

# EDUCATIONAL REQUIREMENTS AS BARRIERS TO RELEASE FOR INCARCERATED PEOPLE WITH COGNITIVE DISABILITIES

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## TABLE OF CONTENTS

Introduction.....	227
I. Educational Requirements Imposed On People in the Criminal Legal System Who Have Cognitive Disabilities.....	229
A. Prevalence of Cognitive Disabilities Among Incarcerated People ....	229
B. The Current State of Discretionary Parole .....	232
C. Educational Requirements in the Criminal Legal System.....	233
1. Requirements for Parole .....	233
2. Requirements During Incarceration .....	235
3. Conditions of Release.....	236
II. Educational Requirements May Prevent Incarcerated People with Cognitive Disabilities from Becoming Eligible for Parole.....	237
A. Correctional Systems Neglect to Identify People with Cognitive Disabilities.....	237
1. Undiagnosed Cognitive Disabilities Often Remain Unidentified Without Adequate Assessment .....	238
2. Absence of Adequate Cognitive Assessments in Correctional Facilities .....	240
B. Lack of Academic Accommodations in Correctional Facilities.....	243
1. Statutory Requirements for Accommodations.....	244
2. Insufficient Provision of Academic Accommodations.....	245
C. Difficulties Completing Alternative Requirements for Incarcerated People with Cognitive Disabilities.....	247

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- 1. Cognitive Disabilities Can Affect Individuals' Ability to Complete Alternative Programming ..... 248
- 2. Individuals with Cognitive Disabilities May Face Challenges Enrolling in Alternative Programming ..... 250
- D. Absence of Accommodations at Parole Hearings..... 251
- III. Potential Solutions ..... 252
  - A. Feasible Changes to Screening Procedures in Correctional Facilities ..... 252
  - B. Other Potential Adjustments to Intake Processes ..... 258
- Conclusion ..... 260

## INTRODUCTION

Samuel<sup>1</sup> had a ninth grade education and an undiagnosed intellectual disability when he first entered prison nearly forty years ago. While incarcerated he persistently prioritized his learning goals, working tirelessly for twenty years to complete basic education and literacy classes.<sup>2</sup> After completing the classes, Samuel was then permitted to enroll in a course designed to prepare students for the General Educational Development (GED) test.<sup>3</sup> He was unable to pass the test after diligently attending classes and completing assignments for eleven years.

Beyond his learning goals, in taking the GED test Samuel's freedom was at stake. Under Louisiana state law, Samuel was required to attain a high school equivalency credential in order to become eligible for parole consideration.<sup>4</sup> He was exempted from the requirement if a certified educator deemed him incapable of attaining the credential due to a learning disability.<sup>5</sup> However, neither his teachers nor other correctional staff flagged him as having a cognitive impairment and in need of an exemption, even though it takes on average only three months to pass the GED test<sup>6</sup> and he had been studying for more than a decade. Since the prison did not arrange for an assessment of his cognitive abilities, Samuel was unable to demonstrate that he qualified for the exemption without his attorneys' assistance.

Samuel's attorneys fiercely advocated for the requirement to be waived so that he could become eligible for parole. Correctional personnel

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1. Name has been changed. Samuel agreed to have his experiences shared in this Note anonymously. Telephone Interview with Jenay Nurse, Senior Att'y, Squire Patton Boggs (Feb. 5, 2020).

2. Samuel was required to complete these classes in order to become eligible to enroll in General Education Development (GED) classes and take the GED test. *Id.*

3. The GED test determines whether the test-taker has a high school level of education. Passing the test grants the test-taker a high school equivalency diploma. *What Is a GED?*, GED TESTING SERV.: BLOG FOR STUDENTS (Aug. 12, 2019), <https://ged.com/blog/what-is-a-ged/> [<https://perma.cc/8SKG-7XB9>].

4. Under LA. STAT. ANN. § 15:574.4(A)(4) (2019), incarcerated individuals who have reached sixty years of age and have served at least ten years of their sentence are eligible for parole consideration if they meet certain conditions. One of these conditions is earning a high school diploma or GED credential. LA. STAT. ANN. § 15:574.4(A)(4)(e) (2019).

5. *Id.*

6. *How Do I Get My GED and How Long Does It Take?*, GED TESTING SERV.: BLOG FOR STUDENTS (Sept. 3, 2019), <https://ged.com/blog/how-do-i-get-my-ged-and-how-long-does-it-take/> [<https://perma.cc/M2CK-4KG4>].

could not provide an established process for obtaining an exemption, signaling that they likely had not provided many—if any—exemptions in the past. Samuel’s attorneys decided to hire a psychologist to travel to Louisiana to conduct a formal intellectual evaluation, which revealed Samuel’s IQ is “[e]xtremely low” and consistent with an intellectual disability.<sup>7</sup> The psychologist also determined that Samuel’s difficulties passing the GED test were “due to pervasive long-standing intellectual limitations,” which “are likely to be unresolved despite significant efforts on Samuel’s part to overcome them.” This evaluation was included in Samuel’s parole board packet, along with an explanation of his efforts to pass the GED test, and Samuel was granted parole after almost forty years in prison.

As demonstrated by Samuel’s experience, some states impose educational requirements on incarcerated individuals without proactively assessing them for disabilities that may inhibit their ability to meet those requirements. Many state correctional systems have not instituted effective procedures to assess whether an individual may have a cognitive disability and, as a result, some people with cognitive disabilities who are otherwise eligible for parole may needlessly sit in prison.

This Note aims to demonstrate how educational requirements imposed on incarcerated individuals such as Samuel impose barriers to release. Part I first provides an overview of the prevalence of cognitive disabilities among incarcerated populations. It then discusses parole boards’ discretionary release decision-making and the educational requirements that are imposed on individuals who are incarcerated or released on parole. Part II examines the ways in which the educational requirements discussed in Part I are disadvantageous for people with cognitive disabilities in the criminal legal system.<sup>8</sup> Not only do jails and prisons fail to adequately screen incarcerated people for cognitive impairments, but they also fail to provide adequate academic accommodations and suitable alternative requirements for individuals who have cognitive disabilities. Lastly, Part III suggests improvements to prisons’ screening and training processes that could help correctional officers identify individuals who have cognitive disabilities.

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7. The clinician also determined that Samuel’s reading ability is between a fourth and sixth grade level, and his math ability is at a sixth grade level. Telephone Interview with Jenay Nurse, *supra* note 1.

8. The author has elected to use the term “criminal legal system” instead of “criminal justice system” in order to reflect the unjust nature of the current system.

## I. EDUCATIONAL REQUIREMENTS IMPOSED ON PEOPLE IN THE CRIMINAL LEGAL SYSTEM WHO HAVE COGNITIVE DISABILITIES

Part I provides information regarding the ways in which incarcerated individuals' educational attainment can play a role in parole decisions, which can pose difficulties for people who have cognitive disabilities. Section I.A discusses the prevalence of cognitive disabilities among people in the criminal legal system, followed by an overview in Section I.B of the status of discretionary parole in the United States and how parole boards make decisions. Lastly, Section I.C describes educational requirements that are imposed on people in the criminal legal system.

### A. Prevalence of Cognitive Disabilities Among Incarcerated People

Cognitive disability is an umbrella term that covers a range of conditions that impair one's "intellectual and/or adaptive functioning in social, practical or conceptual domains."<sup>9</sup> These conditions include intellectual and other developmental disabilities,<sup>10</sup> learning disabilities, autism spectrum disorders, acquired brain injuries, and neurodegenerative diseases,<sup>11</sup> though these conditions do not always significantly impair cognitive functioning.<sup>12</sup> Cognitive disabilities can affect people differently

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9. Jesse T. Young et al., *Severity of Cognitive Disability and Mental Health Court Determinations About Fitness to Stand Trial*, 62 J. INTELL. DISABILITY RSCH. 126, 127 (2018) (citation omitted).

10. For diagnostic criteria for intellectual and other developmental disabilities, see, e.g., Alan Carr & Gary O'Reilly, *Diagnosis, Classification and Epidemiology*, in THE HANDBOOK OF INTELLECTUAL DISABILITY AND CLINICAL PSYCHOLOGY PRACTICE 3 (Alan Carr et al. eds., 2d ed. 2016); AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013); *Definition of Intellectual Disability*, AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, <https://www.aaid.org/intellectual-disability/definition> [<https://perma.cc/U6RF-SG62>]; *Intellectual and Developmental Disabilities (IDDs): Condition Information*, NAT'L INST. OF CHILD HEALTH & HUM. DEV., <https://www.nichd.nih.gov/health/topics/idds/conditioninfo/default#f1> [<https://perma.cc/Y2SZ-KULC>].

11. CONSUMER & GOVERNMENTAL AFFS. BUREAU, INDIVIDUALS WITH COGNITIVE DISABILITIES: BARRIERS TO AND SOLUTIONS FOR ACCESSIBLE INFORMATION AND COMMUNICATION TECHNOLOGIES 3 (2016), <https://www.fcc.gov/document/white-paper-ict-access-people-cognitive-disabilities> [<https://perma.cc/Q6N9-GBTA>].

12. Young et al., *supra* note 9, at 127; see also Susan Hayes, *Criminal Behavior and Intellectual and Developmental Disabilities: An Epidemiological Perspective*, in THE WILEY HANDBOOK ON OFFENDERS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: RESEARCH, TRAINING, AND PRACTICE 21, 23 (William R. Lindsay & John L. Taylor eds., 2018) [hereinafter THE WILEY HANDBOOK] (explaining that people who have developmental disabilities "may not have intellectual impairments").

and evolve over time.<sup>13</sup> They may be present from birth, appear over time, or be acquired through a brain injury or other medical incident.<sup>14</sup>

Individuals who have cognitive disabilities may encounter challenges with reading comprehension,<sup>15</sup> “reasoning, problem solving and learning,”<sup>16</sup> and/or “everyday social and practical abilities.”<sup>17</sup> Some may need more intensive instructional support than their peers,<sup>18</sup> and may experience learning difficulties without appropriate modifications and supports.<sup>19</sup>

The exact number of incarcerated individuals who have cognitive disabilities is unknown, partly because correctional systems do not effectively and consistently identify individuals who have cognitive disabilities.<sup>20</sup> Studies have reached varying estimates<sup>21</sup> but researchers

13. Marcia Scherer et al., *Assistive Technologies for Cognitive Disabilities*, 17 CRITICAL REVS. PHYSICAL & REHAB. MED. 195, 195 (2005) (“Cognitive disabilities are clinically complex—each having unique effects on an individual that often change over time, sometimes rapidly.”).

14. *Id.* Cognitive disabilities have “no criterion for age of onset of impairment,” with the exception of intellectual and developmental disabilities. Young et al., *supra* note 9, at 127.

15. See, e.g., Diane M. Browder et al., *Research on Reading Instruction for Individuals with Significant Cognitive Disabilities*, 72 EXCEPTIONAL CHILD 392, 393 (2006) (“[E]ducators have emphasized that students with significant cognitive disabilities require intensive instruction in order to learn to read.”); Alexandra Shelton et al., *A Synthesis of Reading Comprehension Interventions for Persons with Mild Intellectual Disability*, 89 REV. EDUC. RSCH. 612, 640 (2019) (“Many individuals with mild [intellectual disability] face significant difficulty reading and comprehending text.”)

