



Texas' School-to-Prison Pipeline

.....
Dropout to Incarceration

The Impact of School Discipline and Zero Tolerance

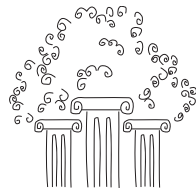




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Texas
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Special thanks to Elyshia Aseltine with the University of Texas Population Center for her work as Research Assistant on the School-to-Prison project.

Texas Appleseed Mission

Texas Appleseed's mission is to promote justice for all Texans by using the volunteer skills of lawyers and other professionals to find practical solutions to broad-based problems. Our prior work to protect the rights of juveniles and persons with mental disabilities in the criminal justice system—timed with the Harvard School of Civil Rights' invitation to join a national discussion on the “school-to-prison pipeline”—alerted us to the need to explore the relationship between school discipline policies, the dropout rate, and “gateways” into the juvenile justice system.

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Texas Appleseed is deeply indebted to our Consulting Committee for providing crucial guidance on the school-to-prison pipeline project.

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SCHOOL DISCIPLINE:

A Timeline

1947–1965

During this period, the State of Texas becomes involved in overseeing the public education system—focusing on school funding, minimum standards, and teacher education and certification requirements.

Increased interest in juvenile crime and community-based mental health services in the 1960s leads state lawmakers to consider the need for school counseling to address students' behavior problems.

1967

The Interim Committee on Juvenile Crime recommends improved school counseling and greater attention to dropout prevention—and urges those Texas school districts prohibiting corporal punishment to reconsider that decision and “avoid the excesses of coddling.” The only recommendation to become law is creating new counseling positions in schools.

1976

An interim committee report to the 65th Legislature concludes that school “disciplinary procedures...are best handled at the local level.”

1981

The Select Committee on Public Education endorses written student Codes of Conduct along with pilot programs to educate disruptive students in alternative settings, but stops short of recommending the state mandate these measures.

1980

Attorney General Mark White's office publishes a proposed “Voluntary Student Code of Conduct” for use in public schools.

1965

1965

The State of Texas creates the Texas Department of Mental Health and Mental Retardation—with a new focus on providing community mental health services for children and adults.

1970

1971

The Committee to Study the Psychiatric Problems of Youth recommends training teachers and other public school personnel to identify students with “mental health problems.”

1975

1978

The Select Committee on Drug and Alcohol Abuse recommends adding alcohol and drug education programs to public school curriculum in Texas.

1980

1979

The Texas Education Code is amended to allow teachers to remove a pupil from the classroom “to maintain effective discipline” and to recommend suspension of any student who assaults a teacher or who “repeatedly interfere(s) with that teacher's ability to communicate effectively with the majority of students in the class.” A due process hearing is required.

Governor Bill Clements' Advisory Committee on Education recommends written student Codes of Conduct and better enforcement of student attendance.

1969

The State of Texas creates the Texas Education Code. Subchapter I, entitled “Discipline; Law & Order,” allowing school districts to suspend “incorrigible” students and bring proceedings in juvenile court against students “who persistently violate the reasonable rules and regulations of the school.”

1983

The National Commission on Excellence in Education releases *“A Nation at Risk: The Imperative for Educational Reform”*—claiming that U.S. students lag those in other nations and warning of *“a rising tide of mediocrity.”*

The reconstituted Select Committee on Public Education headed by H. Ross Perot begins to examine “every aspect of the public education system”—ultimately recommending state-funded alternative schools and Texas Education Agency approval of discipline management programs implemented by school districts.

1986

A special session of the 69th Legislature amends the Education Code to allow school boards to suspend students for up to six days without referring them to an alternative education program. The Code does not mandate suspension or expulsion for any offense—that decision is left to local districts.

1995

In his State of the State address to the 74th Legislature, Governor George W. Bush notes: *“We must adopt one policy for those who terrorize teachers or disrupt classrooms—zero tolerance.”*

The 74th Legislature rewrites the Texas Education Code to include Chapter 37—creating Disciplinary Alternative Education Programs (DAEPs) and Juvenile Justice Alternative Education Programs (JJAEPs), listing the offenses that trigger mandatory referrals to these programs, and giving school districts discretion to refer students for other Code of Conduct violations.

In its 1995 Long-range Plan for Public Education, the State Board of Education includes: *“Promote zero-tolerance guidelines for behaviors and actions that threaten school safety.”*

1985

1990

1995

2000+

1985

The 69th Legislature replaces out-of-school suspension and expulsion of students with their being assigned to alternative education programs. School districts are required for the first time to adopt a discipline plan, provide teacher training in discipline management, and develop and distribute a Student Code of Conduct.

1992

The State Board of Education begins to call for zero tolerance policies to prevent school violence and drug abuse, a shift rooted in the state and national “war on drugs” campaigns of the 1980s and the passage of the federal Gun Free School Zones Act in 1990.

1996-2007

The Texas Education Code, Chapter 37, Discipline; Law & Order, is amended almost every legislative session in this period.

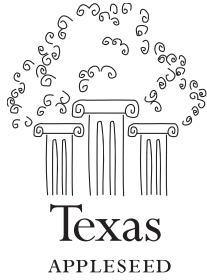
In 2007, state lawmakers pass legislation requiring the Texas Education Agency (TEA) to develop minimum standards for DAEPs, but stop short of requiring TEA to monitor or implement those standards.

Texas’ School-to-Prison Pipeline: Dropout to Incarceration

The Impact of School Discipline and Zero Tolerance

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Visit the Texas Appleseed website at www.texasappleseed.net to review this report along with the following data tables used to create this analysis:

Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to In-School Suspension (ISS), 2001-06

Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to Out-of-School Suspension (OSS), 2001-06

Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to Disciplinary Alternative Education Programs (DAEPs), 2001-06

Districts with Discretionary Disciplinary Referrals for Pre-K, K & 1st Grade Students, 2001-06

Overall In-School Suspension (ISS) Referral Rates by School District, 2001-06

Overall Out-of-School Suspension (OSS) Referral Rates by School District, 2001-06

Overall Disciplinary Alternative Education Program (DAEP) Referral Rates by School District, 2001-06

Overrepresentation of Minority and Special Education Students in Discretionary Referrals to In-School Suspension (ISS), 2001-06

Overrepresentation of Minority and Special Education Students in Discretionary Referrals to Out-of-School Suspension (OSS), 2001-06

Overrepresentation of Minority and Special Education Students in Discretionary Referrals to Disciplinary Alternative Education Programs (DAEPs), 2001-06

Statewide Enrollment & Overall Disciplinary Referral Rates, 2001-06

Statewide Discretionary & Mandatory Referrals, by Category of Offense, 2001-06

Texas' School-to-Prison Pipeline: Dropout to Incarceration

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EXECUTIVE SUMMARY

“He who opens a school door, closes a prison.” – Victor Hugo

Involvement in the criminal justice system can be viewed as a continuum of entry points—from early school-based behavior problems that result in suspensions, expulsions, or Disciplinary Alternative Education Program (DAEP) placements to more serious law breaking and probation violations that can involve the juvenile justice system and, ultimately, the adult penal system.

In Texas and nationally, zero tolerance policies are removing thousands of juveniles from the classroom and sending them to in-school and out-of-school suspension and to DAEPs. For too many, involvement in the school disciplinary system becomes a gateway to the justice system.

Over the past year, **Texas Appleseed**—a nonprofit public interest law center—has worked in pro bono collaboration with nine law firms and corporate legal departments, a consulting team of interdisciplinary experts, and other organizations as diverse as the Texas Public Policy Foundation, Advocacy Inc., and the Harvard Civil Rights Project to document the impact of a “school-to-prison pipeline” in Texas and identify policy areas in need of systemic reform.

Numerous studies by national experts in the fields of education, criminal justice, and mental health have established a link between school dropout rates and incarceration. This link holds true in Texas. *One in three juveniles* sent to a locked down facility operated by the Texas Youth Commission has already dropped out of school—and *more than 80 percent of Texas adult prison inmates are school dropouts.*

School-to-Prison Dropout Link...

- **More than a third** of Texas public school students dropped out in 2005-06.
- Disciplinary Alternative Education Programs have **five times the dropout rate** of mainstream schools.
- **One in three juveniles** sent to the Texas Youth Commission are school dropouts.
- **More than 80 percent** of Texas prison inmates are dropouts.

What is less well known is that the precursor for many young people's involvement in the juvenile justice system is disciplinary referrals in school—referrals to in-school suspension (ISS), out-of-school suspension (OSS), and to Disciplinary Alternative Education Centers (DAEPs). The more serious offenders are sent to more restrictive Juvenile Justice Alternative Education Programs (JJAEPs) or to Texas Youth Commission facilities. The last segment of the “pipeline” is adult prison.

A study published by Texas A&M University's Public Policy Research Institute in 2005 concluded that, among the “risk factors” commonly associated with future involvement in the juvenile justice system, the *single most important predictor is a history of disciplinary referrals at school.*

In Texas, the number of student disciplinary referrals to ISS classrooms, out-of-school suspension—and ultimately to alternative campuses (DAEPs)—increased dramatically in the mid-1990s following passage of the Federal Gun Free Schools Act of 1994 and the subsequent 1995 overhaul of Texas school discipline laws (see *Texas Education Code, Chapter 37, Discipline; Law & Order*). Chapter 37 mandates the serious offenses for which students *must* be removed to DAEPs in order to maintain safe schools. It also gives school districts wide latitude to remove students for other violations of their student Code of Conduct. Though most districts do not have a *written* zero tolerance policy, many Texas school districts currently exercise their discretion under Chapter 37 to adhere to the spirit of zero tolerance in removing students from the classroom for offenses such as profanity, disrupting class, and persistent violation of a student Code of Conduct.

The single greatest predictor of future involvement in the juvenile system is a history of disciplinary referrals at school.

– Public Policy Research Institute,
Texas A&M University (2005)

Working closely with the Population Research Center at The University of Texas, Texas Appleseed examined the disciplinary data self-reported by school districts to the Texas Education Agency—calculating in-school suspension (ISS), out-of-school suspension (OSS), and Disciplinary Alternative Education Program (DAEP) referral rates for all Texas school districts. This analysis specifically examined disciplinary referrals for a five-year period (2001-06)—disaggregated by seriousness of offense (mandatory versus

discretionary referrals), race, ethnicity, participation in special education, and grade level for all Texas school districts. It identified districts with the highest annual referral rates to DAEPs, OSS, and ISS as well as those disproportionately referring minority and special education students at rates exceeding what could be anticipated given their representation in the overall school population. (For a more detailed explanation of the methodology used, see *Quantitative Methods* in the *Appendix*.)

Texas Appleseed is deeply grateful to the more than 40 volunteers at major law firms and corporate legal departments who interviewed principals, teachers, counselors, and police officers in nine school districts across the state about school disciplinary practices, their attitudes toward zero tolerance discipline, and the role of Disciplinary Alternative Education Programs (DAEPs). These pro bono partners visited alternative schools as well as public elementary, middle, and high schools. Texas Appleseed also conducted several focus groups with parents and students to obtain their views on DAEP referrals and related school discipline issues.

