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## Correctional Education Can Make a Greater Impact on Recidivism by Supporting Adult Inmates with Learning Disabilities

Angela Koo

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## COMMENTS

### **CORRECTIONAL EDUCATION CAN MAKE A GREATER IMPACT ON RECIDIVISM BY SUPPORTING ADULT INMATES WITH LEARNING DISABILITIES**

Angela Koo\*

*This Comment brings attention to a group that is overlooked within our prisons—adult inmates with learning disabilities. These inmates currently face challenges in receiving appropriate educational programming. Recognizing that several studies support the proposition that education reduces recidivism, this Comment argues that correctional education programs must make reforms to accommodate adult inmates with learning disabilities in order for education to fully impact recidivism rates.*

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## INTRODUCTION

Navigating the world with a learning disability can be challenging. For example, students with an auditory processing disorder, which impacts the ability to hear and distinguish sounds, or a visual processing disorder, which impacts the ability to process information visually, can have serious difficulty learning in a traditional classroom.<sup>1</sup> During primary school,

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<sup>1</sup> See *Learning Disabilities and Disorders*, HELPGUIDE.ORG, [http://www.helpguide.org/mental/learning\\_disabilities.htm](http://www.helpguide.org/mental/learning_disabilities.htm) (last visited Sept. 23, 2014), *archived at* <http://perma.cc/KH32-JBZG>. Auditory and visual processing disorders are just two of the specific learning disabilities that a student might have.

mastering the basics of reading and math may not come easily for these students because they process information differently than their peers without learning disabilities. As each academic year builds upon basic skills taught in previous years, students with learning disabilities are vulnerable to falling behind—sometimes far behind—their peers in grade-level achievement.

A student's difficult experiences in primary and secondary school will likely continue into adulthood because learning disabilities do not magically disappear with age. There is no "cure" for a learning disability;<sup>2</sup> learning disabilities continue to impact adults' information processing as they did when the adults were children. Learning strategies to mitigate this impact and receiving accommodations or modifications at work and school can help adults manage their learning disabilities, but do not eliminate them. Because of this reality, adults with learning disabilities face extra challenges as they find and maintain employment, live in their communities, and provide for their families. And if these adults come into contact with the criminal justice system, their learning disabilities are with them as they serve their sentences, prepare for their release, and return to their communities.

This Comment focuses on adult prisoners with learning disabilities in the United States. Researchers estimate that 30%–50% of the adult prison population has a learning disability.<sup>3</sup> Currently, correctional education programs do not support these inmates even though numerous research studies suggest that correctional education decreases recidivism rates.<sup>4</sup> Reducing recidivism rates is one of the main goals of incarceration.<sup>5</sup> Lower

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<sup>2</sup> *Learning Disability Fast Facts*, NAT'L CTR. FOR LEARNING DISABILITIES, <http://www.nclld.org/types-learning-disabilities/what-is-ld/learning-disability-fast-facts> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/ZX8A-3ZNC>.

<sup>3</sup> MICHELLE TOLBERT, NAT'L INST. FOR LITERACY, STATE CORRECTIONAL EDUCATION PROGRAMS: STATE POLICY UPDATE 11 (2002), *available at* [http://www.prisonpolicy.org/scans/nil/st\\_correction\\_02.pdf](http://www.prisonpolicy.org/scans/nil/st_correction_02.pdf), *archived at* <http://perma.cc/KUX7-PXM2>.

<sup>4</sup> *See* LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS, at xvi (2013), *available at* [https://www.bja.gov/Publications/RAND\\_Correctional-Education-Meta-Analysis.pdf](https://www.bja.gov/Publications/RAND_Correctional-Education-Meta-Analysis.pdf), *archived at* <http://perma.cc/D3XA-MFLP> (finding that correctional education, on average, reduces individuals' risk of recidivating); STEPHEN J. STEURER & LINDA G. SMITH, CORR. EDUC. ASS'N & MGMT. & TRAINING CORP., EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY - EXECUTIVE SUMMARY 10 (2003), *available at* <http://www.ceanational.org/PDFs/EdReducesCrime.pdf>, *archived at* <http://perma.cc/WZ2E-UYUE> (finding recidivism rates to be lower for participants in correctional education programs compared to nonparticipants).

<sup>5</sup> The Department of Justice has cited recidivism as a main goal of incarceration in several publications. For example, in a comprehensive review of the criminal justice system in 2013, the Department identified reduction of recidivism as one of the five goals of its

recidivism rates are beneficial to society; lower rates mean that more released inmates are reintegrating into their communities as law-abiding citizens and pursuing noncriminal activities to make a living.<sup>6</sup> Thus, reforms in correctional education—namely, giving particular attention to the needs of inmates with learning disabilities—could greatly impact recidivism rates. The reforms proffered in this Comment are applicable to both federal and state prisons.

Part I of this Comment describes learning disabilities and some of the flaws of the current correctional education programs. Part II presents the link between correctional education and decreased recidivism. Part III explores inmates' legal rights regarding education, which may include the right to make constitutional and statutory challenges, and explains how pursuing litigation under these rights is an inefficient solution to inadequate correctional educational programming. Part IV presents the final piece of background information by drawing attention to the lack of research and discussion regarding adult prisoners with learning disabilities.

Part V argues that the strong link between education and recidivism, coupled with the significant percentage of adult prisoners with learning disabilities, provides a compelling rationale for correctional education reform. Specifically, correctional education programs cannot effectively reduce recidivism unless they recognize and support adult inmates with learning disabilities. Part VI presents four possible solutions that, together or separately, can improve the impact of educational programming for these inmates: testing for learning disabilities upon prison entry; mandating trainings on learning disabilities for all correctional educators; providing life skills training for prisoners to manage their learning disabilities upon release; and generating more discussion and research about this particular population. These solutions have the potential to address the gap in current correctional education programs, and thus, have a greater impact on recidivism rates.

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review. See U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY 1 (2013), available at <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>, archived at <http://perma.cc/UN5Y-CUNR>. And, in an annual report from 1999 examining incarceration, it identified offenders' "reintegration into society" as one of its strategic goals. See U.S. DEP'T OF JUSTICE, DETENTION AND INCARCERATION 12 (1999), available at <http://www.justice.gov/archive/ag/annualreports/ar99/Chapter5.pdf>, archived at <http://perma.cc/GYH6-BD9D>.

<sup>6</sup> See John H. Esperian, *The Effect of Prison Education Programs on Recidivism*, 61 J. CORRECTIONAL EDUC. 316, 320 (2010).

## I. LEARNING DISABILITIES AND CORRECTIONAL EDUCATION PROGRAMS

Part I presents background information for the rest of this Article. Subpart I(A) defines “learning disability” and explains the impact of learning disabilities on students. Subpart I(B) introduces adult correctional education programs, describing the important role they play in educating inmates.

### A. WHAT IS A LEARNING DISABILITY?

According to the National Joint Committee on Learning Disabilities, a learning disability is a “general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, and mathematical abilities.”<sup>7</sup> Researchers believe that a malfunction in the central nervous system causes the effects of a learning disability.<sup>8</sup> These effects “include specific deficits in one or more of the following areas: oral comprehension, organization, coordination, perception, expressive language, the ability to sustain attention, nonverbal reasoning, integration of information, and social judgment.”<sup>9</sup> Having a learning disability does not automatically mean mental retardation or limited intelligence, as many people with learning disabilities are of average or above average intelligence.<sup>10</sup> Many people with learning disabilities look, behave, and perform similarly to their counterparts without learning disabilities.

Having a learning disability simply means that a person’s ability to learn or communicate is impacted in a certain way. The degree of that impact can vary depending on the severity of the disability, and individuals cope with or compensate for their deficits in different ways.<sup>11</sup> Though individuals with learning disabilities are often as intelligent as their peers, they may require more time to process information or complete assignments

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<sup>7</sup> TOLBERT, *supra* note 3, at 11–12. There is a wide range of learning disabilities, which includes dyslexia, dysgraphia, auditory processing disorder, visual processing disorder, and other related disorders such as ADHD. *What Are Learning Disabilities?*, NAT’L CTR. FOR LEARNING DISABILITIES, <http://nclld.org/types-learning-disabilities/what-is-ld/what-are-learning-disabilities> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/MD48-HEVZ>.

<sup>8</sup> TOLBERT, *supra* note 3, at 11–12.

<sup>9</sup> Sara N. Barker, *A False Sense of Security: Is Protection for Employees with Learning Disabilities Under the Americans with Disabilities Act Merely an Illusion?*, 9 U. PA. J. LAB. & EMP. L. 325, 327 (2007).

<sup>10</sup> *Id.* at 327–28.

<sup>11</sup> This is the way I describe and see learning disabilities based on my experience as a special education teacher. For more information, see Carol Weller et al., *Adaptive Behavior of Adults and Young Adults with Learning Disabilities*, 17 LEARNING DISABILITY Q. 282 (1994) (discussing maladaptive and adaptive characteristics of adults and young adults with learning disabilities in social, educational, and working environments).

than their nondisabled peers. Recent research shows that students with learning disabilities can be just as successful as their nondisabled peers if their teachers implement interventions to support their needs.<sup>12</sup> Providing certain accommodations can also help students with learning disabilities achieve academic progress because it allows them “to show what they know [on classroom assignments and assessments] without being impeded by their disability.”<sup>13</sup> Simple and inexpensive interventions and accommodations can adequately help individuals overcome the varied ways a learning disability affects them.

#### B. ADULT CORRECTIONAL EDUCATION PROGRAMS

More than 1.5 million people are incarcerated in state and federal prisons.<sup>14</sup> Many of these inmates come from backgrounds where educational opportunities were limited in some way, and, thus, they are generally less educated than the general population.<sup>15</sup> In 1997, “[e]ighty-two percent of the U.S. population held high school diplomas or GEDs . . . but only 70 percent of federal prisoners and 60 percent of state prisoners had reached the same level of education.”<sup>16</sup> And “in 2004, approximately 36 percent of individuals in state prisons had attained less than a high school education compared with 19 percent of the general U.S. population age 16 and over.”<sup>17</sup> Since a large portion of inmates enter prison without a high level of education, many prisoners earn their GED or high

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<sup>12</sup> See *Successful Strategies for Teaching Students with Learning Disabilities*, LEARNING DISABILITIES ASS’N OF AM., <http://www.ldanatl.org/aboutld/teachers/understanding/strategies.asp> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/3BBU-D8DF>. Some effective interventions include breaking up learning into smaller steps, providing prompts of learning strategies, and using graphics to illustrate a teacher’s oral instructions. *Id.*

<sup>13</sup> *Accommodations for Students with Learning Disabilities*, NAT’L CTR. FOR LEARNING DISABILITIES, <http://www.ncl.org/students-disabilities/accommodations-education/accommodations-students-learning-disabilities> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/Z97F-M4P5>. Some examples of effective accommodations include presenting information in alternative formats such as visually or in larger print, providing frequent breaks or extra time on assignments, and allowing answers to be given verbally. *Id.*

<sup>14</sup> ANNA CRAYTON & SUZANNE REBECCA NEUSTETER, PRISONER REENTRY INST., *THE CURRENT STATE OF CORRECTIONAL EDUCATION 1* (2008), *available at* <http://www.urban.org/projects/reentry-roundtable/upload/Crayton.pdf>, *archived at* <http://perma.cc/FA5B-6MP7>. Other researchers say the current prison population is at two million. See Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61, 72 (2002).