16. Kathy Ellem & Kelly Richards, *Police Contact with Young People with Cognitive Disabilities: Perceptions of Procedural (In)justice*, 18 YOUTH JUST. 230, 231 (2018).

17. *Id.*

18. Browder et al., *supra* note 15, at 392.

19. Shelton et al., *supra* note 15, at 613 (“[I]t is especially important that educators capitalize on the strengths of individuals with [intellectual disability] by providing individualized supports and adapting environments to foster participation in typical settings.”).

20. Salma Ali et al., *Issues Concerning People with Intellectual and Developmental Disabilities Involved in Criminal Justice Procedures*, in THE WILEY HANDBOOK, *supra* note 12, at 437, 438 (William R. Lindsay & John L. Taylor eds., 2018) (“It is difficult to know how many people with [intellectual and developmental disabilities] enter the criminal justice system. This is because there is little routine screening of individuals as they enter the system, or at any point within it.”); Hayes, *supra* note 12, at 24 (“Identification of people with intellectual disabilities at every stage in the criminal justice system is inconsistent and usually ad hoc . . .”).

21. Researchers have likely reached different estimates in part because they use different sample selection methods. Katarzyna Uzieblo et al., *Intelligent Diagnosing of Intellectual Disabilities in Offenders: Food for Thought*, 30 BEHAV. SCIS & L. 28, 31; John L.

have largely found that the number may be sizable.<sup>22</sup> National studies of state and federal prison populations conducted over the past few decades have “consistently found overrepresentation” of people with intellectual disabilities, “ranging from 3% up to 19% in some correctional institutions.”<sup>23</sup> Studies have also found that there is likely a significant number of people in correctional facilities who have “learning difficulties” more generally.<sup>24</sup> A Bureau of Justice Statistics report based on the 2011–12 National Inmate Survey states that adults incarcerated in prison are four times more likely than members of the general population to report having a cognitive disability, and those in jail are 6.5 times more likely.<sup>25</sup> Approximately 20% of people in prison and 30% of people in jail reported in the Survey that they have a cognitive disability.<sup>26</sup> Therefore, though scholars have not determined the exact number of imprisoned individuals who have cognitive disabilities, there is most likely a sizable number of people in the criminal legal system who have cognitive impairments that

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Taylor & William R. Lindsay, *Offenders with Intellectual and Developmental Disabilities: Future Directions for Research and Practice*, in THE WILEY HANDBOOK, *supra* note 12, at 453, 454–55 (discussing various methodological issues that have led to differing prevalence rates across studies).

22. Ali et al., *supra* note 20, at 438 (“[I]t is clear that significant numbers of people with IDD are caught up in the criminal justice system.”); Hayes, *supra* note 12, at 33 (“[I]t appears to be increasingly obvious that people with intellectual and developmental disabilities are overrepresented in the criminal justice system . . . .”); DIANA BRAZZELL ET AL., FROM THE CLASSROOM TO THE COMMUNITY: EXPLORING THE ROLE OF EDUCATION DURING INCARCERATION AND REENTRY, URB. INST. JUST. POL’Y CTR. 9 (2009), <https://www.urban.org/sites/default/files/publication/30671/411963-From-the-Classroom-to-the-Community.PDF> [<https://perma.cc/QR2R-QQ76>] (“While none of the studies . . . provide a definitive answer regarding disability rates among the nation’s incarcerated population, they indicate a high prevalence of learning disabilities and other special needs and suggest that more accurate data are needed.”); Young et al., *supra* note 9, at 127 (explaining that “prevalence estimates based on validated screening tools suggest that” cognitive disabilities “may be overrepresented in the criminal justice system”).

23. Hayes, *supra* note 12, at 29.

24. Ali et al., *supra* note 20, at 438. In the 2003 National Assessment of Adult Literacy survey, approximately 17% of incarcerated persons surveyed reported having been diagnosed with a learning disability. This number does not include people who were not surveyed because they have a cognitive disability, mental disorder, and/or could not communicate in English or Spanish. ELIZABETH GREENBERG ET AL., NAT’L CTR. FOR EDUC. STAT., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 116 tbl.D3-1 (2007), <https://nces.ed.gov/pubs2007/2007473.pdf> [<https://perma.cc/5B6K-RMNU>].

25. JENNIFER BRONSON ET AL., BUREAU OF JUST. STAT., DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12, at 3 (2015), <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf> [<https://perma.cc/68D8-ZU7P>].

26. *Id.*

would pose challenges for their ability to meet educational requirements for parole.

### B. The Current State of Discretionary Parole

A majority of states provide opportunities for release through either mandatory or discretionary parole. Mandatory release is determined by sentencing guidelines or statute, with authorities having no role in deciding whether to release an individual.<sup>27</sup> In contrast, discretionary release decisions are made by parole boards or similar authorities.<sup>28</sup> These authorities review individual cases, deciding whether a given incarcerated person should be released.<sup>29</sup>

States have moved towards greater determinacy in sentencing, thus diminishing the role of parole boards in determining release.<sup>30</sup> Sixteen states have abolished discretionary release for a majority or all cases,<sup>31</sup> but parole boards in these states may still make release decisions for individuals who were convicted before the sentencing schemes changed, and/or for people who are serving life sentences.<sup>32</sup> The remaining thirty-four states still have parole boards that make release decisions for a significant number of incarcerated individuals.<sup>33</sup>

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27. JEREMY TRAVIS & SARAH LAWRENCE, URB. INST. JUST. POL'Y CTR., *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 3–4 (2002), [http://webarchive.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://webarchive.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf) [<https://perma.cc/RLT9-8WE5>].

28. *Id.*

29. *Id.* at 4.

30. EBONY L. RUHLAND ET AL., ROBINA INST. OF CRIM. L. & CRIM. JUST., *THE CONTINUING LEVERAGE OF RELEASING AUTHORITIES: FINDINGS FROM A NATIONAL SURVEY* 9 (2017), [https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final\\_national\\_parole\\_survey\\_2017.pdf](https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/final_national_parole_survey_2017.pdf) [<https://perma.cc/YFR6-2VK4>].

31. Kevin R. Reitz & Edward E. Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. REV. CRIMINOLOGY 281, 283 (2020).

32. Edward E. Rhine et al., *Parole Boards Within Indeterminate and Determinate Sentencing Structures*, ROBINA INST. OF CRIM. L. & CRIM. JUST.: NEWS & VIEWS FROM ROBINA (April 3, 2018), <https://robinainstitute.umn.edu/news-views/parole-boards-within-indeterminate-and-determinate-sentencing-structures> [<https://perma.cc/PV8U-CRAN>].

33. These states may deny the possibility of parole for individuals convicted of particular crimes. Jorge Renaud, PRISON POL'Y INITIATIVE, *Grading the Parole Release Systems of All 50 States* (Feb. 26, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html) [<https://perma.cc/DBR2-2V4G>]. Scholars have found that many of these states have mixed systems: they use fixed sentences and mandatory release for some incarcerated persons, and use parole boards to determine release for others. RUHLAND ET AL., *supra* note 30, at 9.

Therefore, though states have shifted towards more determinant sentencing and have somewhat diminished parole boards' discretionary authority, discretionary parole "is still the nation's mainstream framework for setting the duration of prison sentences"<sup>34</sup> and "remains an influential component across the correctional landscape today."<sup>35</sup> According to the Bureau of Justice Statistics, in 2016 56% of people released from prisons in forty-five states were granted release by parole boards' discretionary decisions.<sup>36</sup> Overall, parole boards continue to play a significant role in determining whether a large number of persons who are incarcerated are released before they have served their maximum sentence.<sup>37</sup>

### C. Educational Requirements in the Criminal Legal System

A lack of educational attainment can prevent a person from obtaining parole or, if they are granted parole, can lead to their release being revoked. It can do so in a few different ways. First, some state statutes explicitly require incarcerated people to meet specific educational requirements in order to become eligible for parole. Second, some states, as well as the federal system, require individuals to meet certain educational requirements while incarcerated, and the failure to meet these requirements can be considered against them at parole hearings. Third, parole boards can impose educational requirements as conditions for parole, and the failure to meet such conditions can lead to the revocation of release.

#### 1. Requirements for Parole

In certain states, people who are incarcerated are required by statute to meet particular educational requirements in order to become eligible for parole.<sup>38</sup> For instance, people incarcerated in Michigan who are serving sentences of at least two years must obtain a high school diploma or equivalency certificate before being released on parole.<sup>39</sup> Parole boards in Missouri are not permitted to grant incarcerated individuals parole until they have attained—or have made "an honest good-faith effort" to attain—a

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34. Reitz & Rhine, *supra* note 31, at 283.

35. RUHLAND ET AL., *supra* note 30, at 9.

36. Reitz & Rhine, *supra* note 31, at 283.

37. RUHLAND ET AL., *supra* note 30, at 9–10.

38. See e.g., LA. STAT. ANN. § 15:574.4(A)(4)(e) (2019); MICH. COMP. LAWS SERV. § 791.233(1)(f) (LexisNexis 2019); MO. REV. STAT. § 217.690(13) (2018); OKLA. STAT. tit. 57, § 332.8 (2019).

39. MICH. COMP. LAWS SERV. § 791.233(1)(f) (LexisNexis 2019).

high school diploma or its equivalent.<sup>40</sup> Further, incarcerated individuals in Louisiana who have reached the age of sixty years and have served at least ten years of their sentence are eligible for parole, but only if they have obtained a high school diploma or GED credential.<sup>41</sup>

Several of these statutes provide exceptions for people in prison who have learning or other cognitive disabilities.<sup>42</sup> In Michigan, the director of the Department of Corrections may waive the requirement for individuals who have learning disabilities or who, through no fault of their own, are unable to meet the requirements for a high school diploma or equivalency credential.<sup>43</sup> Similarly, the director of the Department of Corrections in Missouri may also waive the educational requirement by certifying to the parole board that an individual is unable to obtain a high school diploma or equivalent credential.<sup>44</sup>

In some states, individuals in prison who are unable to meet the educational requirements due to a cognitive disability may be able to satisfy the requirements through other means.<sup>45</sup> If an incarcerated person in Louisiana has been deemed by a certified educator as incapable of meeting the requirement due to a learning disability, for example, the individual can instead complete “a literacy program, an adult basic education program, or a job-skills training program.”<sup>46</sup> However, the lack of testing and

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40. MO. REV. STAT. § 217.690(13) (2018). Likewise, in Oklahoma, the parole board may require incarcerated individuals to reach a high school level of proficiency in particular skills before releasing them on parole. OKLA. STAT. tit. 57, § 332.8 (stating that the Pardon and Parole Board “shall mandate participation in education programs to achieve the proficiency level established in in Section 510.7”); *Id.* § 510.7 (establishing the proficiency level as “at least a high school equivalency development level of proficiency in reading, writing and computation skills, to the extent resources are available”).

