts, eating disorders, alcohol and other drug abuse, and delinquent behavior. Incarcerated youth, homeless or runaway youth, and youth who victimize siblings or assault parents are known to have high rates of prior maltreatment.

Source:

1. Council on Scientific Affairs, American Medical Association. “Adolescents as Victims of Family Violence.” *Journal of the American Medical Association* 270(15), 1993, 1850-1856.

Choosing One System over Another

Minor’s Access

One benefit of emancipation is that minors can initiate the proceeding in many states. Thus, an older youth may be able to avoid (or seek dismissal of) a status offense proceeding (for behavior such as running away or being beyond the parents’ control) by pursuing emancipation.

Access to Benefits

Emancipation may cut off access to some benefits that would be available if the youth was still under the parents’ legal control. Most federal benefits, such as SSI or Social Security Survivor’s benefits, will be unaffected. Full emancipation automatically allows a minor to become his own representative payee, which can be a significant advantage to a youth when another adult has received social security payments on the child’s behalf. However, emancipation is not necessarily required for a child to become her own payee, as youth 15 and older (unless the child has a court-appointed legal guardian) are generally presumed able to be

their own payees.¹¹ Food stamps and medical coverage will likely be unaffected as well, though a parent will often drop the child from private insurance coverage. For teen parents, TANF (cash assistance) rules may change, as the teen parent may no longer have to live in an “approved placement” such as with a potentially abusive parent or other relative. Whether a family that continues to care for an emancipated minor continues receiving child-only TANF may depend on state law. Child support payments before and after age 18 may be cut off, depending on state law.

- *Questions to ask to help your client navigate between status offense and emancipation proceedings:*
 - What are the youth’s preferences regarding each proceeding?
 - Can the youth live on his own and support himself?
 - What long-term services or supports does the youth need?
 - Who in the family or community can best meet the youth’s needs?
 - If the local Department of Health and Social Services is involved, is it providing appropriate services to the youth?
 - Does the youth have the documents, identification, etc. that he will need as he becomes an adult?
 - Will the youth’s cultural and emotional needs be met by each potential proceeding?
 - Is there a cost and who will pay?
 - How flexible are each of the proceedings and how easily could each be modified if the youth’s or other circumstances change?
- *Legal issues to address when moving between emancipation and status offense systems:*
 - Which proceeding will result in the best and most appropriate long-term services or supports for the youth?
 - Did the court consider the youth’s wishes regarding each proceeding?

Moving Between Status Offense and Civil Commitment Proceedings

Another proceeding which could overlap with a status offense proceeding is a mental health or substance abuse commitment proceeding. Often parents or the state initiate status offense proceedings for youth with substance abuse or mental health issues. Parents may have been pushed in this direction because they’ve

been told the child doesn't meet criteria for inpatient commitment, no hospital beds are available, or the child's mental health/substance abuse issue is mistakenly seen only as a behavioral issue.

Choosing One System over Another

Due Process Protections

State laws vary regarding the process offered in a commitment proceeding. In some states, juveniles are afforded the same due process as adults facing involuntary commitment. In others, due process is only provided when the state seeks to commit the child, but not when a parent seeks the commitment. If commitment is a possibility, be aware of the due process protections available in these proceedings. Because these proceedings result in arguably the greatest threat to a juvenile's liberty, carefully advise your clients about the pros and cons in consenting to such a proceeding. Status offense proceedings may have more regular reviews, may be shorter in duration, and may preclude, except through contempt, placement in a locked facility.

Capacity Issues

If your client has significant mental health or substance abuse issues, assess your client's ability to follow court orders, especially in status offense proceedings. Also be aware of your duty under the rules of professional conduct if your client's issue is severe enough to interfere with his ability to make decisions about his representation.

