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## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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- I. Introduction: The need for information gathering and sharing
  - A. System failure
  - i.
  - C. Ethical obligation
  - D. Best practice
- II. Obtaining Records
  - A. Requesting education records
  - B. Requesting social services/child welfare records
  - C. Requesting medical/mental health records
- III. Using Records
  - A. Capacity to proceed
  - B. Custody hearings
  - C. Suppression
  - D. Transfer/Waiver
  - E. Negotiations
  - F. Adjudicatory proceedings
  - G. Dispositional proceedings
- IV. Conclusion
- V. Appendices
  - A. Summary of juveniles' educational rights
  - B. Summary of juveniles' Medicaid rights
  - D. Sample interview form
  - E. Sample records authorizations and requests
  - F. Referral resources

## **INTRODUCTION**

*Manny is a sweet, intelligent child who has suffered physical and emotional abuse all his life. Neighbors frequently reported his family to the Division of Social Services (DSS), which waited years before removing Manny from his home and placing him into foster care. In the next five years, Manny lived in thirty-six different placements, including therapeutic foster homes, "regular" foster homes, and distant and unknown relatives' homes. His defiant behavior landed him short stays in psychiatric residential treatment facilities, as well, though he never received the one-on-one counseling and therapy that several psychological evaluations recommended for him. In addition to his diagnoses of Post-Traumatic Stress Disorder (PTSD) and Oppositional Defiant Disorder (ODD), a psycho-educational evaluation conducted by his school revealed that Manny suffers from an auditory processing disorder, which has made it very difficult for him to understand instructions and progress in school, despite his high IQ. His school gave him an Individualized Education Program (IEP), which describes his disability and how it affects his academics and behavior, and details services and methods the school is supposed to use to help him succeed. However, the IEP is rarely followed, and Manny is failing all of his classes and repeatedly gets in trouble without effective interventions from his teachers or administrators. Last week, Manny was completely frustrated trying to complete an English assignment with multiple-step directions that he could not follow, and got very upset, shouting at the teacher when he felt he wasn't being heard. Though his behavioral intervention plan in his IEP requires adults to allow him to visit the school counselor when he finds himself getting frustrated, his teacher did not let him leave the room and called a School Resource Officer (SRO), instead. When the officer arrived, Manny was throwing a chair across the room and accidentally injured another student. The school resource officer got involved, TASERed and handcuffed Manny, and charged him with assault.*

It has always been critical for juvenile defenders to have a deep understanding of their clients' backgrounds and needs. Today, that understanding is imperative, as resource starvation in the public education, child welfare, and mental health systems has led the juvenile justice system to become a dumping ground for children and youth who are not getting their educational, medical, mental health, and safety needs met. Children who end up as juvenile defendants are typically followed by a paper trail far longer and sadder than any child should have, but it is a paper trail that juvenile defenders can use to understand and better represent their client. Juvenile delinquency charges are far more likely for children:

- 1) who have been failed by their parents or guardians, and who thus have had extensive involvement with the Division of Social Services (DSS), all of which should be well-documented in agency and court records;<sup>2</sup>
- 2) who have been failed by their schools, and thus are shadowed by suspensions, expulsions, and bad grades, all of which should be included in the child's education records; and
- 3) who are mentally or physically disabled, conditions that should be reflected in special education files and medical and Medicaid records.<sup>3</sup>

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

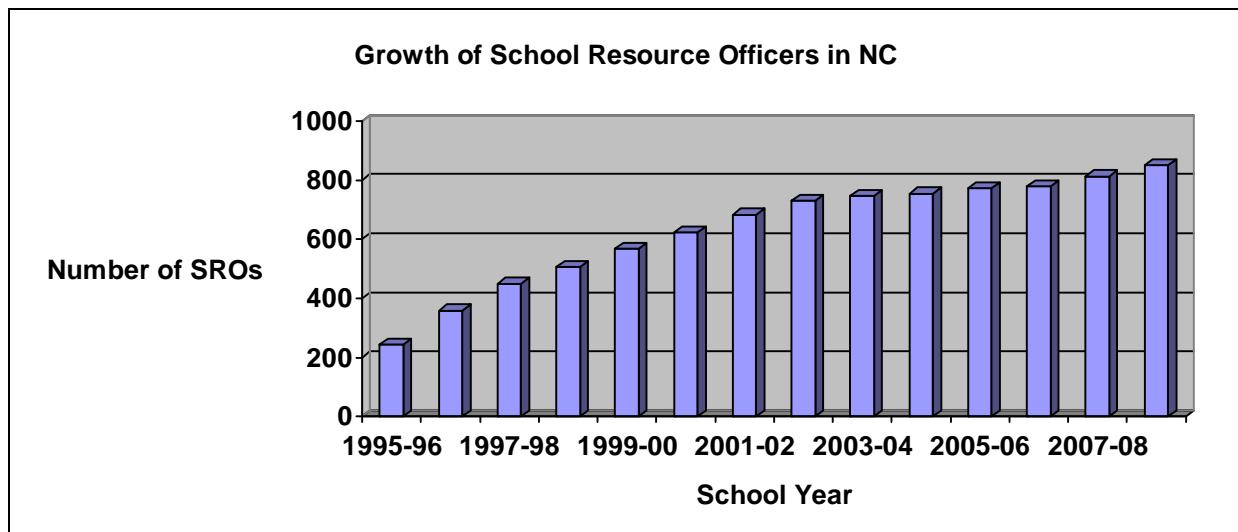
Juvenile defenders will improve the quality of their representation and be more zealous advocates for their clients if they understand how clients have been served (or not served) in these systems, and then use that understanding in delinquency proceedings and to spot issues that require appropriate referrals. Obtaining records helps juvenile defenders win cases, and the records also help those who may represent their clients in the future.

### Education

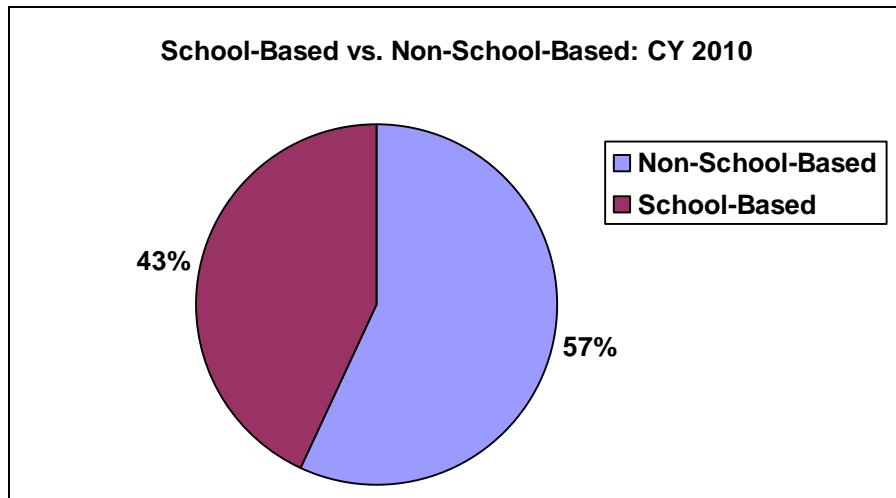
The public education and the juvenile justice systems increasingly overlap as North Carolina's school-to-prison pipeline has become enormous. The school-to-prison pipeline is a system of laws, policies, and practices that pushes students out of public schools and into the juvenile and criminal justice systems.<sup>4</sup> Academic failure, zero tolerance policies, a lack of high-quality interventions and alternatives, over-policing, and excessive suspensions and school-based court referrals, among other factors, combine to funnel thousands of youth from the public education system into the prison industrial complex every year.

The juvenile justice system is often the next stop for children not receiving adequate educational services.<sup>5</sup> In North Carolina, juveniles are assessed at intake for their risk of future offending and their individual needs to be addressed. In 2010, 44.6% had serious problems in school (e.g., suspension from school, expulsion, dropping out). Youth committed to youth development centers (YDCs) are also assessed. Last year, 76.8% had serious problems in school.<sup>6</sup>

Additionally, North Carolina public schools are moving ever closer to police states. As of the 2008-09 school year,<sup>7</sup> there were 849 school resource officers (SROs)—certified law enforcement officers who are permanently assigned to provide coverage to a school or a set of schools—patrolling North Carolina public schools. The 2008-09 SRO total represented a 249% increase from the first recorded baseline of 243 in 1996. One hundred and thirteen of the 115 school districts had at least one identified SRO. Over 96% of SROs carried either pepper spray, a TASER, or both.<sup>8</sup>



Given the over-policing, it is no wonder that thousands of public school students are funneled from the schoolhouse to the jailhouse each year. In 2010, 16,140 students age fifteen and younger were referred to juvenile court for alleged incidents—the vast majority of which were low-level misdemeanors—on school property. Shockingly, 43% of all delinquency complaints were school-based.<sup>9</sup> Fortunately, delinquency complaints in North Carolina are decreasing; however, non-school-based delinquency complaints decreased twice as fast as school-based delinquency complaints between 2007 and 2010—a 23.3% decrease versus an 11.6% decrease, respectively.<sup>10</sup>



### Mental Health

The majority of juveniles who end up in the juvenile justice system have mental health disorders.<sup>11</sup> Many of these children, who should be receiving mental health treatment, are instead locked up in juvenile detention facilities, awaiting placement in community-based or residential treatment facilities.<sup>12</sup> In North Carolina, where funding was eliminated for all long-term Level III and IV residential treatment,<sup>13</sup> where community-based mental health services are continuously reduced, and where the Department of Health and Human Services (DHHS) recently announced that probable cuts to mental health services will soon reduce or eliminate mental health treatment for the majority of Medicaid-eligible people who receive those services,<sup>14</sup> youth with mental health needs are especially at risk of being incarcerated instead of treated.