<sup>15</sup> Emily A. Whitney, Note, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 TRANSNAT’L L. & CONTEMP. PROBS. 777, 786 (2009).

<sup>16</sup> *Id.* at 787.

<sup>17</sup> DAVIS ET AL., *supra* note 4, at xv.

school diploma during incarceration.<sup>18</sup> Thus, education programs in prisons play an important role in educating incarcerated individuals. In fact, “at least 70 percent of state and federal inmates who held a GED as of 1997 earned it while in prison.”<sup>19</sup>

Indeed, correctional education programs are integral to the rehabilitative goals of both state and federal prisons and their importance cannot be understated. Education programs are part of prisons’ efforts to promote rehabilitation, one of the major goals of the criminal justice system.<sup>20</sup> Offenders can rehabilitate themselves by “[l]earning to read, write, compute, and effectively communicate” which “prepares the prisoners for life upon release.”<sup>21</sup> The Federal Bureau of Prisons has made an effort to promote rehabilitation through education in federal prisons by requiring, for the most part, inmates to be at a high school level of reading, writing, and math.<sup>22</sup> If inmates, at the time they enter prison, do not meet this standard, they are enrolled in an adult basic education or GED program.<sup>23</sup> These programs are offered in about 90% of federal prisons.<sup>24</sup> And all federal prisons offer literacy classes.<sup>25</sup>

State prisons, on the other hand, do not have these requirements. In 1992, the U.S. Department of Education enacted the Functional Literacy for State and Local Prisoners Program,<sup>26</sup> which provides funding to state prisons “to help them establish, improve, and expand . . . functional literacy program[s]” that will “reduce recidivism through the development and improvement of life skills necessary for reintegration into society.”<sup>27</sup> State

<sup>18</sup> Whitney, *supra* note 15, at 787.

<sup>19</sup> *Id.* (citing WENDY ERISMAN & JEANNE BAYER CONTARDO, INST. FOR HIGHER EDUC. POLICY, *LEARNING TO REDUCE RECIDIVISM: A 50-STATE ANALYSIS OF POSTSECONDARY CORRECTIONAL EDUCATION POLICY 4* (2005), available at <http://www.ihep.org/sites/default/files/uploads/docs/pubs/learningreducerecidivism.pdf>, archived at <http://perma.cc/V75F-EJV6>).

<sup>20</sup> *See id.* at 779, 787.

<sup>21</sup> *Id.* at 789.

<sup>22</sup> Under the “Education Programs” section of its website, the Federal Bureau of Prisons states that “[i]n most cases, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the literacy program for a minimum of 240 hours or until they obtain the GED.” *Education Programs*, FED. BUREAU OF PRISONS, [http://www.bop.gov/inmates/custody\\_and\\_care/education.jsp](http://www.bop.gov/inmates/custody_and_care/education.jsp) (last visited Oct. 4, 2014), archived at <http://perma.cc/8LFT-DQWU>.

<sup>23</sup> *Id.*

<sup>24</sup> CRAYTON & NEUSTETER, *supra* note 14, at 9.

<sup>25</sup> FED. BUREAU OF PRISONS, *supra* note 22.

<sup>26</sup> *See* Functional Literacy for State and Local Prisoners Program, 34 C.F.R. § 489 (1992); Whitney, *supra* note 15, at 788.

<sup>27</sup> U.S. DEP’T OF EDUC., CFDA No. 84.255, ADULT EDUCATION—FUNCTIONAL LITERACY AND LIFE SKILLS: PROGRAMS FOR STATE AND LOCAL PRISONERS (1997), available at <http://>

prison programs are not uniform since each state has the flexibility to create its own programs.<sup>28</sup> A 2002 report stated that twenty-two states require inmates to participate in education programs if they have not reached a certain level of education—some require inmates to be at the GED level, while others require sixth-grade achievement.<sup>29</sup> In addition, about 84% of state prisons in the United States offer some type of correctional educational programming.<sup>30</sup>

While state departments of corrections and the Bureau of Prisons have made an effort to make education programs widely available to the general prison population, efforts to address the needs of inmates with learning disabilities within these programs have been limited.

Compared to the general population, the prison population represents a remarkably high percentage of adults with learning disabilities. Only 3%–15% of adults in the general population are estimated to have learning disabilities, compared to 30%–50% of inmates.<sup>31</sup> Academics have differing theories to explain the disproportionate representation of individuals with learning disabilities in the criminal justice system. Some argue that because broken public school systems fail to identify children with learning disabilities, the schools place them in a “school-to-prison pipeline”<sup>32</sup> by disciplining them without addressing their learning disabilities. Other academics put forth a susceptibility theory: they believe that the differences

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[www2.ed.gov/pubs/Biennial/95-96/eval/417-97.pdf](http://www2.ed.gov/pubs/Biennial/95-96/eval/417-97.pdf), archived at <http://perma.cc/UD9J-TY4Z?type=pdf>.

<sup>28</sup> Michael K. Greene, Note, “*Show Me the Money!*” *Should Taxpayer Funds Be Used to Educate Prisoners Under the Guise of Reducing Recidivism?*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 173, 178 (1998).

<sup>29</sup> CRAYTON & NEUSTETER, *supra* note 14, at 4.

<sup>30</sup> DAVIS ET AL., *supra* note 4, at 4.

<sup>31</sup> TOLBERT, *supra* note 3, at 11. Approximations of the percentage of inmates with learning disabilities vary, but are always significantly greater than the percentage of adults with learning disabilities in the general population. See CRAYTON & NEUSTETER, *supra* note 14, at 5 (“Approximately 17 percent of adult prisoners have been diagnosed with some type of learning difference compared to six percent of the general adult population.”); Nancy Cowardin, *Disorganized Crime: Learning Disability and the Criminal Justice System*, 13 *CRIM. JUST.* 10, 11 (1998) (“[I]t is widely estimated that 20 to 55 percent of criminal justice clients qualify as having specific to pervasive learning disabilities.”).

<sup>32</sup> See Mark McWilliams & Mark P. Fancher, *Undiagnosed Students with Disabilities Trapped in the School-to-Prison Pipeline*, *MICH. B. J.*, Aug. 2010, at 28, 30 (emphasizing that undiagnosed disabilities contribute to racial disparities in school discipline, which go on to manifest in prison populations); Kristina Menzel, *The School-to-Prison Pipeline: How Schools Are Failing to Properly Identify and Service Their Special Education Students and How One Probation Department Has Responded to the Crisis*, 15 *PUB. INT. L. REP.* 198, 199–200 (2010) (referencing the ACLU’s argument “that ‘the school-to-prison pipeline’ is the product of, among other factors, ‘the practices and policies of school districts’ that result in the criminalization of in-school behaviors” (citation omitted)).

in cognitive, language, social, and personal characteristics make individuals with learning disabilities more susceptible to entering the criminal justice system than their peers without learning disabilities.<sup>33</sup> Specifically, they have poorer decisionmaking skills that lead to criminal behavior, weaker avoidance strategies to evade police and other authorities, “behavior problems” that lead to harsher punishment by the criminal justice system, and a greater inability to learn experientially and prevent recidivism.<sup>34</sup> Regardless of the explanation for these statistics, the fact remains that a large number of inmates today, a number quite disproportionate to the general population, have learning disabilities.

Recognition of adult prisoners with learning disabilities within correctional education programs is rare, and accessing appropriate curriculum is a challenge. For example, in California state prisons, special-education-like instruction is not available to inmates with learning disabilities enrolled in the adult basic education program.<sup>35</sup> The current prison system in California does not provide the teaching strategies necessary to help inmates with learning disabilities make academic progress.<sup>36</sup> Ninety-eight percent of classes are staffed without trained special educators, and classes do not provide the low teacher–student ratio that would maximize learning for individuals with learning disabilities.<sup>37</sup>

In Illinois, adult prisoners with learning disabilities are not the priority of educational programming because prisons have deficiencies to address in their education programs for adults without learning disabilities and juveniles. State prisons are struggling to staff enough full-time general education teachers.<sup>38</sup> Juvenile correction facilities, where special education is mandatory for youth with learning disabilities, are also struggling to meet the required special educator–student ratio.<sup>39</sup> Unable to provide adequate general education programs, Illinois prisons are nowhere near meeting the needs of adult prisoners with learning disabilities.

The growth of the prison population is one major reason that correctional education programs have not made efforts to support inmates

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<sup>33</sup> Cowardin, *supra* note 31, at 11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Discussion with Alan Mills, Legal Director, Uptown People’s Law Center, in Chi., Ill. (Oct. 9, 2013) [hereinafter Mills Discussion].

<sup>39</sup> Patrick Smith, *Report: Youth Prison in Chicago Has Inadequate Teacher Staffing*, WBEZ (JULY 10, 2013), <http://www.wbez.org/news/report-youth-prison-chicago-has-inadequate-teacher-staffing-108008>, archived at <http://perma.cc/S2NN-MAYG>.

with learning disabilities.<sup>40</sup> Although funding has grown with the steady increase in the prison population over the last few decades, these funds have primarily gone towards constructing and operating more prisons.<sup>41</sup> Funding for education programs has not kept up with the growing prison population, and, thus, education programs are under strain to serve more inmates with the same budget.<sup>42</sup> Since the basic educational needs of prisoners without learning disabilities are not yet being met, there is little room left in the budget to serve the needs of prisoners with learning disabilities.

## II. EDUCATION AND RECIDIVISM

The effectiveness of incarceration is often measured by rates of recidivism—how many ex-prisoners return to criminal behavior after release.<sup>43</sup> While many factors—such as length of incarceration, socioeconomic status, and quality of postrelease supervision—influence recidivism,<sup>44</sup> educational achievement may be one of the most important factors because it can be addressed during incarceration.<sup>45</sup> Other factors, such as socioeconomic status, are difficult to address because they are beyond the control of the correctional facility, but education can be adequately addressed in prison simply because inmates must be in prison.

Correctional education can reduce recidivism by giving inmates the basic educational skills and achievements that they lacked upon entry. Leaving prison with basic skills and a high school diploma or GED, an inmate could be more qualified for employment than before he entered prison, perhaps leading him to choose a postrelease lifestyle that does not involve his former criminal behavior.<sup>46</sup> In a 2013 report funded by the Department of Justice's Bureau of Justice Assistance, the RAND

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<sup>40</sup> MGMT. & TRAINING CORP., *THE CHALLENGE OF TEACHING (AND LEARNING) IN PRISON 3* (2003), *formerly available at* <http://www.mtctrains.com/institute/publications/RP-TheChallengeofTeachingandLearninginPrison.pdf> (URL became unavailable during the editing process), *archived at* <http://perma.cc/F4UT-FEFR?type=pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Esperian, *supra* note 6, at 320.

<sup>44</sup> *Id.*

<sup>45</sup> Mills Discussion, *supra* note 38. See RICHARD J. COLEY & PAUL E. BARTON, EDUC. TESTING SERV., *LOCKED UP AND LOCKED OUT: AN EDUCATIONAL PERSPECTIVE ON THE U.S. PRISON POPULATION 16* (2006), *available at* <http://www.ets.org/Media/Research/pdf/PIC-LOCKEDUP.pdf>, *archived at* <http://perma.cc/DJ4H-JV6K> (describing how a variety of states have not only made education available to inmates, but have made participation mandatory as long as the inmate is incarcerated and have offered incentives for participation).