The statewide average overall referral rate to a Disciplinary Alternative Education Program is *2% a year*, however **167 school districts** referred students at *two to six times the state average* for one or more years between 2001 and 2006.

– Analysis of data self-reported by school districts to the Texas Education Agency

Our findings underscore the importance of Texas school districts utilizing more effective, research-based strategies to improve student behavior, reduce school dropouts, and help stem the growth of Texas' prison system—the largest in the nation. A survey of current research in the field suggests this *can be done while maintaining safe schools* and classrooms where teachers can teach and students can learn.

Major Findings: Discipline in Texas Public Schools

Texas has one of the largest school systems in the nation—with more than **4.4 million students** currently attending public schools in **1,037 school districts**. This report focuses on the discretionary application of school discipline—and not the disciplinary actions that schools are mandated to take under Chapter 37, Texas Education Code, to address students' most serious misbehavior.

The following is a summary of major findings based on both quantitative and qualitative data collected over the last year:

❖ **High recidivism and dropout rates underscore the failure of Disciplinary Alternative Education Programs (DAEPs) to meet the needs of large numbers of students—a problem compounded by the lack of state oversight.**

- In Texas, DAEPs have *five times the dropout rate* of mainstream schools.
- In 2005-06 alone, the *recidivism rate approached 30 percent*—with 105,530 unduplicated students accounting for almost 137,000 DAEP referrals that year.

- ♦ The 80th Legislature voted in 2007 to require the Texas Education Agency (TEA) to adopt the state’s first minimum standards for DAEPs—but *did not require TEA to monitor or enforce them*.
- ♦ Two-thirds of the students sent to DAEPs in Texas are referred at the *discretion of school districts*, and are not mandatory removals under state law.
- ❖ **Where a child attends school—and not the nature of the offense—is the greater predictor of the likelihood of a student’s receiving a disciplinary referral.**
 - ♦ The overall statewide average referral rate to a Disciplinary Alternative Education Program is *2 percent a year*—however **167 districts** referred students at *two to six times the state average* for one or more years between 2001 and 2006.
 - ♦ In 2005-06, **79 school districts** referred students to out-of-school suspension (OSS) at a rate of *20 percent or higher*—compared to the statewide average of *14 percent*. The “Top 10” districts had overall OSS referral rates *ranging from 37 to 58 percent* that year.
 - ♦ **More than 300 districts (326)** exceeded the statewide overall ISS referral rate of *17 percent* in 2005-06, and the “Top 10” districts had overall ISS referral rates *ranging from 45 to 67 percent* that year.
- ❖ **African American students—and to a lesser extent Hispanic students—are significantly over-represented in schools’ discretionary disciplinary decisions (suspensions and DAEP referrals) compared to their percentage in the overall student population.**
 - ♦ In Texas, **211 school districts** disproportionately referred African American students to DAEPs for one or more years between 2001 and 2006. In 2005-06 alone, **15 school districts** referred African American students *at more than twice their representation in the student population, with discretionary referral rates ranging from 21 to 65 percent*.
 - ♦ For one or more years between 2001 and 2006, **503 school districts** over-represented African American students in discretionary referrals to out-of-school suspension (OSS) and **347 districts** over-represented them in discretionary referrals to in-school suspension (ISS).
 - ♦ **Forty school districts** overrepresented Hispanic students in discretionary DAEP referrals, **224 districts** disproportionately suspended them from school, and **92 districts** over-represented them in discretionary referrals to ISS for one or more years (2001-06).

❖ **Special education students are significantly overrepresented in discretionary disciplinary referrals compared to their percentage in the overall school population.**

- ♦ Although special education students represented *11 percent* of the overall Texas public school population in 2005-06, they accounted for *22 percent* of total annual DAEP referrals, *26 percent* of out-of-school suspensions, and *21 percent* of ISS referrals that year.
- ♦ Almost a third of Texas' school districts—or **412 districts**—referred special education students to DAEPs at rates exceeding their representation in the student population for one or more years between 2001 and 2006.
- ♦ Every year in that five-year period, **79 school districts** disproportionately referred special education students to DAEPs, **317 districts** disproportionately suspended them from school, and **328 districts** over-referred them to ISS.

❖ **Texas school districts referred about 500 pre-K and kindergarten students and about 2,700 1st graders to DAEPs between 2001 and 2006—even though Texas law restricts referral of children under age 6 to those who *bring a gun to school*.**

- ♦ **Fourteen school districts**—led by *Pasadena ISD (85 referrals)*—account for almost *half (271)* of the referrals of pre-K and kindergarten students to DAEPs in this five-year period.

What These Findings Mean for Students and Parents

Research studies and interviews conducted for this report in nine Texas school districts point to *fewer discipline problems in schools where parents are involved*. When schools actively reach out to parents—and when parents discuss behavior expectations with their children and communicate actively with the school—there is less classroom disruption and greater capacity to keep schools safe.

If a teacher conference or disciplinary hearing is scheduled to discuss a child's behavior issues and determine whether suspension, expulsion, or a referral to a Disciplinary Alternative Education Program (DAEP) is needed, *it is critical that a parent or guardian attend*. If the school has made sufficient attempts to secure their attendance—and a parent or guardian is not present for a scheduled disciplinary hearing, the school can proceed and make a disciplinary decision without their input.

Almost a third of Texas' school districts—or **412 districts**—referred special education students to DAEPs at rates exceeding their representation in the student population for one or more years between 2001 and 2006.

Likewise, African American students—and to a lesser extent Hispanic students—are significantly overrepresented in discretionary suspensions and DAEP referrals.

– Analysis of data self-reported by school districts to the Texas Education Agency

Parents and students must be aware of their rights and responsibilities when it comes to laws and school policies governing school discipline. This is particularly true in cases involving special education students, where different state and federal laws impact how these students can be appropriately disciplined and how disciplinary decisions can be appealed.

Policy Recommendations

Based on its findings, Texas Appleseed has developed the following policy recommendations to promote school discipline programs that work, are fairly applied, and have the greatest potential to reverse the trend toward higher rates of school dropouts and incarceration.

Amend the Texas Education Code to achieve the following:

- **Provide state oversight of DAEPs.** Require the Texas Education Agency (TEA) to monitor and enforce standards for Disciplinary Alternative Education Programs (DAEPs). In 2007, TEA was mandated to develop the state’s first standards for DAEPs, but not required to monitor or enforce those standards.
- **Factor “intent” into discretionary discipline decisions.** Require school officials and school districts to consider a student’s “intent” when making discretionary disciplinary decisions. Currently, districts *may* consider intent but are not required to do so.
- **Place a cap on suspensions.** Place a cap on the number of days that a student may be referred to in-school and out-of-school suspension (ISS and OSS) in an academic year.
- **Notify districts with disproportionate disciplinary referrals.** Require the Texas Education Agency (TEA) to notify and provide guidance to districts that exceed the prior year’s statewide average referral rate to ISS, OSS, and DAEP or are at high risk for referring a disproportionate number of minority or special education students for disciplinary action. The TEA already collects this disciplinary data.
- **Compliance with federal laws.** Require TEA to monitor DAEPs to ensure compliance with federal and state statutes governing English as a Second Language instruction and education of students with disabilities.
- **Improve DAEP academic standards and course offerings.** Require TEA to improve academic standards and range of course offerings—and *explore the use of technology* to more closely link curriculum offered at DAEPs and mainstream schools.
- **Early parent notification requirements.** Require schools to alert parents *immediately* when disciplinary action is taken. Current policy requires notification within three days.
- **Rights and responsibilities.** Require the Texas Education Agency to create a model student and parent “Bill of Rights and Responsibilities” for inclusion in a school’s Code of Conduct.

In addition, the State of Texas should provide *funding for expanded school-based mental health services* and encourage partnerships between schools and community mental health providers to support students and families.

The Texas Education Agency should create a *discretionary grant program* to help fund implementation of research-based practices proven successful at reducing the number of school discretionary referrals.

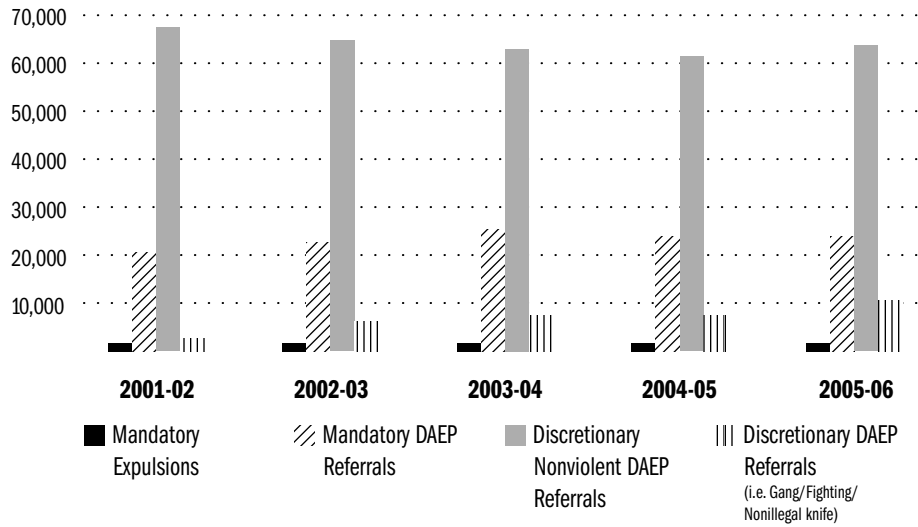
Policy recommendations at the school district and campus level include:

- **Research-based discipline strategies.** Develop, implement, and regularly evaluate a school-wide disciplinary plan that employs *research-based strategies* that have been shown to reduce the number of disciplinary referrals.
- **Positive behavior support.** Ensure that expectations for behavior and consequences for misbehavior are well-defined, easily understood, and well-publicized to faculty, staff, students, and parents. Regularly recognize and *positively reward* good behavior.
- **Teacher/staff training.** Provide ongoing teacher and staff training in positive behavior management, as well as training to enhance cultural competency and the ability to form a positive relationship with parents and students.
- **Formalized plans to monitor at-risk students.** Adopt formalized, campus-based programs to monitor at-risk students to prevent escalating disciplinary action and support their success in school.
- **Transition planning.** Strengthen transition planning, monitoring, and support of students upon their return to school from a disciplinary suspension or alternative school placement.
- **Parent involvement.** Engage parents as partners in reinforcing positive behaviors at school—notifying them immediately when a disciplinary action is taken, and offering them the opportunity to enter into a signed agreement establishing a plan to address the student’s behavior as an alternative to a discretionary disciplinary referral to a DAEP for non-violent, non-criminal behavior.
- **Improve administrative oversight of ISS academics.** Ensure that students assigned to ISS are given daily assignments to keep them *on track in regular classes*.