### Child Abuse/Neglect/Dependency/Abandonment and Agency Response

Children who are abused and neglected are 58% more likely to be arrested as juveniles than children who are not.<sup>15</sup> Early and effective intervention with abused or neglected children and their families is essential to the prevention of juvenile delinquency, but resource-starved agencies charged with abuse prevention and treatment are not serving the majority of families in need.<sup>16</sup> Even when DSS does intervene, the services are limited and often ineffective. It is well known that children placed in DSS custody frequently languish there for years at a time and are shifted from placement to placement, sometimes multiple times a year. Many of the children who land in delinquency court bear not only the scars of abuse and neglect, but also the trauma of

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

being removed from their homes and placed in a system of care that does not actually care for them.

### **Ethical Obligation**

The criminalization of the school environment and the severe lack of community-based and residential mental health services for children are just two of many reasons why juvenile defenders must be knowledgeable about students' educational and Medicaid rights (see Appendix A). Gathering and using students' education and medical records will enable a juvenile defender to improve outcomes for her client both in and out of the delinquency courtroom. Not only will such knowledge improve the quality of the representation and outcomes for children, but also it is an ethical obligation and best practice.<sup>17</sup>

The North Carolina State Bar Rules of Professional Conduct mandate that a lawyer must be zealous, competent, and diligent.<sup>18</sup> The Rules further obligate attorneys to "pursue a matter on behalf of a client despite...personal inconvenience..., and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."<sup>19</sup> Only by obtaining a clients' education, social service, and medical can a juvenile defense attorney be fully zealous and diligent.

### **Best Practice**

The National Juvenile Defender Center has provided standards for the role of juvenile defense counsel. It asserts that: "Competent juvenile defense counsel has a working knowledge of and maintains contacts with experts in ancillary areas of law that often intersect juvenile delinquency matters, including but not limited to the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration." It further recommends that: "Juvenile defense counsel is familiar with special education law and works to ensure that the client is in an appropriate educational setting. Juvenile defense counsel ensures that the client's rights are protected at school discipline or expulsion hearings."<sup>20</sup>

The focus of this manuscript is providing an introduction to obtaining and using juvenile clients' education, abuse/neglect/dependency, and medical/mental health records. However, it is also important that juvenile defenders do not rely solely on these records; interviews with clients can reveal the clients' perspective about their experiences with these systems, and usually reveal gaps in incomplete agency files, or information that conflicts with the files and should thus be further investigated (see Appendix B for a model client interview form). Furthermore, juvenile defenders should familiarize themselves with the policies and practices of the local agencies that affect their clients' daily lives. Finally, continuing legal education and training is recommended to develop a more comprehensive understanding of the laws and policies governing these systems and advocacy for the children affected by them.

## **OBTAINING RECORDS**

Juvenile defense attorneys should gather their client's records as soon as possible after being retained by a client or appointed to represent a client.<sup>21</sup> It is essential that juvenile defenders collect all available records from the agencies that serve the juvenile, rather than simply relying on information provided by clients, clients' families, and court counselors.

### **Requesting Education Records**

The Family Educational Rights and Privacy Act (FERPA) is a federal law that gives parents or eligible students<sup>22</sup> the right to review the student's education records maintained by the school.<sup>23</sup> FERPA applies to all public schools in North Carolina because it applies to all educational agencies and institutions that receive funding from the U.S. Department of Education.<sup>24</sup> A parent is defined as "a legal guardian or other person standing *in loco parentis* (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the welfare of the child)."<sup>25</sup>

Education records are those records that are: 1) directly related to a student; and 2) maintained by an educational agency or institution or by a party acting for the agency or institution.<sup>26</sup> Under North Carolina statute, a student's official record must contain, at a minimum: 1) adequate identification data including date of birth, attendance data, grading and promotion data; and 2) notice of any suspension for a period of more than 10 days or of any expulsion and the conduct for which the student was suspended or expelled. Local boards of education may require schools in their jurisdiction to contain other factual information as may be deemed appropriate.<sup>27</sup>

Education records do not include records<sup>28</sup> of the law enforcement unit<sup>29</sup> of an educational agency or institution.<sup>30</sup> As such, the law enforcement unit may refuse to provide a parent with an opportunity to review law enforcement unit records, and it may disclose law enforcement unit records to third parties without the parent's prior written consent.<sup>31</sup> Records of a law enforcement unit do not include: 1) records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or 2) records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution.<sup>32</sup> In other words, records created by SROs that are maintained by the school should be provided by the school, as should records created by SROs exclusively for purposes of suspension or expulsion. In addition, it might be useful to obtain the Memorandum of Understanding (MOU) that exists between the school system and local law enforcement agencies, as well as any local school district policies that relate to SROs.<sup>33</sup>

Juvenile defenders can review a client's education records from the client's school by obtaining written consent from the client's parent or guardian.<sup>34</sup> The release must specify the records to be released, the reasons for such release, and to whom the records will be released (see Appendix C for a sample release).<sup>35</sup> The release should be sent to the principal of the client's school, along with a letter detailing the specific records being requested (see Appendix D for a

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

sample letter). It is advisable to send the release and request letter to the juvenile's guidance counselor because he or she is often the person who ultimately fulfill the request.

The school must comply with a request for records within a reasonable period of time, but not more than 45 days after it has received the request.<sup>36</sup> However, schools most often fulfill records within two weeks, especially if emails are sent and calls are made to follow up on the request. Additionally, schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records.<sup>37</sup> However, schools often provide copies of the records to attorneys who send requests, especially if the records can be scanned and emailed or faxed in order to save copying costs.

Schools sometimes refuse to share records that contain the personally identifiable information of other students. Though it is true that a parent only has the right to view information about his or her student, and not personally identifiable information about any other students contained in the same document,<sup>38</sup> schools can, and do, redact any identifying information about other students and release the redacted records.<sup>39</sup> Thus, ask for redacted records if the school attempts to block access due to other students' privacy.

If a school refuses to comply with an adequate records request, the remedies are somewhat limited. There is no private right of action to enforce FERPA under a § 1983 action.<sup>40</sup> Two remedies remain available. First, counsel could file a complaint, on behalf of the client's parent, with the U.S. Department of Education's Family Policy Compliance Office.<sup>41</sup> Second, counsel could file a grievance, on behalf of the client's parent, with the client's current school—the school that received the records request. Each local education agency is required to have a grievance policy.<sup>42</sup>

The school may charge a fee for a copy of an education record,<sup>43</sup> unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records.<sup>44</sup> Therefore, if the client's family is indigent, the juvenile defender should request a waiver of copying fees, or alternatively, that the records be scanned and emailed or faxed. A school is not required to provide information that is not maintained or to create education records in response to a parent's request.<sup>45</sup> The school must respond to reasonable requests for explanations and interpretations of the records.<sup>46</sup> If the records contain information about another student, the attorney may inspect only the specific information about her client.<sup>47</sup> However, the attorney can request that any identifiable information for other students be redacted.

Parents of students who require services from the school system due to identified disabilities (generally, this will be a child who has an individualized education program, an "IEP") are specifically guaranteed access to their students' educational records under state and federal law.<sup>48</sup> Though these provisions, and the accompanying enforcement regulations, do not necessarily require more from the school than FERPA already does, pointing out these additional requirements could bolster your request for records.<sup>49</sup>

## **Requesting Social Services Records Concerning Abuse/Neglect/Dependency/Abandonment**

The North Carolina general statutes, the North Carolina Administrative Code, and Division of Social Services (DSS) manuals specify what the DSS record for a juvenile who has been the victim or alleged victim of abuse, neglect, dependency or abandonment (hereinafter "the DSS file" and, more importantly, make it clear that the child is always entitled to review that file.<sup>50</sup> The following section describes the contents of a typical DSS file, a record well worth requesting for any client, even if she has never been in DSS custody.

### *Reports and Investigations of Abuse, Neglect, Dependency or Abandonment*

As soon as a call is made to DSS child protective services (CPS), reporting suspected child abuse, neglect, dependency, or abandonment, DSS creates a record for the suspected child victim. If the reporter's description of the behavior meets the definition of abuse, neglect, dependency or abandonment, DSS must investigate the child's situation immediately following the report.<sup>51</sup> The juvenile victim of the reported abuse/neglect/dependency/abandonment, and presumably that juvenile's attorney, can access the records of the report and the ensuing DSS investigation on her own -- i.e., without a court order or a release from a parent.<sup>52</sup> Even if the DSS investigation concluded that that the child need not be taken into DSS custody, the family may nevertheless have been involved with DSS through a safety plan monitored by DSS. Thus, even a child who has never been in DSS custody is entitled to examine her own DSS record, which should consist of many documents, including:

- 1) the report of abuse/neglect/dependency itself, though the reporter's name will likely be redacted;
- 2) documentation of whether previous reports of abuse/neglect/dependency concerning the same child victim have been made;
- 3) an intake report form, which should include information about the child's educational, mental health, and medical needs and other needs and supports;
- 4) documentation of visits to the household and interviews with members of the family or others, including safety assessment forms, which contain detailed information about the household, safety issues in the house, and proposed resolutions to any safety issues; and
- 5) documentation of any referrals to the district attorney or law enforcement concerning the abuse, neglect, dependency or abandonment.<sup>53</sup>

These records, which juvenile defenders will not get unless they request them, give the defense attorney a perspective on the child's home life that could prove invaluable in representing that child. Children may be unlikely to speak about, or even remember, this kind of limited DSS involvement, so it is always worth requesting DSS records for every juvenile client.