<sup>46</sup> See COLEY & BARTON, *supra* note 45 at 3 (pointing out that one of the challenges ex-inmates face after release is that they have “little education and low literacy levels [which is] not desired by employers”).

Corporation used meta-analytic data to find that “receiving correctional education while incarcerated reduces an individual’s risk of recidivating after release.”<sup>47</sup> Numerous other studies have also confirmed that correctional education programs reduce recidivism: a research study involving eight states showed that correctional education programs reduced recidivism rates from 49% to 20%.<sup>48</sup> A different single-state study, which looked particularly at incarcerated women with children, reported that the recidivism rate was 6.71% for those who earned their GED or 8.75% for those who participated in vocational training, compared to 26% for those who did not participate in either vocational or academic training.<sup>49</sup> A three-state recidivism study of 3,170 released male and female inmates also confirmed the impact of correctional education on recidivism.<sup>50</sup> In each state, the recidivism rates of participants in correctional education programs were lower than the rates of nonparticipants.<sup>51</sup> In 2010, the RAND Corporation “undert[ook] a comprehensive review of the scientific literature and a meta-analysis to synthesize the findings from multiple studies as to the effectiveness of correctional education programs in helping to reduce recidivism and improve postrelease employment outcomes.”<sup>52</sup> It published its findings in 2013, finding that “inmates who participated in high school [or] GED programs had 30 percent lower odds of recidivating than those who had not.”<sup>53</sup>

Correctional education’s impact on employment is notable as well. The three-state recidivism study found that those who participated in correctional education had higher yearly wages than those who did not.<sup>54</sup> Similarly, the RAND study reported that employment for those who participated in correctional education programs was 13% higher than nonparticipants.<sup>55</sup> This “positive association”<sup>56</sup> between correctional education and employment may contribute to lower rates of recidivism because employment “refocuses individuals’ time and efforts on prosocial activities,”<sup>57</sup> brings individuals in “frequent contact with conventional

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<sup>47</sup> DAVIS ET AL., *supra* note 4, at xvi.

<sup>48</sup> Esperian, *supra* note 6, at 323.

<sup>49</sup> *Id.*

<sup>50</sup> STEURER & SMITH, *supra* note 4, at 10.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> DAVIS ET AL., *supra* note 4, at v.

<sup>53</sup> *Id.* at xvi (emphasis omitted).

<sup>54</sup> STEURER & SMITH, *supra* note 4, at 14.

<sup>55</sup> Press Release, RAND Corp., Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook (Aug. 22, 2013), *available at* <http://www.rand.org/news/press/2013/08/22.html>, *archived at* <http://perma.cc/NL6C-F956>.

<sup>56</sup> DAVIS ET AL., *supra* note 4, at xvi–xvii.

<sup>57</sup> LE’ANN DURAN ET AL., THE COUNCIL OF STATE GOV’TS JUSTICE CTR., INTEGRATED

others,”<sup>58</sup> and places former inmates in a social context that promotes conformity.<sup>59</sup> The results from a series of studies in 2000 to evaluate the effectiveness of Texas’s prison educational program, like the three-state recidivism study and RAND study, suggest that education increases the likelihood of employment and higher wages after release.<sup>60</sup> The studies’ results go a step further, however, by finding that employment leads to reduced recidivism rates.<sup>61</sup>

Studies have shown a direct correlation between a lack of education and incarceration: about 40% of state prisoners do not have their high school diploma or GED,<sup>62</sup> compared to 18% of the unincarcerated population.<sup>63</sup> Thus, allowing inmates to leave prison with the same educational deficiencies with which they arrived may increase the chances

REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS 2 (2013), available at <https://www.bja.gov/publications/csg-reentry-and-employment.pdf>, archived at <http://perma.cc/UC3D-SJZT>.

<sup>58</sup> Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 AM. SOC. REV. 529, 529 (2000).

<sup>59</sup> *Id.*

<sup>60</sup> See Tony Fabelo, *The Impact of Prison Education on Community Reintegration of Inmates: The Texas Case*, 53 J. CORRECTIVE EDUC. 106, 109 (2002) (reporting that “[t]he nonreader who became a reader had an employment rate that was 18% higher than the employment rate of nonreaders . . . [and] those who earned a GED had an employment rate that was 7% higher than those who did not earn a GED” and that wages for those literate or holding GEDs were higher than for those who remained illiterate or without GEDs). Fabelo also noted that inmates who enter prison at lower educational levels and achieve to higher levels improve their employment prospects more than those who entered with relatively higher education levels and achieve a higher education. *Id.*

<sup>61</sup> *Id.* (reporting that employed former inmates had a 20% lower two-year recidivism rate than those unemployed, though noting that higher wages, regardless of educational level, were connected to lower rates of recidivism); see also Uggen, *supra* note 58, at 542–43 (finding that former inmates twenty-six years old and over were less likely to reoffend if given marginal employment opportunities compared to similarly-aged offenders who are not given such opportunities, but employment did not have the same impact on former inmates under age twenty-six).

<sup>62</sup> Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. FOR SOC. JUST. 293, 298 (2006) (citing CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://www.bjs.gov/content/pub/pdf/ecp.pdf>, archived at <http://perma.cc/NY4Q-S4VS>).

<sup>63</sup> *Id.* at 335 n.40 (citing HARLOW, *supra* note 62, at 1). A different source compares 40% of state prisoners without their high school diplomas or GEDs to 13.7% of adults between the ages of eighteen and sixty-four without the same level of academic achievement. ANNE RODER, ECON. MOBILITY CORP., STRENGTHENING CORRECTIONAL EDUCATION FOR ADULTS 1 (The Working Poor Families Project Policy Brief, Summer 2009), available at <http://www.workingpoorfamilies.org/pdfs/policybrief-summer09.pdf>, archived at <http://perma.cc/76F9-956A>.

that an inmate recidivates.<sup>64</sup> As the above studies demonstrate, correctional education can have a significant impact on recidivism rates.

### III. PRISONERS' LEGAL RIGHTS TO EDUCATION

However the system struggles to meet the needs of inmates with learning disabilities, the fact remains that educational programming in prisons is a vital means by which inmates access education.<sup>65</sup> Thus, if an inmate with a learning disability needs additional time for tests or assignments, or targeted instruction to help with challenging subjects, or simply cannot keep up in a general education classroom, what legal rights does he have to improve his access to education? Part III presents the ways an inmate might challenge correctional education programs. Theoretically, he can bring constitutional challenges and claims under disability statutes to get appropriate remedies such as accommodations or modifications. In reality, inmates have a low probability of obtaining these remedies through the legal process.

#### A. CONSTITUTIONAL CHALLENGES

First, prisoners, like non-prisoners, do not have a constitutional right to education in the United States.<sup>66</sup> The Supreme Court has stated that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”<sup>67</sup> Since there is no fundamental or constitutional right to education, there is no constitutional basis to challenge the failure to provide adequate educational programs.<sup>68</sup> Without a constitutional right to education, there is certainly none to rehabilitation, which could be another way to request education access.<sup>69</sup> The Eighth Amendment, which permits inmates to bring causes of action when prison conditions and practices constitute “cruel and unusual punishment,” could be an avenue for making a constitutional challenge.<sup>70</sup> However, failing to provide adequate educational programming rarely falls within the scope of cruel and unusual punishment.<sup>71</sup> Thus, inmates with learning disabilities cannot rely on the constitution alone to get adequate educational services.

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<sup>64</sup> Colgan, *supra* note 62, at 298.

<sup>65</sup> See *supra* subpart I(B).

<sup>66</sup> See Greene, *supra* note 28, at 177 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

<sup>67</sup> *Rodriguez*, 411 U.S. at 35.

<sup>68</sup> See *id.*; Whitney, *supra* note 15, at 790.

<sup>69</sup> Whitney, *supra* note 15, at 790.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; see *Johnson v. Randle*, 451 F. App'x 597, 599 (7th Cir. 2011) (dismissing

## B. STATUTORY CHALLENGES TO PRISON EDUCATION PROGRAMS

Without the ability to make constitutional challenges, adult inmates with learning disabilities can turn to three federal disability statutes to access greater education in prison. Section 504 of the Rehabilitation Act,<sup>72</sup> Title II of the Americans with Disabilities Act of 1990 (ADA),<sup>73</sup> and the Individuals with Disabilities Education Act (IDEA)<sup>74</sup> provide potential avenues for inmates. While these statutes provide much-needed protection for prisoners with a variety of disabilities, procedural barriers still remain, and inmates with learning disabilities continue to have difficulties in challenging education programs.

### *i. Section 504 of the Rehabilitation Act and Title II of the ADA*

#### a. Purposes of § 504 and Title II

The Rehabilitation Act “protects qualified individuals from discrimination based on their disability.”<sup>75</sup> Section 504 in particular mandates that individuals with disabilities cannot be excluded from participating in, denied the benefits of, or subjected to discrimination in “any program or activity receiving Federal financial assistance” or carried out by any executive agency of the federal government.<sup>76</sup> These “program[s] or activit[ies]” include federal jails, prisons, and other detention facilities.<sup>77</sup>

The ADA, signed into law in 1990<sup>78</sup> and amended in 2008,<sup>79</sup> expanded the reach of § 504 of the Rehabilitation Act and has the greatest potential

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inmate’s Eighth Amendment action seeking learning disability testing and special education services because the Eighth Amendment “does not compel prison administrators to provide general educational programs for inmates”).

<sup>72</sup> 29 U.S.C. § 794(a) (2012).

<sup>73</sup> 42 U.S.C. §§ 12131–12134 (2012).

<sup>74</sup> 20 U.S.C. §§ 1400–1482 (2012).

<sup>75</sup> OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUMAN SERVS., FACT SHEET: YOUR RIGHTS UNDER SECTION 504 OF THE REHABILITATION ACT (2006), available at <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504.pdf>, archived at <http://perma.cc/F5YX-NMC2>. The Rehabilitation Act was enacted in 1973. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

<sup>76</sup> 29 U.S.C. § 794(a); see John Parry, *Disability Discrimination Law in Correctional Facilities*, 24 CRIM. JUST. 20, 21 (2009).

<sup>77</sup> 29 U.S.C. § 794(b); Parry, *supra* note 76, at 21.

<sup>78</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)); see CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *Introduction to the ADA*, ADA.GOV, [http://www.ada.gov/ada\\_intro.htm](http://www.ada.gov/ada_intro.htm) (last visited Sept. 23, 2014), archived at <http://perma.cc/C8JU-56ZB>.

<sup>79</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 29 and 42 U.S.C.); see Parry, *supra* note 76, at 21.

impact for inmates with learning disabilities.<sup>80</sup> In particular, Title II of the ADA applies to both federal and state prisons<sup>81</sup> and prohibits discrimination based on disability by any public entity, regardless of whether it receives federal funding.<sup>82</sup> Litigants may bring § 504 and Title II claims together; Section 504 applies to the entities that receive federal assistance, and Title II applies to all state and local government agencies regardless of whether they receive federal funding.<sup>83</sup>

#### b. Bringing Claims Under § 504 and Title II

An inmate who has been excluded from participation, denied benefits, or subjected to discrimination by a federal or state prison can bring a claim under Title II of the ADA.<sup>84</sup> He can also bring a claim under § 504 of the Rehabilitation Act because it is litigated similarly to a claim under Title II. Since § 504 laid the groundwork for Title II, the language of these statutes is quite similar.<sup>85</sup> For § 504 claims, litigants must prove that they have a

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<sup>80</sup> See Parry, *supra* note 76, at 21.