41. LA. STAT. ANN. § 15:574.4(A)(4)(e) (2019).

42. *See, e.g.*, MICH. COMP. LAWS SERV. § 791.233(1)(f) (LexisNexis 2019) (“The department may also waive the [education] restriction . . . as to any prisoner who has a learning disability . . .”); MO. REV. STAT. § 217.690(13) (2018) (“[T]he director may waive this [education] requirement by certifying in writing to the board that the offender . . . is academically unable to obtain a high school diploma or its equivalent.”); LA. STAT. ANN. § 15:574.4(A)(4)(e) (2019) (“If the offender is deemed incapable of obtaining a GED credential, the offender shall complete . . . a literacy program, an adult basic education program, or a job-skills training program.”).

43. MICH. COMP. LAWS SERV. § 791.233(1)(f) (LexisNexis 2019).

44. MO. REV. STAT. § 217.690(13) (2018).

45. *See, e.g.*, LA. STAT. ANN. § 15:574.4(A)(4)(e) (2019) (providing alternatives to obtaining a GED credential for individuals who have been “deemed by a certified educator as being incapable of obtaining a GED credential due to a learning disability”).

46. *Id.*

accommodations for cognitive disabilities in many correctional systems may prevent individuals with these disabilities from taking advantage of the exceptions designed for them. Further, cognitive impairments can prevent people in prison from completing the alternative requirements.<sup>47</sup> As a result, even the educational requirements that do account for disabilities can still impose barriers to release for incarcerated people with cognitive disabilities.<sup>48</sup>

## 2. Requirements During Incarceration

Certain states, as well as the Federal Bureau of Prisons, require individuals who have not reached a certain level of education to participate in educational programming while they are incarcerated.<sup>49</sup> A 2014 survey found that twenty-four states have mandatory educational programming for incarcerated people who do not have a high school diploma or equivalent credential.<sup>50</sup> It also found that fifteen other states have mandatory educational programming for individuals who have not reached a particular grade level.<sup>51</sup>

Parole boards can consider participation in educational programming at an individual's parole hearing.<sup>52</sup> A 2001 study of incarcerated persons in Colorado found that the failure to complete required programming could lead to denial of parole, but completion of the programs was usually not sufficient to lead to a grant of parole.<sup>53</sup> Eleven years after the Colorado study, another study found that not having a high school education reduces an incarcerated person's odds of getting a

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47. See *infra* Section II.C.

48. See *infra* Section II.C.

49. Amanda Pompoco et al., *Reducing Inmate Misconduct and Prison Returns with Facility Education Programs*, 16 *CRIMINOLOGY & PUB. POL'Y* 515, 518 (2017).

50. LOIS M. DAVIS ET AL., RAND CORP., *HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE?* 60 (2014), [https://www.rand.org/pubs/research\\_reports/RR564.readonline.html](https://www.rand.org/pubs/research_reports/RR564.readonline.html) [<https://perma.cc/XV2P-Y5WV>].

51. *Id.*

52. At parole hearings in New Jersey, for instance, the board considers "[p]articipation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes . . . participation in . . . academic or vocational education programs." N.J. STATE PAROLE BD., *THE PAROLE BOOK: A HANDBOOK ON PAROLE PROCEDURES FOR ADULT AND YOUNG ADULT INMATES* 47 (5th ed. 2012), <https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf> [<https://perma.cc/88AH-7FBZ>].

53. Mary West-Smith et al., *Denial of Parole: An Inmate Perspective*, 64 *FED. PROB.* 3, 5 (2000).

favorable parole decision by almost half.<sup>54</sup> This research suggests that parole boards take seriously individuals' lack of educational attainment when making a release decision.

### 3. Conditions of Release

If an incarcerated person is granted parole, the parole board may impose educational requirements that the individual must meet in order to prevent revocation of their release.<sup>55</sup> Several states impose these requirements as standard conditions for all people on parole who have not reached a particular education level.<sup>56</sup> In Georgia, for example, individuals on parole who have not attained a high school diploma or GED certification must obtain one or the other after they are released.<sup>57</sup> Alternatively, they may meet the requirement by pursuing a trade at a vocational school or, if they are deemed incapable of meeting the requirement, may be required only "to attempt to improve their basic educational skills."<sup>58</sup> Failure to attend necessary courses, or to "make reasonable progress" on meeting this requirement, is grounds for revocation of release.<sup>59</sup> In some other states, parole boards may impose educational requirements as special conditions for parole,<sup>60</sup> as evidenced in parole handbooks<sup>61</sup> and parole statutes.<sup>62</sup>

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54. Jason Matejkowski et al., *Mental Illness, Criminal Risk Factors and Parole Release Decisions*, 29 BEHAV. SCI. & L. 528, 540 (2011).

55. Lawrence F. Travis III & James Stacey, *A Half Century of Parole Rules: Conditions of Parole in the United States, 2008*, 38 J. CRIM. JUST. 604, 605-07 (2010). If a person on parole violates the conditions of their parole, they have committed a technical violation and may be returned to prison. Merry Morash et al., *Technical Violations, Treatment and Punishment Responses, and Recidivism of Women on Probation and Parole*, 30 CRIM. JUST. POL'Y REV. 788, 789-91 (2019).

56. See, e.g., GA. CODE ANN. § 42-9-44(b) (2010).

57. *Id.*

58. This requirement does not apply to persons on parole who demonstrate "an existing ability or skill which does in fact actually furnish the parolee... a reliable, regular, and sufficient income." *Id.*

59. *Id.*

60. As opposed to standard conditions that are imposed on all persons on parole, special conditions are tailored to the individual circumstances of an individual released on parole. For example, someone who does not have a high school diploma may be required to study for the GED test. Travis III & Stacey, *supra* note 55, at 605.

61. See, e.g., TEX. BD. OF PARDONS & PAROLES, PAROLE IN TEXAS: ANSWERS TO COMMON QUESTIONS 21 (2019), available at [https://www.tdcj.texas.gov/bpp/publications/PIT\\_English.pdf](https://www.tdcj.texas.gov/bpp/publications/PIT_English.pdf) [<https://perma.cc/Z24K-NJ2J>] ("A Parole Panel may add special release conditions for any offender. The most common special conditions include... educational programs..."); UTAH DEP'T OF CORR., SPECIAL CONDITIONS OF PAROLE 2 (2015), available at <https://corrections.utah.gov/images/Brooke/ParoleSpecialConditions2015.pdf>

## II. EDUCATIONAL REQUIREMENTS MAY PREVENT INCARCERATED PEOPLE WITH COGNITIVE DISABILITIES FROM BECOMING ELIGIBLE FOR PAROLE

For incarcerated people with cognitive disabilities, educational requirements for parole can pose barriers to release and reentry into society. This is especially concerning considering the prevalence of undiagnosed cognitive disabilities among people in the criminal legal system.<sup>63</sup> Section II.A discusses how many jails and prisons do not adequately assess individuals for cognitive disabilities, allowing undiagnosed disabilities to remain unidentified. Section II.B explains how numerous correctional facilities fail to provide reasonable academic accommodations for people who have cognitive disabilities. Section II.C examines some of the ways in which cognitive disabilities can interfere with an individual's ability to complete alternative requirements created for people who have these disabilities. Lastly, Section II.D describes how people with cognitive disabilities often do not receive accommodations at parole hearings, further hindering their ability to explain why they were not able to meet educational requirements.

### A. Correctional Systems Neglect to Identify People with Cognitive Disabilities

Though many scholars estimate that cognitive disabilities are prevalent among incarcerated populations,<sup>64</sup> it is difficult to find reliable data on the actual number of persons in prisons and jails who have these disabilities.<sup>65</sup> This lack of concrete data highlights the fact that correctional

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[<https://perma.cc/TMC9-WACA>] (listing a special condition for parole or probation as “[s]uccessfully complet[ing] educational and/or vocational training as directed”).

62. See, e.g., IOWA ADMIN. CODE r. 201-45.2(906) (2010) (“If needed, the parolee shall continue to work toward attaining a GED or complete the requirements for a high school diploma.”); OKLA. STAT. tit. 57, § 332.8 (2016) (“The Board may require any program to be completed after the inmate is released on parole as a condition of parole.”).

63. See *supra* Section I.A.

64. See *supra* Section I.A.

65. See, e.g., Jessica Jones, *Persons with Intellectual Disabilities in the Criminal Justice System: Review of Issues*, 51 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 723, 724 (2007) (explaining that it is difficult to determine the prevalence of intellectual disabilities in the criminal legal system, considering “the wide range of diagnostic and classification criteria used, as well as the variety of assessment tools utilised by clinicians and researchers”); BRAZZELL ET AL., *supra* note 22, at 9 (“Most correctional systems do not maintain data on special needs individuals, and often the numbers they have are grossly underestimated owing to low diagnosis rates.”).

facilities do not effectively and consistently identify people who have cognitive impairments.<sup>66</sup> Without proper screening and tracking procedures, incarcerated people with undiagnosed cognitive disabilities are unable to obtain exemptions and accommodations for educational requirements for parole. This Section will first discuss the reasons why incarcerated individuals' cognitive disabilities often go undetected absent adequate screening procedures. It will next cover the breadth of the absence of sufficient procedures for screening incarcerated people for cognitive disabilities, and the limitations of those procedures that do exist.

### 1. Undiagnosed Cognitive Disabilities Often Remain Unidentified Without Adequate Assessment

Having not been evaluated for cognitive impairments, uncounted individuals move through the criminal legal system with undiagnosed cognitive disabilities.<sup>67</sup> Many incarcerated people with cognitive disabilities have a disability that was not diagnosed before they entered the criminal legal system.<sup>68</sup> Correctional personnel may use a range of methods to try to identify whether an individual may have a cognitive impairment, such as relying on self-reporting or education records.<sup>69</sup> However, if diagnostic tools are not used to assess every individual's cognitive functioning, many individuals' cognitive disabilities may remain unnoticed by criminal legal system personnel for a few reasons. First, some individuals with cognitive disabilities use compensatory behaviors to mask their impairments<sup>70</sup> or

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66. BRAZZELL ET AL., *supra* note 22, at 8–9 (stating learning disabilities and other disorders often go undiagnosed or misdiagnosed “within correctional facilities, as evidenced by the lack of reliable data on the number and types of disabilities among inmates”).

67. Caroline Everington & Ruth Luckasson, *Addressing the Needs of the Criminal Defendant with Mental Retardation: The Special Educator as a Resource to the Criminal Justice System*, 24 EDUC. & TRAINING MENTAL RETARDATION 193, 194 (1989) (“There is considerable reason to believe that many individuals with [an intellectual disability] pass through the system undetected . . . In fact, many are not detected until after sentencing and incarceration, if at all, and even then it may be by happenstance that their disability is discovered.”).

68. Susan Carol Hayes, *Early Intervention or Early Incarceration? Using a Screening Test for Intellectual Disability in the Criminal Justice System*, 15 J. APPLIED RES. INTELL. DISABILITIES 120, 120–21 (2002).

69. Grazia Catalano et al., *Screening Prisoners for Cognitive Impairment—Literature Review*, 11 J. INTELL. DISABILITIES & OFFENDING BEHAV. 201, 202 (2020).