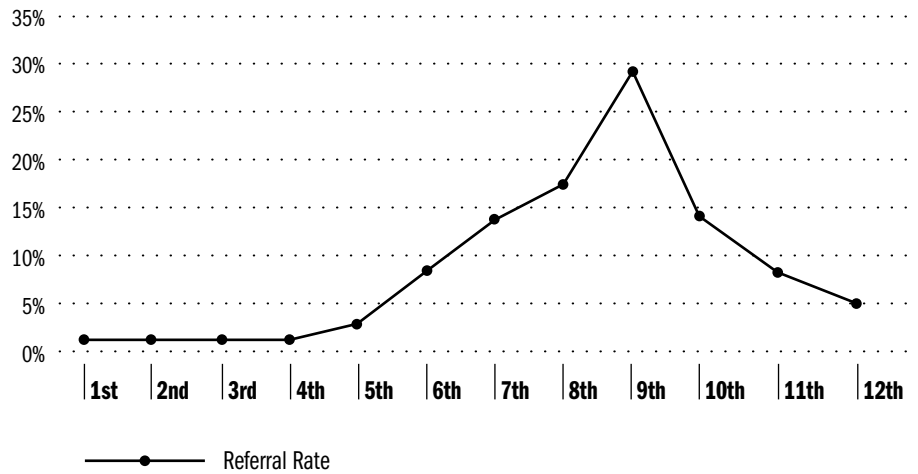
This project is supported by grants from **Houston Endowment** and the **Meadows Foundation** with additional support from the **Simmons Foundation**.

Texas Appleseed is deeply grateful to **Vinson & Elkins LLP** for leading pro bono work on this project. Assisting in this research effort are pro bono attorneys with **Denton, Navarro, Rocha & Bernal, PC**; **Escamilla & Poneck, Inc.**; **ExxonMobil**; **Greenberg Traurig, LLP**; **Mayer Brown LLP**; and **Patton Boggs LLP**. Other pro bono partners on this project are **Ahmad, Zavitsanos & Anipakos, P.C.**; and **Weil, Gotshal & Manges LLP**.

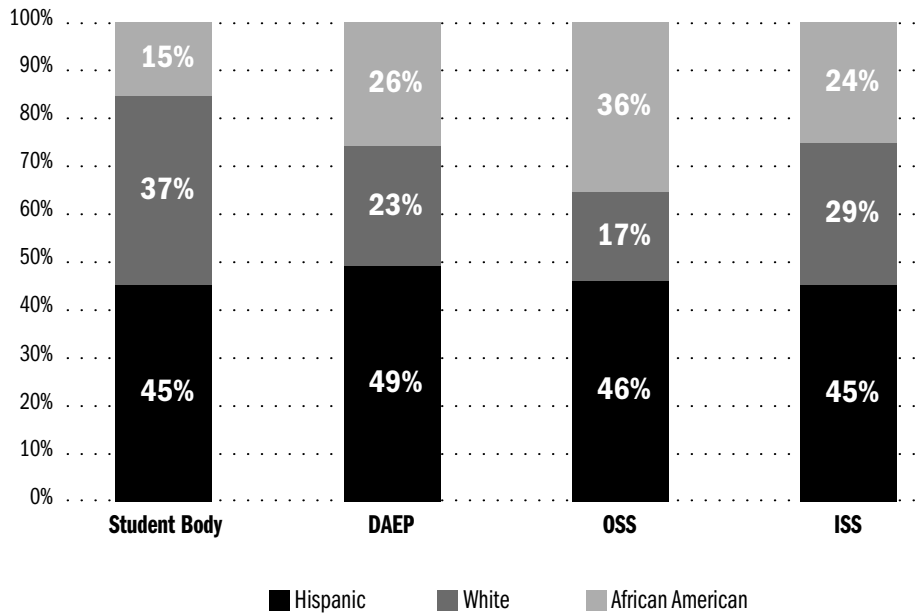
Statewide Discretionary vs. Mandatory DAEP Referrals, 2001-06



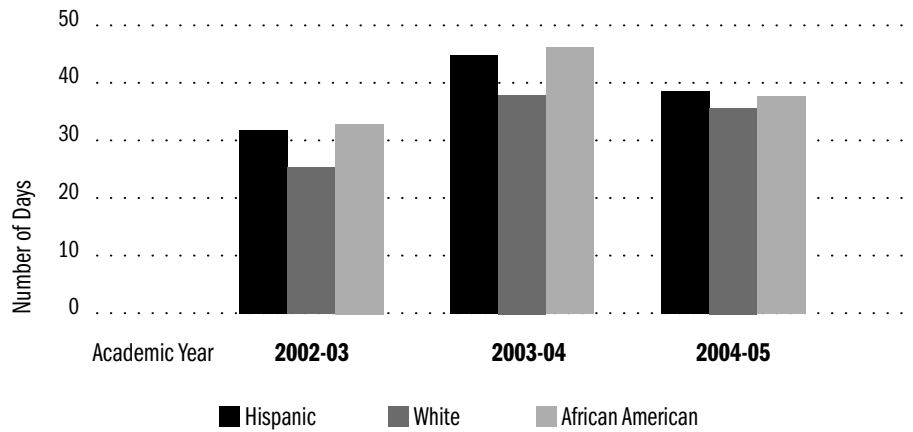
Statewide DAEP Referral Rate by Grade Level, 2005-06



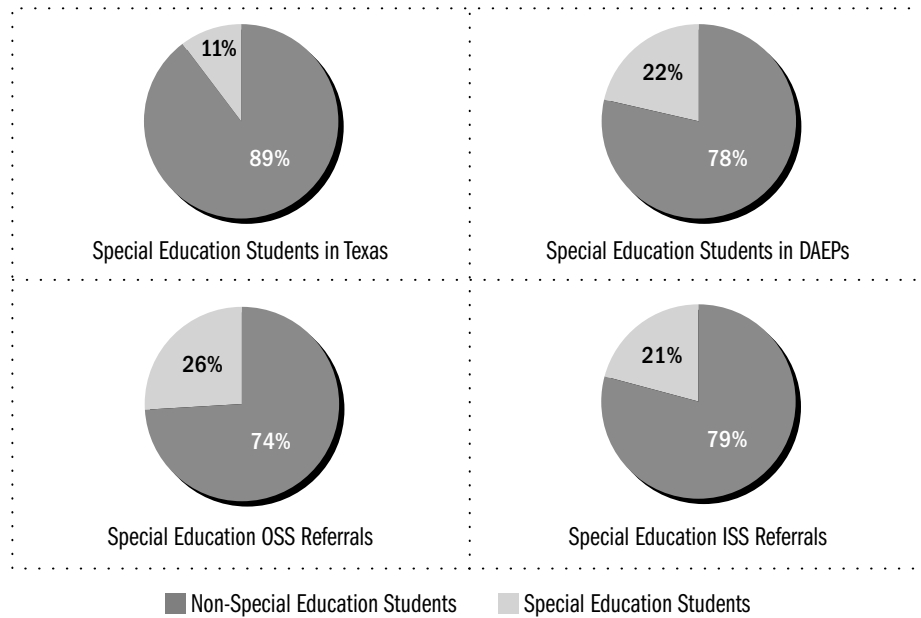
**Overrepresentation of Minority Students
in Discretionary Discipline Referrals, 2005-06**



Length of Stay at DAEPs, By Race/Ethnicity, 2002-05



Statewide Profile of Disciplinary Referrals of Special Education Students, 2005-06



School Districts Referring More than 40 1st Graders to DAEPs, 2001-06

School District	1st Graders Referred
Alief ISD	124
Arlington ISD	125
Conroe ISD	55
Cypress-Fairbanks ISD	42
Dallas ISD	148
Ector County	40
Harlingen CISD	44
Hurst-Euless-Bedford ISD	46
Irving ISD	46
Leander ISD	40
Mesquite ISD	153
North East ISD	147
Northside ISD	57
Pasadena ISD	345
Waco ISD	94

**School Districts Referring More than 10
Pre-K & Kindergarten Students to DAEPs, 2001-06**

School District	Pre-K & Kindergarten Students Referred to DAEPs
Dallas ISD	13
Denton ISD	10
Ector County	12
Grand Prairie ISD	12
Irving ISD	14
Katy ISD	11
Killeen ISD	19
Leander ISD	19
Mesquite ISD	14
Northside ISD	19
Pasadena ISD	85
Plano ISD	10
Temple ISD	16
Waco ISD	17

Texas' School-to-Prison Pipeline: Dropout to Incarceration

The Impact of School Discipline and Zero Tolerance

INTRODUCTION

13

In Texas and nationally, zero tolerance policies are referring thousands of juveniles, including large numbers of minority and special education students, to in-school and out-of-school suspension (ISS and OSS) and Disciplinary Alternative Education Programs (DAEPs).

The original goal of zero tolerance was to reduce the potential for violence on school campuses and to keep students and teachers safe. School districts across the country adopted zero tolerance policies in the wake of well-publicized incidents of school violence, including most notably the 1999 Columbine High School shootings near Littleton, Colorado, in which 14 students (including the two shooters) and a teacher died. However, in many school districts across the country, it is applied to a wide range of nonviolent offenses that, critics claim, “criminalizes” student misbehavior.

While a majority of Texas schools have not formally adopted zero tolerance policies, many school districts have exercised the latitude under the Texas Education Code to take a zero tolerance approach to enforcing their own student Codes of Conduct—and, as a result, ***the vast majority of students sent to DAEPs in Texas are there at the discretion of the school district.***

Texas Appleseed’s interest in the school-to-prison pipeline grew out of its work on indigent defense issues. In 2000, Texas Appleseed published its Fair Defense Report, outlining problems surrounding inadequate representation of indigent criminal defendants in Texas. Our research showed that the problems were particularly acute for juvenile defendants and for persons who had a mental illness or intellectual disability.

In 2004, the Harvard Civil Rights Project invited Texas Appleseed to participate in a conference focused on the school-to-prison pipeline phenomenon. In this instance, the same populations facing the most serious challenges in obtaining adequate representation in the justice system—young black males and persons with mental disabilities—were being overrepresented in school disciplinary referrals, raising serious due process and constitutional protection questions. In 2006, Texas Appleseed launched a multi-year school-to-prison pipeline project—beginning with school disciplinary practices that

remove students from mainstream classrooms and concluding with incarceration in Texas' adult prisons, where more than 80 percent of inmates are high school dropouts.

This report focuses on the initial segment of the school-to-prison pipeline: school discipline resulting in suspension or referral to a Disciplinary Alternative Education Program. These disciplinary options are described below:

- *In-School Suspension (ISS)*—A student, who violates the student Code of Conduct, may be removed from the regular classroom and placed in an ISS room on campus. There is no cap on the number of days a student may spend in ISS.
- *Out-of-School Suspension (OSS)*—A student may be suspended from school for one to three days and is not allowed on campus during that period.
- *Referral to a Disciplinary Alternative Education Program (DAEP)*—Students removed from school for more than three days must be sent to a DAEP—unless they are expelled and referred to Juvenile Justice Alternative Education Program for a more serious offense. The Texas Education Code mandates a DAEP referral for specific types of student misconduct on or near school grounds and at school-sponsored activities; however, school districts may also exercise discretion to send students to DAEPs for other types of misconduct specified in their student Codes of Conduct. A DAEP is usually housed on a separate campus. Students continue to study core subjects (math, English, history and science) and receive behavioral counseling. The average length of stay in a DAEP in Texas is 30 to 40 days. Smaller districts may provide a DAEP room on the home campus, where disciplined students are kept apart from other students.