<sup>81</sup> After the Supreme Court's ruling in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), state prisons are now included under the statute's definition of "public entity." The Court held that "[s]tate prisons fall squarely within the statutory definition of 'public entity,' which includes 'any . . . instrumentality of a State . . . or local government.'" *Id.* at 210 (quoting 42 U.S.C. § 12131(1)(B)).

<sup>82</sup> 42 U.S.C. § 12132. Note that the ADA does not mention that the public entity must receive federal funding like the Rehabilitation Act requires. Compare 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (emphasis added)), with 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." (emphasis added)).

<sup>83</sup> See Parry, *supra* note 76, at 22; *id.* at 24 ("Today, plaintiffs may use section 504—as well as Title II—to challenge public entities' discriminatory actions. The ADA specifies that all of its provisions and regulations are incorporated by reference under section 504."). See also OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERVS., KNOW THE RIGHTS THAT PROTECT INDIVIDUALS WITH DISABILITIES FROM DISCRIMINATION, available at <http://www.hhs.gov/ocr/civilrights/resources/factsheets/504ada.pdf> (last visited Sept. 23, 2014), archived at <http://perma.cc/7HCA-6SYJ>.

<sup>84</sup> 42 U.S.C. § 12132; Parry, *supra* note 76, at 21.

<sup>85</sup> Compare 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."), with 29 U.S.C. § 794(a) (2012) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .").

disability using similar criteria to the ADA.<sup>86</sup> They must also show that they are “qualified”—again, using a similar standard to the ADA.<sup>87</sup>

To bring a successful claim, the inmate must first prove that he has a disability that substantially limits a major life activity, has a record of a mental or physical impairment, or is regarded as having an impairment.<sup>88</sup> Next, the inmate must demonstrate that he is “qualified,” meaning that he is capable of participating in the prison education program with or without reasonable modifications.<sup>89</sup> Essentially, the inmate with a learning disability needs to prove that a reasonable modification to educational programming would allow him to access education the way his nondisabled peers in prison do. Once an inmate has shown that he has a disability and is qualified, he is entitled to receive reasonable modifications.<sup>90</sup> However, the prison may present an affirmative defense.<sup>91</sup> If it can prove that the requested modifications would fundamentally alter the nature of the prison or impose an undue burden, it does not have to provide them.<sup>92</sup>

### c. Difficulties with Bringing Claims Under § 504 and Title II

The body of case law regarding adult inmates with learning disabilities bringing claims against correctional education programs for education access is small. This underutilization of federal statutes might be explained by the challenges of bringing § 504 and Title II claims. First, the Prison Litigation Reform Act (PLRA)<sup>93</sup> creates a great hurdle for prisoners to bring claims under the Rehabilitation Act or the ADA<sup>94</sup> by requiring them to first

<sup>86</sup> See 29 U.S.C. § 705(20) (2012); 29 U.S.C. § 794(a).

<sup>87</sup> 29 U.S.C. § 794(a). See Civil Rights Div., U.S. Dep’t of Justice, *supra* note 78.

<sup>88</sup> Definition of Disability, 42 U.S.C. § 12102; Parry, *supra* note 76, at 22.

<sup>89</sup> 42 U.S.C. § 12131(2); Brian Lester, *The Americans with Disabilities Act and the Exclusion of Inmates from Services in Prisons: A Proposed Analytical Approach Regarding the Appropriate Level of Judicial Scrutiny of a Prisoner’s ADA Claim*, 79 N.D. L. REV. 83, 88 (2003).

<sup>90</sup> Lester, *supra* note 89, at 88. See 1 AMERICANS WITH DISABILITIES PRACTICE AND COMPLIANCE MANUAL § 2:90 (Supp. Aug. 2014) [hereinafter PRACTICE AND COMPLIANCE]; Glenda K. Harnad et al., 14 C.J.S. Civil Rights § 101 (last updated Sept. 2014). Title I of the ADA regarding equal opportunity for individuals with disabilities in the employment setting defines “reasonable accommodation.” 42 U.S.C. § 12111(9).

<sup>91</sup> Lester, *supra* note 89, at 88.

<sup>92</sup> *Id.* See PRACTICE & COMPLIANCE, *supra* note 90, § 2:90; Harnad et al., *supra* note 90. Title I of the ADA defines “undue hardship” and spells out the affirmative defense. See 42 U.S.C. §§ 12111(10), 12112(b)(5)(A).

<sup>93</sup> 18 U.S.C. § 3626 (2012); 42 U.S.C. § 1997e (2012).

<sup>94</sup> The IDEA, 20 U.S.C. §§ 1400–1482 (2012), has its own separate exhaustion requirements. See *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875–79 (9th Cir. 2011). It is not quite clear whether an inmate would be required under the PLRA to exhaust all the IDEA administrative remedies before bringing claims against a prison. See JOHN BOSTON,

exhaust administrative remedies before bringing claims about prison conditions.<sup>95</sup> This hurdle delays or even prevents inmates from actually bringing claims in court.<sup>96</sup> The PLRA is meant to prevent meritless lawsuits and reduce strain on the judiciary.<sup>97</sup> But it has also been quite a successful procedural defense against inmates bringing even meritorious claims.<sup>98</sup> It not only delays potential claims against the correctional facilities, but limits the remedies federal courts can provide to redress illegal discrimination.<sup>99</sup>

Another challenge is that the ADA does not explicitly cover learning disabilities.<sup>100</sup> An inmate who wishes to prove that he has a qualifying disability under the ADA must demonstrate one of the following: his learning disability is a physical or mental impairment that “substantially limits one or more major life activities”; he has documentation of his learning disability; or the prison has regarded him as having a learning disability.<sup>101</sup> This definition creates a hurdle that inmates with learning disabilities may not be able to overcome. For example, needing documentation for the learning disability narrows the number of inmates who can bring claims. While this way of proving “disability” is not a barrier for inmates who were tested and qualified for special education services as children, it excludes inmates who were not tested during childhood.<sup>102</sup>

Without documentation, prisoners must rely on proving that they have a disability that “substantially limits one or more major life activities.”<sup>103</sup>

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THE LEGAL AID SOCIETY, THE PRISON LITIGATION REFORM ACT 96 & n.406 (2006), available at [http://www.law.yale.edu/documents/pdf/Boston\\_PLRA\\_Treatise.pdf](http://www.law.yale.edu/documents/pdf/Boston_PLRA_Treatise.pdf), archived at <http://perma.cc/YT9D-7TF5> (noting that it remains unaddressed whether the PLRA requires an inmate bringing claims regarding education services under the IDEA to exhaust all of the IDEA’s exhaustive remedies).

<sup>95</sup> 42 U.S.C. § 1997e.

<sup>96</sup> See Parry, *supra* note 76, at 24. Inmates need to give a written description of their complaints, called grievances, to a prison official. AM. CIVIL LIBERTIES UNION, KNOW YOUR RIGHTS: THE PRISON LITIGATION REFORM ACT (PLRA) (2002), available at [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file79\\_25805.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf), archived at <http://perma.cc/6X3M-FC2Y>.

<sup>97</sup> Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 290–91 (2004).

<sup>98</sup> See Parry, *supra* note 76, at 24.

<sup>99</sup> *Id.* There have been instances where courts have had to vacate injunctions in inmates’ favor or shifted the burden of proof onto inmates because PLRA requirements were not strictly met. See *id.*

<sup>100</sup> See 42 U.S.C. § 12102 (2012); Barker, *supra* note 9, at 331–33.

<sup>101</sup> 42 U.S.C. § 12102. See Barker, *supra* note 9, at 331.

<sup>102</sup> Documentation of a learning disability allows an inmate to qualify as having a disability under the ADA. See *Arlt v. Mo. Dep’t of Corr.*, 229 F. Supp. 2d 938, 940 (E.D. Mo. 2002) (explaining that defendants do not dispute that inmate with recorded learning disability was qualified within the meaning of the Rehabilitation Act and ADA).

<sup>103</sup> 42 U.S.C. § 12102.

The ADA Amendments Act of 2008 actually made it easier for plaintiffs to show that they have a disability by listing activities that are automatically considered major life activities for the purpose of qualifying as disabled.<sup>104</sup> The amendments also stated that mitigating measures, such as medication, would not be considered when determining whether an impairment substantially limits a major life activity.<sup>105</sup> Lastly, under the amendments, a plaintiff can demonstrate disability by proving that the prison “regarded” him as having an impairment; in other words, that the prison treated the inmate as if he had a disability, whether or not he actually did.<sup>106</sup>

While Congress intended to broaden the definition of disability and help plaintiffs bring their claims in court,<sup>107</sup> it can still be difficult for prisoners to demonstrate that their learning disabilities qualify as disabilities. Even if an inmate can meet one or more of the requirements of the ADA, prisons can always raise the affirmative defense that the requested reasonable modification or accommodation would fundamentally change the prison or create an undue burden.<sup>108</sup> Indeed, courts tend to give “considerable discretion” to the prison administrators when determining whether modification would fundamentally alter the prison.<sup>109</sup> Therefore, inmates with qualifying disabilities still struggle to find success with their claims under § 504 and the ADA.

*ii. The Individuals with Disabilities Education Act*

*a. Purpose of the IDEA*

The purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that

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<sup>104</sup> See 42 U.S.C. § 12102(2); Parry, *supra* note 76, at 22. “Major life activities” may “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *The ADA Amendments Act of 2008: Frequently Asked Questions*, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP’T OF LABOR, <http://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm#Q1> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/3SAF-W5D7>.

<sup>105</sup> See 42 U.S.C. § 12102(4)(E)(i); Parry, *supra* note 76, at 22.

<sup>106</sup> See 42 U.S.C. § 12102(1)(C); Parry, *supra* note 76, at 22. Even for an inmate that proves “disability” by showing that the prison regarded him as disabled, the prison would not be required to provide accommodations. See OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, *supra* note 104.

<sup>107</sup> 42 U.S.C. §§ 12102, 12131. See OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, *supra* note 104.

<sup>108</sup> An accommodation could be reasonable and not impose an undue burden if the cost, given the entity’s overall financial resources and type of operations, is low enough so that the entity is not “fundamentally alter[ed].” See Parry, *supra* note 76, at 23.

<sup>109</sup> *Id.* at 25.

emphasizes special education and related services designed to meet their unique needs . . . .<sup>110</sup> While inmates with learning disabilities can bring claims under the IDEA, its application is quite limited for adult prisoners because its focus is juveniles with disabilities.<sup>111</sup> It requires “states receiving federal funding to provide a free and appropriate public education to all eligible youth with disabilities through the age of twenty-one in the least restrictive environment.”<sup>112</sup> It also provides “youth with disabilities and their parents procedural and substantive rights concerning student assessment, disability identification, and specialized education.”<sup>113</sup> A narrow demographic of adults inmates—those between eighteen and twenty-one years old—can rely on the IDEA to enforce their rights if they have a specific learning disability.<sup>114</sup>

#### b. Bringing Claims Under the IDEA

In practice, the age limitations of the IDEA may be even more restricted because a state may choose to specify in law that special education services “do not have to be provided to correction inmates over 18 because they had never been identified as an eligible child with a disability before incarceration.”<sup>115</sup> After amendments in 1997, the IDEA created this exemption that allowed states to limit its obligation to provide a free appropriate public education to individuals up to the age of twenty-one.<sup>116</sup> Despite the fact that a significant portion of youths that end up in the juvenile system have undiscovered education-related disabilities, states can

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<sup>110</sup> 20 U.S.C. § 1400(d)(1)(A) (2012). See Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 231–32 (2013).