70. See, e.g., Martha E. Snell et al., *Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 220, 226 (2009) (“Individuals with intellectual disability may go to great lengths to hide their

may “deny having problems understanding information.”<sup>71</sup> They may do so in order to appear less vulnerable and avoid becoming victimized,<sup>72</sup> even when speaking with criminal legal system personnel and other persons of authority.<sup>73</sup>

Another reason that criminal legal system personnel often overlook imprisoned persons’ cognitive impairments is that they often lack knowledge about the characteristics of cognitive disabilities, and may even confuse these disabilities with mental health conditions such as anxiety disorders and depression.<sup>74</sup> Mental health conditions can co-occur with cognitive disabilities,<sup>75</sup> but they are distinctive conditions that may require different treatments.<sup>76</sup> A survey of jails in North Carolina revealed that a

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limitations, consuming significant effort to attempt to appear as their often-mistaken image of competent.”).

71. Catalano et al., *supra* note 69, at 203.

72. PA. MENTAL HEALTH & JUST. CTR. OF EXCELLENCE, MANAGING AND TREATING JUSTICE-INVOLVED INDIVIDUALS WITH INTELLECTUAL DISABILITIES IN PENNSYLVANIA 4 (2012), available at <http://www.pacenterofexcellence.pitt.edu/documents/ID%20and%20CJS%20in%20PA%2012%2013%2012%20-%20final%20copy%20sent%20to%20MHJAC.pdf> [<https://perma.cc/2JYT-2QMT>]; see also Anna Scheyett et al., *Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 INTELL. & DEVELOPMENTAL DISABILITIES 13, 13 (2009) (explaining that people with disabilities often adopt a “cloak of competence” to disguise their disabilities, hiding them even from police).

73. Scheyett et al., *supra* note 72, at 14 (describing as a “halo effect” situations in which someone “exhibit[s] his or her best behavior in front of an authority figure and, thus, decreas[es] the likelihood of being identified as having an intellectual or developmental disability”).

74. Everington & Luckasson, *supra* note 67, at 194. Criminal legal system personnel who are often unskilled in identifying signs of cognitive disabilities also include police officers and judges. See Scheyett et al., *supra* note 72, at 14 (explaining that police officers “often lack skills in identifying the more subtle signs of intellectual and developmental disabilities in individuals, who may appear to have adequate functioning. As a result, processing from arrest through trial may proceed without the justice system becoming aware that the individual has a disability.” (citation omitted)); Nancy Cowardin, *Disorganized Crime: Learning Disability and the Criminal Justice System*, 13 CRIM. JUST. 10, 15 (1998) (“Judges routinely take school reports of failing grades and/or behavior referrals at face value in making major decisions related to client disposition. Yet, they rarely require school officials to identify underlying causation for poor performance.”).

75. BRONSON ET AL., *supra* note 25, at 3.

76. While some mental illnesses and disorders are episodic and may differ in severity at different points in time, cognitive disabilities such as intellectual disabilities are typically present throughout one’s life, and are not alleviated by medication or other treatment. James W. Ellis et al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 HOFSTRA L. REV. 1305, 1386–89 (2018).

majority fail to provide adequate training on either mental disorders or cognitive disabilities and administrators often do not know the difference.<sup>77</sup> Similarly, interviews with jail administrators in Washington revealed a lack of awareness of the significance of cognitive disabilities, as well as a belief that personnel can just “tell” if an incarcerated person has a cognitive disability.<sup>78</sup>

## 2. Absence of Adequate Cognitive Assessments in Correctional Facilities

Cognitive impairments often are not identified if the criminal legal system does not affirmatively assess individuals for such disabilities.<sup>79</sup> Regrettably, many correctional facilities do not screen incarcerated people for cognitive disabilities.<sup>80</sup> Further, the process of properly identifying individuals with these disabilities is not a simple task,<sup>81</sup> and even the

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77. In a survey of 80 jail administrators in North Carolina, only 28 administrators indicated that they provide continuing education for their personnel on mental disorders or disabilities. The administrators revealed their lack of understanding of intellectual and developmental disabilities in interviews, with some administrators even confusing them with mental illness. Also, the Department of Corrections’ manual addresses disabilities in a unit titled “Aspects of Mental Illness.” Scheyett et al., *supra* note 72, at 19–20 (also reporting that no administrators surveyed “reported that their officers received training in co-occurring mental illnesses and developmental disabilities”).

78. MEGHAN AP SHAGA, DISABILITY RTS. WASH., YOU CAN’T JUST “TELL:” WHY WASHINGTON JAILS MUST SCREEN FOR MENTAL ILLNESS AND COGNITIVE DISABILITIES 4 (Sept. 2016), available at [https://www.disabilityrightswa.org/wp-content/uploads/2017/12/YouCantJustTell\\_September2016.pdf](https://www.disabilityrightswa.org/wp-content/uploads/2017/12/YouCantJustTell_September2016.pdf) [<https://perma.cc/E7HK-VUGW>].

79. See *supra* Section II.A.1.

80. See, e.g., Cowardin, *supra* note 74, at 16 (“With the exception of some juvenile clients with current disability status, it has been our finding that the justice system neither detects, understands, nor provides for cognitive differences at arrest, adjudication, or disposition unless assisted or ordered to do so.”); BRAZZELL ET AL., *supra* note 22, at 9 (“Most correctional systems do not maintain data on special needs individuals, and often the numbers they have are grossly underestimated owing to low diagnosis rates.”); PA. MENTAL HEALTH & JUST. CTR. OF EXCELLENCE, *supra* note 72, at 4 (“Screening procedures for [intellectual disabilities], including offender self-report, are not routine in the [criminal legal system].”); Scheyett et al., *supra* note 72, at 20 (“Individuals with intellectual and developmental disabilities are not being consistently screened or reliably and effectively identified when they enter the jails.”).

81. See, e.g., *Frequently Asked Questions on Intellectual Disability*, AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, <https://www.aaid.org/intellectual-disability/definition/faqs-on-intellectual-disability> [<https://perma.cc/X7L8-VBAL>] (“The evaluation and classification [of] intellectual disability is a complex issue.”); Montgomery Cnty. Emergency Serv., Inc., *Persons with Intellectual Disability and the Criminal Justice System: What Families, Providers, and Law Enforcement Should Know*, 7 MCES QUEST, no. 2,

correctional systems that do screen individuals for cognitive disabilities may not do so adequately.<sup>82</sup> The Marshall Project surveyed all fifty states' corrections departments about whether they screen for intellectual or other developmental disabilities.<sup>83</sup> Out of the thirty-eight states that responded, five states do not use a test to screen for developmental disabilities,<sup>84</sup> and twenty-five states use screening protocols that experts have deemed inadequate.<sup>85</sup> Several of these states use an IQ test to screen for disabilities but may not administer it effectively. In North Carolina, people who receive a score signaling the presence of an intellectual disability take the test again, allowing them to potentially attain a higher score simply because they are more familiar with the exam.<sup>86</sup> This prevents correctional staff from properly identifying individuals who may have an intellectual disability.<sup>87</sup> Other states use exams that are less suited to identify cognitive disabilities.<sup>88</sup>

Some correctional facilities rely on individuals to self-report that they have cognitive disabilities, or on personnel to identify cognitive impairments through simple observation.<sup>89</sup> Basing identification of

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July 2007, at 3 (stating that the process of diagnosing intellectual disabilities involves "clinical observation, testing, and assessment").

82. For example, Disability Rights Washington's AVID Project, which works to protect the rights of persons with disabilities who are incarcerated in Washington, found adequate screening for cognitive disabilities "severely lacking" in county jails across the state. APShAGA, *supra* note 78, at 4.

83. Chiara Eisner, *Prison Is Even Worse When You Have a Disability Like Autism*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/02/prison-is-even-worse-when-you-have-a-disability-like-autism> [<https://perma.cc/LV8E-LEHX>].

84. In Kentucky and Virginia, for example, correctional staff rely on self-reporting, whereas officials in New Mexico and Delaware use individuals' educational and medical records to determine who may have a disability. *Id.*

85. *Id.* (explaining that "several mental health and legal experts" have stated that the protocols do not "meet professional standards").

86. In its research, The Marshall Project discovered that a particular individual received a score "suggesting a serious intellectual disability," but scored "in the normal range" when they took the exam again a few days later. *Id.*

87. *Id.*

88. For example, eight states reported using the Test of Adult Basic Education, "which is designed to evaluate academic achievement" rather than to identify disabilities. *Id.*

89. Interviews with 80 jail administrators in North Carolina revealed that a large number of the jails use screening processes "based on the erroneous assumptions that individuals with intellectual and developmental disabilities can be identified based on appearance or responses to a few intake questions . . . or that they will willingly self-identify when asked." Scheyett et al., *supra* note 72, at 21. Of the 80 administrators surveyed, none of them reported using a screening process supported by empirical

cognitive disabilities on self-identification or mere observation alone is insufficient, though, as individuals may mask their disabilities.<sup>90</sup> Self-reports are also typically inaccurate, as people with cognitive disabilities may incorrectly assess their abilities<sup>91</sup> or shy away from disclosing their impairments, especially when answering intake questions posed by a stranger.<sup>92</sup> Clinicians and researchers therefore widely recommend against relying on self-reports or mere observation when diagnosing cognitive disabilities.<sup>93</sup>

Not only do some correctional facilities use potentially inaccurate self-reports in screening individuals for cognitive disabilities, but they also use group tests that can yield inaccurate results.<sup>94</sup> Rather than screening incarcerated people individually for cognitive disabilities, some jails and prisons administer written tests to groups.<sup>95</sup> The results of these tests can be unreliable, as individuals can receive help from or copy the answers of other test-takers in the group, and the tests lack sufficient interaction between the examiner and subject.<sup>96</sup>

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research. Thirty-seven administrators reported that their jails used only informal screening for disabilities, with thirty-three of the jails basing identification on correctional officers' observations of incarcerated persons. *Id.* at 18.

90. *Id.* at 21 (explaining that some people who have disabilities may try to hide their disabilities "and may have the initial appearance of adequate functioning, particularly to untrained persons." Therefore, research contradicts the underlying assumptions of screening processes that rely on individuals willingly self-identifying as having a disability, or on identifying persons with disabilities based on their appearance or responses to a few questions during intake).

91. Clinicians have found that persons with intellectual disabilities often overstate their abilities. Ellis et al., *supra* note 76, at 1384–85.

92. An individual who has recently arrived at a jail or prison has typically not established a trusting relationship with the staff member conducting their intake interview, which may lead them to give inaccurate answers. See Salma Ali & Scott Galloway, *Developing a Screening Tool for Offenders with Intellectual Disabilities—the RAPID*, 7 J. INTELL. DISABILITIES & OFFENDING BEHAV. 161, 163 (2016) (explaining that incarcerated individuals' lack of trust of the person conducting an interview or evaluation "is likely to lead to defensiveness and a lack of engagement. Consequently, the likelihood of failing to identify such offenders remains high.").

93. Ellis et al., *supra* note 76, at 1385.

94. *Id.* at 1356–57.

95. Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 WM. & MARY BILL RTS. J. 467, 474 (2014).

96. *Id.* ("In the case of group-administered tests, there is the additional risk that the individual received additional help or copied the responses of others."); Ellis et al., *supra* note 76, at 1357 (explaining that one of the reasons why "group tests are viewed as having substantially reduced accuracy and reliability" is because they lack "direct interaction and observation between the examiner and the subject").

Further, existing screening processes used to identify people with cognitive disabilities are likely ineffective when they involve intake interviews conducted in open areas.<sup>97</sup> Identification of cognitive disabilities often occurs during intake, when an individual first arrives at a prison or jail. The presence of other people having conversations in the room during intake interviews may make it difficult for people with cognitive disabilities to answer questions accurately.<sup>98</sup> Also, individuals with cognitive disabilities may shy away from disclosing and discussing their disabilities in front of other people out of fear of stigmatization and victimization.<sup>99</sup> However, from the research that has been conducted in this area, it appears that intake interviews are commonly conducted in open areas.<sup>100</sup> This is just one of the ways in which existing screening procedures can be inadequate at identifying people who have cognitive disabilities.

#### B. Lack of Academic Accommodations in Correctional Facilities

For incarcerated individuals with cognitive disabilities who must meet educational requirements in order to become eligible for parole, access to academic accommodations can be crucial. These individuals often enter the criminal legal system with a lower level of educational attainment and have educational needs that differ from those of other people who are incarcerated.<sup>101</sup> They may encounter difficulties in inaccessible learning environments “and may need specialized programming provided by expert instructors.”<sup>102</sup> Despite statutory protections, in practice individuals with cognitive disabilities do not always receive accommodations in the prison education context. As a result, completing educational requirements for parole can be especially difficult for persons with diagnosed or undiagnosed cognitive disabilities.

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97. Scheyett et al., *supra* note 72, at 15.

98. *Id.* (“Intake in a stressful and confusing setting where multiple people are present and conducting other conversations may make it more difficult for individuals with intellectual and developmental disabilities to answer questions accurately.”).

99. *Id.*

100. Only thirty-three of 80 North Carolina jail administrators interviewed reported that they conduct intake interviews in private settings, and thirty-three other respondents stated that their jails rarely or never conduct intake interviews in private areas. *Id.* at 18. Washington is another state in which a study of jails’ screening procedures found that screenings are frequently conducted in non-private areas. APSHAGA, *supra* note 78, at 12, 14.

101. BRAZZELL ET AL., *supra* note 22, at 30.

102. *Id.* at 29–30.

## 1. Statutory Requirements for Accommodations

Incarcerated people who have cognitive disabilities are eligible for protections under federal statutes that theoretically ensure they will receive accommodations in correctional education settings. The Individuals with Disabilities Education Act (IDEA) entitles persons under the age of twenty-one who have disabilities to a free appropriate public education (FAPE).<sup>103</sup> Adults older than twenty-one years of age who have disabilities can seek accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA). Section 504 prohibits programs that receive federal financial assistance from discriminating against people with disabilities.<sup>104</sup> It applies to both federal correctional institutions and state correctional institutions that receive funding from the federal government.<sup>105</sup> Title II of the ADA extends to state and local programs, and covers people incarcerated in state-run prisons and jails.<sup>106</sup>

Section 504 and the ADA impose a range of requirements on correctional facilities.<sup>107</sup> They require correctional facilities to provide incarcerated people with disabilities the same opportunities to benefit from services as the broader prison population.<sup>108</sup> Therefore, if a correctional facility provides educational services to the broader incarcerated population, it must provide people who have cognitive disabilities with accommodations. Mere equal access to education services is insufficient to comply with the statute, as the ADA “places an affirmative obligation on the facility to provide reasonable accommodations and modifications to

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103. *Individuals with Disabilities Education Act (IDEA)*, AM. PSYCH. ASS'N, <https://www.apa.org/advocacy/education/idea> [<https://perma.cc/X6XM-F7EK>].

104. 29 U.S.C. § 701 (codifying Section 504).

105. RACHAEL SEEVERS, AVID PRISON PROJECT, MAKING HARD TIME HARDER 10–11 (2016), available at <http://www.avidprisonproject.org/Making-Hard-Time-Harder/assets/making-hard-time-harder---pdf-version.pdf> [<https://perma.cc/34FF-4N8W>].

106. *Id.* at 10 (“[T]he ADA extends to inmates in state-run correctional facilities . . .”); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 206, 213 (1998) (holding that Title II of the ADA extends to state prisons).

107. Margo Schlanger, *Prisoners with Disabilities*, in REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 295, 301 (Erik Luna ed., 2017) (explaining that the two statutes require that correctional facilities “avoid discrimination; individually accommodate disability; maximize integration of prisoners with disabilities with respect to programs, service, and activities; and provide reasonable treatment for serious medical and mental-health conditions”).

108. *Id.* at 303 (citing 28 C.F.R. § 35.130(b)(1)).

[incarcerated persons] with disabilities to ensure they have access to such services.”<sup>109</sup>

Under the ADA, an incarcerated person who has a cognitive disability is entitled to reasonable accommodations that would ensure they can participate in provided educational programs.<sup>110</sup> To obtain an accommodation, either an individual must request an accommodation or their need for an accommodation must be so reasonably evident as to put correctional personnel on notice.<sup>111</sup> Unfortunately, those in need of accommodations often find themselves “caught in an endless cycle of institutional grievances and appeals as they seek approval for accommodations,”<sup>112</sup> and individuals with cognitive disabilities thus often find themselves without educational services modified for their needs.

## 2. Insufficient Provision of Academic Accommodations

Despite the fact that federal statutory law requires that correctional facilities provide accommodations for individuals with disabilities, research has shown that many facilities fail to provide accessible learning environments for people who have cognitive disabilities. The Bureau of Justice Statistics found that as of 2000, only 21.9% of private prisons, 39.6% of state prisons, and 59.7% of federal prisons offered special education programs.<sup>113</sup> In 2005, the Bureau reported that only 667 out of 1,821 state and federal correctional facilities provided special education programming, and 165 facilities did not offer any educational programs.<sup>114</sup> Given the prevalence of cognitive disabilities among incarcerated people, there are likely a large number of individuals unable to complete education requirements for parole because they do not have access to instruction appropriately suited to their needs.

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109. SEEVERS, *supra* note 105, at 11. Correctional facilities thus “may not provide an alternative service ‘that is not equal to that afforded others,’ and must provide aids, benefits, or services that would enable the [incarcerated person] to ‘gain the same benefit, or to reach the same level of achievement as that provided to others.’” Schlanger, *supra* note 107, at 303 (quoting 28 C.F.R. § 35.130(b)(1)).

110. SEEVERS, *supra* note 105, at 11–12.

111. Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L.J. 309, 315 (2017).

112. SEEVERS, *supra* note 105, at 5.

113. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., EDUCATION AND CORRECTIONAL POPULATIONS 4 (2003), available at <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/XM4M-PANS>].

114. JAMES J. STEPHAN, BUREAU OF JUST. STAT., CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 26 tbl.18 (2008), available at <https://www.bjs.gov/content/pub/pdf/csf05.pdf> [<https://perma.cc/T5GA-CWHJ>].

There are several possible explanations for why, despite federal statutory law, many correctional facilities do not provide learning environments that are accessible for people with cognitive disabilities. First, the IDEA outlines several situations in which facilities are not required to provide appropriate educational services to individuals who have disabilities and are under the age of twenty-one.<sup>115</sup> For instance, these individuals are not entitled to a free, appropriate education if, prior to their incarceration, they were not identified as a child with a disability and did not have an individualized education program under the IDEA.<sup>116</sup> Also, youth who have been adjudicated as adults are excluded from the typical assessment testing, and their education program and placement can be modified because of “a bona fide security or compelling penological interest that cannot otherwise be accommodated.”<sup>117</sup> Many incarcerated individuals with cognitive disabilities who are under twenty-one fall into these and other exceptions, and consequently are not entitled to appropriate educational services.

Additionally, many facilities neglect incarcerated individuals with cognitive disabilities’ needs for accommodations. Some facilities have a process for requesting accommodations under the ADA, but these processes often require individuals to complete written requests. This can prove problematic for people with cognitive disabilities.<sup>118</sup> Further, cognitive disabilities may not be so reasonably evident as to put personnel on notice of an individual’s need for accommodations. They can be non-obvious to untrained prison staff, and so without “assessment techniques and training, prison staff are not able to effectively determine the need for reasonable accommodations for [incarcerated people] with disabilities.”<sup>119</sup> Many facilities do not provide adequate ADA training to their personnel and so staff frequently misunderstand the communication issues faced by individuals with cognitive disabilities.<sup>120</sup> As a result, incarcerated persons

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115. Blakely Evanthia Simoneau, *Special Education in American Prisons: Risks, Recidivism, and the Revolving Door*, 15 STAN. J. C.R. & C.L. 87, 90–91 (2019).

116. 34 C.F.R. § 300.102(a)(2).

117. 20 U.S.C. § 1414(d)(7)(B).

118. Schlanger, *supra* note 107, at 298 (stating that incarcerated people “with intellectual disabilities may be unable to access medical care or other resources and services, because officials require written requests and they are illiterate”).

119. Blanck, *supra* note 111, at 315.

120. *Id.* at 318 (“[C]orrectional staff frequently incorrectly believe that . . . inmates with cognitive and mental health impairments can appropriately read and understand documents presented to them, for example, to review and acknowledge by signature.”).

“with disabilities who need accommodations are often overlooked, ignored, or even punished.”<sup>121</sup>

Many correctional facilities may fail to provide modified academic programming because they lack the resources to do so. Correctional facilities house diverse populations and it can be challenging to provide educational services that meet incarcerated individuals’ wide range of unique needs.<sup>122</sup> Correctional systems may lack the qualified personnel needed to meet the demand for specialized instruction,<sup>123</sup> and may have reached their capacity to provide educational services to the large numbers of incarcerated individuals.<sup>124</sup>

### C. Difficulties Completing Alternative Requirements for Incarcerated People with Cognitive Disabilities

Some jurisdictions that have implemented educational requirements for parole have adopted alternative requirements for individuals who have cognitive disabilities.<sup>125</sup> These alternative requirements are intended to prevent people who have disabilities from being held to standards that they cannot feasibly meet. However, in reality, some incarcerated individuals with cognitive disabilities may be unable to successfully participate in alternative programming without modifications or specialized instruction. Cognitive disabilities can affect performance in nonacademic situations, such as vocational programs, and alternative programming is often not modified to meet the needs of individuals who have cognitive impairments.

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121. SEEVRS, *supra* note 105, at 4.

122. Peter E. Leone et al., Understanding and Responding to the Education Needs of Special Populations in Adult Corrections 14 (Mar. 31–Apr. 1, 2008) (unpublished manuscript), available at <http://johnjay.jjay.cuny.edu/files/ReentryRoundtableonEducation.pdf> [<https://perma.cc/6JAU-YBF5>].