This Texas Appleseed report begins with an overview of the main provisions found in *Texas Education Code, Chapter 37, Discipline; Law & Order*. (See the *Appendix* for a more detailed analysis of this section of the Education Code and for an expanded history of evolving school discipline issues in Texas.)

The Chapter 37 overview provides a context for a detailed analysis of suspension and DAEP referral data self-reported by Texas school districts to the Texas Education Agency for a five-year period (2001-06). As part of this analysis, Texas Appleseed has identified the following:

- School districts exceeding statewide average referral rates to in-school and out-of-school suspension (ISS and OSS) and to DAEPs (*mandatory and discretionary referrals combined*);
- School districts over-representing African American, Hispanic, and special education students in *discretionary referrals* to DAEPs, OSS, and ISS at rates exceeding what could be statistically anticipated given their representation in the overall student population; and
- School districts sending very young children (pre-K, kindergarten, and 1st graders) to DAEPs, a practice questioned by educational and behavioral experts.

In school districts where fewer than five students fit these categories, the data was “masked” by TEA to ensure the privacy of individual students as mandated by the Family Educational Rights and Privacy Act (FERPA). In these instances, low estimates of “masked data” were applied to reach conservative calculations of disciplinary referral rates. (See *Quantitative Methods* in the *Appendix*.)

Given that only low estimates were used when presented with “masked” data, ***it is probable that this report underestimates the impact of discretionary disciplinary referrals of minority and special education students.***

Also included in this report are the results of field interviews conducted by our pro bono legal partners under the coordination of Vinson & Elkins LLP. (See *Acknowledgements* for a complete listing of participating firms.) More than 40 volunteer attorneys interviewed DAEP administrators, principals at mainstream schools, teachers, counselors, and campus police officers in a representative sampling of school districts (urban, suburban, and rural). Interview subjects in these nine districts were asked about school disciplinary practices, their attitudes toward zero tolerance discipline, and the role of DAEPs. It is significant that the views expressed in these interviews are largely consistent with the results of the disciplinary data analysis and the findings of nationally known educational and mental health experts cited in this report.¹

The last chapter, “*Best Practice Model: A Multi-layer Approach to Successful School Discipline*,” offers examples of research-based programs that school districts can use as components of an effective multi-tier, school-wide discipline plan endorsed by the U.S. Department of Education and supported by national education and behavioral experts. Brief case studies, included as part of this final chapter, document the early successes that three Texas school districts—Austin, Amarillo, and Flower Bluff—have had in using Positive Behavior Support to begin implementation of this model discipline program.

1 Not all school districts contacted chose to participate in our research, even after being informed that all respondents would remain anonymous in exchange for candid insights into the disciplinary process.

TEXAS EDUCATION CODE, CHAPTER 37: Discipline; Law & Order, aka *Safe Schools Act*

In 1995, the Texas Legislature passed Chapter 37 of the Texas Education Code—the state’s first set of regulations specifying the range of disciplinary measures that schools could impose for different types of offenses.² These provisions, which have been amended almost every legislative session, *mandate* discipline for a list of specific serious offenses while giving school districts *wide discretion* to apply the same disciplinary measures for other violations of their student Code of Conduct.

A detailed statutory analysis of Chapter 37 is included in the *Appendix*. What follows is an overview of Chapter 37’s major provisions that form the foundation for school discipline in Texas public schools today.

Student Code of Conduct

Every school in Texas must adopt a written student Code of Conduct each year and make it easily accessible to parents and students.³ This code must specify the mandatory and discretionary infractions for which a student may be removed from the classroom, suspended or expelled from school, or sent to a Disciplinary Alternative Education Program.⁴ *These Codes of Conduct vary among school districts.*

The Code of Conduct also must specify whether the following must be factored into a disciplinary decision: self-defense, intent, a student’s disciplinary history, or a student’s disability impacting capacity to understand what constitutes wrongful conduct.⁵ Currently, school districts are allowed, but not required, to consider a student’s intent in making disciplinary decisions. As recently as Spring 2007, state lawmakers held hearings on legislation to require school districts to factor “intent” into disciplinary decisions, but the measure failed to pass.⁶

2 Tex. S.B. 1, 74th Leg. Sess., R.S. (1995).

3 TEX. EDUC. CODE § 37.001(a)(2006).

4 *Id.*

5 *Id.*

6 Tex. H.B. 851, 80th Leg. Sess., R.S. (2007).

In Texas, every public school's student Code of Conduct must outline the procedure for notifying a student's parent or guardian of student misbehavior and disciplinary action.⁷ Current law requires parents be notified within three days.⁸

Removals from the Classroom

A teacher may send a disruptive student to the principal's office "*to maintain effective discipline in the classroom*"—and can **permanently** remove a student who repeatedly interferes with the teacher's ability to teach or other students' ability to learn.⁹ Depending on the offense the principal may place a student in another classroom, In-School Suspension (ISS), or a Disciplinary Alternative Education Program (DAEP).¹⁰ For certain offenses, including assault against a teacher, the student may not be returned to that teacher's classroom without the teacher's consent.¹¹ In other instances, the student may be returned to the same classroom if a three-person review committee determines it is the best or only alternative.¹²

Suspension

Chapter 37 limits suspension from school to a maximum of three days, although there is no limit on the number of times a student may be suspended in one year.¹³ Limiting suspensions to a maximum of three days is widely interpreted to apply only to Out-of-School Suspension (OSS). Most Texas schools do not place a limit on the number of days a student can be sent to In-School Suspension (ISS), a separate classroom setting on the home campus where students have a monitored "study hall."

Disciplinary Alternative Education Programs (DAEPs)

Every Texas school district is required to provide a DAEP, and districts may join together to support one such program.¹⁴ In smaller, rural districts, a DAEP may be a separate classroom on the school campus where referred students are isolated from other students, but more frequently DAEPs are housed on separate campuses.

Since 1995, DAEP programs have focused on educational basics and provided behavioral counseling, but have not been monitored by the state. The 80th Legislature passed HB 426 in Spring 2007 requiring the Texas Education Agency (TEA) to establish **minimum standards** for DAEPs, however the bill does not specifically instruct TEA to establish curriculum standards—and does not require the agency to monitor or enforce these standards.¹⁵ Instead, TEA must report back to the Legislature in 2009 on what monitoring and enforcement would cost.¹⁶

7 TEX. EDUC. CODE § 37.001(a)(2006).

8 *Id.*

9 TEX. EDUC. CODE § 37.002(b)(2006).

10 *Id.*

11 *Id.* at § 37.002(c).

12 *Id.*

13 TEX. EDUC. CODE § 37.005 (2006).

14 *Id.* at §§ 37.007(d) & 37.008.

15 Tex. H.B. 426, 80th Leg. Sess., R.S. (2007).

16 *Id.*

As currently structured, separate DAEP programs must be maintained for children younger than 10 years old.¹⁷ Students younger than six years old can be placed in a DAEP for *only one reason*: bringing a firearm to school.¹⁸

Chapter 37 *mandates* a student’s removal to a DAEP for the following: 1) committing a felony or engaging in conduct punishable as a felony; 2) injuring another person during an assault; 3) selling, giving, possessing, or being under the influence of a dangerous drug or alcohol; and 4) committing an offense that involves volatile chemicals, public lewdness, or retaliation against a school employee.¹⁹ The district superintendent may choose to keep a student in a DAEP for felony conduct occurring *off campus* even if a prosecutor does not pursue a felony conviction, the student is found not guilty, the case is dismissed, or the student receives deferred adjudication.²⁰ This decision may be appealed to the local school board—and that decision appealed to the Commissioner of Education.²¹

Chapter 37 also gives Texas schools wide discretion to send students to a DAEP for other offenses listed in their student Code of Conduct.²² Depending on the school district, these offenses can range from fighting and gang activity to disrupting class, using profanity, playing a prank (i.e., throwing a tennis ball in the hallway and narrowly missing another student [a case in Texas]), misusing a school parking decal, inadvertently bringing a prescription or over-the-counter drug to school, or doodling in class (when the drawing contains a weapon).

[For purposes of this report, Texas Appleseed *excluded fighting, school-related gang violence, and criminal mischief* from the list of offenses for which Texas school districts exercise discretion in sending students to DAEPs.²³ Our analysis of disciplinary referral data, self-reported to the Texas Education Agency by school districts, found that: 1) these most serious offenses comprise only a small percentage of discretionary disciplinary referrals to DAEPs; 2) *minority and special education students are significantly overrepresented* in discretionary referrals for other kinds of student Code of Conduct violations; and 3) because discretion is involved, *where a student goes to school in Texas—and not the nature of the offense—is the greater predictor of the likelihood of a student’s receiving a disciplinary referral.*] See *Quantitative Methods* in the *Appendix* (Group C, page 108) for “referral reason” codes used in the Appleseed analysis.

Prior to removing a student to a DAEP, the principal or assistant principal will conduct a removal hearing (except in emergency removal situations discussed later in this chapter).²⁴ The student and parent or guardian must receive written notice of the meeting and an explanation for the student’s proposed removal, and be invited to attend and respond.²⁵ The hearing will take place even if the student and the parents do not attend once valid attempts to contact them have been made.²⁶ This is not a formal hearing, and often consists of little more than a discussion with the student of the reason for the disciplinary referral.

17 TEX. EDUC. CODE §§ 37.006(f) & 37.007(f)(2006).

18 *Id.* at § 37.006(f)(1).

19 *Id.* at §§ 37.006(a) & 37.006(c).

20 *Id.* at § 37.006(h).

21 *Id.* at § 37.006(i)-(j).

22 *Id.* at § 37.001.

23 TEX. EDUC. CODE §§ 37.001 & 37.002.

24 TEX. EDUC. CODE § 37.009 (2006).

25 *Id.*

26 *Id.*

A student may not be removed to a DAEP for more than one year unless the student is considered a threat to the safety of others in a regular classroom or if it is considered in the student's best interest.²⁷ The average length of stay in a DAEP in Texas is currently between 30 and 40 days.²⁸ The term of DAEP placement must be consistent with what is outlined in the student Code of Conduct, and a student sent to an alternative program for a longer period is entitled to have his or her status reviewed every 120 days.²⁹ The district is only required at this time to provide a core curriculum for DAEPs (English, math, science and history), and not all courses needed for graduation from high school.³⁰

Expulsion

Chapter 37 outlines terms for mandatory and discretionary expulsion from school. Expelled students are *not* sent to DAEPs. Instead, they are sent to Juvenile Justice Alternative Education Programs (JJAEPs) or in some cases, where a JJAEP is not available, are expelled "to the street."