<sup>111</sup> See 20 U.S.C. § 1400(d)(1)(A).

<sup>112</sup> Sheldon-Sherman, *supra* note 110, at 231–32.

<sup>113</sup> *Id.* at 231; see 20 U.S.C. §§ 1400.

<sup>114</sup> See Sheldon-Sherman, *supra* note 110, at 232.

<sup>115</sup> Parry, *supra* note 76, at 26; see 20 U.S.C. § 1412(a)(1)(B)(ii). This issue was recently discussed by the Ninth Circuit in *Los Angeles Unified School District v. Garcia*, 669 F.3d 956 (9th Cir. 2012), where the court decided to certify to the California Supreme Court the question of whether the state is required to provide special education services to incarcerated eighteen to twenty-one year olds. *Id.* at 958.

<sup>116</sup> See 20 U.S.C. § 1412(a)(1)(B)(ii); Sheri Meisel et al., *Collaborate to Educate: Special Education in Juvenile Correctional Facilities*, NAT’L CTR. ON EDUC., DISABILITY, & JUVENILE JUSTICE (1998), [http://www.edjj.org/Publications/list/meisel\\_henderson\\_cohen\\_leone-1998.html](http://www.edjj.org/Publications/list/meisel_henderson_cohen_leone-1998.html), archived at <http://perma.cc/G9Q8-XRJX> (“The 1997 reauthorization of IDEA . . . permits states to exempt adult correctional facilities from responsibility for providing special education to youth from 18 to 21 years of age if, prior to their incarceration, they were not identified as disabled and did not have an IEP in their last educational placement.”).

legislate away their moral obligation to support young adults with disabilities that end up in prison after they are eighteen years old.<sup>117</sup>

Washington has gone even further with this provision. In *Tunstall v. Bergeson*, the Washington Supreme Court found that “the State is not obligated to provide an identical education to all children within the state regardless of the circumstances in which they are found.”<sup>118</sup> Essentially, “*regardless of the circumstances involved*, the state was not required under federal or state law to provide special education services to corrections inmates between 18 and 22 years of age.”<sup>119</sup> Adult inmates in Washington between eighteen and twenty-two years old with learning disabilities, whether identified before incarceration or not, thus have no standing to bring IDEA claims. Legal rights under the IDEA essentially do not extend to adult inmates in Washington.

### *iii. Litigation Is an Inadequate Solution*

Litigating under these statutes appears to be the only way for these prisoners to try to have their educational needs met. Achieving success through litigation is difficult, however, as the inmates must have standing under the act, administrative remedies must be exhausted, the undue burden defense must be overcome, and, if invoked, inmates must fall within the narrow application of the IDEA.<sup>120</sup> Even in the case where a claim might be successful, the inmate will most likely not receive reasonable modifications or accommodations until the lengthy litigation process, which can take years, has completed.<sup>121</sup> But inmates with learning disabilities need support in education programs *now*, not later. As the litigation regime continues to provide limited, if any, redress for these inmates, their access to education remains impacted.

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<sup>117</sup> Parry, *supra* note 76, at 26.

<sup>118</sup> *Tunstall v. Bergeson*, 5 P.3d 691, 701 (Wash. 2000) (emphasis omitted).

<sup>119</sup> Parry, *supra* note 76, at 26 (emphasis added).

<sup>120</sup> See *supra* subparts III(B)(i)–(ii).

<sup>121</sup> See, e.g., *Shaw v. N.Y. Dep’t of Corr. Servs.*, 451 F. App’x 18, 20 (2d. Cir. Dec. 15, 2011) (reversing dismissal of inmate’s request for reasonable accommodations for his learning disability in the prison education program, but then remanding the claim and requiring inmate to return to prison grievance system for further review of his request). This is an example of an inmate being semi-successful in his claim, having dismissal reversed, but still having to go through more administrative requirements before he can get his accommodations.

IV. DISCUSSION OF *ADULT* INMATES WITH LEARNING DISABILITIES IS LACKING

Part of the limited redress in courts might be due to the lack of public and political discourse about learning disabilities in prisons. Despite the alarmingly high percentage of adults with learning disabilities in prisons, minimal discussion or research about this population exists. Many journal articles and studies have examined the U.S. prison population from a variety of angles. While this research brings attention to much-needed prison issues, too few articles focus on adult prisoners with learning disabilities. Most authors' studies and research are not specific to inmates with learning disabilities nor are their recommendations tailored to solving the needs of this particular population.<sup>122</sup> At best, the existing discussions describe the number of inmates with learning disabilities in one paragraph—or sometimes one or two sentences—to help paint a picture of the troubled state of incarceration.<sup>123</sup> Reports and articles regarding prisoners with disabilities or correctional education in general get closer to addressing adult inmates with learning disabilities, but, again, the discussion is limited.<sup>124</sup>

On the other hand, journal articles and studies examining incarcerated youth with learning disabilities are abundant. This is surprising given that youth with learning disabilities in the juvenile justice system are overrepresented in the same way adults with learning disabilities are overrepresented in the general prison population. While 9%–13% of public school students have disabilities, 30%–70% of youth in the juvenile justice

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<sup>122</sup> See, e.g., Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California Parolees in Parole Revocation Proceedings*, 33 W. ST. U. L. REV. 1 (2006). In arguing that California's right to counsel in parole revocation proceedings should be adopted in other states, Zucker devotes one paragraph to describing parolees with disabilities' right to counsel, but since inmates with learning disabilities are not the focus of his article, he does not detail what kinds of disabilities are involved. *Id.* at 7–8. See also Caroline Wolf Harlow et al., *GED Holders in Prison Read Better than Those in the Household Population: Why?*, 61 J. CORRECTIONAL EDUC. 68 (2010). Harlow discusses prisoners with learning disabilities in her literature review and analysis of data, which supports the finding that GED holders in prison have higher prose scores than those outside of prison. *Id.* at 68. The article reviews several other factors, concluding that inmates are reading more in prisons and improving their literacy. *Id.* at 68.

<sup>123</sup> See, e.g., Cindy Chen, Comment, *The Prison Litigation Reform Act of 1995: Doing Away with More than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 215 (2004) (arguing that the PLRA has the potential to bar meritorious claims, and stating in one sentence that “[a] great deal of prisoners . . . have learning disabilities” to support the proposition that prisoners' lawsuits may not be as frivolous as they appear).

<sup>124</sup> See, e.g., J.M. Kirby, Comment, *Graham, Miller & the Right to Hope*, 15 CUNY L. REV. 149, 162–63 (2011) (discussing inmates with learning disabilities in one sentence to support the larger argument that “education in prisons represents a continued denial of education” to a population that had inadequate access to education before incarceration).

system have disabilities, with specific learning disability<sup>125</sup> being one of the most common conditions.<sup>126</sup> Similarly, 30%–50% of the adult prison population has a learning disability even though only about 6% of the adult nonprison population has one.<sup>127</sup> A few reasons might explain the stark contrast in discussions between juveniles and adults with learning disabilities.

First, juveniles have stronger legal rights regarding education than adults: the IDEA protects youth with learning disabilities in a way that the Rehabilitation Act and ADA do not protect adults. The IDEA explicitly covers learning disabilities, mandates special education services for students identified as having a “specific learning disability,” and provides certain rights to juveniles for the assessment of learning disabilities.<sup>128</sup> The federal statutes available to adults, § 504 of the Rehabilitation Act and Title II of the ADA, do not provide these protections.<sup>129</sup> The statutes do not explicitly cover learning disabilities, mandate specialized educational services, or provide rights to inmates to request assessments.<sup>130</sup> Simply put, prisons *must* support juveniles with learning disabilities, whereas providing the same kinds of services for adult inmates with learning disabilities is not so heavily mandated.

Another reason for the focus solely on correctional education quality for youth might be that education as a cost-effective tool to reduce recidivism is more effective at the juvenile level. Educating incarcerated juveniles helps redirect lives at an earlier stage.<sup>131</sup> The earlier a youth can

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<sup>125</sup> Sheldon-Sherman, *supra* note 110, at 229. “Specific learning disability” is a term used to describe “a disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.” 20 U.S.C. § 1401(30) (2012).

<sup>126</sup> Sheldon-Sherman, *supra* note 110, at 229. See Jamie Polito Johnston, Note, *Depriving Washington State’s Incarcerated Youth of an Education: The Debilitating Effects of Tunstall v. Bergeson*, 26 SEATTLE U. L. REV. 1017, 1018 (2003) (“A recent study has estimated that 35.6% of juvenile offenders have learning disabilities . . .”); *Fast Facts: Students with Disabilities*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Sept. 23, 2014), *archived at* <http://perma.cc/FT7H-M7NC> (reporting that roughly 5% of the 13% of students receiving special education services in public schools have specific learning disabilities, which constitutes the largest eligibility category).

<sup>127</sup> CRAYTON & NEUSTETER, *supra* note 14, at 5.

<sup>128</sup> 20 U.S.C. § 1414; Sheldon-Sherman, *supra* note 110, at 232 (noting that the IDEA mandates correctional facilities “to provide youth with disabilities with a specialized education, particularly tailored to meet their needs, and in the least restrictive environment appropriate with youth who are not disabled” (citations omitted)).

<sup>129</sup> See 29 U.S.C. § 794(a) (2012); 42 U.S.C. §§ 12131–12165 (2012).

<sup>130</sup> See 29 U.S.C. § 794(a); 42 U.S.C. §§ 12131–12132.

<sup>131</sup> See Johnston, *supra* note 126, at 1019.

acquire educational skills, the higher the chances that he will exit the juvenile system and become a productive member of society.<sup>132</sup> Ideally, adult recidivism for juveniles is avoided altogether. This rationale remains true for juvenile inmates with learning disabilities because significant educational gains can be made in a short period of time through sufficient levels of support.<sup>133</sup> However, as shown by the statistics that recidivism rates in adults are lowered through education, even if education might work better for youths, the conversation in regards to adults should not be ignored.<sup>134</sup>

#### V. PROVIDING CORRECTIONAL EDUCATION FOR ADULT INMATES WITH LEARNING DISABILITIES CAN FURTHER REDUCE RECIDIVISM RATES

In light of the significant percentage of adult inmates with learning disabilities in American prisons, the theory of reducing recidivism rates through education must include supports for these prisoners. The statistics on education's impact on recidivism rates are compelling—they suggest that programs can decrease recidivism and save costs for states and the federal government.<sup>135</sup> And 30%–50% of the prison population is estimated to have a learning disability.<sup>136</sup> Some prisoners already know of their learning disabilities from testing in primary or secondary school; others have yet to identify that their learning challenges are related to a learning disability since many inmates were not previously tested in school.<sup>137</sup> It cannot be ruled out that some inmates with learning disabilities have benefitted from correctional educational programs as they exist now and have not recidivated because of their correctional education. However, recidivism rates could likely be even lower if the needs of this special population were met. Currently, support for inmates with learning disabilities is lacking: there is no testing for learning disabilities in correctional education programs, specialized educational curriculum, training for correctional educators, or significant research regarding this population. Until these supports are in place, education's full impact on recidivism cannot be observed.