### *Children in Protective DSS Custody*

If the investigation following a report of abuse/neglect/dependency/abandonment resulted in the child being taken out of her home, then a much larger file will result, all of which DSS is statutorily required to share with a juvenile and a juvenile's attorney upon request. The DSS director must maintain a separate file for each child in DSS custody or in other court placement

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

due to abuse or neglect.<sup>54</sup> These files must contain: "family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; [and] interviews with the juvenile's family[.]"<sup>55</sup> The administrative code enumerates more specifically the documents, in addition to those listed the section above, that must be in this file, the most relevant of which are: 1) child medical evaluations and child mental health evaluation requests, consents, and reports; and 2) any other medical, psychological, or psychiatric reports.<sup>56</sup> DSS additionally requires, in its manuals detailing record-keeping protocol for both its child protective services and child placement services divisions, that these files contain a plethora of useful documents, for example:

- 1) the placement history log, which lists all of the child's prior placements, including caregivers' names and addresses, as well as the dates of placement, and specific reasons for the move;
- 2) educational information, including educational reports, records, and IEPs when appropriate;
- 3) court documents; and
- 4) annual photos of the child.<sup>57</sup>

Though juvenile defenders can usually gather a child's medical documents from his or her doctors, and the education files from the school system, the DSS file can be accessed by the defense attorney and the client without a parental release, which is extremely helpful if the parent is not available or cooperative. Many other documents are included in every child's file, and it is helpful to look at the DSS manuals, which list and describe what records DSS is required to maintain for each child.

Be aware that a child who was placed out of her parent's home should have both a CPS (child protective services) file and a file with Child Placement Services. Much of the information in these files will overlap, yet it is still critical to request and receive both the Child Protective and Child Placement files.

### *Clerk's Court File*

If a petition alleging abuse, neglect or dependency was actually filed by DSS against the child's parent or guardian, then the clerk must keep a record of that case, including: "the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding."<sup>58</sup> The juvenile and her attorney are allowed access to that record,<sup>59</sup> but the clerk will likely redact information about other juveniles from the file, which can be time-consuming and may result in less informative records.

### **Requesting Health Records**

The Health Insurance Portability and Accountability Act (HIPAA) controls the security and privacy of protected health information, or "PHI," defined basically as individually identifiable health information.<sup>60</sup> With a valid authorization, the individual who is the subject of the PHI can authorize her attorney to access her PHI, which includes any information created by

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

a health care provider or health plan that: "relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."<sup>61</sup>

Because minors are not typically considered "individuals" according to the federal HIPAA regulations, and thus cannot access their own health information, a "personal representative" acting for the minor (usually the parent) must generally sign any authorization an attorney uses to access his minor client's health information.<sup>62</sup> Thus, juvenile defense attorneys should, as soon as possible after assuming representation of the client, ask the client's parent, or whomever is authorized to make medical decisions for the client (his DSS social worker, for example), to sign an authorization enabling health care providers and health plans to release the client's health information to the juvenile defense attorney. It is important to get a list from the parent and client of all the child's recent health care providers, including physicians, physician's assistants, nurses, psychologists, psychiatrists, and licensed clinical social workers, among others. If the juvenile is Medicaid-eligible and has a Medicaid case manager, the case manager may have gathered many of the health records already, which the defense attorney can access with valid authorization.

### *A Minor's Access to Her Own Health Records*

A minor can access her own health records, and can presumably authorize her attorney to do the same, under a few important circumstances. If the minor herself had the legal ability to consent to her own medical services, then the records of that medical service can be accessed by the minor, with no need for authorization from the minor's personal representative.<sup>63</sup> In North Carolina, the treatments to which a minor can consent without a representative's input are: "medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130A-135 [], (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance."<sup>64</sup>

Even if the minor's personal representative also consented to any of these medical services for the minor, the minor can access the record of those services on her own.<sup>65</sup> Thus, the minor's attorney can access these particular records with an authorization signed only by the minor; the parent or guardian's signature is not necessary. These include records that may be crucial to a juvenile's defense, including records concerning treatment of emotional disturbance.

Most psychiatric residential facilities in North Carolina publish their own policies concerning access to confidential patient records. Some facilities' policies specifically allow a minor patient to access her own records, without parental consent. Therefore, if the parent or guardian will not sign an authorization, it is worth checking the policies of facilities that have treated a client to see if the records can be accessed with only an authorization from the minor.

## **USING RECORDS**

After obtaining and carefully reviewing a client's records, a juvenile defense attorney should create a plan to use the records during the delinquency proceedings.<sup>66</sup> (Note that juvenile defenders can also use the records to: 1) better know how to listen and understand clients;<sup>67</sup> 2) provide more holistic civil legal advocacy to clients (e.g., requesting an evaluation to determine eligibility for special education services, representing a student in a long-term suspension appeal, representing a child in a Medicaid appeal); and 3) making appropriate referrals to legal services agencies (see appendix G). However, such topics are not addressed in detail in this manuscript.)

### **Capacity to Proceed**

A juvenile who lacks the mental capacity to proceed may not be subjected to an adjudicatory or dispositional proceeding in juvenile court.<sup>68</sup> A juvenile does not have the capacity to proceed when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.<sup>69</sup> The question of the capacity of the juvenile to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the juvenile's capacity to proceed.<sup>70</sup> When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed.<sup>71</sup>

Counsel has a duty to make a "reasonable investigation" into the juvenile's capacity to proceed to an adjudicatory hearing.<sup>72</sup> Juvenile defenders, therefore, should use a client's records to inform the decisions about whether to file a motion, and if a motion is filed, to help inform the evaluator.<sup>73</sup> It is also a good idea to try to get an independent evaluation.

### **Custody Hearings**

A juvenile may be held in secure custody during three stages of the proceeding: pre-adjudication, post-adjudication/pre-disposition, and post-disposition.<sup>74</sup> There are three types of custody in juvenile delinquency proceedings.<sup>75</sup> Temporary custody means taking physical custody of a juvenile until a court order for custody can be obtained, such as where a law enforcement officer arrests a juvenile based on reasonable grounds to believe the juvenile is an absconder (i.e., a juvenile who has unlawfully left a detention center or residential facility) or has committed a crime for which arrest would be lawful, if the juvenile were an adult.<sup>76</sup> Secure custody is the placement of a juvenile in an approved locked facility after a petition has been filed and pending an adjudicatory or dispositional hearing, or pending placement pursuant to a dispositional order.<sup>77</sup> Nonsecure custody is the placement of a juvenile without restriction on the juvenile's freedom of movement in the custody of the Division of Social Services (DSS) or a person designated by the court. The juvenile may be placed in nonsecure custody after a petition has been filed and pending an adjudicatory or dispositional hearing, or pending placement pursuant to a dispositional order.<sup>78</sup> Judges may issue an order for secure or nonsecure custody if the criteria set forth in G.S. 7B-1903 are met.<sup>79</sup>

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

Counsel must be prepared to argue against all secure and nonsecure custody during all three stages of the proceedings.<sup>80</sup> A client's records can be used to persuade the judge not to detain a client.<sup>81</sup> For example, counsel could argue against ongoing temporary custody because detention will disrupt special education or mental health services<sup>82</sup> or that being in the community will facilitate proper evaluations.<sup>83</sup> Additionally, the client's records may provide insight into available community-based, less intrusive, more appropriate alternatives that can be offered to the court as providing both protection and supervision for the juvenile and protection of the public.<sup>84</sup> The records can also be used to argue against specific bases for custody. For example, one basis for custody is "[t]he juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or post-release supervision[.]"<sup>85</sup> A juvenile's records can provide counsel with good argument that the failure to appear was not willful.

### Suppression

Prior to searching a student, school officials must have reasonable suspicion to believe the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.<sup>86</sup> North Carolina courts have generally, although not always, considered school resource officers (SROs) to be school officials, and therefore, have applied the same reasonable suspicion standard to searches by SROs on school grounds.<sup>87</sup> Outside police officers who conduct a school-based searches are generally held to a probable cause standard. Of course, voluntary consent of a student eliminates such requirements. Finally, lockers and computers are generally considered school property and not protected.

A juvenile in custody is entitled to statutory protections that include and go beyond the requirements of *Miranda* warnings.<sup>88</sup> The right to have a parent, custodian, or guardian present during custodial interrogation applies to all juveniles, including those who are 16 or over and no longer under the jurisdiction of the juvenile court.<sup>89</sup> A custodial confession or admission of a juvenile who is less than 14 years of age may not be admitted into evidence unless made in the presence of the juvenile's parent, guardian, custodian, or attorney.<sup>90</sup> Interrogation must cease when the right to remain silent or have a parent, guardian, custodian, or attorney present is invoked.<sup>91</sup> Lastly, waiver by juveniles must be "knowingly, willingly, and understandingly."<sup>92</sup>

Juvenile defenders handling school-based delinquency cases should review the client's education records to help determine whether the client's Fourth or Fifth Amendment rights were violated, and thus the fruits of an unlawful search or interrogation should be suppressed.<sup>93</sup> The records can reveal answers to important questions, such as: who conducted the search or interrogation (e.g., police officer?, school resource officer?, school official?); where did the search or interrogation take place (e.g., expectation of privacy?); why did the search or interrogation take place (e.g., reasonable suspicion?, probable cause?); and how did the search or interrogation take place (e.g., in custody?, parent present?, questioning techniques?).<sup>94</sup>