Expulsion is *mandatory* if a student uses, exhibits, or possesses a firearm, illegal knife, club, or prohibited weapon on school property or while attending a school-sponsored event or school-related activity.³¹ A student also must be expelled for aggravated assault (including sexual assault), arson, murder or attempted murder, indecency with a child, aggravated kidnapping, aggravated robbery, manslaughter, or criminally negligent homicide.³² Selling, giving, or delivering marijuana, a controlled substance, dangerous drug, or alcohol on or within 300 feet of school property—if punishable as a felony—will result in mandatory expulsion from school.³³ Most offenses requiring mandatory expulsion are defined in the Texas Penal Code. Under the federal Gun-Free Schools Act, students caught bringing a firearm to school must be expelled for at least one year. Federal law defines a "firearm" as a gun, bomb, rocket, missile, grenade, or similar device.³⁴

Texas school districts can exercise their *discretion* to expel a student if he engages in a false alarm or report—such as making a threatening call or pulling a fire alarm—or commits the following within 300 feet of school property or while attending a school-sponsored or related activity: sells, gives or delivers marijuana, a controlled substance, dangerous drug, or alcohol—if not punishable as a felony; engages in an offense involving abuse of glue or aerosol paint, or use of a volatile chemical; assaults a school employee or volunteer; engages in public lewdness or indecent exposure; or engages in deadly conduct as defined by the Texas Penal Code.³⁵ A student may also be expelled for engaging in conduct that would have required expulsion if committed on campus, possessing a firearm, assaulting another student, or committing aggravated robbery against another student.³⁶

27 *Id.*

28 *See* TEX. EDUC. AGENCY, 2006 COMPREHENSIVE ANNUAL REPORT ON TEXAS PUBLIC SCHOOLS.

29 TEX. EDUC. CODE § 37.009 (2006).

30 *Id.* at § 37.008.

31 *Id.* at § 37.007(a).

32 *Id.*

33 *Id.* at § 37.007(a)(3).

34 Safe Schools Act, 18 U.S.C. § 921.

35 TEX. EDUC. CODE § 37.007(b)(2006).

36 *Id.*

A student also may be expelled for engaging in “serious and persistent misbehavior” that violates the district’s student Code of Conduct while attending a Disciplinary Alternative Education Program.³⁷

Before a student may be expelled, the school board must provide the student with a hearing at which the student is afforded due process rights (except in emergency placements described below).³⁸ The parent or guardian is invited in writing to attend.³⁹ At the hearing, the parent, guardian, or another adult can give guidance to the student provided they are not employed by the school district.⁴⁰ The hearing may be held without the student and/or parent present if there has been a good faith effort to notify them.⁴¹ If the school board’s designee makes the decision to expel the student, that decision can be appealed to the school board—and that decision may be appealed by trial *de novo* to a district court in the home county.⁴²

An expulsion may not exceed one year, unless the district determines the student is a threat to the safety of other students or district employees or that extended placement is in the best interest of the student.⁴³ A student’s parent or guardian is responsible for his or her supervision during expulsion.⁴⁴

Emergency Disciplinary Placement

A principal or her or his designee may order a student’s immediate expulsion or placement in a DAEP if he or she reasonably believes the student’s behavior is so disruptive or abusive as to prevent learning in the regular classroom, or that an emergency disciplinary placement is necessary to protect persons or property from immediate harm.⁴⁵

The disciplined student must receive oral notice of the reasons for the emergency placement—and must receive an appropriate due process hearing for removal within a “reasonable time,” but no later than 10 days after the emergency placement.⁴⁶

Juvenile Justice Alternative Education Program (JJAEP)

A juvenile board of a Texas county with a population greater than 125,000 must establish a JJAEP, subject to the approval of the Texas Juvenile Probation Commission.⁴⁷ Juvenile courts in these counties must order expelled students to attend a JJAEP if a court finds they have committed an infraction that mandates their expulsion from school and have engaged in delinquent conduct under Title 3 of the Family Code.⁴⁸

Smaller counties with less than 125,000 people may create a JJAEP, but are not required to do so.

37 *Id.* at § 37.007(c).

38 *Id.* at § 37.009(f).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at § 37.019.

46 *Id.*

47 *Id.* at § 37.011(a).

48 *Id.* at § 37.011(b). Title 3 addresses juvenile justice under the Family Code.

JJAEPs are required to offer the same basic curriculum as DAEPs. JJAEPs are required to operate at least seven hours per day, 180 days per year,⁴⁹ whereas a similar standard was not applied to DAEPs until the 2007 legislative session. For purposes of accountability, a JJAEP student's standardized test scores are attributed to their home campus.⁵⁰

Discipline of Special Education Students

When disciplining a special education student, school districts must follow procedures outlined by the federal government under the Individual with Disabilities Education Act 2004.⁵¹

A special education student can only be removed from his or her assigned classroom for more than 10 days for disciplinary reasons if it is determined that the misconduct is **not related** to the student's disability and **not** a direct result of the district's failure to implement the student's Individual Education Plan (IEP).⁵²

The review process to determine whether or not a child's misbehavior is related to her or his disability is called a "manifestation determination."⁵³ This review must be carried out by the district, the parent, and members of the child's IEP team at an Admission, Referral, and Dismissal (ARD) meeting within 10 school days of the decision to change the child's placement for behavioral reasons.⁵⁴ Even if the child has not yet received special education services, these protections may be triggered if a parent or guardian has expressed a concern regarding his or her child in writing, requested an evaluation, or if a teacher has expressed a concern to the school's director of special education.⁵⁵

If the manifestation determination committee decides the behavior is a manifestation of the child's disability, the child's IEP team must conduct a functional behavioral assessment, implement a behavioral intervention plan, and return the child to the placement from which he or she was removed.⁵⁶ If such a plan already exists, the team must review it and make any necessary changes.⁵⁷ The only exception is in cases involving weapons, drugs, or serious bodily injury. In such cases, the school district may place a student in an alternative educational setting for up to 45 school days even if the misbehavior is a manifestation of a child's disability.⁵⁸ Chapter 37 includes strict limitations on the use of confinement, restraint, seclusion, and time out practices for students with disabilities.⁵⁹

If the manifestation determination committee decides the student's misbehavior is **not related to his or her disability**, then the student may be disciplined in the same manner

49 *Id.* at § 37.011(f).

50 *Id.* at § 37.011(h).

51 Lucy Wood, *The Special Education Due Process Hearing – Discipline and Behavioral Issues Under the New IDEA*, in STATE BAR OF TEXAS, CLE MATERIALS FOR SPECIAL EDUCATION ISSUES AND THE JUVENILE JUSTICE SYSTEM (June 2006).

52 *Id.* at 2.

53 *Id.* at 3.

54 *Id.* at 7; TEX. EDUC. CODE § 37.004 (2006).

55 *Id.* at 6.

56 *Id.* at 7.

57 *Id.* at 7-8.

58 *Id.* at 9.

59 TEX. EDUC. CODE § 37.0021 (2006).

as a student without a disability.⁶⁰ However, while a special education student is in an alternative education placement, he or she must receive a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior that caused the referral.⁶¹ Teachers in alternative education programs who are assigned special education students must be properly credentialed to teach special education.⁶²

The Individuals with Disabilities Education Act (IDEA) also requires school districts to continue educational services to all special education students who are expelled or removed from their home school for more than 10 days.⁶³ IDEA includes an appeal process for parents who disagree with a manifestation determination, and the Texas Administrative Code sets out the appeal process for Texas students.⁶⁴ It includes the right to appeal the administrative hearing officer's decision to a state court or federal district court.⁶⁵

Resources for Students

Chapter 37 includes several provisions aimed at creating resources for students with disciplinary problems.⁶⁶ For example, each district must appoint at least one educator to act as a liaison officer for children disciplined through the court system. This person works with the student and family to improve attendance and progress in school. The Texas Education Agency does not provide data on the number of Texas school districts implementing the following *optional programs* to help at-risk students:

- *School-Community Guidance Centers.* These centers coordinate the efforts of school districts, police departments, probation officers, and school attendance personnel to help juvenile offenders and children with severe behavioral problems or character disorders be more successful in school.⁶⁷
- *Cooperative Programs.* School districts may develop alliances with state youth agencies to benefit children found to have engaged in delinquent conduct.⁶⁸

Conclusion

Chapter 37 sets out several levels of discipline (suspension, referral to a DAEP, expulsion) that school districts may use to address different types of student misconduct. Although certain offenses trigger mandatory disciplinary action under state law, Texas school districts retain wide discretion to discipline students.

60 Wood, *supra* note 51, at 12.

61 *Id.* at 8.

62 TEX. EDUC. CODE § 37.004 (2006).

63 Wood, *supra* note 51, at 8.

64 *Id.* at 9-10; TEX. ADMIN. CODE § 89.1165 (2006).

65 Wood, *supra* note 51, at 11.

66 TEX. EDUC. CODE § 37.014 (2006).

67 *Id.* at § 37.051.

68 *Id.* at § 37.052.

TEXAS SCHOOL DISCIPLINE POLICIES: Impacting the School-to-Prison Pipeline

As discussed in the previous chapter, Texas lawmakers passed sweeping legislation in 1995 (*Texas Education Code, Chapter 37, Discipline; Law & Order*) that left wide discretion to school districts to manage discipline at the local level—while establishing, for the first time, a state-imposed list of serious offenses triggering mandatory removal from the regular classroom and placement in an alternative education program.

Since the mid-1990s, disciplinary referrals to in-school suspension (ISS), out-of-school suspension (OSS), and Disciplinary Alternative Education Programs (DAEPs) have increased. Over a decade ago, only the worst behavioral violations were cause for removal from the mainstream campus. Today, many school districts are *using their discretion under state law* to suspend or refer students to DAEPs for a range of student Code of Conduct violations—including *disrupting class, talking back to a teacher, or using profanity*. Although Texas law allows school districts to consider a student’s “intent” when reaching a disciplinary decision, it is not mandatory. About half of the more than 1,000 members of the Association of Texas Professional Educators surveyed in fall 2006 reported that their student Code of Conduct did not permit consideration of intent or self-defense.

For purposes of this report, Texas Appleseed *excluded fighting, school-related gang violence, and criminal mischief* from its analysis of discretionary disciplinary referrals self-reported by school districts to the Texas Education Agency (2001-06).

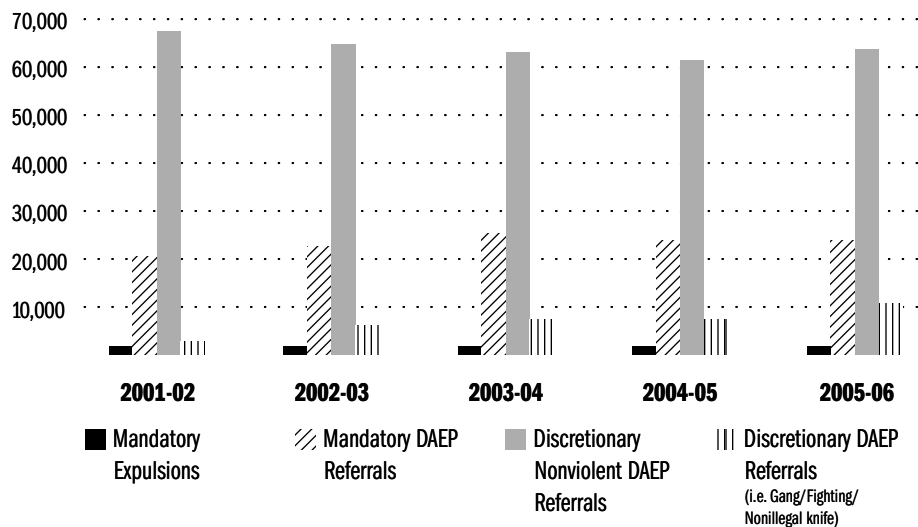
Our analysis found that: 1) these most serious offenses comprise only a small percentage of discretionary disciplinary referrals; 2) minority and special education students are significantly overrepresented in discretionary referrals for lesser offenses; and 3) where a student goes to school in Texas—and not the nature of the offense—is the greater predictor of the likelihood of a student’s receiving a disciplinary referral.