Correctional education programs must be reformed not just because education is an effective tool for reducing recidivism, but also because it is

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<sup>132</sup> See Sheldon-Sherman, *supra* note 110, at 228 (providing the example that in California, “youth parolees are three to five times more likely to succeed on parole if they earn a high school diploma or GED prior to their release”).

<sup>133</sup> See *id.* at 230.

<sup>134</sup> See *supra* Part II.

<sup>135</sup> See Sheldon-Sherman, *supra* note 110, at 230.

<sup>136</sup> TOLBERT, *supra* note 3, at 11.

<sup>137</sup> Parry, *supra* note 76, at 26.

cost-effective. Decreases in recidivism rates from correctional education programs save states millions of dollars that would have been spent on reincarcerating inmates.<sup>138</sup> For example, government analysts in Maryland calculated that a drop in recidivism saved the state \$24 million, which was twice the state's investment in correctional education.<sup>139</sup> A meta-analysis of correctional education programs conducted by the RAND Corporation also confirmed the cost-effectiveness of correctional education programs.<sup>140</sup> It revealed that the direct cost of educating inmates is about \$1,400–\$1,744 per inmate compared to reincarceration costs of \$8,700–\$9,700 per inmate.<sup>141</sup> Essentially, every dollar spent on correctional education saves four or five dollars in reincarceration costs during the three years after release.<sup>142</sup>

Education may be the least costly option for reducing recidivism when compared to alternative solutions. A recent study found that every \$1 million invested into incarceration prevented 350 crimes whereas the same investment into correctional education prevented 600 crimes.<sup>143</sup> This suggests that education, compared to “tough on crime” policies that lengthen incarceration, may be a cheaper way to reduce recidivism.<sup>144</sup> This study also found that a state's one million dollar investment in correctional education could prevent twenty-six reincarcerations a year.<sup>145</sup> On the other hand, if a state decided not to invest money in their correctional education programs, they would end up spending \$1.6 million in reincarceration costs.<sup>146</sup> Ultimately, a state could have saved \$600,000 by investing \$1 million in correctional education.<sup>147</sup>

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<sup>138</sup> STEURER & SMITH, *supra* note 4, at 2.

<sup>139</sup> *Id.*

<sup>140</sup> RAND CORP., *supra* note 55. See DAVIS ET AL., *supra* note 4, at xviii (stating that the “cost analysis suggests that correctional education programs are cost-effective . . . [W]e estimated that the three-year reincarceration costs for those who did not receive correctional education would be between \$2.94 million and \$3.25 million. In comparison, for those who did receive correctional education, the . . . costs would be between \$2.07 million to \$0.97 million *less* for those who receive correctional education.”)

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> AUDREY BAZOS & JESSICA HAUSMAN, UCLA SCH. OF PUB. POLICY & SOC. RESEARCH, CORRECTIONAL EDUCATION AS A CRIME CONTROL PROGRAM 2, 5–6 (Mar. 2004), *available at* <http://www.ceanational.net/PDFs/ed-as-crime-control.pdf>, *archived at* <http://perma.cc/U5D9-Z4RE> (reporting these results based off a study comparing the cost-effectiveness of incarceration and education by looking at the reductions in recidivism in Maryland, Minnesota, and Ohio).

<sup>144</sup> *Id.* at 7.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

Other benefits from education's impact on recidivism provide compelling reasons to invest in and reform correctional education programs. From a public safety viewpoint, correctional education programs are a viable solution in light of the reality that hundreds of thousands of inmates are released back to the community every year.<sup>148</sup> Educating inmates that will inevitably be released can reduce the number of reoffenders and reincarcerations. It can also prevent thousands of new victimizations each year.<sup>149</sup> And from a social viewpoint, inmates who receive their education and do not return to criminal behavior can stay out of prison and become productive, employed citizens who take care of their families.<sup>150</sup> The children of these released inmates no longer have to live without the emotional and financial support of a parent.<sup>151</sup>

## VI. POSSIBLE SOLUTIONS

Correctional institutions must make changes to educational programming to maximize the benefits of educating prisoners. In its current state, education as a cost-effective means for reducing recidivism is underutilized because it is designed to rehabilitate only one kind of inmate—the one without a learning disability. This kind of programming leaves the educational needs of a significant portion of the prison population unaddressed. Prisons must support these inmates because individuals with learning disabilities have an increased chance of entering the criminal justice system.<sup>152</sup> A national study found that 20% of students with learning disabilities had been arrested less than two years after exiting school, and 31% had been arrested three-to-five years after leaving secondary school.<sup>153</sup> Of the students with learning disabilities who had dropped out of school, 56.4% were arrested three-to-five years after high

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<sup>148</sup> TOLBERT, *supra* note 3, at 1 (reporting that nearly 600,000 inmates were released in 2000).

<sup>149</sup> *Id.*

<sup>150</sup> STEURER & SMITH, *supra* note 4, at 2.

<sup>151</sup> See Raymond R. Swisher & Unique R. Shaw-Smith, *Paternal Incarceration and Adolescent Well-Being: Life Course Contingencies and Other Moderators*, 104 J. CRIM. L. & CRIMINOLOGY 929, 957 (2014) (finding that paternal incarceration is positively associated with adolescent delinquency, which is consistent with other research that suggests paternal incarceration leads to aggressive behavior in childhood and adolescence); Sara Wakefield, *Accentuating the Positive or Eliminating the Negative? Paternal Incarceration and Caregiver-Child Relationship Quality*, 104 J. CRIM. L. & CRIMINOLOGY 905, 921 (2014) (finding that paternal incarceration correlates strongly with negative parenting behaviors, such as where caregivers insult, scream, cry, or punish children).

<sup>152</sup> Juliana M. Taymans & Mary Ann Corley, *Enhancing Services to Inmates with Learning Disabilities: Systemic Reform of Prison Literacy Programs*, 52 J. CORRECTIONAL EDUC. 74, 74 (2001).

<sup>153</sup> *Id.*

school.<sup>154</sup> While an arrest does not always result in time served in prison, these statistics suggest that individuals with learning disabilities are at greater risk of entering the criminal justice system. For many, an arrest could lead to a prison sentence. Thus, it is important to identify these inmates with learning disabilities.

Additionally, prisoners with learning disabilities are a vulnerable prison population.<sup>155</sup> Prisons cannot ignore the fact that these inmates have processing deficits that impact their functioning in all aspects of prison life. From understanding directions from prison officials to accessing education in correctional classrooms and making social judgments, inmates with learning disabilities are impacted by their deficits. Prisons need to make changes to address these inmates in order to comply with the goals of incarceration. Part VI presents four reforms that, together or separately, could help resolve some of the gaps in correctional educational programming and could maximize the impact on recidivism rates while maintaining costs at a minimum. First, inmates should be tested for learning disabilities at the prison door. Second, correctional educators should be trained to teach students with learning disabilities. Third, life skills should be taught to inmates with learning disabilities to set them up for postconviction success. Finally, discussion and research about this largely underrepresented population should increase.

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<sup>154</sup> *Id.* The dropout rate for students with learning disabilities is higher than that of nondisabled students. See MARTHA L. THURLOW ET AL., NAT'L CTR. ON SECONDARY EDUC. & TRAINING, STUDENTS WITH DISABILITIES WHO DROP OUT OF SCHOOL—IMPLICATIONS FOR POLICY AND PRACTICE 1 (2002), available at [http://www.ncset.org/publications/issue/NCSETIssueBrief\\_1.2.pdf](http://www.ncset.org/publications/issue/NCSETIssueBrief_1.2.pdf), archived at <http://perma.cc/82PK-7EGL> (“The dropout rate for students with disabilities is approximately twice that of general education students.”); MARILYN McMILLEN, NAT'L CTR. FOR EDUC. STATISTICS, DROPOUT RATES IN THE UNITED STATES: 1995, at 47 (1997), available at <http://nces.ed.gov/pubs97/97473.pdf>, archived at <http://perma.cc/6N6K-F54Z> (“[S]tudents with disabilities were more likely to have dropped out than students without disabilities (14.6 percent versus 11.8 percent).”). Coupling this with the fact that students who drop out of school are 3.5 times more likely to be arrested and eight times more likely to be incarcerated, these statistics are especially troubling. *Crime Linked to Dropout Rates, Report Says*, SCH. LIBRARY JOURNAL (Aug. 27, 2008), <http://www.slj.com/2008/08/students/crime-linked-to-dropout-rates-report-says/>, archived at <http://perma.cc/HF38-X57U>.

<sup>155</sup> The Prison Reform Trust published a study, *No One Knows*, to highlight the needs of prisoners with learning disabilities in the United Kingdom. PRISON REFORM TRUST, NO ONE KNOWS: OFFENDERS WITH LEARNING DISABILITIES AND DIFFICULTIES, [http://www.prisonreformtrust.org.uk/Portals/0/Documents/No%20One%20Knows%20wales%20briefing\(english\).pdf](http://www.prisonreformtrust.org.uk/Portals/0/Documents/No%20One%20Knows%20wales%20briefing(english).pdf) (last visited Sept. 23, 2014), archived at <http://perma.cc/7C48-BX4Z>. This report outlines the challenges that inmates with learning disabilities experience, including bullying, higher rates of depression and other mental health issues, and uncertainty over how to prepare for release. *Id.* at 3. It also recommends that “people with learning disabilities . . . should be identified at the point of arrest in order that appropriate support may be put into place.” *Id.*

## A. TEST FOR LEARNING DISABILITIES AT THE PRISON DOOR

In order to maximize the impact of education on recidivism, correctional education programs must be aware of who their students are. Testing upon prison entry would identify a large part of the prison population that may need accommodations or modifications to fully realize the benefits of educational programming.

Including a test for learning disabilities within the already-existing battery of tests would be a seamless addition. Prisons already make the effort to uncover certain information about new inmates with a battery of tests intended to determine mental health, physical health, and security needs in prisons.<sup>156</sup> Prisons also give educational tests, such as the Test of Adult Basic Education (TABE) and the Comprehensive Adult Student Assessment Systems (CASAS).<sup>157</sup> These tests are designed to give the prison comprehensive information about an inmate's education level to make an appropriate placement in an education program. Assessment is a crucial principle of effective educational programs,<sup>158</sup> and testing inmates for learning disabilities is a natural addition to the existing assessments since it will reveal information pertinent to placement.

Testing could take place in two possible ways. One option would be to use the current educational assessment as a screening test. Some inmates enter prison already having been identified as having a learning disability during primary or secondary school; this will already be documented before entry. However, for those who fell through the cracks of the educational system and did not undergo assessment earlier in life, the educational assessment can be a screening test for whether further testing for learning disabilities is necessary. The results of the education assessment, combined with information regarding the inmate's educational background, can determine whether prison administrators need to test for a learning disability. Prisons can look at the best practices of schools to consider how this might work. Schools that regularly implement informal and formal assessments and academic interventions track academic progress and use the data from assessments and interventions to decide whether to further

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<sup>156</sup> Mills Discussion, *supra* note 38 (describing the intake process in Illinois state prisons).

<sup>157</sup> See *Adult Basic Education (ABE) I, II, and III*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/rehabilitation/adult-basic-education.html> (last visited Oct. 8, 2014), archived at <http://perma.cc/W8KR-EFR7>; *Kern Valley State Prison*, CAL. DEP'T OF CORR. & REHAB., [http://www.cdcr.ca.gov/Facilities\\_Locator/KVSP-Inmate\\_Programs.html](http://www.cdcr.ca.gov/Facilities_Locator/KVSP-Inmate_Programs.html) (last visited Oct. 8, 2014), archived at <http://perma.cc/FH6G-UPDX>.