For any type of delinquency case, school-based or not, records can potentially provide counsel with support for a motion to suppress.<sup>95</sup> For example, in determining whether a waiver of rights was voluntary, courts must look at the "totality of the circumstances," including custody, mental capacity, physical environment, and manner of interrogation.<sup>96</sup> The court must consider the specific facts and circumstances of each case, including background, experience,

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

and conduct of the accused.<sup>97</sup> If a juvenile has a learning disability or a mental health issue, the *Miranda* waiver may not have been knowing and intelligent.<sup>98</sup> Further, when arguing that a client's statement to an officer was not voluntary under the Fourteenth Amendment, a defender can submit education and mental health records to a judge to show that a client's mental illness or learning disability rendered her statement involuntary.<sup>99</sup>

### Transfer

Jurisdiction over a juvenile may be transferred to superior court if the juvenile was at least 13-years-old at the time of allegedly committing an offense that would be a felony, other than a Class A felony, if committed by an adult.<sup>100</sup> At the transfer hearing, the juvenile may be heard and may offer evidence.<sup>101</sup> In the transfer hearing, the court must determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court by considering, among other factors: the maturity of the juvenile; the intellectual functioning of the juvenile; prior attempts to rehabilitate the juvenile; the likelihood that the juvenile would benefit from treatment or rehabilitative efforts; and whether the alleged offense was committed in a willful manner.<sup>102</sup>

A juvenile's records may provide valuable information about:

- Mitigating factors, such as educational history, mental and emotional state, intellectual functioning, developmental issues, family history, and other factors that dispel images such as criminal sophistication;
- Witnesses who can provide helpful insight into the juvenile's character, such as teachers, counselors, psychologists, and other persons with a positive personal or professional opinion of the juvenile, may be called to testify; and
- Whether the juvenile has a disability or mental health condition that can only be addressed through services only available in state's juvenile detention center and youth development centers (YDCs) -- and therefore, are not available if the juvenile is transferred to superior court.<sup>103</sup>

### Negotiations<sup>104</sup>

A juvenile's records can also be helpful during negotiations with court counselors and district attorneys. For example, a juvenile defense attorney could use the records to argue that:

- school-based special education services could obviate the need for juvenile court proceedings;<sup>105</sup>
- disciplinary proceedings at school constitute sufficient punishment; and
- an IEP Team meeting record showed that a school-based incident was a manifestation of the client's disability, and therefore, the charges should be dismissed or reduced because of lack of capacity, culpability, and/or *mens rea*

### Adjudicatory Proceedings

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

The adjudicatory hearing is the hearing before a district court judge to determine whether a juvenile is delinquent. Allegations in the petition must be proved beyond a reasonable doubt by the State. Counsel for the juvenile may cross-examine the State's witnesses and may present testimony and other evidence.<sup>106</sup>

The contents of a juvenile's records can be used for a variety of purposes in adjudicatory proceedings. For example:

- the write up in a notice of suspension can support a self-defense theory;
- special education records showing that student's school-based delinquent conduct was a manifestation of her disability could help negate intent;<sup>107</sup>
- mental health records could support an insanity defense;<sup>108</sup>
- special education records and mental health records can be used to argue that the case should be dismissed in the interest of justice because the disability is so severe that it may be difficult or impossible to comply with court orders;<sup>109</sup> and
- an unclean hands defense may be available if a client's education records show that the school failed to provide the client with necessary services and interventions (e.g., an IEP and a behavior intervention plan), the client's behavior was closely related to the failure, and the school filed a delinquency complaint against the client for the alleged misconduct.<sup>110</sup>

Even if these defenses are not successful, the presentation to the court of records during the adjudicatory hearing can prime the judge to be more sympathetic toward your client and thus lenient at disposition.

### Dispositional Proceedings

Following an adjudication of delinquency the court proceeds to a dispositional hearing.<sup>111</sup> The purpose of dispositions in juvenile actions is to design an appropriate plan that: 1) meets the needs of the juvenile; and 2) achieves the objectives of the State in exercising jurisdiction, including the protection of the public.<sup>112</sup> The court should develop a disposition in each case that, among other things, provides the appropriate treatment and rehabilitation to assist the juvenile toward becoming a non-offending, responsible, and productive member of the community.<sup>113</sup> The court must consider, among other things, the degree of culpability indicated by the circumstances of the particular case; and the rehabilitative and treatment needs of the juvenile. Statutory alternatives range from dismissal of the case to commitment to the Department of Juvenile Justice.<sup>114</sup>

The juvenile has an opportunity to present evidence and advise the court concerning the disposition they believe to be in the best interests of the juvenile.<sup>115</sup> A client's records can help the defense attorney.<sup>116</sup>

- verify and supplement the contents of a predisposition report;<sup>117</sup>
- provide a basis for cross-examination of a court counselor during a disposition hearing;

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

- argue for the dispositional proceedings to be continued for up to six month in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, or through some other plan approved by the court;<sup>118</sup>
- determine the need to request an expert evaluation, and inform the evaluator, if the evaluation takes place;<sup>119</sup>
- argue that rehabilitation and treatment will be better addressed in the community;<sup>120</sup>
- argue that a client should not be placed in a detention facility because it will be a major disruption in her education and/or treatment, or that she will not receive the instruction and services as mandated in her IEP or person centered plan.<sup>121</sup>
- argue for diminished culpability;<sup>122</sup>
- identify appropriate witnesses for the hearing (e.g., teachers, counselors, therapists, psychiatrists);<sup>123</sup>
- argue against any terms of probation for which compliance will be unduly difficult for the client (e.g., a juvenile may not be able to "remain on good behavior" if she has a severe behavior disorder;<sup>124</sup> a juvenile cannot "attend school regularly"<sup>125</sup> if she is suspended; a juvenile may not be able to "maintain passing grades in up to four courses during each grading period"<sup>126</sup> if she has a severe learning disability and the school has not provided her with an adequate IEP; a juvenile cannot "not associate with specified persons"<sup>127</sup> if she lives with the person in a group home, foster home, or other child welfare placement)
- Communicate (in writing) the juvenile's educational, medical, mental health, and other needs to the appropriate (e.g., juvenile detention facility, youth development center, ).<sup>128</sup>

## CONCLUSION

The children who end in delinquency court have stories that need to be heard, read, and re-told in a way that will make a difference in their defense and in their lives. Until juvenile defenders delve into the written documents created by the teachers, guidance counselors, school principals, social workers, DSS investigators, doctors, nurses, and therapists who have encountered their clients through the years, they will not know the whole story and will likely miss something critical to their clients' cases. Hopefully, this manuscript makes it easier for juvenile defense attorneys to do their jobs fully and zealously.

**Appendix A:**  
**Summary of Juveniles' Education Rights**

Students attending North Carolina public schools have the right to:

- The equal opportunity to a sound basic education. At a minimum, students must receive a free education that teaches them to read and write, and to use science, math and technology. Students must know history, civics, geography, and economics well enough to be an informed member of society and participate in the democratic process. Students must be able to successfully go on to college or vocational education after graduation. Students must have learned enough knowledge and skills to compete for further education or a decent job.
- Have their parents inspect and review their complete educational records.
- The creation of a Personal Education Plan for students who are at risk of academic failure or scored a Level I or Level II on their EOGs/EOCs.
- Clear rules and policies defining prohibited behavior and potential consequences (check your local board of education policies or code of conduct).
- Freedom of speech and expression, although it cannot be vulgar, lewd, threatening, or disruptive speech.
- Freedom of religion, both to express religious views and also to be free from the establishment of religion by the school.
- Freedom of assembly. Students have a right to form non-disruptive protests, although the school can restrict the location when on school property.
- Freedom from discrimination based on race, national origin, gender, religion, or sexual orientation.
- Remain silent when questioned by the police.
- Freedom from unreasonable searches and seizures. Student should know that:
- School officials may search students' lockers any time without any suspicion, notice, or probable cause.
- School officials only need reasonable suspicion to search students and their belongings.
- Police need probable cause—and usually a search warrant—to search students and their property.

Students facing short-term suspension (10 days or fewer) have the right to:

- Receive an explanation from the school as to why they are being suspended (what rule they broke and the evidence against them).
- Tell their side of the story.
- Take textbooks home, get homework, and have a chance to make up tests (parents should request this from the school's front office).

Students facing long-term suspension (more than 10 days) or expulsion have the right to:

- Take textbooks home, get homework and have a chance to make up tests during the first ten days of the suspension and during the appeals process.

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

- Receive written notice of the charge(s) that must include: a description of the incident; the specific policies or rule from the student code of conduct that the student is charged with violating; the specific process for parents to request a hearing to challenge the suspension or expulsion, including how many days a parent has to request it; and the format for holding a hearing.
- Have an informal hearing before an unbiased decision-maker where students can present evidence in their defense, bring witnesses to testify on their behalf, and question the witnesses, evidence or statements used against them by the school. The student can make a recording of the hearing.
- Bring an attorney to the hearing. In addition to having a parent or attorney speak, some districts also allow students to bring a community advocate to the hearing. Check your local board of education policies on advocates and see below for a listing of free legal resources.
- Appeal to the local board of education.
- Appeal to the local superior court.

Students with a disability have the right to:

- A free, appropriate public education, including special education and related services to meet the students' needs.
- An individualized education program (IEP) designed to meet their unique educational needs.
- Receive their education in the least restrictive environment, with their non-disabled peers as much as possible.
- A free independent educational evaluation if the student's parent disagrees with the evaluation conducted by the school.

Students with disabilities who are suspended for more than ten days (total) in one school year have the right to:

- A special meeting called a manifestation determination review to decide if the alleged misbehavior was: 1) caused by or directly and substantially related to the disability; or 2) a direct result of the school's failure to implement the student's individualized education program (IEP).
- Request a functional behavioral assessment to figure out the causes of the behavior problems and to identify ways to prevent problem behaviors.
- Request a behavior intervention plan to reduce the likelihood of misconduct; identify supports or strategies that will improve behavior; establish steps to be taken when misconduct happens; and identify consequences for misconduct.