123. OSA D. COFFEY ET AL., DEPT. OF JUST. NAT’L INST. OF CORRECTIONS, PROGRAMMING FOR MENTALLY RETARDED AND LEARNING DISABLED INMATES 111–12 (1989) (“Data from a national survey of state administrators of correctional and special education agencies revealed a dearth of qualified special education personnel relative to estimates of the number of handicapped offenders in correctional programs.”).

124. Leone et al., *supra* note 122, at 14–15 (“The trends over the past [few decades] have not only taxed the capacity of correctional institutions to provide educational services to a growing population; they have forced the agency to respond to individuals with complex social and educational needs.”). For example, as of 2008, California facilities have encountered issues with staff vacancies, lack of funding, and facility lockdowns. These issues have caused less than half of enrolled students to attend class on any given day. *Id.*

125. *See supra* Section I.C.1.

### 1. Cognitive Disabilities Can Affect Individuals' Ability to Complete Alternative Programming

In some jurisdictions, incarcerated individuals with cognitive disabilities may be given the option to participate in nonacademic programming as an alternative to educational requirements. Correctional administrators may fail to recognize, however, that some cognitive disabilities can affect individuals' ability to complete vocational programming without appropriate modifications.<sup>126</sup> This may be part of the reason why research has indicated that individuals "with disabilities are less likely to be successful when given work assignments in correctional facilities."<sup>127</sup>

People who have cognitive disabilities may have difficulty completing vocational and other non-academic programming without accommodations. For instance, they may encounter issues with attention span,<sup>128</sup> verbal comprehension and communication,<sup>129</sup> and problem-solving.<sup>130</sup> Learning disabilities, for example, can inhibit individuals' ability to learn the social information that they need to make decisions.<sup>131</sup> Learning disabilities can also hinder individuals' ability to process and organize information, resulting in more errors when they are completing

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126. Jennifer M. Reingle Gonzalez et al., *Disproportionate Prevalence Rate of Prisoners with Disabilities: Evidence from a Nationally Representative Sample*, 27 J. DISABILITY POL'Y STUD. 106, 113 (2016).

127. *Id.*

128. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985) (explaining that people with intellectual disabilities may encounter issues with "attention span, focus, and selectivity in the attention process").

129. *See, e.g.*, JENNY TALBOT, PRISON REFORM TR., PRISONERS' VOICES: EXPERIENCES OF THE CRIMINAL JUSTICE SYSTEM BY PRISONERS WITH LEARNING DISABILITIES AND DIFFICULTIES 37 (2008), available at <http://www.prisonreformtrust.org.uk/Portals/0/Documents/No%20One%20Knows%20report-2.pdf> [<https://perma.cc/FN9B-QFX9>] (describing a study of incarcerated persons with learning difficulties or disabilities in England, Wales, and Scotland. More than half of the surveyed individuals reported "difficulties making themselves understood in prison, which rose to more than two-thirds for those with possible learning disabilities").

130. *See, e.g.*, MICHAEL L. WEHMEYER, PROMOTING SELF-DETERMINATION IN STUDENTS WITH DEVELOPMENTAL DISABILITIES 36 (2007) (explaining that research suggests individuals with intellectual and developmental disabilities "may approach problems with a limited repertoire of solutions and a more rigid approach to the process," though they "can learn more effective problem-solving skills").

131. Cowardin, *supra* note 74, at 11-12.

tasks.<sup>132</sup> Also, though people with cognitive disabilities can often learn to follow instructions, they may struggle to differentiate between relevant and irrelevant cues when unfamiliar cues are present.<sup>133</sup>

Further, incarcerated people with cognitive disabilities may also have impaired time management skills, which can pose problems in vocational programs, as many job-related responsibilities involve properly allotting time among multiple tasks.<sup>134</sup> They may have difficulty managing their time due to limitations of their working memory, or difficulty grasping abstract concepts of time.<sup>135</sup> As a result, they encounter challenges completing work tasks.<sup>136</sup> Research has shown that people with cognitive disabilities often can learn time-management skills;<sup>137</sup> however, correctional facilities typically do not provide individualized training in this area. They also do not provide the job coaches or individualized support that have enabled many individuals with cognitive disabilities to succeed in vocational settings outside of correctional facilities.<sup>138</sup>

Considering these difficulties, some incarcerated people who have cognitive disabilities may encounter difficulties in job training programs. Researchers have found that some individuals with cognitive disabilities may need continued support and frequent prompts in order to improve their job skills.<sup>139</sup> They are typically not provided such individualized attention and assistance in correctional facilities, especially because many

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132. Individuals with learning disabilities may “employ ineffective nonverbal imagery to make choices,” and processing information in this way “increases the likelihood of errors of omission . . . and commission.” *Id.* Also, language immaturity can affect one’s “ability to organize and monitor input on a continuing basis,” and so people with learning disabilities may “appear disorganized, relying . . . on impulse, guesswork, and luck.” *Id.* at 12.

133. Teresa A. Taber et al., *Use of Self-Operated Auditory Prompts by Workers with Moderate Mental Retardation to Transition Independently Through Vocational Tasks*, 19 RSCH. DEVELOPMENTAL DISABILITIES 327, 328 (1998).

134. Daniel K. Davies et al., *Enhancing Independent Time-Management Skills of Individuals with Mental Retardation Using a Palmtop Personal Computer*, 40 MENTAL RETARDATION 358, 358 (2002).

135. Julie M. Green et al., *The Use of Assistive Technology to Improve Time Management Skills of a Young Adult with an Intellectual Disability*, 26 J. SPECIAL EDUC. TECH. 13, 14 (2011).

136. *Id.*

137. Davies et al., *supra* note 134, at 358–59.

138. Virginia Morash-Macneil et al., *A Systematic Review of Assistive Technology for Individuals with Intellectual Disability in the Workplace*, 33 J. SPECIAL EDUC. TECH. 15, 15 (2018).

139. *Id.*

facilities are not even aware if a program participant has a cognitive disability.

## 2. Individuals with Cognitive Disabilities May Face Challenges Enrolling in Alternative Programming

Though individuals with cognitive disabilities may be able to complete alternative programming with appropriate modifications or specialized instruction, alternative programming in correctional facilities is often not accessible. Within correctional facilities, conflicting priorities can lead to certain individuals not being permitted to enroll in programming.<sup>140</sup> For example, an individual may not be permitted to enroll in certain programs due to security or work assignment considerations.<sup>141</sup> Further, within and outside of correctional facilities, a lack of cooperation among agencies may prevent the proper identification of individuals with cognitive disabilities' needs, thereby preventing these people from enrolling in needed programming.<sup>142</sup>

People who are incarcerated and have cognitive disabilities may also be unable to enroll in alternative programming because they cannot fulfill educational prerequisites. Vocational programming modified to their needs is severely lacking,<sup>143</sup> and these individuals often struggle to enroll in programming that requires them to first meet certain educational requirements.<sup>144</sup> As a result, individuals with cognitive disabilities who "may be capable of doing the manual work for which a program trains . . . are effectively barred from vocational participation."<sup>145</sup>

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140. COFFEY ET AL., *supra* note 123, at 111 ("Within institutions, the absence of comprehensive and coordinated administrative structures leads to conflicting priorities among inmate programs.").

141. *Id.*

142. SHEREEN HASSAN & ROBERT GORDON, SIMON FRASER UNIV., CRIMINOLOGY RSCH. CTR., DEVELOPMENTAL DISABILITY, CRIME, AND CRIMINAL JUSTICE: A LITERATURE REVIEW 17 (2003) ("[T]here is a lack of inter-agency agreement and cooperation . . . [T]he only U.S. program where effective agency collaboration has been documented is in Lancaster County, Pennsylvania, where . . . services have been combined to better address the needs of adult offenders with disabilities.").

143. COFFEY ET AL., *supra* note 123, at 110 (mentioning "[t]he virtual absence of vocational special education in correctional programs").

144. Cowardin, *supra* note 74, at 15 ("We have concluded that vocational offerings in most prisons exclude LD [learning disabled] inmates based on entrance criteria (literacy attainment) that are beyond their capabilities.").

145. *Id.*

#### D. Absence of Accommodations at Parole Hearings

People who have cognitive disabilities are further disadvantaged by the lack of accommodations at parole hearings. Though the state has an affirmative duty to provide reasonable accommodations, researchers have found that courts often do not provide needed accommodations.<sup>146</sup> Unable to fully participate in and comprehend the hearings, some individuals with cognitive disabilities may be unable to prove that they have a disability, and thus argue that they should not be subject to educational requirements for parole.

People who are incarcerated frequently represent themselves at parole hearings, which can be challenging for those who have cognitive disabilities, as some of the procedures associated with the hearings rely on an individual's ability to read and write.<sup>147</sup> As of 2016, only two states "provide for appointment of legal counsel to litigants with disabilities as a form of reasonable accommodation."<sup>148</sup> Indigent individuals with cognitive disabilities in other jurisdictions may be unable to afford counsel and may even be denied representation due to their disabilities.<sup>149</sup> This can pose serious problems for people with cognitive disabilities, especially those with language and processing disorders, as they may not be able to fully comprehend the verbal content of the hearings without appropriate accommodations.

Parole commissioners are often unaware of signs or characteristics of cognitive disabilities, which can pose an additional challenge for people with undiagnosed cognitive disabilities. Individuals who have cognitive disabilities may be unable to communicate effectively to a parole board that they have a disability, presuming that they are aware that their difficulties

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146. As of 2016, less than 30% of court systems acknowledge on their websites that "mental disability" is a basis for accommodations. REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA'S JAILS AND PRISONS* 8 (2016), available at <https://cdn.americanprogress.org/wp-content/uploads/2016/07/18000151/2CriminalJusticeDisability-report.pdf> [<https://perma.cc/J2KG-ZA44>].

147. Cowardin, *supra* note 74, at 16 ("Most procedures associated with hearings, including such tasks as filling out hearing requests, appeal forms, and reading/responding to disciplinary reports, depend on an inmate's ability to read and write.").

148. VALLAS, *supra* note 146, at 8.

149. *See, e.g., id.* at 9 ("Some disability advocates even report instances of public defenders refusing to accept cases involving defendants with disabilities, apparently due to lack of comfort or experience representing clients with disabilities.").

constitute a disability.<sup>150</sup> Without a diagnosis of a cognitive disability in the incarcerated person's file, and with no training on how to spot cognitive disabilities, parole commissioners may not realize that an individual has a disability. As a result, they may deny them release without realizing their need for accommodations.

### III. POTENTIAL SOLUTIONS

As Section II.A demonstrated, cognitive disabilities are typically not identified without effective screening tools,<sup>151</sup> and yet correctional systems in the United States do not adequately screen incarcerated people for cognitive disabilities.<sup>152</sup> If these same systems impose educational requirements on people in prisons and jails, they should actively seek to identify which individuals are in need of modifications or specialized instruction in order to complete such requirements. Part III discusses two possible ways that correctional staff can become better equipped to identify people who have cognitive disabilities. First, correctional facilities could implement short assessment tools to identify which individuals may have cognitive disabilities. Second, more effective training of criminal legal system personnel and defense attorneys could help them proactively identify people with cognitive disabilities.