<sup>158</sup> MGMT. & TRAINING CORP. INST., PROGRAMS THAT HELP OFFENDERS STAY OUT OF PRISON 4 (2009), available at <http://www.mtctrains.com/sites/default/files/StayOutOfPrisonFull2009.pdf>, archived at <http://perma.cc/8HVQ-3JGL?type=pdf>.

test for learning disabilities.<sup>159</sup> Prisons can do something similar to determine whether testing should take place. Another option for testing would be to administer an assessment for learning disabilities to every inmate who comes through the door.

The first option is the most appealing because it reduces up-front costs. Testing for learning disabilities requires a professional clinician or diagnostician licensed to administer psycho-educational test batteries,<sup>160</sup> which “are designed to provide a comprehensive assessment of an individual’s strengths and weaknesses across a wide range of skills and abilities.”<sup>161</sup> Rather than incurring the expensive cost of formally testing every inmate, correctional facilities can design a protocol to use results from the TABE and CASAS and background information in an inmate’s file to initially identify inmates that present education deficiencies. To determine whether an initially identified inmate should ultimately be tested for a learning disability, the protocol should determine a time frame for observation and the number of informal classroom assessments that should be observed by instructors during that time. This method will lead to testing only those inmates that present a real possibility of having a learning disability, as well as screen out those inmates that may have done poorly on the educational assessment for other reasons, such as lack of education or even apathy. Testing every inmate at the door is more costly, but, in the end, can be a cost-effective method as well. The up-front investment in identifying those with learning disabilities will likely improve the impact of correctional education programs on inmates with learning disabilities. Over time, recidivism rates will further decrease because more of the inmate population will experience the benefits of educational achievement.

However it is implemented, assessment at the door would not only inform prisons about the large number of inmates with learning disabilities, but would educate the inmate about himself. Many inmates with undiagnosed learning disabilities may not understand why their educational experiences have been difficult for so many years. Perhaps knowledge of the learning disability can provide an explanation for those past experiences. An inmate may feel empowered to take a proactive role in seeking additional supports moving forward. Many inmates will not be in prison long enough to receive the benefit of earning their high school diploma or GED, but they can at least gain this important piece of

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<sup>159</sup> See Sara McDaniel et al., *A Guide to Implementing Response to Intervention in Long-Term Residential Juvenile Justice Schools*, 62 J. CORRECTIONAL EDUC. 51, 52–53 (2011).

<sup>160</sup> See Taymans & Corley, *supra* note 152, at 74.

<sup>161</sup> John M. Hintze, *Psychoeducational Test Batteries*, in *ENCYCLOPEDIA OF PSYCHOLOGICAL ASSESSMENT* 771, 771 (Rocío Fernández-Ballesteros ed., 2003).

information.<sup>162</sup> Knowing about their learning disabilities alone can potentially affect recidivism rates because inmates may approach postrelease life differently once they learn of their learning disability. They may seek and receive accommodations in educational or employment settings that allow them to succeed in a way that they were not able to before.

Understanding the disability can help a prisoner identify his areas of strength and weakness, which can help him choose a career that utilizes his strengths. Researchers have found that adults with learning disabilities that have been successful at securing and maintaining employment have chosen careers that rely on their strengths.<sup>163</sup> On the other hand, adults with learning disabilities that are not successfully employed commonly lack “self-understanding.”<sup>164</sup> These less successful adults “did not understand how their specific deficits impacted on job performance,” which resulted in fewer applications for jobs that capitalized on their strengths, an inability to anticipate challenges in their current jobs, and an inability to develop compensatory strategies when they were experiencing difficulty in meeting work responsibilities.<sup>165</sup> This research suggests educating the large number of inmates with learning disabilities about their deficits will better prepare them to obtain and sustain employment after release.

#### B. TRAINING FOR CORRECTIONAL EDUCATORS

Reforms to correctional education programs must include training correctional educators about learning disabilities. At a formal policy level, prisons address the needs of inmates with learning disabilities through educational standards and training manuals. The Correctional Education Association has developed seventy-one standards to serve as benchmarks for the quality of adult correctional education programs, and several of these standards address the issue of learning disabilities.<sup>166</sup> In addition, the National Adult Literacy and Learning Disabilities Center published “Bridges to Practice: A Research-Based Guide for Literacy Practitioners Serving Adults with Learning Disabilities” in 1999 to serve as a

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<sup>162</sup> Mills Discussion, *supra* note 38 (explaining that the average prisoner in Illinois stays in prison for less than two years).

<sup>163</sup> Pamela B. Adelman & Susan A. Vogel, *Issues in the Employment of Adults with Learning Disabilities*, 16 LEARNING DISABILITY Q. 219, 223 (1993). For example, successful individuals with greater strengths in visual-perceptual or quantitative skills chose jobs that relied on those abilities, and those with weaker reading skills entered jobs that did not rely on that ability. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> TOLBERT, *supra* note 3, at 16.

professional development manual for educators working with individuals with learning disabilities.<sup>167</sup> However, it is uncertain how these standards and manuals affect the actual educational experience of inmates with learning disabilities. Similar standards and training manuals are in place to ensure the quality of juvenile educational programs, but, as this Comment described earlier, there are serious shortcomings in the services that are currently provided to youth with learning disabilities.<sup>168</sup> If juvenile education programs are inadequate even with formal policies in place, adult programs may be similarly inadequate.

State and federal prisons should make efforts to institute trainings that go beyond advice included in the manuals for all correctional educators. Trainings cannot just be part of formal policy; they must be held regularly. Having skilled educators is a principle of effective correctional educational programming.<sup>169</sup> All correctional educators should undergo training to:

understand learning disabilities and their characteristics; apply screening and learning style inventories to improve practice; understand the difference between screening and formal assessment; use effective instructional practices, including specific techniques and instructional strategies; use strategies training so that students can learn how to learn, think, and solve problems on their own; understand and use high and low technologies whenever possible; and recognize the self-esteem and social skills of these adults and provide ways to foster development in these areas.<sup>170</sup>

These trainings should be held annually to refresh correctional educators' best practices because new inmates with learning disabilities will always be arriving in their classrooms.

A recent article highlighted the importance of having properly trained correctional educators in prisons by explaining the consequences of teaching individuals with learning disabilities without accommodations.<sup>171</sup> First off, it found that prisoners with learning disabilities are less likely to participate in prison education programs in the first place because

<sup>167</sup> Taymans & Corley, *supra* note 152, at 76. See NAT'L ADULT LITERACY & LEARNING DISABILITIES CTR., BRIDGES TO PRACTICE: GUIDEBOOK 1: PREPARING TO SERVE ADULTS WITH LEARNING DISABILITIES (1999), available at [http://www.valrc.org/courses/adultld/bridges\\_pt1.pdf](http://www.valrc.org/courses/adultld/bridges_pt1.pdf), archived at <https://perma.cc/7BQL-JGCI?type=pdf>; NAT'L ADULT LITERACY & LEARNING DISABILITIES CTR., BRIDGES TO PRACTICE: GUIDEBOOK 2: THE ASSESSMENT PROCESS (1999), available at [http://www.valrc.org/courses/adultld/bridges\\_pt2.pdf](http://www.valrc.org/courses/adultld/bridges_pt2.pdf), archived at <https://perma.cc/X27H-SMH8?type=pdf>.

<sup>168</sup> See *supra* text accompanying note 39.

<sup>169</sup> See MGMT. & TRAINING CORP. INST., *supra* note 158, at 5.

<sup>170</sup> TOLBERT, *supra* note 3, at 17 (quoting Neil Sturomski, *Learning Disabilities and the Correctional System*, 3 LINKAGES: LINKING LITERACY & LEARNING DISABILITIES (Nat'l Adult Literacy & Learning Disabilities Ctr., Wash. D.C.), Fall 1996, at 4).

<sup>171</sup> Douglas P. Wilson, *The Silent Victims: Inmates with Learning Disabilities*, CRIMINAL JUSTICE POLICY COAL. (Apr. 22, 2010), [http://www.cjpc.org/wap\\_silent\\_victims.htm](http://www.cjpc.org/wap_silent_victims.htm), archived at <http://perma.cc/8XA8-XEFU>.

classrooms lack accommodations.<sup>172</sup> By avoiding a classroom that is inaccessible to them, inmates with learning disabilities often end up relying on other inmates for letter writing or other activities.<sup>173</sup> But this dependency on others puts these inmates with learning disabilities “at a greater risk of being victims of violence, extortion, or being forced to perform favors in return.”<sup>174</sup> As inmates with learning disabilities remain reluctant to participate in education programs due to lack of trained educators and proper accommodations, their needs will continue to go unaddressed.

Following through with formal policies and providing annual trainings is a cost-effective method for prisons to address the issue of learning disabilities. These reforms are less costly and controversial than other possible reforms, such as hiring special education teachers or attempting to emulate the services ensured under the IDEA, like individualized education plans.<sup>175</sup> Given that the IDEA does not extend rights to special education services to adults, these alternative reforms would be expensive and difficult to advocate for.

Trainings can also save money by proactively providing what learners with learning disabilities need, which avoids the need for costly litigation. Correctional educators with adequate training can implement basic and inexpensive accommodations for inmates with learning disabilities.<sup>176</sup> Thus, the prison and inmate can completely avoid costly and lengthy litigation in many cases.

Limiting correctional educator trainings to adult basic education and high school diploma or GED programs can ensure that this reform remains cost-effective. It also prioritizes those inmates with the greatest learning needs. Studies highlight that the current prison population has high rates of illiteracy<sup>177</sup> and lacks high school diplomas and GEDs.<sup>178</sup> Additionally, narrowing the focus of trainings avoids many of the political controversies surrounding funding of correctional reform. Some critics of correctional education argue that formal prison education is wrong because it uses

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Attempting to emulate the special education model for adults in correctional education programs would likely cause controversy because there is already debate about providing general education to prisoners. See Greene, *supra* note 28, at 178.

<sup>176</sup> See *supra* subpart I(A).

<sup>177</sup> Richard A. Tewksbury & Gennaro F. Vito, *Improving the Educational Skills of Jail Inmates: Preliminary Program Findings*, 58 FED. PROBATION 55, 55 (1994) (citing a study that, using sixth grade achievement as a cutoff, suggests that half of inmates in the United States are illiterate).

<sup>178</sup> *Id.* (citing a study that suggests that well over half of inmates have not completed high school).

taxpayer money to give a material benefit to criminals.<sup>179</sup> Especially in the 1990s, there was strong disfavor among politicians for providing educational benefits to prisoners.<sup>180</sup> These critiques, however, centered around postsecondary education programs for prisoners. Politicians denounced the “taxpayer rip-off” that rewarded prisoners for their crimes with a college education.”<sup>181</sup> Limiting funding for trainings to the most basic educational needs avoids this political issue while still providing much-needed reforms since even critics of correctional education “acknowledge[] that a high illiteracy rate exists among prisoners, and that the teaching of reading skills to prisoners that will eventually be released is a worthy endeavor.”<sup>182</sup>

### C. PROVIDE LIFE SKILLS TRAINING

Correctional education programs should also involve life skills training for inmates with learning disabilities as part of their adult basic education because they will face additional challenges upon release. Most prisons offer life skills programs for inmates to prepare for post-prison life.<sup>183</sup> However, given that life skills programs are part of educational programming, it is likely that they, too, fail to recognize the significant population of adult inmates with learning disabilities. Thus, life skills programs should be designed with the challenges of learning disabilities in mind, particularly in employment. Finding employment is crucial for former inmates not only because they need to find a steady, legal source of income, but because employment offers structure and a sense of responsibility through the reintegration process, which is beneficial to their postprison life.<sup>184</sup>

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<sup>179</sup> Greene, *supra* note 28, at 174–75.