– See *Quantitative Methods* in the *Appendix* (Group C, page 108) for “referral reason” codes used in the Appleseed analysis.

Currently, Texas has more than 4.4 million students attending public schools in 1,037 school districts. Between 2001 and 2006, discretionary DAEP referrals far outnumbered state-mandated referrals.

In 2005-06 alone, Texas public schools made 62,981 discretionary referrals to DAEPs compared to 27,093 state-mandated referrals for serious offenses outlined in the Texas Education Code. While there is a perception that the majority of discretionary referrals to DAEPs are a response to fights on school property or at school-sponsored events, Texas Appleseed's research found that *discretionary DAEP referrals for other violations of a student Code of Conduct out-numbered referrals for fighting and like offenses 6:1 in 2005-06.* (See the *Appendix* for the methodology used to analyze quantitative data obtained from the Texas Education Agency.)

Statewide Discretionary vs. Mandatory DAEP Referrals, 2001-06



In addition, the statewide average referral rate to both out-of-school and in-school suspension (OSS and ISS) increased steadily between 2001 and 2006. According to data posted by the Texas Education Agency, **school districts sent 613,549 students to OSS and more than 1.7 million to ISS in 2005-06.**

An over-reliance on suspension and DAEP referrals to manage student behavior has led to the following systemic problems:

- **Learned negative behaviors.** Discretionary referrals to ISS, OSS, and DAEPs do not make mainstream schools safer and, according to many experts, grouping such students may result in more “learned” behavior problems.
- **Negative impact on academics.** Disciplinary referrals can have a substantial negative impact on a student’s academic skills. Repeated referrals to ISS and OSS results in lost class time. Texas does not require state oversight of DAEPs, resulting in varying quality of academic programs. Disciplinary action that removes students from the

regular classroom to alternative settings with less direct teaching can exacerbate a student's academic problems.

- **Higher dropout rates.** Disciplinary referrals may impact a student's decision not to stay in school. Repeated suspensions are correlated with an increased risk of dropping out—and according to the Texas Education Agency, DAEPs have *five times* the dropout rate of mainstream programs.⁶⁹
- **Overrepresentation of minorities.** African-American and Hispanic students are overrepresented in discretionary disciplinary referrals compared to their percentage in the overall student population, raising concerns about possible institutional bias.
- **Overrepresentation of special education students.** Overrepresentation of special education students in discretionary disciplinary referrals raises questions about whether teachers receive adequate training in disciplining these students, or whether schools are rigorously following IDEA requirements and adhering to students' Individual Education Plans (IEPs) and Behavior Intervention Plans (BIPs).
- **Stigmatizing young children.** Children in pre-K, kindergarten, and 1st grade are being referred to DAEPs in Texas. According to educational experts, this practice can stigmatize young children as “behavior problems” early in their education and make it more difficult for them to relate positively to school.
- **Lack of consistency in discipline.** Rates of suspension and referral to DAEPs vary widely across Texas. Adopting a zero tolerance approach has not increased consistency in discipline and, instead, students' chances of receiving some type of disciplinary referral depend largely on where they go to school, rather than on the type of offense.

Disciplinary Referrals Fail to Make Schools Safe

In 2006, the American Psychological Association (APA) published an evidentiary review of studies that evaluated both the effectiveness of zero tolerance policies in school discipline and whether zero tolerance policies made schools safer.⁷⁰

In considering this question, the APA examined data around two key assumptions of zero tolerance policies:

- Removal of students who violate school rules will create a school climate more conducive to learning for those students who remain; and
- The swift and certain punishments of zero tolerance have a deterrent effect upon students, thus improving overall student behavior and discipline.⁷¹

Research around these assumptions proved both of them wrong. In fact, data gathered during a longitudinal study suggests “*frequent use of suspension has no measurable positive deterrent or academic benefit to either the students who are suspended or to non-suspended*”

69 TEXAS EDUCATION AGENCY, 2006 COMPREHENSIVE ANNUAL REPORT ON TEXAS PUBLIC SCHOOLS: A REPORT TO THE 80TH LEGISLATURE FROM THE TEXAS EDUCATION AGENCY 54 (2006).

70 AM. PSYCHOL. ASS'N, ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS (2006).

71 *Id.* at 5-6.

students.”⁷² A recent survey of Texas teachers supports these findings. When asked whether it had become easier to maintain discipline in the classroom over the last 10 years, 87 percent of survey respondents said “no.”⁷³

“Upon arriving at school (a DAEP), students are subjected to dress code inspection. They wear a uniform and are met at the doors by teachers.... Students move through hallways without talking, and no signing is permitted. Most students shake hands with adults or visitors. They may carry nothing but their white binders, two pencils (no mechanical pencils), and notebook paper into the building.... Students are ‘wanded’ and pass through metal detectors upon entry into the building.”

– A teacher’s description of a
highly structured DAEP

The APA found that schools with higher rates of suspension and expulsion have poorer school climate ratings.⁷⁴ This is an important finding, since many of the resources published around school discipline indicate that one of the keys to reducing school violence and reducing dropouts is *good school climate*.⁷⁵ In fact, a sense of “connectedness” to school is positively associated with reduced risk of drug use, violence, and early sexual activity.⁷⁶ Students report a lower level of “connectedness” in schools that rely extensively on suspension for minor infractions.⁷⁷

The APA’s research also showed that rather than reducing the likelihood of disruption, disciplinary referrals to out-of-school suspension (OSS) or expulsion appear to predict higher future rates of misbehavior.⁷⁸ In other words, instead of deterring future misbehavior, suspension instead may have the opposite effect of increasing the future probability of disruptive behavior.⁷⁹

This is supported by Texas data showing a significant recidivism rate for disciplinary referrals. TEA reported that 794,845 individual students were disciplined in 2005-06, while the state’s “discipline record count” (total number of disciplinary referrals) was 2,587,550.⁸⁰

72 Linda M. Raffaella Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE 17, 25 (New Directions for Youth Development 2003).

73 ASS’N OF TEX. PROF’L EDUCATORS, REPORT ON THE 2006 ATPE DISCIPLINE SURVEY 2 (2006).

74 AM. PSYCHOL. ASS’N, *supra* note 70, at 5-6.

75 DENISE GOTTFREDSON, SCHOOL-BASED CRIME PREVENTION, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING, A REPORT TO THE UNITED STATES CONGRESS (1997); U.S. DEP’T OF EDUC., EARLY WARNING, TIMELY RESPONSE A GUIDE TO SAFE SCHOOLS 4 (1998); U.S. DEP’T OF EDUC., SAFEGUARDING OUR CHILDREN: AN ACTION GUIDE 7 (2000).

76 Johanna Wald & Michael Kurlaendar, *Connected in Seattle? An exploratory study of student perceptions of discipline and attachments to teachers*, in DECONSTRUCTING THE SCHOOL TO PRISON PIPELINE 35, 38 (New Directions for Youth Development 2003).

77 *Id.* at 38.

78 AM. PSYCHOL. ASS’N, *supra* note 70, at 49-52.

79 *Id.*

80 Texas Education Agency, State Level Annual Discipline Summary PEIMS Discipline Data for 2005-2006, available at http://www.tea.state.tx.us/adhocrpt/Disciplinary_Data_Products/Disciplinary_Data_Products.html

DAEP administrators and teachers almost uniformly suggested that mainstream schools should pay greater attention to students returning from DAEPs and transitioning back into regular classes to prevent recidivism and avoid additional problems for at-risk students.

– Interviews with nine Texas school districts conducted by Texas Appleseed pro bono partners

Recidivism rates are high for DAEPs. In 2005-06 alone, the recidivism rate for DAEPs approached 30 percent—but it is no surprise that recidivism rates for OSS and ISS are much higher.⁸¹ In 2005-06, 105,530 students were referred to a DAEP in Texas, while the total number of DAEP referrals was 136,938.⁸² That same year, there were 1.7 million ISS referrals involving 652,460 unduplicated students,⁸³ and 638,257 referrals to OSS involving 311,940 unduplicated students.⁸⁴ ***Well-administered suspension and DAEP programs are needed, however high recidivism rates are a persuasive indicator that current approaches to managing problem behavior are not working for significant numbers of students.***

This conclusion is supported by a study published by Texas A&M Public Policy Research Institute in 2005 which found that ***among the “risk factors” commonly associated with referral to the juvenile justice system, the single most important predictor for referral was a history of disciplinary referrals at school.***⁸⁵ The study considered the following factors: gender, low income status, academic giftedness, limited English proficiency, school disciplinary contact, whether or not the juvenile was a gang member, race/ethnicity, disability status, offense type, who the child was living with at the time of the offense, school attendance rate, and age.⁸⁶ The study found:

Holding all other risk factors statistically constant, students involved in one or more disciplinary incidents were 23.4 percent more likely to encounter a referral [to the juvenile justice system] than those with no school disciplinary contact. Not surprisingly, the more severe the disciplinary history, the higher the probability of a referral. Each additional disciplinary infraction increased the likelihood of justice involvement by a maximum of 1.5 percent. Each day a juvenile was suspended from school elevated the probability by 0.1 percent. Still, there was a clear “threshold effect” so that even a single contact with school discipline authorities greatly increased a student’s chance of a [Texas Juvenile Probation Commission] referral.⁸⁷

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 THE PUBLIC POLICY RESEARCH INSTITUTE, STUDY OF MINORITY OVERREPRESENTATION IN THE TEXAS JUVENILE JUSTICE SYSTEM FINAL REPORT (2005), available at <http://DMCFinalReport.tamu.edu>.

86 *Id.* at 16-18.

87 *Id.* at 24.

Several studies have identified a phenomenon that may explain why misbehavior increases rather than decreases after school disciplinary referrals.⁸⁸ These studies showed that aggregating students who misbehaved resulted in higher rates of problem behavior for the entire group.⁸⁹ This is true even where the purpose of grouping young people was for providing social skills training meant to address problem behavior.⁹⁰ *This phenomenon also is discussed in a federal report on crime prevention—which found that **intervention programs that brought “high-risk youth” together led to increased, rather than decreased, delinquency.***⁹¹

Some researchers refer to this effect as “deviancy training” or “peer contagion.”⁹² Essentially, when misbehaving youth are placed together, their peer group provides positive reinforcement for delinquent or “antisocial” acts, making it more likely that they will engage in these acts in the future.⁹³ In addition, “mutual bonding among...low-achieving high school students appeared to be prognostic of increases in school alienation.”⁹⁴ Thus, these studies suggest that students who are grouped together in ISS or DAEPs will leave these settings with a higher likelihood of misbehaving and feeling even more alienated from school.