## Appendix B: Summary of Juveniles' Medicaid Rights

### **Right to Medically Necessary Services:**

The federal law governing Medicaid requires states to provide "early and periodic screening, diagnostic, and treatment," (hereinafter "EPSDT") services to all Medicaid recipients under the age of 21.<sup>1</sup> EPSDT requires states to cover:

*necessary health care, diagnostic services, treatment, and other measures described in [42 U.S.C. § 1396d (a)] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.*<sup>2</sup>

In accordance with this broad statutory language, the scope of benefits covered by the EPSDT program is generous, as courts have held over and over again. Any service within the scope of those listed in the federal statute must be covered if it is necessary to "correct or ameliorate"<sup>3</sup> a child's condition, regardless of whether that service was chosen by the state for coverage for adults.<sup>4</sup> Among the services mandated to be covered for children under EPSDT are:

other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial services (provided in a facility, a home, or other setting) *recommended by a physician or other licensed practitioner of the healing arts* within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.<sup>5</sup>

Since the 1989 EPSDT amendments were passed, every court addressing the issue has held that EPSDT truly delivers the promise it embodies: **any service within the scope of the federal Medicaid Act that is medically necessary shall be provided to a child under age 21.**<sup>6</sup>

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<sup>1</sup> 42 U.S.C. § 1396d(a)(4)(B).

<sup>2</sup> 42 U.S.C. § 1396d (r)(5) (emphasis added).

<sup>3</sup> The N.C. D.H.H.S. has defined "ameliorate" quite broadly: "'Ameliorate' means to improve or maintain the recipient's health in the best condition possible, compensate for a health problem, prevent it from worsening, or prevent the development of additional health problems. Even if the service will not cure the recipient's condition, it must be covered if the service is medically necessary to improve or maintain the recipient's overall health." See. N.C. D.H.H.S. EPSDT Policy Instruction Update, p. 2 (Aug. 28, 2007), available at <http://www.ncdhhs.gov/mhddssas/epsdt/epsdt-policy8-17-07Instructupdate.pdf>.

<sup>4</sup> See 42 U.S.C. § 1396d(r)(5); *Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993), *Salazar v. D.C.*, 954 F.Supp. 278, 328 (D.D.C. 1996); *Parents League for Effective Autism Servs. v. Jones-Kelley*, 565 F.Supp.2d 905, 911 (S.D. Ohio 2008); *Rosie D. v. Romney*, 410 F.Supp.2d 18, 25 (D. Mass. 2006).

<sup>5</sup> 42 U.S.C. § 1396d (a)(13) (emphasis added).

<sup>6</sup> See, e.g., *Pereira*, 996 F.2d at 725-26; *Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 293 F.3d 472, 480 (8th Cir. 2002), *Pittman v. Sec'y, Fla. Dep't of Health & Rehab. Servs.*, 998 F.2d 887 (11th Cir. 1993).

**Right to Notice of and Fair Hearing Concerning any Reduction or Denial of Medically Necessary Services and Right to Continued Services Pending Appeal**

Because Medicaid enrollees have a property interest in their Medicaid benefits, those benefits are protected by the Due Process Clause of the U.S. Constitution.<sup>1</sup> In North Carolina, when a Medicaid recipient receives notice that her benefits are going to be reduced or denied altogether, she has the right to a fair, *de novo* hearing before an impartial Administrative Law Judge at the Office of Administrative Hearings.<sup>2</sup> The decision of the ALJ can be appealed by either party to the agency itself, the NC Department of Health and Human Service (DHHS).<sup>3</sup> **Pending a fair hearing and a final agency decision concerning a reduction or denial of Medicaid benefits that the child is currently receiving, she has the right to continue to receive those benefits.**<sup>4</sup> If the Medicaid recipient wants to appeal the resulting decision -- the final decision of DHHS -- she can file a petition for judicial review in Superior Court.<sup>5</sup>

Medicaid recipients can also go to federal court to litigate their Medicaid entitlements; the above description is in no way meant to be an exhaustive description of Medicaid rights or procedures. However, it is important to note that the Medicaid hearing process in North Carolina is streamlined, fairly speedy, and can achieve extremely effective results for the children who are routinely denied health benefits to which they are clearly entitled.

**The Juvenile Defense Attorney's Role**

If a medical professional has recommended that a Medicaid-eligible child receive treatment, including mental health treatment, to correct or ameliorate that child's condition (which means to improve or maintain the child's health in the best condition possible), then the child is entitled to receive what the doctor orders. For example, sometimes it will come up in court that the juvenile is in detention because no bed is available in a psychiatric residential treatment facility. **If a Medicaid-eligible child is not receiving services that a medical professional has recommended for him due to a denial from Medicaid or a lack of available services, an appeal should be filed in the Office of Administrative Hearings.** If a child is being held in custody pending mental health treatment or placement, the defense attorney can continue to schedule secure custody hearings and question those who should be appealing this denial of services -- case managers and social workers, for example -- to alert the judge to the situation and try to force some action on a clearly illegal situation.

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<sup>1</sup>See U.S. Const., amend. XIV, § 1; *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also Jane Perkins, *Issue Brief: Appeal Rights and Medicaid Benefit Reductions*, National Health Law Program (Dec. 2010). Available at

[www.healthlaw.org/images/stories/Issue\\_Brief\\_Appeal\\_Rights\\_and\\_Medicaid\\_Benefit\\_Reductions.pdf](http://www.healthlaw.org/images/stories/Issue_Brief_Appeal_Rights_and_Medicaid_Benefit_Reductions.pdf).

<sup>2</sup> N.C. Gen. Stat. § 150B, Article 3; see also S.L. 2009-550/House Bill 274 (the Medicaid hearing portions of which are detailed at <http://www.ncoah.com/hearings/medicaid.html#regulations>), North Carolina Department of Health and Human Services: Medicaid Recipient Due Process Rights and Prior Approval Policies and Procedures, available at <http://www.lssp.org/mccartneysettlement.html> (Exhibit B, *McCartney v. Dempsey* settlement agreement, October 2010).

<sup>3</sup> N.C. Gen. Stat. § 150B, Article 3.

<sup>4</sup> 42 C.F.R. §§ 431.210.431.230.

<sup>5</sup> N.C. Gen. Stat. § 150B, Article 3.

USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

**Appendix C:**  
**Sample Interview Form**

**Current school:** \_\_\_\_\_ **Current grade:** \_\_\_\_\_

**Current classes:**

Class	Teacher	Grade

**School staff who would be good character witnesses for client?**

\_\_\_\_\_

**Unexcused absences during current school year (or previous school year, if summer):** \_\_\_\_\_

**Guidance Counselor:** \_\_\_\_\_

**Mental health professionals:**

	Name	Agency
Therapist		
Psychologist		
Psychiatrist		

**Disability/Disabilities?** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Individualized Education Program (IEP)?** Yes No

**If not, ever been evaluated?** Yes No

**If so, when?** \_\_\_\_\_

**Special education classes?** Yes No

**Behavior Intervention Plan (BIP)?** Yes No

**Section 504 Plan?** Yes No

**Personal Education Plan (PEP)?** Yes No

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

**Extra services at school (e.g., tutoring, counseling, special classes)?**

\_\_\_\_\_

\_\_\_\_\_

**Extracurricular activities (e.g., sports, clubs, student government)?**

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## Schools:

Grade	School	Grade	School
1		7	
2		8	
3		9	
4		10	
5		11	
6		12	

## **Retention(s):**

Grade	Reason

## **What kind of grades does your student usually make?**

Circle one:    All As              As & Bs              Bs & Cs              Cs & Ds              Ds & Fs              All Fs

**What kind of standardized test scores does your students get?**

Circle one:    All 4s                  4s & 3s                  3s & 2s                  2s & 1s                  All 1s

**Suspension(s)/Expulsion(s):**

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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**Average absences per school year over last three full school years?**

0-10	11-20	21-30	31-40	41-50	51-60	61-70	71-80	81-90	91-100	>100
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## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

### **Appendix D:** **Sample Education Records Release**

Client's/Student's Name: \_\_\_\_\_

Social Security Number: \_\_\_\_\_ Date of Birth: \_\_\_\_\_

I request and authorize \_\_\_\_\_ and \_\_\_\_\_  
(name of school) (name of school system)  
to provide \_\_\_\_\_ education records to \_\_\_\_\_  
(client's name) (attorney's name)  
or his/her staff.

Need for Disclosure: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(e.g., investigation, representation)

I understand that:

- This authorization expires in one calendar year;
- This authorization may be revoked at any time, except to the extent that the holder of the information/records has already taken substantial action in reliance on the authorization;
- Any further disclosure may be made only as provided by law;
- A photocopy of this form is as valid as the original;
- The information and records to be released are protected under Federal Educational Rights and Privacy Act (FERPA); and
- My signature below authorizes release of all education records and information.