#### A. Feasible Changes to Screening Procedures in Correctional Facilities

Evaluating an individual's intellectual and cognitive functioning is typically not a simple task,<sup>153</sup> and correctional systems often fail to identify individuals who have cognitive disabilities even though a range of validated

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150. In a parole board hearing, the person being considered for parole typically must "ascertain nuanced expectations, engage in rigorous self-analysis, interpret varied circumstances, and articulate persuasive reasoning all under extreme pressure." This can be especially arduous for an individual who has an intellectual or "developmental disability who, by definition, has difficulty receiving, processing, and expressing information." NATHANIEL HSIEH, STAN. INTELL. & DEVELOPMENTAL DISABILITIES L. & POL'Y PROJECT, LEFT BEHIND: DEVELOPMENTAL DISABILITY AND THE PURSUIT OF PAROLE 10 (2018), available at <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/11/Nathaniel-Hsieh-Left-Behind-Developmental-Disability-and-the-Pursuit-of-Parole.pdf> [<https://perma.cc/9L8J-3MSX>].

151. See, e.g., APSHAGA, *supra* note 78, at 11 (explaining that one of the reasons for why this is the case is that people with cognitive disabilities may not feel comfortable disclosing their disabilities because of fear of stigmatization and victimization, and because they are also frequently skilled at hiding their impairments).

152. See *supra* Section II.A.2.

153. Everington, *supra* note 95, at 469-70.

assessment tools exist.<sup>154</sup> Two of the instruments most widely used in the United States to measure intelligence are the Stanford-Binet and Wechsler Adult Intelligence Scales (WAIS).<sup>155</sup> However, given the personnel and time limitations in prisons and jails, administering full diagnostic assessments such as the Stanford-Binet and WAIS for all incarcerated individuals may not currently be feasible.<sup>156</sup> Full diagnostic assessments are time consuming<sup>157</sup> and may need to be administered by “appropriately qualified applied psychologists or by someone under their supervision.”<sup>158</sup>

Although correctional facilities may not currently have the time and personnel resources required to administer full diagnostic assessments for all imprisoned individuals,<sup>159</sup> they could use shorter assessment instruments to determine which individuals are in need of full assessments.<sup>160</sup> Some facilities already attempt to screen for cognitive disabilities, but they often use inadequate assessment protocols to do so.<sup>161</sup> Correctional facilities could instead employ effective screening tools and standards that have been developed by experts and are already available

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154. Donald M. Linhorst et al., *Criminal Justice Responses to Offenders with Intellectual and Developmental Disabilities*, in THE WILEY HANDBOOK, *supra* note 12, at 86, 88.

155. Wayne Silverman et al., *Stanford-Binet and WAIS IQ Differences and Their Implications for Adults with Intellectual Disability (a.k.a. Mental Retardation)*, 38 INTEL. 242, 242 (2010).

156. A.Y.M. van Esch et al., *Intelligence Assessment Instruments in Adult Prison Populations: A Systematic Review*, 62 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 3225, 3226 (2018); Stephen D. Husband & Clifford M. Decato, *The Quick Test Compared with the Wechsler Adult Intelligence Scale as Measures of Intellectual Functioning in a Prison Clinical Setting*, 50 PSYCH. REP. 167, 167 (1982). These intelligence assessments are typically devised to be administered by trained clinicians, and administering them is a specialized skill that prison staff who are untrained and inexperienced in this area likely do not have. Erik Søndena et al., *Validation and Adaptation of the Norwegian Version of the Hayes Ability Screening Index for Intellectual Difficulties in a Psychiatric Sample*, 65 NORDIC J. PSYCHIATRY 47, 47 (2011) (“The validated [screening] instruments are...designed to be administered by examiners who have psychological or psychometric training...”); Ellis et al., *supra* note 76, at 1414 (“[T]he administration and evaluation of IQ testing is a particularly specialized and demanding skill.”).

157. Søndena et al., *supra* note 156, at 47.

158. Karen McKenzie et al., *Screening for Offenders with an Intellectual Disability: The Validity of the Learning Disability Screening Questionnaire*, 33 RES. DEVELOPMENTAL DISABILITIES 791, 792 (2012).

159. Catalano et al., *supra* note 69, at 204.

160. Husband & Decato, *supra* note 156, at 167.

161. See *supra* Section II.A.2 (discussing the absence of adequate screening and tracking procedures in correctional facilities).

for use.<sup>162</sup> Shorter forms of full diagnostic assessments are available, and can be helpful for making quick, rough assessments.<sup>163</sup> Rather than diagnosing cognitive disabilities, these short assessment tools simply identify which individuals are in need of a full diagnostic assessment.<sup>164</sup> As compared to the full diagnostic assessments, these shorter tests typically either have fewer questions or focus on only one aspect of intelligence,<sup>165</sup> and do not need to be administered by trained professionals.<sup>166</sup> They are not intended to be substitutes for the full diagnostic assessments.<sup>167</sup> They can be used as quick screening tools, but should be followed by a full assessment.<sup>168</sup>

Correctional staff could use a short assessment instrument such as the Hayes Ability Screening Index (HASI), which was designed to be used in the criminal legal system.<sup>169</sup> It can be administered by professionals who do not have any specialist training,<sup>170</sup> and takes only ten to fifteen minutes to complete.<sup>171</sup> The HASI does not diagnose an intellectual disability, but

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162. APESHAGA, *supra* note 78, at 11–12 (“Screening standards for jails are readily available. . . . In addition, researchers have developed comprehensive, evidence-based screening tools for cognitive disabilities and mental illness that can be used in correctional settings.”).

163. Ellis et al., *supra* note 76, at 1354–55.

164. Erik Søndena et al., *Validation of the Norwegian Version of the Hayes Ability Screening Index for Mental Retardation*, 101 PSYCH. REP. 1023, 1028 (2007).

165. Ellis et al., *supra* note 76, at 1355.

166. Henk Nijman et al., *Development and Testing of a Screener for Intelligence and Learning Disabilities (SCIL)*, 31 J. APPLIED RSCH. INTELL. DISABILITIES e59, e59 (2018) (explaining that screening tools have been developed that do not “require intensive training of the staff members who administer them”).

167. Catalano et al., *supra* note 69, at 201, 205 (explaining that screening tools “do not provide a diagnosis for intervention and treatment,” and “cannot feasibly include all functions or domains of cognitive ability”).

168. Ellis et al., *supra* note 76, at 1355 (“[T]here is a strong consensus among psychologists and other clinicians that [the short tests] cannot be used as a substitute for a full assessment of intelligence in matters of significance.”); McKenzie et al., *supra* note 158, at 792 (stating that screening tools can indicate whether someone likely has an intellectual disability and signal “the need for further assessment”); Catalano et al., *supra* note 69, at 203 (describing “the value of using screening tools as a first step to inform the selection and application of diagnostic assessment instruments”).

169. Søndena et al., *supra* note 164, at 1024 (explaining that the HASI was developed as “a valid and user-friendly test to screen for [intellectual disability] within the criminal justice system”).

170. Ali & Galloway, *supra* note 92, at 163 (stating that the HASI is “designed to be administered by all professionals, including those with no specialist training in [intellectual disabilities] or in the administration of specialist psychological instruments”).

171. Hayes, *supra* note 68, at 122.

rather identifies individuals who need further assessment.<sup>172</sup> It consists of four subtests.<sup>173</sup> The scores of each subtest are added together, and individuals who receive a total score that is lower than the cutoff score of eighty-five are referred for further testing.<sup>174</sup>

Unlike many screening tools that have not been tested for use in the criminal legal system, the HASI has been validated as a practical, easy-to-use tool for use in correctional settings.<sup>175</sup> It uses tests “well known from the neuropsychological test tradition,” and its scores correlate significantly with well-known intelligence assessment tools.<sup>176</sup> Though researchers have deemed the HASI a valid screening tool, the HASI is designed to be overinclusive and may flag people who have mental health conditions or do not speak English.<sup>177</sup> However, researchers argue that these groups benefit from further assessment, and assert that mental health conditions or a lack of English-speaking skills can mask the presence of a cognitive disability.<sup>178</sup> If a facility finds that the HASI falsely identifies more individuals than they have the resources to properly diagnose, they could adjust the HASI’s cut-

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172. *Id.* at 125.

173. The first subtest asks four questions regarding the subject’s socioeconomic status, and any learning difficulties the subject experiences in school. The second subtest tests the subject’s spelling, word rotation, and attention skills, requiring the subject to spell the word “WORLD” backwards. The third subtest asks the subject to complete a puzzle and is designed to assess the subject’s divided attention, visual-conceptual, and visuomotor tracking skills. It asks the subject to draw lines between alternating letters and numbers, and is a variation of the well-regarded Trail-Making Test. Lastly, the fourth subtest asks the subject to draw the face of a clock with the hands at 3:40, testing their visuospatial and constructional aptitudes. Søndena et al., *supra* note 164, 1024–25.

174. The cut-off score for individuals between the ages of 13 and 18 is 90, and the cut-off score for adults over the age of 18 is 85. The HASI generates an IQ score, but only provides scores that are below average and are within the range of 48.7–96.4. Since it was designed to screen for intellectual disabilities, it does not calculate high IQ scores. *Id.*

175. Ali & Galloway, *supra* note 92, at 163.

176. For example, the results of the Clock Drawing subtest correlate with the scores of nonverbal visuoconstruction tests such as the Block part of the WAIS, and the Rey-Osterrieth Complex Figure Copy Test. Søndena et al., *supra* note 164, at 1024–25; *see also* Hayes, *supra* note 68, at 122–24 (describing a study that found significant correlation between the HASI’s results and the results of other tests); Catalano et al., *supra* note 69, at 205 (stating that across three studies of correctional populations in Norway and Australia, the HASI generated scores that positively correlated with “the overall full scaled score of the Wechsler Intelligence Scale”).

177. Hayes, *supra* note 68, at 125.

178. *Id.* at 125–26.

off score, as some researchers recommend.<sup>179</sup> Overall, some scholars have found that the HASI is a valid tool for quickly screening incarcerated people for cognitive impairments, and does not fall into some of the pitfalls that other tests fail to avoid.<sup>180</sup>

There are, however, other accurate assessment tools that correctional facilities could implement. A 2018 study of available short intelligence tests found that both the Satz-Mogel short form of the WAIS (Satz-Mogel)<sup>181</sup> and the Ammons Quick Test (QT)<sup>182</sup> generate reliable estimates of incarcerated individuals' intellectual functioning.<sup>183</sup> The scores that these tests generate correlate with results of the WAIS.<sup>184</sup> The Satz-Mogel is a shortened version of the WAIS and takes approximately thirty to forty-five minutes to administer.<sup>185</sup> Within five to fifteen minutes, the QT measures verbal intelligence and estimates the subject's IQ and mental age.<sup>186</sup> Though researchers found both tests generate relatively accurate results, they recommend the Satz-Mogel as generating the most accurate results. The QT, however, may be preferred in prisons because it is shorter

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179. Søndena et al., *supra* note 164, at 1028 (recommending adjusting the cut-off score for adults from 85 to 81 or 79. Researchers found that adjusting the score to 81 or 79 did not prevent the HASI from being sensitive to intellectual disabilities).