If the youth appears to lack the ability to effectively assist you, or does not appear to understand the proceeding or its consequences, invest time and care to fully assess the client's level of comprehension. You may need to seek the appointment of a guardian ad litem for the youth. Always ensure the proceedings and consequences are explained in a developmentally appropriate manner. If the proceeding could result in placement outside of the youth's home, ensure the youth understands this placement may limit contact with his family, school, and friends. Be familiar with your state's ethics rules as they relate to the representation of clients whose capacity to make "adequately considered decisions in connection with a representation is diminished."¹² (See *Youth Clients with Diminished Capacity* box.)

- ***Questions to ask to help your client navigate between status offense and civil commitment proceedings:***
 - Is the youth's mental health or substance abuse issue better addressed in the community?

Youth Clients with Diminished Capacity

Under Model Rule of Professional Conduct 1.14, a lawyer for a youth should maintain a normal client-lawyer relationship as much as reasonably possible. The lawyer can take reasonably necessary protective action if the client has diminished capacity and can't adequately act in her own interest (because of mental impairment or any other reason) to protect the client and her interests. This action can include consulting with individuals or entities, or obtaining an evaluation to determine the client's ability to understand and assist in the representation. It may also include seeking the appointment of a guardian ad litem.

- Is the youth capable of following the court's orders in a status offense proceeding?
- Is the youth willing to participate in community-based mental health or substance abuse services?
- Will the youth have an attorney if facing civil commitment?
- *Legal issues to address when moving between commitment and status offense systems:*
 - Does the client meet the criteria for involuntary commitment?
 - Is there a community-based alternative that would better serve the youth?

Conclusion

Representing status offenders can involve several legal proceedings. To help your client navigate these proceedings, you will need to understand the legal and social effects of pursuing or defending against one proceeding over another. To advocate for a youth and ensure appropriate services are provided, invest enough time and ask the right questions to gather information and establish a good working relationship with your client. Representing youth in these "crossover" proceedings is a case-specific endeavor, especially when the youth's issues are complex. You can smooth your client's transition to adulthood by helping the youth avoid legal or social consequences that will be difficult or impossible to remedy. Protecting your clients' liberty, protecting against long-term collateral consequences, and ensuring your client has a voice in the proceedings are essential to effective representation.

Endnotes

1. Dedel, Kelly. *Juvenile Runaways*. Washington, DC: U.S. Department of Justice, Office of Community Oriented Policing Services, February 2006, available at www.popcenter.org/Problems/PDFs/JuvenileRunaways.pdf; Finkelstein, Marni et al. *Youth Who Chronically AWOL From Foster Care: Why They Run, Where They Go, and What Can Be Done*. New York, NY: Vera Institute of Justice, August 2004, available at www.vera.org/download?file=261/Foster%2BAWOLs.pdf; Ryan, Kevin M. "Stemming the Tide of Foster Care Runaways: A Due Process Perspective." *Catholic University Law Review* 42, 1993, 271, 279; Kaplan, Caren. *Children Missing from Care: An Issue Brief*. Washington, DC: Child Welfare League of America, 2004. April 27, 2009, available at www.cwla.org/programs/fostercare/childmiss.htm.
2. Mogulescu, Sara and Gaspar Caro. *Making Court the Last Resort: A New Focus for Supporting Families in Crisis*. New York, NY: Vera Institute of Justice, December, 2008, available at www.vera.org/download?file=1796/status_offender_finalPDF.pdf.
3. Through the College Cost Reduction and Access Act of 2007 (Pub. L. No. 110-84), status offenders may be eligible if they are designated as homeless students in the year in which they apply for college. The determination of homelessness can be made by a high school or school district homeless liaison, a director of an accredited HUD homeless shelter, or a director of a runaway/transitional living program or homeless youth basic shelter. They may also be eligible if they can show exceptional circumstances leading to a finding of "independent student status." 20 U.S.C. § 1087vv(d).
4. In January 2009, a Washington State Court of Appeals determined that youth have a right to appointed counsel at the initial fact finding in a truancy action, given the nature of the truancy proceedings, the extreme consequences that a contempt action could impose, and the potential impact to the youth's right to an education. *Bellevue School Dist. v. E.S.*, 199 P.3d 1010 (Wash. App. Ct. 2009).
5. Wash. Rev. Code § 13.34.165 (maximum term of confinement that may be imposed as a remedial sanction for contempt of court for status offender is confinement for up to seven days) and Fla. Stat. § 984.09(2)(a) (2004) (a child who has been held in direct or indirect contempt may be placed in a secure detention facility for five days for a first offense or 15 days for a second offense.) *But see also*, *W.C. v. Smith*, 898 So. 2d 1137 (Fla. Dist. Ct. App. 2005) (dependent youth who has run away from a foster care placement is not properly placed in secure detention for 21 days as a sanction for indirect contempt because, in addition to being unrepresented throughout the proceedings, the child was given none of the other procedural protections required by rule and five days in secure detention was the maximum sentence for a first-time contempt); *In re Dependency of A.K.*, 174 P.3d 11 (Wash. 2007) (before a juvenile court may exercise its inherent authority to hold a dependent juvenile in contempt and impose a punitive sanction, it first must find that the statutory remedies for criminal contempt are not adequate).
6. The same is true with parents placing children in foster care because of unmet mental health needs.
7. Holman, Barry and Jason Ziedenberg. *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*. Washington, DC: The Justice Policy Institute, 2006, available at www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf; Hughes, Theresa. "Juvenile Delinquent Rehabilitation: Placement of Juveniles Beyond Their Communities as a Detriment to Inner City Youths." *New England Law Review* 36, 2001, 153, 157-58.