\_\_\_\_\_  
Printed Name of Client

\_\_\_\_\_  
Signature of Client

\_\_\_\_\_  
Date

\_\_\_\_\_  
Relationship of Representative to Client

\_\_\_\_\_  
Printed Name of Representative

\_\_\_\_\_  
Signature of Client's Representative

\_\_\_\_\_  
Date

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

### **Appendix E:** **Sample Education Records Request**

[Date]

Via facsimile ([Fax Number of School]) and email ([Principal's Email Address])

[Name of Principal]

[Name of School]

[Address of School]

[City, State Zip]

**Re: [Name of Client]**

Dear Principal [Last Name of Principal],

I am an attorney and have been retained by [Name of Client], a [Number] grade student at your school. I would like to review [Name of Client]'s cumulative file. In particular, I would like copies of any of the following that the school or school district has in its possession that relate to [Name of Student]:

- a complete academic transcript;
- level of achievement on all standardized tests, including all end-of-grade and end-of-course exams and State writing assessments, and any nationally-normed test the student has taken;
- attendance data;
- teacher or counselor ratings and observations;
- progress reports;
- records or reports of behavioral incidents, including referral forms, notices of in-school or out-of-school suspensions, or records from disciplinary proceedings;
- results of any benchmark tests the student has taken in current or already completed courses or grade levels;
- the results and raw data from any writing test the student has taken;
- any current or former Personal Education Plan;
- records of the student's involvement in any school-sponsored tutoring, drop-out prevention, or other enrichment program;
- any writing portfolio the student has completed or a teacher has maintained; and
- the coursework, graded assignments, and grade histories for core academic classes (Language and Math for grades 1 through 8, and English I, U.S. History, Algebra I, Civics/Economics, and Biology) the student has taken.

I also would like a copy of [Name of Client]'s confidential psychological file, if one exists, including:

- information regarding any special education services and testing, including any IEPs or student assistance plans, that have been in place for the student;

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

- documents pertaining to any home/hospital ("homebound") services that have been provided;
- the results of any testing or evaluations; and
- minutes of IEP meetings.

Finally, I would like a copy of [Name of Client]'s complete discipline records, including any records and documents related to her most recent suspension.

Enclosed is an authorization to release education records, signed by [Client's Name]'s [Mother/Father/Legal Guardian], [Name of Mother/Father/Legal Guardian]. The authorization allows me to inspect and copy [Name of Client]'s records. Feel free to fax the records to my office ([Fax Number]) or email me ([Email Address]) a scanned copy. I am also happy to come to the school to pick up copies of the records. If you have any questions or need additional information, please do not hesitate to call ([Phone Number]) or email me.

Sincerely,

[Your Name], Esq.

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

### Appendix F: Sample DSS Records Request

[Date]

[Name of Recipient]  
[Name of County] County Department of Social Services  
[Address]  
[Address]

**Re: [Client's Name] (DOB: [Date of birth])**

Dear [Name of Recipient],

I write to request, on [Name of client]'s behalf, any records maintained by the [Name of county] County Department of Social Services (DSS) pertaining to [Client's name].

The North Carolina Administrative Code (NCAC) allows the juvenile named in the case record and that juvenile's attorney to examine and copy the DSS record without a court order. *See 10A NCAC 70A.0113(a)(2).*

Enclosed is an authorization to release confidential information, signed by [Name of client]. I can come to your office to go through the file and copy only what is necessary, or feel free to fax the records to my office ([Fax number]) or email me ([Email address]) a scanned copy. If you have any questions or need additional information, please do not hesitate to contact me at [Your phone number].

Sincerely,

---

[Your name]  
[Name of client]'s Defense Attorney

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

### **Appendix G:** **Advocacy Organizations**

#### Education

Name	Geographic Focus	Contact Information	Website
Advocates for Children's Services	Statewide	919-226-0052 acsinfo@legalaidnc.org	<a href="http://www.legalaidnc.org/acs">www.legalaidnc.org/acs</a>
Council for Children's Rights	Mecklenburg Co.	704-372-7961 info@cfcrights.org	<a href="http://www.cfcrights.org">www.cfcrights.org</a>
Disability Rights NC	Statewide	919-856-2195 info@disabilityrightsnc.org	<a href="http://www.disabilityrightsnc.org">www.disabilityrightsnc.org</a>
Duke Children's Law Clinic	Triangle	919-613-7169	<a href="http://www.law.duke.edu/chilledlaw">www.law.duke.edu/chilledlaw</a>
Exceptional Children's Assistance Center	Statewide	800-962-6817 ecac@ecacmail.org	<a href="http://www.ecac-parentcenter.org">www.ecac-parentcenter.org</a>
Legal Aid of NC	Statewide	1-866-219-5262	<a href="http://www.legalaidnc.org">www.legalaidnc.org</a>
Parents Supporting Parents	Guilford Co.	psp.org@triad.rr.com	<a href="http://www.parents-supporting-parents.org">www.parents-supporting-parents.org</a>
Pisgah Legal Services	Western NC	828-253-0406 info@pisgahlegal.org	<a href="http://www.pisgahlegal.org">www.pisgahlegal.org</a>
Wake Help Initiative	Wake Co.	919-576-9253 wakehelp@gmail.com	<a href="http://www.wakehelp.org">www.wakehelp.org</a>
Autism Society of NC	Statewide	1-800 442-2762	<a href="http://www.autismsociety-nc.org">www.autismsociety-nc.org</a>

#### Mental Health/Medicaid

Name	Geographic Focus	Contact Information	Website
Disability Rights NC	Statewide	919-856-2195 info@disabilityrightsnc.org	<a href="http://www.disabilityrightsnc.org">www.disabilityrightsnc.org</a>
Legal Services of the Southern Piedmont	Charlotte area & west-central NC	704-376-1600 info@lssp.org	<a href="http://www.lssp.org">www.lssp.org</a>
National Health Law Program	Nationwide	919-968-6308 nhelpnc@healthlaw.org	<a href="http://www.healthlaw.org">www.healthlaw.org</a>
Duke Children's Law Clinic	Triangle	919-613-7169	<a href="http://www.law.duke.edu/chilledlaw">www.law.duke.edu/chilledlaw</a>
National Alliance on Mental Illness - NC (NAMI)	Statewide	800-451-9682 (NC only) mail@naminc.org	<a href="http://www.naminc.org">www.naminc.org</a>
Autism Society of NC	Statewide	1-800-442-2762	<a href="http://www.autismsociety-nc.org">www.autismsociety-nc.org</a>
TEACCH (autism spectrum)	Statewide	TEACCH@unc.edu	<a href="http://www.teacch.com">www.teacch.com</a>

#### Foster Children

Name	Geographic Focus	Contact Information	Website
Strong Able Youth Speaking Out (SAYSO)	Statewide	919-384-1457	<a href="http://www.saysoinc.org">www.saysoinc.org</a>

# USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

## Endnotes

Note: Short cites were not used in order to make the citations more user-friendly.

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<sup>1</sup> Erwin Byrd is a Staff Attorney at Advocates for Children's Services, a statewide project of Legal Aid of North Carolina, Inc. B.A., The University of the South in Sewanee, TN; J.D., UNC School of Law; erwinb@legalaidnc.org. Jason Langberg is an Equal Justice Works Fellow at Advocates for Children's Services. B.A., University of North Carolina at Chapel Hill; J.D., Boston College Law School; jasonl@legalaidnc.org. They thank Barbara Fedders, Clinical Assistant Professor of Law at UNC School of Law, for her guidance and editing.

<sup>2</sup> See English, D., Widom, C., & Brandford, C. (2004). Another look at the effects of child abuse. *National Institute of Justice Journal*, 251, 23-24.

<sup>3</sup> See Kathleen Skowyra and Joseph J. Cocozza, *A Blueprint for Change: Improving the System Response to Youth with Mental Health Needs Involved in the Juvenile Justice System*, National Center for Mental health and Juvenile Justice (June 2006), at [www.ncmhjj.com/Blueprint/pdfs/ProgramBrief\\_06\\_06pdf](http://www.ncmhjj.com/Blueprint/pdfs/ProgramBrief_06_06pdf).

<sup>4</sup> What is the School-to-Prison Pipeline?, American Civil Liberties Union, [www.aclu.org/racial-justice/what-school-prison-pipeline](http://www.aclu.org/racial-justice/what-school-prison-pipeline).

<sup>5</sup> See *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 8 (citation omitted). Available at [www.njdc.info/2006resourceguide/start.swf](http://www.njdc.info/2006resourceguide/start.swf); Joseph Tulman and Douglas Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. Sch. L. Rev. 875, 876-77 (2009/2010); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 28-29 (2003); Joseph Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law Into Delinquency Representation in the Juvenile Law Clinic*, 42 Wash. U. J. Urb. & Contemp. L. 223 (1992).

<sup>6</sup> *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 26, Available at [www.juvjus.state.nc.us/resources/pdf\\_documents/annual\\_report\\_2010.pdf](http://www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf).

<sup>7</sup> The data was tracked by the Center for the Prevention of School Violence. However, more recent data does not exist because the Center was defunded by the General Assembly.

<sup>8</sup> *Annual School Resource Officer Census 2008-2009*, North Carolina Department of Juvenile Justice and Delinquency Prevention, Center for the Prevention of School Violence, p. 1. Available at [www.juvjus.state.nc.us/cpsv/pdf\\_files/SRO\\_Census\\_08\\_09.pdf](http://www.juvjus.state.nc.us/cpsv/pdf_files/SRO_Census_08_09.pdf).

<sup>9</sup> *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 21, Available at [www.juvjus.state.nc.us/resources/pdf\\_documents/annual\\_report\\_2010.pdf](http://www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf).

<sup>10</sup> *2010 Annual Report*, North Carolina Department of Juvenile Justice and Delinquency Prevention, p. 21, Available at [www.juvjus.state.nc.us/resources/pdf\\_documents/annual\\_report\\_2010.pdf](http://www.juvjus.state.nc.us/resources/pdf_documents/annual_report_2010.pdf).