Given the consequences of removing students from the mainstream school setting, ***Texas policymakers should reexamine the discretionary practice of referring more than 60,000 students annually (2001-06) to DAEPs.*** Large numbers of DAEP, OSS, and ISS referrals, along with high recidivism rates, should trigger an internal campus review of teacher training needs and a reexamination of disciplinary strategies and goals.

Academic Impact of Disciplinary Referral

The practice of removing students from mainstream programs through disciplinary referrals has been shown to have a negative effect on academic achievement. Many students return to their home schools from DAEPs with little or no academic improvement, and students who are repeatedly suspended from school may lose academic skills as a result of lost instruction time.⁹⁵

Suspension

A student’s total number of suspensions can have a negative impact on achievement up to a year to two years later.⁹⁶ This is true when controlling for socioeconomic status.⁹⁷ Disciplining

88 AM. PSYCHOL. ASS’N *supra* note 70, at 49-52.

89 *Id.*

90 *Id.*

91 LAWRENCE W. SHERMAN ET AL, PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T WHAT’S PROMISING A REPORT TO THE UNITED STATES CONGRESS 35 (1997).

92 Thomas J. Dishion & Joan McCord, *When Interventions Harm*, AM. PSYCHOLOGIST, Vol. 54, No. 9, at 755-64; Thomas J. Dishion & Kenneth A. Dodge, *Peer Contagion in Interventions for Children and Adolescents: Moving Towards an Understanding of the Ecology and Dynamics of Change*, J. OF ABNORMAL CHILD PSYCHOL., Vol. 33, No. 3, at 395-400.

93 Dishion & McCord, *supra* note 92.

94 *Id.*

95 AUGUSTINA H. REYES, DISCIPLINE, ACHIEVEMENT, RACE – IS ZERO TOLERANCE THE ANSWER? 42-43 (Rowman & Littlefield 2006).

96 AM. PSYCHOL. ASS’N, *supra* note 70, at 47.

97 *Id.* at 47.

elementary and middle school students with out-of-school suspension (OSS) has been shown to contribute to poor academic performance and failure to graduate on time.⁹⁸

It is not hard to imagine why this might be the case in Texas. High recidivism rates for students referred repeatedly to in-school and out-of-school suspension represent lost instruction time. In-school suspension in many Texas schools consists of little more than a study hall. Also, there are no limits on the number of days—either cumulatively within a school year or as the result of a single referral—that a student may spend in ISS. In many schools, students are not given academic assignments in ISS, and their teachers do not provide them with the work that they are missing in class. Students who are suspended out of school (OSS) receive no instruction whatsoever. Currently, there is no cap on the cumulative number of days that a student may spend in out-of-school suspension in the course of one academic year.

In addition, studies indicate that high rates of suspension or expulsion may have an impact on a school’s overall academic achievement, when controlling for demographic indicators such as race, ethnicity, and socioeconomic status.⁹⁹ Schools that suspend and expel students at a lower rate show better overall achievement.¹⁰⁰

DAEP Referral

In Texas, there is no state agency charged with oversight of DAEP programs. State law mandates creating these programs, but each school district is left with the task of structuring its DAEP curriculum.¹⁰¹ The only academic courses that Texas requires for DAEPs are the four “core” courses: English, math, science, and history.¹⁰² However, this does not mean that students will have teacher-led instruction as they would in a traditional school setting. In many alternative education programs, work is given to students in packets—and once they complete a packet of worksheets, they are given another one.

Until 2007, DAEPs were exempt from the Education Code’s requirement concerning length of school day.¹⁰³ This meant that in some instances, DAEPs were only providing four hours or less of instruction.¹⁰⁴ Concerns raised by advocates and educators led the legislature to pass House Bill 426, effective September 1, 2007, requiring DAEPs to provide a seven-hour school day, the minimum length for mainstream programs.¹⁰⁵

Advocates and educators also have raised concerns regarding the quality of academic programs in DAEPs.¹⁰⁶ House Bill 426, mentioned above, also requires TEA to adopt

98 Linda M. Raffaele Mendez, *supra* note 72, at 25-26 .

99 AM. PSYCHOL. ASS’N, *supra* note 70, at 48.

100 *Id.*

101 TEX. PUBLIC POLICY FOUND., SCHOOLING A NEW CLASS OF CRIMINALS? BETTER DISCIPLINARY ALTERNATIVES FOR TEXAS STUDENTS 11 (2006), available at http://www.texaspolicy.com/publications.php?cat_level=99.

102 TEX. EDUC. CODE §37.008(a)(4).

103 *Id.* at §37.008(c).

104 HOGG FOUND. FOR MENTAL HEALTH, SCHOOL DISCIPLINE AND CHILDREN WITH SERIOUS EMOTIONAL DISTURBANCES (2005)(some DAEPs provide minimum of four hours of instruction needed for funding requirements), available at http://www.hogg.utexas.edu/programs_SpecialEd.html; TEX. PUBLIC POLICY FOUND., SCHOOLING A NEW CLASS OF CRIMINALS?, *supra* note 101, at 12 (TEA acknowledges some DAEPs only provide 2 hours instruction).

105 Tex. HB 426, 80th Leg. Sess., R.S. (2007).

106 REYES, *supra* note 95, at 53-56; TEX. PUBLIC POLICY FOUND., *supra* note 101, at 12.

minimum standards for the operation of DAEPs.¹⁰⁷ These standards are to address student/teacher ratios; student health and safety; reporting of abuse, neglect, or exploitation; and planning for transition back to the regular campus.¹⁰⁸ However, the bill does not require TEA to monitor compliance or enforce these provisions.¹⁰⁹ Instead, it simply requires TEA to report to the 81st Legislature on the cost of enforcing these standards.¹¹⁰ Without ensuring that the state is monitoring and enforcing these provisions, there is no guarantee that districts will be motivated to adopt the new TEA standards.

Students who attend DAEPs may be at greater risk for academic problems.

Some students referred to DAEPs should not be there, some interviewees said. For example, “several students were referred to a DAEP for borrowing a school parking decal. Another student was referred for doodling on a paper during a class period and drawing a gun as a doodle. Students feel a strong sense of injustice about these referrals,” a teacher said.

– Interviews with nine Texas school districts conducted by Texas Appleseed pro bono partners

Students often do not have access to advanced curriculum, including foreign languages, in alternative education programs.¹¹¹ Some DAEPs lack libraries, and students are not allowed to take textbooks home with them.¹¹² DAEPs may include required attendance in behavioral programs that are not relevant to the reason for the student’s referral.¹¹³ Some DAEPs focus primarily on discipline, with a secondary focus on academics.¹¹⁴

A 2006 survey of Texas teachers conducted by the Association of Texas Professional Educators (ATPE) revealed that many teachers do not believe DAEP programs are successful.¹¹⁵ Teachers questioned DAEPs’ accountability for the academic performance of students, and 47 percent of teachers responded that students were not receiving adequate academic instruction while placed in a DAEP.¹¹⁶ ATPE received these comments from teachers:

- *Academic standards are lowered and grades are inflated in DAEPs. Instruction is not aligned to the TEKS (Texas Examination of Knowledge and Skills). Some students are sent to the DAEP just so that their grade point averages will improve. When the student returns to the regular classroom, he is behind. Accountability is lost.*

107 Tex. HB 426, *supra* note 105.

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 AUGUSTINA H. REYES, *supra* note 95, at 55; TEX. PUBLIC POLICY FOUND., *supra* note 101, at 11-12.

113 AUGUSTINA H. REYES, *supra* note 95, at 55.

114 INTERCULTURAL DEVELOPMENT RESEARCH ASS’N, DISCIPLINARY ALTERNATIVE EDUCATION PROGRAMS IN TEXAS – WHAT IS KNOWN; WHAT IS NEEDED 22 (1999).

115 ASS’N OF TEX. PROF’L EDUCATORS, *supra* note 73, at 9.

116 *Id.* at 10-11.

- *DAEPs need more rigorous instruction and supervision. Too many students view the DAEP as an easier and less stressful classroom environment. It is 'fun' for them, or they sleep through it. Students actually look forward to being reassigned to the DAEP.*
- *More computers and access to lab facilities are needed to help students stay on grade level, particularly in math and science.*
- *DAEPs need certified teachers in every subject.*
- *Students referred to DAEPs should follow the lesson plan and complete the homework and quizzes prepared by the original classroom teacher, rather than the DAEP teacher. The student's work should be returned to his or her regular classroom teacher, not just grade reports. DAEPs should consider video conferencing with the regular classroom.*
- *More communication and interaction is necessary between the regular classroom teacher and the DAEP teacher.*
- *The DAEP schedule should match that of the regular classroom. Too often the DAEP offers a shorter instructional day, and students like this.*¹¹⁷

These comments reflect teachers' concerns that many DAEP programs are failing Texas' students academically. One of the conclusions of the ATPE survey was that personnel and curriculum standards for DAEPs should be "*commensurate with regular K-12 public education requirements.*"¹¹⁸

Link Between Dropout and Disciplinary Referrals

Suspension and Dropout

Studies show that school suspension is associated with a higher likelihood of school dropout.¹¹⁹ A history of being disciplined in school is one of the strongest predictors of dropout.¹²⁰ Students with more than one 6th grade suspension are less likely to graduate with their same-age peers.¹²¹ A study of the reasons that students give for dropping out of school showed that students ages 16 and younger are more likely than older students to leave school for disciplinary reasons.¹²² The same study showed that African American males are more likely to drop out of high school for disciplinary reasons than members of any other ethnic or gender group, an important finding given the overrepresentation of African American students in disciplinary referrals in Texas and nationwide.¹²³ An American Psychological Association report concluded that this relationship was not "entirely accidental" and cited research suggesting that, in some schools, suspension was "used

117 *Id.* at 11-12.

118 ASS'N OF TEX. PROF'L EDUCATORS, *supra* note 73, at 20.

119 Linda M. Raffaella Mendez, *supra* note 72, at 26; GOVERNMENT ACCOUNTABILITY OFFICE, SCHOOL DROPOUTS, EDUCATION COULD PLAY A STRONGER ROLE IN IDENTIFYING AND DISSEMINATING PROMISING PREVENTION STRATEGIES 3 (2002).

120 THE JUSTICE MATTERS INSTITUTE, TURNING TO EACH OTHER NOT ON EACH OTHER, HOW SCHOOL COMMUNITIES PREVENT RACIAL BIAS IN SCHOOL DISCIPLINE 4 (2000).

121 Linda M. Raffaella Mendez, *supra* note 72, at 30.

122 Elizabeth Stearns and Elizabeth J. Glennie, *When and Why Dropouts Leave High School*, 38 *Youth & Society* 29 (2006).