<sup>180</sup> Blumenson & Nilsen, *supra* note 14, at 73–74.

<sup>181</sup> *Id.* at 74.

<sup>182</sup> Greene, *supra* note 28, at 174.

<sup>183</sup> See FED. BUREAU OF PRISONS, *supra* note 22. Job searching, health issues, and budgeting are some like skills programs offered in prisons. See PETER FINN, NAT’L INST. OF JUSTICE, PROGRAM FOCUS: THE DELAWARE DEPARTMENT OF CORRECTION LIFE SKILLS PROGRAM (1998), available at <https://www.ncjrs.gov/pdffiles/169589.pdf>, archived at <http://perma.cc/53NA-QKQE>; *Life Skills Programming*, VA. DEP’T OF CORR., <https://vadoc.virginia.gov/offenders/institutions/programs/life-skills.shtm> (last visited Oct. 15, 2014), archived at <http://perma.cc/SEC5-DBNX>.

<sup>184</sup> CHRISTY VISHER ET. AL., URBAN INST. JUSTICE POLICY CTR., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 3, 6 (2008), available at [http://www.urban.org/UploadedPDF/411778\\_employment\\_after\\_prison.pdf?RSSFeed=Urban.xml](http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf?RSSFeed=Urban.xml), archived at <http://perma.cc/L22H-LJQ4> (reporting that 79% of study participants spent time searching for a job after release).

All prisoners—with or without learning disabilities—face obstacles trying to find employment. Former prisoners face reluctance from employers to hire people with criminal records, the disadvantage of having weak educational and employment experiences, and the difficult task of explaining the gap in work history during their prison terms.<sup>185</sup> They also face the difficulty of maintaining employment for the long term. A recent study following former inmates in three states upon their release found that less than half of participants were employed eight months after release.<sup>186</sup>

However, inmates with learning disabilities often have an extra challenge when seeking employment.<sup>187</sup> Employers' general lack of understanding about learning disabilities, combined with the "invisible nature" of most learning disabilities,<sup>188</sup> has established a norm that hurts employees. Employers can lack sensitivity to learning needs, often fail to provide accommodations, and sometimes incorrectly assume that employees with learning disabilities are lazy or have bad work habits.<sup>189</sup> This social norm means that many adults with learning disabilities hide their disabilities during the hiring process and during employment in the effort to "pass for normal."<sup>190</sup> Rather than risk not being hired or perhaps even being let go for asking for "special treatment," employees will keep their learning disabilities to themselves.<sup>191</sup> This coping strategy negatively impacts an individual's success in the workplace. For starters, employment numbers are worse for those with learning disabilities than those without: 55% of working-age adults with learning disabilities versus 76% of adults without learning disabilities are employed, and unemployment is at 6% for those with learning disabilities compared to 3% for those without.<sup>192</sup> One poll suggests that adults with learning disabilities have greater challenges than their nondisabled counterparts with maintaining long-term, steady employment.<sup>193</sup> For example, adults with ADHD, on average, held 5.4 jobs in the past ten years compared to adults without ADHD, who held 3.4 jobs in the same time period.<sup>194</sup>

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<sup>185</sup> *Id.* at 8.

<sup>186</sup> *Id.* at 7.

<sup>187</sup> Barker, *supra* note 9, at 335–37 (describing the "social barriers that impede recovery" for employees with learning disabilities).

<sup>188</sup> *Id.* at 335. For many individuals, their learning disabilities are not obvious or noticeable to third parties. Many people with learning disabilities look, behave, and perform similarly to their nondisabled counterparts. *See supra* subpart I(A).

<sup>189</sup> Barker, *supra* note 9, at 335–36.

<sup>190</sup> *Id.* at 336.

<sup>191</sup> *See id.* at 336–37.

<sup>192</sup> NAT'L CTR. FOR LEARNING DISABILITIES, *supra* note 2.

<sup>193</sup> Barker, *supra* note 9, at 337.

<sup>194</sup> *Id.*

Educating prisoners about managing their learning disabilities could make an impact on recidivism rates.<sup>195</sup> Adding a component focused on one's learning disability to the current life skills programs could make a difference. It could educate inmates that they have a right to ask for reasonable accommodations in their workplaces and where to go for help if they are discriminated against. They can turn to informal and formal measures to seek assistance: making a request to their supervisor;<sup>196</sup> making a request to the employer's human resources department; contacting the Equal Employment Opportunity Commission, the federal agency tasked with enforcing the Rehabilitation Act and ADA;<sup>197</sup> or even reaching out to a legal clinic for pro bono employment law services. This practical skill can help the inmate maintain employment after release.

#### D. NEED FOR MORE RESEARCH AND DISCUSSION

The previous three subparts address solutions that can be readily implemented. However, this issue cannot be fully addressed until we know more about adult prisoners with learning disabilities. Discussions about educating imprisoned juveniles with learning disabilities need to expand to include adults. Unfortunately, the current inadequate legal protections contribute to the paucity of journal articles and academic research on the population. Prisons are not legally obligated to provide the same level of support for adult inmates as they are for juvenile inmates under the IDEA. As a result, the lack of services for adult inmates with learning disabilities might not appear as alarming. But it is unacceptable because, without the kind of legal protection that the IDEA provides, adult inmates with learning disabilities are made even more vulnerable in the prison system.<sup>198</sup> This vulnerable population has yet to be adequately discussed and researched.

Adult inmates with learning disabilities raise similar concerns and rationales for providing correctional education support for juveniles with learning disabilities, and thus, a similar amount of discussion should exist around the former topic. First, like juveniles in prison, adult prisoners have experienced high rates of educational failure. Reports suggest that well over

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<sup>195</sup> See *supra* text accompanying notes 162–165.

<sup>196</sup> JOB ACCOMMODATION NETWORK, EMPLOYEES' PRACTICAL GUIDE TO REQUESTING AND NEGOTIATING REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT 7–8, available at <http://askjan.org/Eeguide/EeGuide.pdf> (last visited Sept. 23, 2014), archived at <http://perma.cc/K73T-L78R>.

<sup>197</sup> *The ADA: Your Employment Rights as an Individual with a Disability*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Mar. 21, 2005), <http://www.eeoc.gov/facts/ada18.html>, archived at <http://perma.cc/55QB-K23L>.

<sup>198</sup> See *supra* note 155.

half of all prison inmates have not finished high school.<sup>199</sup> For those who have completed parts of their education, their skills can be two to three grade levels behind the actual grade level they last completed.<sup>200</sup> And second, like juveniles in prison, adult prisoners have increased chances of poverty and unemployment upon release without educational achievement.<sup>201</sup> Since many employers require proof of a high school diploma or GED for employment, both adults and juveniles are at a disadvantage upon release if they do not take part in education programs in prison.<sup>202</sup>

More research is needed about this population. Current studies show a positive relationship between correctional education and reduced recidivism rates.<sup>203</sup> These studies could have greater meaning if they acknowledged the 30%–50%<sup>204</sup> or 20%–55%<sup>205</sup> of inmates with learning disabilities. Of course, undertaking research projects to measure the effectiveness of correctional education programs is a major endeavor in itself; thus, studies like the RAND Corporation's meta-analysis of correctional education<sup>206</sup> and the three-state recidivism study of released inmates<sup>207</sup> are not simple projects. However, the important implications of these studies could mean so much more if they identified this key characteristic.

The Department of Justice could play a key role in furthering research efforts. The Bureau of Justice Assistance funded the RAND Corporation's 2013 study; imagine what information could be learned if learning disabilities were part of the scope of research. Special Reports, like the one on education and correctional programming by the Bureau of Justice Statistics in 2003<sup>208</sup> could also go a long way if they expanded to include information about adults with learning disabilities. If the Department of Justice sponsored studies and reports that incorporate adults with learning disabilities, more attention will be on the population, which could provide the basis for more discussions about testing at the door, training

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<sup>199</sup> Tewksbury & Vito, *supra* note 177, at 55.

<sup>200</sup> *Id.*

<sup>201</sup> Sheldon-Sherman, *supra* note 110, at 228 (stating that marginal literacy as a juvenile has a significant relationship to poverty and unemployment, or underemployment, as an adult). *See also* Whitney, *supra* note 15, at 786–87 (stating that in 1997, prearrest unemployment was at 32%, and 43% of prisoners who did work before prison made near-poverty wages).

<sup>202</sup> Tewksbury and Vito, *supra* note 177, at 55.

<sup>203</sup> *See supra* Part II.

<sup>204</sup> TOLBERT, *supra* note 3, at 11.

<sup>205</sup> Cowardin, *supra* note 31, at 11.

<sup>206</sup> *See* RAND CORP., *supra* note 55.

<sup>207</sup> *See* STEURER & SMITH, *supra* note 4.

<sup>208</sup> HARLOW, *supra* note 62, at 1.

correctional educators about learning disabilities, and providing life-skills training specific to the needs of inmates with learning disabilities.

#### CONCLUSION

This Comment brings attention to a prison population that has gone largely unsupported by prison administrators, researchers, and government officials. Though various sources confirm that inmates with learning disabilities are widely represented in prisons, correctional institutions have made little effort to identify and support them, and researchers and the government have not adequately examined their needs nor made serious effort to include them in research. In addition, federal statutes offer limited support to these inmates, and the current litigation regime is costly, filled with procedural barriers, and time-consuming.

The lack of concern and protection for inmates with learning disabilities is troubling because decreasing recidivism is intricately linked to their education. Education's ability to decrease recidivism rates is real. Numerous studies confirm that inmates who make educational gains in prison are less likely to recidivate. They are also more likely to succeed at finding employment and earning higher wages. Not only does education work, but the costs of educational programming are much less than the costs of reincarcerating inmates.

Given the postrelease benefits of education and the undeniable fact that many inmates have learning disabilities, correctional institutions must make changes to their education programs. Their current educational programming is inadequate because it does not recognize or support inmates with learning disabilities. This inadequacy means that the impact on recidivism has not yet been truly measured because this large segment of the prison population has not been accounted for. To make educational programming effective, prisons must begin identifying inmates with learning disabilities at their doors. Assessing for learning disabilities fits naturally with the battery of other tests prisons conduct upon an inmate's entry.

Prisons must also train correctional educators to work with these inmates. While staffing prisons with special education teachers or mirroring the services provided to juveniles is financially unrealistic, prisons can make significant changes to the classroom experience by following through on formal policies and providing annual trainings on best practices for working with learners with learning disabilities. Classrooms should also incorporate a life-skills component to prepare inmates for postrelease life. Recognizing and addressing the additional challenges that prisoners with learning disabilities face in employment will likely increase inmates' postrelease success. And lastly, further discussion of this population is

needed. Researchers currently studying the relationship between education and recidivism should assess this population and add it to their findings. The Department of Justice can lead these research efforts, which could provide the data base for more discussion and reform. If the suggestions in this Comment are implemented, in part or in whole, the criminal justice system will take a meaningful step towards providing much-needed support to adult inmates with learning disabilities.