180. Some other tests identify mental health conditions rather than cognitive disabilities, fail to make their scoring methods clear, and remain untested and unadapted for use in correctional settings. *See, e.g.*, Ali & Galloway, *supra* note 92, at 163 (“[M]any screening measures that are currently being used have not been validated in criminal justice settings.”); Hayes, *supra* note 68, at 127 (“Many other screening tests attempt to identify psychiatric symptoms rather than intellectual disability.”). Some tests may be inaccurate, such as the Wechsler Abbreviated Scale of Intelligence (WASI), an abbreviated form of the WAIS. Van Esch et al., *supra* note 156, at 3236–37 (summarizing the results of a study of the WASI, which found that it did not “demonstrat[e] the desired accuracy” and consistently produced scores lower than the scores generated by the WAIS); Helen J. Thompson et al., *Inadequacy of Brief IQ Measures in the Classification of Mentally Retarded Prisoners*, 83 AM. J. MENTAL DEFICIENCY 416, 417 (1979) (finding that, when used with incarcerated people, the WASI generated significantly different results from the results of the WAIS).

181. *See* Paul Satz & Steve Mögel, *An Abbreviation of the WAIS for Clinical Use*, 18 J. CLINICAL PSYCH. 77, 77–79 (1962) (describing the development of the Satz-Mogel abbreviated version of the WAIS).

182. *See* R.B. Ammons & C.H. Ammons, *The Quick Test (QT): Provisional Manual*, 11 PSYCH. REP. 111, 115–47 (1962).

183. Van Esch et al., *supra* note 156, at 3236–37.

184. *Id.*

185. *Id.* at 3235.

186. *Id.* at 3234.

and relies less on verbal communication.<sup>187</sup> The Learning Disability Screening Questionnaire (LDSQ) is another viable option.<sup>188</sup> The LDSQ consists of seven items,<sup>189</sup> takes approximately five minutes to complete, and does not need to be administered by a trained professional.<sup>190</sup>

In addition to assessing intellectual functioning, identifying some cognitive disabilities also requires examining adaptive functioning.<sup>191</sup> The Adaptive Functioning Assessment Tool (AFAT) may be used to this end.<sup>192</sup> The AFAT is the first adaptive functioning test to have been developed for use in correctional settings.<sup>193</sup> It can be filled out by any staff member who knows the individual, and consists of statements that describe behaviors that individuals “typically exhibit while in prison.”<sup>194</sup> A study found that it is “a reliable and valid measure of [adaptive functioning] in a prison environment.”<sup>195</sup> The HASI, Satz-Mogel, QT, LDSQ, and AFAT are examples of valid short assessment instruments that correctional facilities can use to identify which incarcerated people may have cognitive disabilities.

After screening incarcerated people for cognitive disabilities with short assessment tools, correctional facilities can refer for further assessment those individuals who have been flagged as potentially having cognitive impairments. Each state’s office for people with intellectual and developmental disabilities could potentially conduct a full diagnostic assessment of those individuals who have been flagged during intake at prisons and jails.<sup>196</sup> Alternatively, departments of corrections could hire or

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187. *Id.* at 3239 (“[W]hen it comes to the applicability in prison populations, the shorter and less verbal QT can be preferred over the use of the Satz-Mogel.”).

188. Catalano et al., *supra* note 69, at 205.

189. The LDSQ tests reading, writing, and telling time, and asks questions about past schooling experiences and other background information. Julia Kelly et al., *Providing a Learning Disability In-Reach Service for Young Adult Offenders Serving a Sentence of Imprisonment for Public Protection*, 3 J. LEARNING DISABILITIES & OFFENDING BEHAVIOUR 139, 141 (2012).

190. Karen McKenzie et al., A Tool to Help Identify Learning Disabilities in Homeless People, 115 NURSING TIMES 26, 27 (2019).

191. Intellectual disability, for example, affects both intellectual and adaptive functioning, which has not been defined consistently but in all definitions “relates to . . . skills required to function independently.” Gareth E. Ross et al., *The Reliability and Validity of the Adaptive Functioning Assessment Tool in UK Custodial Settings*, 24 J. INTELL. DISABILITIES 35, 37 (2020).

192. Catalano et al., *supra* note 69, at 205–06.

193. Ross et al., *supra* note 191, at 38.

194. *Id.*

195. *Id.* at 47.

196. For example, in New York City, the Office for People with Developmental Disabilities could conduct full assessments of incarcerated people who have been

partner with clinicians or advocacy organizations to conduct full assessments.<sup>197</sup>

By implementing effective screening tools, correctional facilities can quickly and easily determine which individuals may have cognitive disabilities. These tools appear to be a practical alternative to administering full diagnostic assessments for all incarcerated individuals, which is likely infeasible given correctional facilities' resource constraints. As long as correctional facilities use valid instruments<sup>198</sup> under conditions that do not inhibit their effectiveness,<sup>199</sup> screening tools can help ensure people who have cognitive disabilities are identified and are not held to educational requirements that they cannot feasibly meet without accommodations.

## B. Other Potential Adjustments to Intake Processes

If correctional facilities decide not to adopt valid screening tools, however, smaller adjustments to intake processes could ensure that incarcerated individuals with cognitive disabilities are identified. One potentially influential change could be to ensure that intake interviews are conducted only in private settings, so that individuals who have disabilities may feel more comfortable speaking about them. Also, correctional facilities could ensure that intake interviews and questionnaires ask specific questions regarding disabilities.<sup>200</sup> Intake forms that ask incarcerated

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identified by Correctional Health Services as potentially having a CD. Ben Hattem, *NYC Jails Fail to Identify Prisoners with Cognitive Problems*, CITY LIMITS (Oct. 27, 2016), <https://citylimits.org/2016/10/27/nyc-jails-fail-to-identify-prisoners-with-cognitive-problems/> [https://perma.cc/JV5K-H6ZH].

197. The Dyslexia Awareness Foundation and Pittsburg State's Center for READING, for example, have been contacting state correctional systems and offering to screen incarcerated individuals for dyslexia. Samantha Michaels, *People in Prison Are Way More Likely to Have Dyslexia. The Justice System Sets Them Up to Fail*, MOTHER JONES (Apr. 30, 2019), <https://www.motherjones.com/crime-justice/2019/04/people-in-prison-are-way-more-likely-to-have-dyslexia-the-justice-system-sets-them-up-to-fail/> [https://perma.cc/E4KS-DNV4].

198. McKenzie et al., *supra* note 158, at 792 (stating that screening tools must "have strong psychometric properties, including reliability, validity, standardisation" and "should also be quick and straightforward to use and have good sensitivity and specificity").

199. For example, "advance instruction to staff who will administer the screening tool and the way the test is explained to [people] of different abilities and linguistic backgrounds" can affect a tool's efficacy. Catalano et al., *supra* note 69, at 203.

200. In a study of 80 jail administrators in North Carolina, only four administrators stated that they asked specific questions about disabilities in their intake forms. Further, only one administrator reported asking whether the individual had ever

people if they have any cognitive disabilities, or have received academic accommodations in the past, could at minimum help correctional personnel identify which individuals need further assessment.

Further, jail and prison staff could receive more continual training on cognitive disabilities and the Americans with Disabilities Act (ADA),<sup>201</sup> as they are commonly tasked with conducting intake interviews and screening for disabilities.<sup>202</sup> Correctional officers often fail to recognize signs of cognitive disabilities among people who are incarcerated. However, with proper training, they could identify and refer for assessment those individuals who show signs of being cognitively impaired. They also may be able to design and monitor effective processes for requesting ADA accommodations, and become more aware and responsive to the need for accessible educational and vocational programming in their facilities.

Additionally, proper training of parole board members may help ensure that unrealistic educational requirements are not imposed on individuals with cognitive disabilities. Unfortunately, scholars have found that parole boards frequently “neither understand LD [learning disability] nor have been provided any sort of training toward this end.”<sup>203</sup> After becoming more educated on cognitive disabilities, parole commissioners may impose more realistic conditions of release and to waive educational requirements for individuals with cognitive disabilities who would otherwise be eligible for parole. Scholars and advocacy organizations have

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been enrolled in special education classes while in school. Scheyett et al., *supra* note 72, at 17–18 (explaining that these administrators reported that they used questions along the lines of, “Have you ever had a problem with a mental illness or mental retardation?”).

201. See *supra* Section II.A; Connie L. Kvarfordt et al., *Youth with Learning Disabilities in the Juvenile Justice System: A Training Needs Assessment of Detention and Court Services Personnel*, 34 CHILD & YOUTH CARE F. 27, 34 (2005) (describing a study in which 38% of juvenile justice personnel in Virginia reported that they did not receive “any training about persons with disabilities.” Of those who received training, 45% stated that they received training on intellectual disabilities eight years ago, on average. Only 47% of respondents reported receiving training on learning disabilities.).

202. Of 80 North Carolina jail administrators interviewed, 63 administrators stated that jail officers typically conducted intake; only six administrators reported that medical staff reviewed the intakes. Scheyett et al., *supra* note 72, at 19–20 (explaining also that many correctional facilities place screening responsibilities in the hands of “officials who have not received adequate and ongoing training in identifying and working with individuals with these disabilities”).

203. Cowardin, *supra* note 74, at 16.

published resources that can be used to help criminal legal system personnel identify individuals who may have cognitive disabilities.<sup>204</sup>

#### CONCLUSION

Educational requirements imposed on incarcerated individuals must be accompanied by proper screening and training measures in order to ensure that they do not unfairly disadvantage people with disabilities. Otherwise, individuals who meet all other requirements for parole needlessly remain in prisons and jails, as Samuel once did. Though an educational requirement was preventing Samuel from becoming eligible for parole, correctional personnel did not proactively assess whether he had a cognitive impairment and was eligible for an exemption. It was only because attorneys hired a psychologist to conduct a cognitive evaluation that Samuel's intellectual disability was diagnosed and he could be exempted from the requirement.

Given the prevalence of cognitive disabilities among people in the criminal legal system, Samuel has likely not been alone in his struggle to become eligible for parole. Attorneys representing him pro bono were able to pay thousands of dollars for a cognitive assessment, but this option is most likely not available for the majority of indigent individuals who are incarcerated. It should not be the case that only those people with cognitive disabilities who can afford to pay for a diagnostic assessment are recognized as having a disability, or that a parole decision hinges on a person's ability to have their disability diagnosed.

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204. See, e.g., PA. MENTAL HEALTH & JUST. CTR. OF EXCELLENCE, *supra* note 72; THE ARC, PATHWAYS TO JUSTICE: GET THE FACTS INTELLECTUAL DISABILITY (ID) (2015), available at [http://thearc.org/wp-content/uploads/2019/07/NCCJDFactSheet\\_ID-Copyrightd-BJA.pdf](http://thearc.org/wp-content/uploads/2019/07/NCCJDFactSheet_ID-Copyrightd-BJA.pdf) [<https://perma.cc/8G8Y-KTA7>] (providing guidance for criminal legal system personnel on how to identify and communicate with people who have intellectual disabilities).