<sup>11</sup> See Kathleen Skowyra and Joseph J. Cocozza, *A Blueprint for Change: Improving the System Response to Youth with Mental Health Needs Involved in the Juvenile Justice System*, National Center for Mental health and Juvenile Justice (June 2006), at [www.ncmhjj.com/Blueprint/pdfs/ProgramBrief\\_06\\_06pdf](http://www.ncmhjj.com/Blueprint/pdfs/ProgramBrief_06_06pdf).

<sup>12</sup> See U.S. House of Representatives Committee on Government Reform—Minority Staff Special Investigation Division, *Incarceration of Youth Who Are Waiting for Community Mental Health Services in the United States*, July 2004.

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>13</sup> N.C. Sess. Law 2009-451, at p. 112 (reducing stays at Level III and IV residential facilities to a maximum of 120 days) and p. 113 (requiring DHHS to report on "its plan for transitioning children out of Level III and Level IV group homes"). LINK?

<sup>14</sup> NC Dept. of Health and Human Services, Division of Medical Assistance, Medicaid 2012: Report on Financial Reality & Expectations, slides 37-39. Available at: [www.ncdhhs.gov/dma/mcac/MCACBudgetPresentation082011.pdf](http://www.ncdhhs.gov/dma/mcac/MCACBudgetPresentation082011.pdf).

<sup>15</sup> North Carolina Child Advocacy Institute, *Childhood Abuse and Neglect: The Link to Delinquency and Criminal Behavior* (Nov. 2005). Available at [http://www.ncchild.org/sites/default/files/For\\_Web--Child\\_Abuse\\_\\_Crime\\_Factsheet,\\_bnb,\\_12-1-05.pdf](http://www.ncchild.org/sites/default/files/For_Web--Child_Abuse__Crime_Factsheet,_bnb,_12-1-05.pdf)

<sup>16</sup> See U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, *Improving Delinquency Through Improved Child Protection Services* (July 2001); North Carolina Child Advocacy Institute, *Childhood Abuse and Neglect: The Link to Delinquency and Criminal Behavior* (Nov. 2005). Available at [http://www.ncchild.org/sites/default/files/For\\_Web--Child\\_Abuse\\_\\_Crime\\_Factsheet,\\_bnb,\\_12-1-05.pdf](http://www.ncchild.org/sites/default/files/For_Web--Child_Abuse__Crime_Factsheet,_bnb,_12-1-05.pdf) (reporting that, in 2004, only 30,000 of the 130,000 reports of abuse and neglect in North Carolina received intervention from DSS Child Protective Services).

<sup>17</sup> See Joseph Tulman, Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System, 3 Whittier J. Child & Fam. Advoc. 3, 51 (2003) (arguing that if public defenders do not know about and raise issues related to clients' disabilities, it could be considered incompetent and discriminatory representation, and the courts might be liable under Americans with Disabilities Act for not screening attorneys appropriately for such knowledge and practice).

<sup>18</sup> North Carolina State Bar, Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, 0.1(2), 0.1(4). Available at [www.ncbar.gov/rules/rules.asp](http://www.ncbar.gov/rules/rules.asp).

<sup>19</sup> North Carolina State Bar, Rules of Professional Conduct, Rule 1.3(1). Available at [www.ncbar.gov/rules/rules.asp](http://www.ncbar.gov/rules/rules.asp).

<sup>20</sup> *Role of Juvenile Defense Counsel in Delinquency Court*, National Juvenile Defender Center, Spring 2009, p. 21. Available at [http://www.njdc.info/pdf/njdc\\_role\\_of\\_counsel\\_book.pdf](http://www.njdc.info/pdf/njdc_role_of_counsel_book.pdf); see also *Ten Core Principles For Providing Quality Delinquency Representation Through Public Defense Delivery Systems*, National Juvenile Defender Center and National Legal Aid & Defender Association, July 2008, 2nd Edition, p. 3. Available at [www.njdc.info/pdf/10\\_Core\\_Principles\\_2008.pdf](http://www.njdc.info/pdf/10_Core_Principles_2008.pdf).

<sup>21</sup> See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); Joseph Tulman and Joyce McGree, Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System, 1998, pp. 4-2, 11-3. Available at [www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf](http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf).

<sup>22</sup> "Eligible students" are students age eighteen and older or emancipated students. See 20 U.S.C.A. 1232h(c)(5)(B). This manuscript does not address "eligible students" because it is created for juvenile defenders and juvenile court jurisdiction in North ends at age sixteen. See N.C.G.S.A. § 7B-1501(7).

<sup>23</sup> 34 C.F.R. 99.10(a).

<sup>24</sup> See 20 U.S.C.A. 1232g(a)(B); 34 C.F.R. 99.1; Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, [www2.ed.gov/policy/gen/guid/fpcos/ferpa/index.html](http://www2.ed.gov/policy/gen/guid/fpcos/ferpa/index.html); The Family Educational Rights and Privacy Act, Guidance for Parents, U.S. Department of Education, February 2011, p. 1. Available at [www2.ed.gov/policy/gen/guid/fpcos/ferpa/parents.html](http://www2.ed.gov/policy/gen/guid/fpcos/ferpa/parents.html).

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>25</sup> 20 U.S.C.A. § 1232h(c)(6)(D).

<sup>26</sup> 34 C.F.R. 99.3.

<sup>27</sup> See 20 U.S.C.A. 1232h(c)(1)(A); N.C. Gen. Stat. § 115C-402(b); *see e.g.*, Wake County Public School System, Board Policy 6300(B). Available at [www.wcpss.net/policy-files/series/policies/6300-bp.html](http://www.wcpss.net/policy-files/series/policies/6300-bp.html).

<sup>28</sup> Records of a law enforcement unit means those records, files, documents, and other materials that are: 1) created by a law enforcement unit; 2) created for a law enforcement purpose; and 3) maintained by the law enforcement unit. 34 C.F.R. 99.8(b)(1).

<sup>29</sup> A “law enforcement unit” means any individual, office, department, division, or other component of a school, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by the school to: enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any law against any individual or organization; or to maintain the physical security and safety of the school. The law enforcement unit does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the school, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceeding against a student. 34 C.F.R. 99.8(a)(1).

<sup>30</sup> 34 C.F.R. 99.3.

<sup>31</sup> The Family Educational Rights and Privacy Act, Guidance for Parents, U.S. Department of Education, February 2011, p. 5. Available at [www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html](http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html).

<sup>32</sup> 34 C.F.R. 99.8(b)(2).

<sup>33</sup> *See Defending Clients Who Have Been Searched and Interrogated at School*, National Juvenile Defender Center, p. 14. Available at [www.njdc.info/pdf/defending\\_clients\\_who\\_have\\_been\\_searched\\_and\\_interrogated\\_at\\_school.pdf](http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf).

<sup>34</sup> See 20 U.S.C.A. 1232g(b)(2)(A).

<sup>35</sup> *See* 20 U.S.C.A. 1232g(b)(2)(A); Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>; *The Family Educational Rights and Privacy Act, Guidance for Parents*, U.S. Department of Education, February 2011, p. 2. Available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/parents.html>.

<sup>36</sup> 34 C.F.R. 99.10(b).

<sup>37</sup> *See* 34 C.F.R. 99.10(d); Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, [www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html](http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html).

<sup>38</sup> *See* 34 C.F.R. s. 99.12(a).

<sup>39</sup> *See* U.S. Dept. of Educ. Family Policy Compliance Office, Letter of Technical Assistance to School District re: Disclosure of education records containing information on multiple students (10/31/03).

<sup>40</sup> *See Gonzaga University v. Doe*, 536 U.S. 273 (2002).

<sup>41</sup> See Family Policy Compliance Office, U.S. Department of Education, [www2.ed.gov/policy/gen/guid/fpco/index.html](http://www2.ed.gov/policy/gen/guid/fpco/index.html).

<sup>42</sup> *See e.g.*, Wake County Public School System, Board Policy 6520, [www.wcpss.net/policy-files/series/policies/6520-bp.html](http://www.wcpss.net/policy-files/series/policies/6520-bp.html).

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>43</sup> However, “[a]n educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.” 34 C.F.R. 99.11(b).

<sup>44</sup> 34 C.F.R. 99.11(a).

<sup>45</sup> See Family Educational Rights and Privacy Act (FERPA), U.S. Department of Education, [www2.ed.gov/policy/gen/guid/fpcos/ferpa/index.html](http://www2.ed.gov/policy/gen/guid/fpcos/ferpa/index.html); *The Family Educational Rights and Privacy Act, Guidance for Parents*, U.S. Department of Education, February 2011, p. 2. Available at [www2.ed.gov/policy/gen/guid/fpcos/parents.html](http://www2.ed.gov/policy/gen/guid/fpcos/parents.html).

<sup>46</sup> See 34 C.F.R. 99.10(c).

<sup>47</sup> See 34 C.F.R. 99.12(a).

<sup>48</sup> See N.C. Gen. Stat. § 115C-109.3; 34 C.F.R. 300.613.

<sup>49</sup> 34 CFR 300.626; NC 1505-2.17 (located in the North Carolina Department of Public Instruction, Exceptional Children Division, Policies Governing Services for Children with Disabilities (amended June 2010), available at [www.dpi.state.nc.us/ec/policy/resources/](http://www.dpi.state.nc.us/ec/policy/resources/)).

<sup>50</sup> N.C. Gen. Stat. § 7B-302(a1)(2), § 7B-2901(a)(1), 7B-2901(b)(1),

<sup>51</sup> N.C. Gen. Stat. § 7B-302(a).

<sup>52</sup> N.C. Gen. Stat. § 7B-302(a1).

<sup>53</sup> See N.C. DHHS online manuals, Division of Social Services, Family Support and Child Welfare, Chapter VIII: Protective Services , Section 1424. Available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>.