8. *In re T.E.M.*, 92 P.3d 259 (Wash. App. Ct. 2004).
9. The Federal Education for Homeless Children and Youths Program (Subtitle B of Title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.)) provides for significant educational stability for students who are “homeless”—a term which does not specifically include status offenders. However, the authors’ experience is that a child in a status offense proceeding (such as a runaway) may be more likely to be seen as homeless under the federal definition than a child who is being shuffled between a custodial and noncustodial parent, even if the child is on the run from the custodial parent.
10. State laws on emancipation can be found at www.jlc.org/factsheets/4/ or http://topics.law.cornell.edu/wex/table_emancipation.
11. Social Security Administration Program Operations Manual System (POMS) sections GN 00502.060 B.1 and GN 00502.020 A.1. A child aged 15 to 17 is generally considered capable of managing his or her own benefits unless he/she has a court-appointed legal guardian or is entitled to disability benefits and a substance abuse condition exists, which indicates the child may need assistance. GN 00502.070 A.1. In addition, if the child is emancipated under state law, SSA policy indicates that an assumption should be made that the child is capable unless some other indicator suggests otherwise. GN 00502.070 A.1. Children under 15 and individuals declared legally incompetent under state law are prohibited from receiving payments directly. GN 00502.005.
12. Washington Rules of Professional Conduct (RPC) 1.14. and the ABA Model Rules of Professional Conduct 1.14 require the lawyer to maintain a normal client-lawyer relationship as far as reasonably possible.

About the Authors

Hannah Benton is an Equal Justice America Fellow at the Center for Children's Advocacy in Hartford, Connecticut. At CCA, Hannah provides representation to children participating in the Truancy Court Prevention Project (TCPP), which uses case management, informal court sessions, and legal assistance to address the root causes of students' attendance problems. Through CCA's TeamChild Juvenile Justice Project, Hannah represents children involved in the status offender and juvenile justice systems on issues of access to mental health and special education services. As part of CCA's Girls' Juvenile Justice Project, Hannah conducts trainings to court-involved girls about their legal rights. Hannah also engages in systemic advocacy on issues including access to interventions and diversionary programs, provision of special education services, truancy and dropout prevention, and policing in schools. Hannah graduated from the University of Chicago in 2004 and Yale Law School in 2008.

Shay Bilchik is the founder and director of the Center for Juvenile Justice Reform at Georgetown University's Public Policy Institute. The Center's purpose is to focus the nation's public agency leaders, across systems of care and levels of government, on the key components of a strong juvenile justice reform agenda. This work is carried out through the dissemination of papers on key topics, the sponsorship of symposia, and a certificate program at Georgetown for public agency leaders. Shay was the President and CEO of the Child Welfare League of America, a position he held from February 2000 to March 2007. Shay led CWLA in its advocacy on behalf of children through his public speaking, testimony and published articles, as well as collaborative work with other organizations. Before his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and supported a balanced and multisystems approach to attacking juvenile crime and addressing child victimization. Before coming to the nation's capital, Shay was an assistant state attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and chief assistant state attorney. Shay earned his B.S. and J.D. degrees from the University of Florida.

Jana Heyd is the assistant director at Society of Counsel, one of the public defense agencies in Seattle, Washington where she has worked for almost 18 years. Jana has been involved primarily in the dependency practice area, working with children and families in the foster care system. Jana is currently the co-chair of the state's Children's Justice Interagency Task Force and is a member of the Child Youth and Family Advisory Council for the state of Washington. Jana is the co-chair of the new juvenile law section of the Washington State Bar Association. Jana volunteers at the Bi-lingual Legal Aid Clinic that provides pro bono legal services to Spanish-speaking individuals. Jana is also involved with the National Voice committee, through the Chief Defenders organization of the National Legal Aid and Defender Association (NLADA.)

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Martha Stone is founder and executive director of the Center for Children's Advocacy in Hartford, CT. Before founding CCA in 1997, Martha served as Associate Director of Children's Rights, Inc., a national organization engaged in child welfare reform. For the 18 years previous to that position, she was Legal Director of the Connecticut Civil Liberties Union. Martha has brought class action lawsuits resulting in consent decrees involving the Connecticut Department of Children and Families, juvenile detention centers, and access to community-based mental health services for the juvenile justice population. She is co-counsel for the plaintiffs in *Sheff v. O'Neill*, the Hartford school desegregation case. She is an adjunct professor at the University of Connecticut School of Law, where she teaches a course in child advocacy. Martha has received many awards for distinguished service including the Connecticut Bar Association Charles J. Parker Legal Services Award, the Connecticut Youth Services Association Advocacy Committee Award, the Bank of America Local Hero Award, and the Champion of Children Award from the Village for Families and Children. She is currently the co-chair of the Connecticut Legislature's Families with Service Needs Advisory Board where she has been instrumental in reforming the status offender system in Connecticut. She received a J.D. and LLM from Georgetown University Law Center.

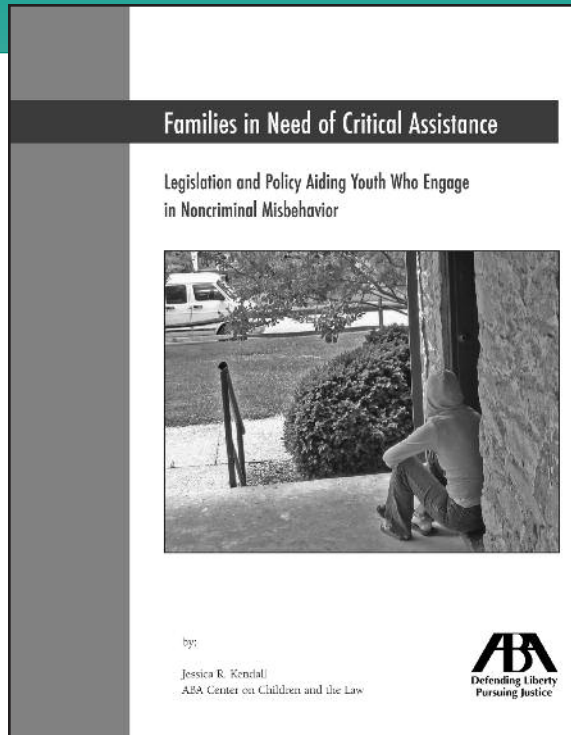
Casey Trupin is a staff attorney at Columbia Legal Services in Seattle, where he advocates for at-risk, homeless, and foster youth as well as adults who are homeless. From 2006-2009 Casey chaired the American Bar Association's Commission on Homelessness and Poverty, and has served on the Commission since 2003. Casey has co-authored and edited a number of books and articles on legal issues related to homeless youth and has lectured nationally on the topic. Casey serves as counsel to thousands of foster youth and homeless adults in litigation and has worked on state and federal legislation to improve services to low-income children, youth, and adults in Washington State and nationwide. In 1997, Casey co-founded Street Youth Legal Advocates of Washington (SYLAW), and went on to direct the program until 2005. Casey has also served as Counsel for Special Projects for the Center for Law and Social Policy (CLASP) in Washington D.C. working on federal child welfare policy. In 2005, Casey was recognized by the Congressional Commission on Adoption Institute as an Angel in Adoption for his work on behalf of homeless and foster youth. In 1996, Casey conducted a year-long study of programs for homeless youth in Latin America as a Thomas J. Watson Fellow. Casey graduated from the University of Washington School of Law with honors in 1999.