<sup>54</sup> N.C. Gen. Stat. § 7B-2901

<sup>55</sup> N.C. Gen. Stat. § 7B-2901.

<sup>56</sup> 10A NCAC 70A .0112.

<sup>57</sup> See N.C. DHHS online manuals, Division of Social Services, Family Support and Child Welfare, Chapter VIII: Protective Services , Section 1424. Available at <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-60/man/>.

<sup>58</sup> N.C. Gen. Stat. § 7B-2901.

<sup>59</sup> N.C. Gen. Stat. § 7B-2901.

<sup>60</sup> 45 C.F.R. 160.103 (HIPAA Definitions), which, incidentally, specifically exclude from the definition of protected health information any education records that are covered by FERPA.

<sup>61</sup> 45 C.F.R. 160.103

<sup>62</sup> 45 C.F.R. 164.502(g).

<sup>63</sup> 45 C.F.R. 164.502(g).

<sup>64</sup> N.C. Gen. Stat. § 90-21.5.

<sup>65</sup> 45 CFR 164.502 (g).

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>66</sup> See Thomas Mayes and Perry Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U.C. Davis J. Juv. L. & Pol'y 125, 133-34 (2000); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); Eric Zogry, Special Education Information Checklist, North Carolina Juvenile Defender, Annual Juvenile Defender Conference, August 2006. Available at [www.ncids.org/Juvenile%20Defender/Training%20Seminars/2006%20Juvenile%20Defender%20Conference/12%20Zogry%2004%20-%20special%20ed%20checklist.pdf](http://www.ncids.org/Juvenile%20Defender/Training%20Seminars/2006%20Juvenile%20Defender%20Conference/12%20Zogry%2004%20-%20special%20ed%20checklist.pdf).

<sup>67</sup> See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 42-44 (2003)

<sup>68</sup> N.C. Gen. Stat. § 7B-2401; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 92. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf).

<sup>69</sup> N.C. Gen. Stat. §§ 7B-2401; 15A-1001(a).

<sup>70</sup> N.C. Gen. Stat. §§ 7B-2401; 15A-1002(a).

<sup>71</sup> N.C. Gen. Stat. §§ 7B-2401; 15A-1002.

<sup>72</sup> See *Becton v. Barnett*, 920 F.2d 1190, 1192-93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding).

<sup>73</sup> See Juvenile Defender Delinquency Notebook, National Juvenile Defender Center, Spring 2006, p. 54. Available at [www.njdc.info/2006resourceguide/start.swf](http://www.njdc.info/2006resourceguide/start.swf); North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 97-98, 109. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 46-47 (2003).

<sup>74</sup> N.C. Gen. Stat. § 7B-1903(b)-(c).

<sup>75</sup> See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 125-26. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf).

<sup>76</sup> N.C. Gen. Stat. § 7B-1900(1).

<sup>77</sup> See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 125. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf).

<sup>78</sup> See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 126. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf).

<sup>79</sup> N.C. Gen. Stat. § 7B-1902.

<sup>80</sup> See North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 125. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf); *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 6. Available at [www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm](http://www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm).

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>81</sup> See Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 1-5. Available at [www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf](http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf).

<sup>82</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System, Office of Juvenile Justice and Delinquency Prevention*, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html).

<sup>83</sup> Sue Burrell and Loren Warboys, Special Education and the Juvenile Justice System, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [https://www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](https://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); Joseph Tulman and Joyce McGree, Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System, 1998, p. 2-12. Available at [www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf](http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf).

<sup>84</sup> See N.C. Gen. Stat. § 7B-1906(d); North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, pp. 128, 134. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_07.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_07.pdf).

<sup>85</sup> See N.C. Gen. Stat. § 7B-1903(b)(3).

<sup>86</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42; *In re Murray*, 136 N.C. App. 648 (2000); *In re P.J.M.*, 136 N.C. App. 648 (2000).

<sup>87</sup> See *In re S.W.*, 171 N.C. App. 335 (2005); *In re J.M.F. & T.J.B.*, 168 N.C. App. 143 (2005); *In re D.D.*, 146 N.C. App. 309 (2001); *In re D.L.D.*, 2010 N.C. App. LEXIS 683; contrast *In re KDL*, 706 S.E.2d 478 (2011).

<sup>88</sup> N.C. Gen. Stat. § 7B-2101.

<sup>89</sup> N.C. Gen. Stat. § 7B-2101(a)(3).

<sup>90</sup> N.C. Gen. Stat. § 7B-2101(b).

<sup>91</sup> See *State v. Branham*, 153 N.C. App. 91 (2002).

<sup>92</sup> N.C. Gen. Stat. § G.S. 7B-2101(d).

<sup>93</sup> See *Defending Clients Who Have Been Searched and Interrogated at School*, A Guide for Juvenile Defenders, National Juvenile Defender Center, Fall 2009. Available at [www.njdc.info/pdf/defending\\_clients\\_who\\_have\\_been\\_searched\\_and\\_interrogated\\_at\\_school.pdf](http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf).

<sup>94</sup> See *Defending Clients Who Have Been Searched and Interrogated at School*, A Guide for Juvenile Defenders, National Juvenile Defender Center, Fall 2009. Available at [www.njdc.info/pdf/defending\\_clients\\_who\\_have\\_been\\_searched\\_and\\_interrogated\\_at\\_school.pdf](http://www.njdc.info/pdf/defending_clients_who_have_been_searched_and_interrogated_at_school.pdf).

<sup>95</sup> See *In re W.R.*, 179 N.C. App. 642 (2006).

<sup>96</sup> See *State v. Bunnell*, 340 N.C. 74, 80 (1995).

<sup>97</sup> See *State v. Johnson*, 136 N.C. App. 683, 693 (2000).

<sup>98</sup> See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 46-47 (2003); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>99</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>100</sup> N.C. Gen. Stat. § 7B-2200.

<sup>101</sup> N.C. Gen. Stat. § 7B-2203(a).

<sup>102</sup> N.C. Gen. Stat. § 7B-2203(b).

<sup>103</sup> See Joseph Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 46-47 (2003); *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 7. Available at [www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm](http://www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 145. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_09.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf).

<sup>104</sup> *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, p. 6. Available at [www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm](http://www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm).

<sup>105</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 2-9. Available at [www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf](http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf).

<sup>106</sup> N.C. Gen. Stat. § 7B-2400 et. seq.; North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 185. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_09.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf).

<sup>107</sup> If a student with an individualized education program (IEP) is suspended for more than ten consecutive school days or a pattern of suspension accumulates to more than ten school days in a school year, the school must conduct a manifestation determination review (MDR). See 34 C.F.R. § 300.519. At the MDR, the IEP Team decides if the conduct in question was: 1) caused by, or had a direct and substantial relationship to, the child's disability; or 2) the direct result of the local educational agency's failure to implement the IEP. See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html); Juvenile Defender Delinquency Notebook, National Juvenile Defender Center, Spring 2006, p. 272; See Joseph Tulman and Joyce McGree, *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA): For Children in the Juvenile Delinquency System*, 1998, p. 2-2. Available at [www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf](http://www.aecf.org/upload/PublicationFiles/JJ3622H5030.pdf).

<sup>108</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html).

## USING JUVENILES' RECORDS TO ENSURE ZEALOUS REPRESENTATION

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<sup>109</sup> Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html).

<sup>110</sup> "a court will not redress a wrong when he who invokes its aid has unclean hands"<sup>110</sup> *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting).

<sup>111</sup> North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 198. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_09.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_09.pdf).

<sup>112</sup> N.C. Gen. Stat. § 7B-2500.

<sup>113</sup> N.C. Gen. Stat. § 7B-2500.

<sup>114</sup> N.C. Gen. Stat. § 7B-2501(d).

<sup>115</sup> N.C. Gen. Stat. § 7B-2501(b).

<sup>116</sup> See Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 796 (2010); *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 226. Available at [www.njdc.info/2006resourceguide/start.swf](http://www.njdc.info/2006resourceguide/start.swf); *Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level*, North Carolina Commission on Indigent Defense Services, Adopted December 14, 2007, pp. 24-25. Available at [www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm](http://www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm); North Carolina Juvenile Defender Manual, Office of Indigent Defense Services, p. 203. Available at [www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook\\_13.pdf](http://www.ncids.org/Other%20Manuals/JuvDefenderManual/JuvenileDefBook_13.pdf).

<sup>117</sup> N.C. Gen. Stat. § 7B-2413.

<sup>118</sup> N.C. Gen. Stat. § 7B-2501(d).

<sup>119</sup> N.C. Gen. Stat. § 7B-2502.

<sup>120</sup> N.C. Gen. Stat. §§ 7B-2501(c)(5); 7B-2506.

<sup>121</sup> See *Juvenile Defender Delinquency Notebook*, National Juvenile Defender Center, Spring 2006, p. 272.

<sup>122</sup> See NCGSA 7B-2501(c)(4); Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [https://www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html).

<sup>123</sup> See N.C. Gen. Stat. § 7B-2501(b).

<sup>124</sup> See N.C. Gen. Stat. § 7B-2510(a)(1).

<sup>125</sup> See N.C. Gen. Stat. § 7B-2510(a)(4).

<sup>126</sup> See N.C. Gen. Stat. § 7B-2510(a)(5).

<sup>127</sup> See N.C. Gen. Stat. § 7B-2510(a)(6).

<sup>128</sup> See Sue Burrell and Loren Warboys, *Special Education and the Juvenile Justice System*, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, July 2000. Available at [www.ncjrs.gov/html/ojjdp/2000\\_6\\_5/contents.html](http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html).