Joseph B. Tulman, Professor of Law at the University of the District of Columbia, David A. Clarke School of Law, directs the law school's Juvenile and Special Education Law Clinic. Professor Tulman has pioneered the use of special education advocacy for children in the delinquency system. He has taught at the National Judicial College in Nevada, and he is a Resource Fellow for the National Center on Education, Disability and Juvenile Justice. The Criminal Law Section of the American Bar Association awarded Professor Tulman its 1996 Livingston Hall Juvenile Justice Award. The D.C. Bar Foundation named him the winner of the 2001 Jerrold Scoutt Prize for sustained, full-time service to underrepresented people in the District of Columbia. In 2007, the Clinical Section of the American Association of Law Schools designated Professor Tulman as a Bellow Scholar.

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Families in Need of Critical Assistance: Legislation and Policy Aiding Youth Who Engage in Noncriminal Misbehavior

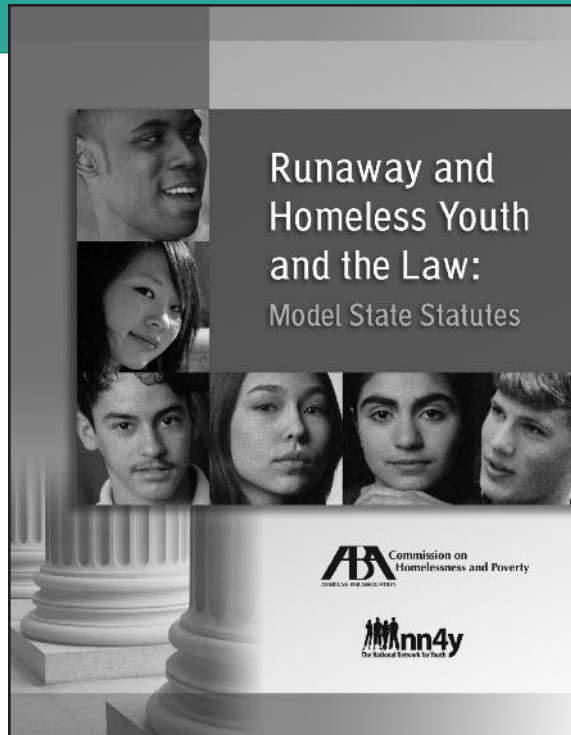
by **Jessica R. Kendall**

Staff Attorney, ABA Center on Children and the Law

This book focuses on addressing the needs of juvenile status offenders and their families. It provides a context for and explanation of the need to better serve families in crisis, reviews the causes and contexts within which youth engage in noncriminal misbehaviors, and suggests legislative and policy strategies to intervene early and divert juvenile status offenders from court systems.

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- lists of state and national resources relating to status offenders, including information on policy reforms;
- Web links to useful national and local programs; and
- accessible and printable PDF versions of each chapter of this book.