123 *Id.* at 45.

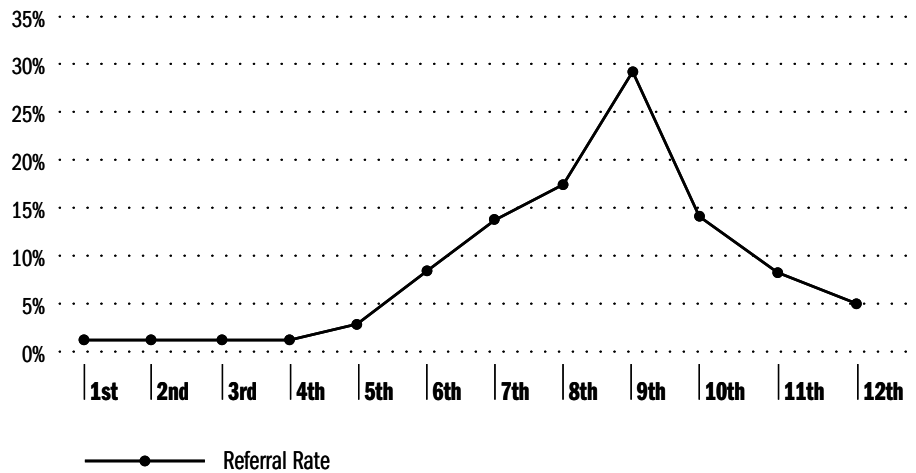
explicitly as a tool for ‘push-out.’¹²⁴ The relationship between dropout and disciplinary referrals to DAEPs is acknowledged by a Texas teacher who responded to the ATPE survey discussed above. The teacher commented:

*Too many DAEP students fail the TAKS and end up dropping out of school.*¹²⁵

The studies showing the relationship between dropout and disciplinary referrals are particularly important to our understanding of Texas disciplinary policy. Texas Education Agency data reflects a spike in disciplinary referrals beginning in 6th grade and continuing through 9th grade. If students are more likely to drop out of school for disciplinary reasons before the age of 16, high referral rates during this time period may be cause for particular concern. Though a Texas-specific study like the one discussed above has not been done, TEA data documenting a spike in DAEP referrals correlates with Texas dropout data, which shows that half of all dropouts leave school before the 10th grade.¹²⁶

When broken down by grade, the rate of disciplinary referrals of Texas students to DAEPs increases from 3 percent in the 5th grade to 8 percent in the 6th grade and continues to rise through 9th grade.¹²⁷ The chart below records statewide DAEP referral data by grade level data for 2005-06, however this pattern of referrals has been consistent for a five-year period (2001-06).

Statewide DAEP Referral Rate by Grade Level, 2005-06



124 AM. PSYCHOL. ASS'N, *supra* note 70, at 51.

125 ASS'N OF TEX. PROF'L EDUCATORS, *supra* note 73, at 12.

126 CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN RESEARCH EDUCATION CENTER, HIGH SCHOOL GRADUATION IN TEXAS INDEPENDENT RESEARCH TO UNDERSTAND AND COMBAT THE GRADUATION CRISIS (2006).

127 Based on data received by Texas Appleseed pursuant to an open records request to the Texas Education Agency.

The data also shows a significant overrepresentation of African American students in disciplinary referrals to ISS, OSS, and DAEPs, which raises concerns given the finding that African American students are more likely to drop out due to disciplinary reasons. In a study published by Texas A&M University, a correlation was found between out-of-school suspensions and the dropout rate among Hispanic students.¹²⁸ The same was true of African American students.¹²⁹ Out-of-school suspension also was shown to negatively affect Hispanic and African American students' pass rates on the TAAS test.¹³⁰

DAEP Dropout Rate

In its 2006 Comprehensive Annual Report on Texas Public Schools, the Texas Education Agency reported that DAEPs have **five times the dropout rate** of mainstream programs.¹³¹

DAEP dropout rates do not capture all students whose decision to leave school may have been related to a disciplinary referral. Many students sent to DAEPs are already experiencing academic problems at school and, because Texas' DAEP programs often fail to provide a curriculum that mirrors that of mainstream schools, many students fall even farther behind and find they cannot catch up. Most campuses lack transitional programs to help these at-risk students successfully reintegrate into their classes. Students often simply give up and drop out.¹³²

Some interviewees noted that students referred to a DAEP were more likely to skip school or drop out than other students.

– Interviews with nine Texas school districts conducted by Texas Appleseed pro bono partners

The high dropout rate of DAEPs and the increased likelihood of dropout following disciplinary action invite closer examination of the role that school disciplinary policies play in the Texas dropout crisis, particularly among minority students. Texas is one of 15 states that produce the highest number of dropouts.¹³³ Only about 74 percent of Texas' students graduate on time.¹³⁴ For African American and Hispanic students, the numbers are even lower, with 68 percent of African American and 65 percent of Hispanic students in Texas receiving a high school diploma.¹³⁵

128 RENE R. ROCHA, SPARE THE ROD, SUSPEND THE CHILD: DISCIPLINE POLICY AND HIGH SCHOOL DROPOUTS 11 (Texas Educational Excellence Project 2003), available at <http://teep.tamu.edu/reports/report024.pdf>.

129 *Id.*

130 *Id.* at 14.

131 TEXAS EDUCATION AGENCY, *supra* note 69.

132 THE JUSTICE MATTERS INSTITUTE, *supra* note 120, at 4; Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, in DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE 9, at 13 (2003).

133 U.S. DEP'T OF LABOR, AN OVERVIEW OF ALTERNATIVE EDUCATION 9 (2006).

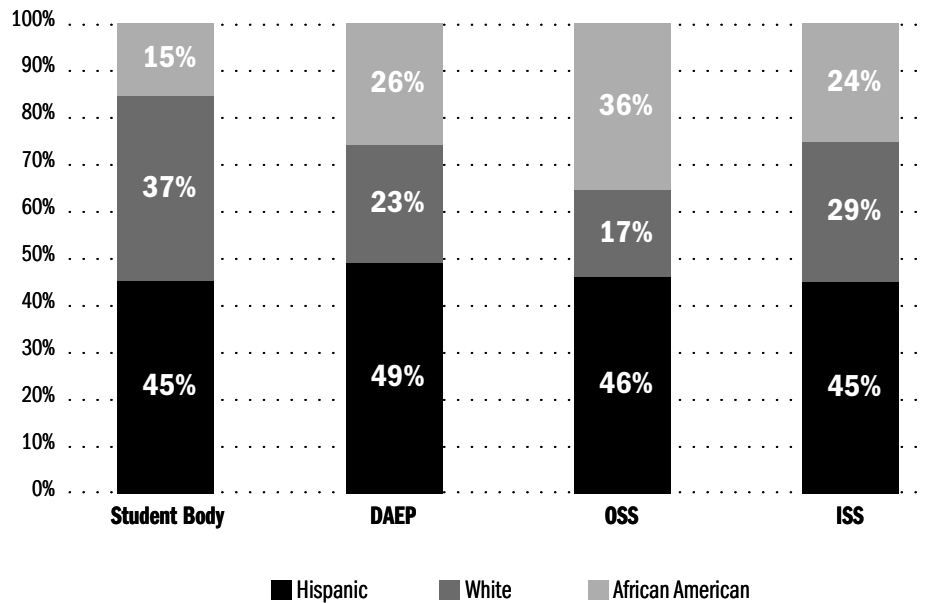
134 HARVARD CIVIL RIGHTS PROJECT, CONFRONTING THE GRADUATION RATE CRISIS IN TEXAS (2006).

135 *Id.* There is some disagreement as to how dropout rates should be calculated, though there is consensus among advocates that TEA woefully underreports dropout. The Harvard Civil Rights Project calculates the adjusted dropout rate using a method that they acknowledge is conservative. Other groups place the graduation rate for African American students at about 55 percent and Latino students at 53 percent. *Id.* at 21.

Overrepresentation of Minority Students in Disciplinary Referrals

National reports indicate that African American, Hispanic, and special education students are overrepresented in disciplinary referrals.¹³⁶ This is true in Texas, and has been since zero tolerance was instituted.¹³⁷ The problem is not limited to a handful of districts—it exists state-wide.¹³⁸ *Almost half of Texas' school districts* have had a disproportionate discretionary referral rate of African American, Hispanic, or special education students for *one or more academic years between 2001 and 2006*.¹³⁹ Texas' teachers acknowledged this—in the ATPE survey, almost 43 percent of the teachers who responded reported seeing a greater number of demographic subgroups, such as special education or racial minorities, referred to DAEPs.¹⁴⁰

Overrepresentation of Minority Students in Discretionary Discipline Referrals, 2005-06



136 RUSSELL J. SKIBA ET AL, THE COLOR OF DISCIPLINE, SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL DISCIPLINE (2000), available at <http://www.indiana.edu/~safeschl/cod.pdf>; Johanna Wald & Daniel J. Losen, *supra* note 132, at 12-13; AM. PSYCHOL. ASS'N, *supra* note 70, at 56-62.

137 FLORENCE LINELLE CLARK, ZERO-TOLERANCE DISCIPLINE: THE EFFECT OF TEACHER DISCRETIONARY REMOVAL ON URBAN MINORITY STUDENTS (2002) (doctoral thesis examining school suspension rate trends found African American students were most heavily impacted by the 1996 adoption of discretionary removal policy).

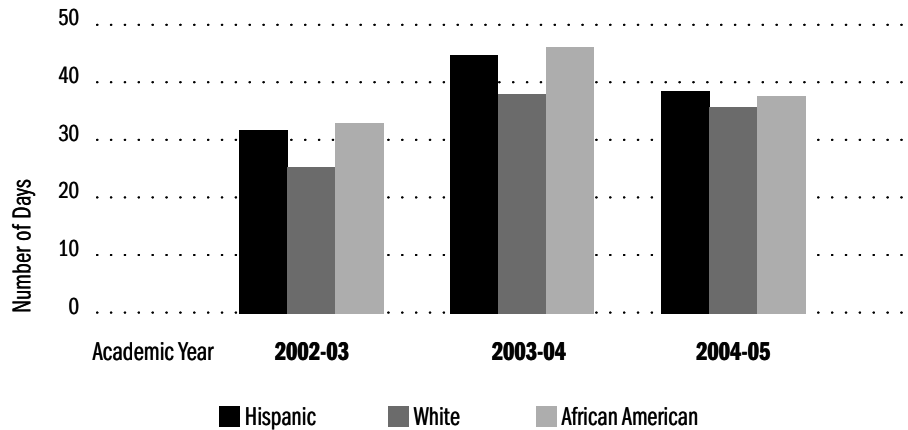
138 Based on data gathered from TEA and analyzed by Texas Appleseed.

139 *Id.*

140 ASS'N OF TEX. PROF'L EDUCATORS, *supra* note 73, at 10.

In Texas, African American and Hispanic students also spend more time in DAEP programs, on average, than white students. Statewide, the Texas Education Agency reports the following:¹⁴¹

Length of Stay at DAEPs, By Race/Ethnicity, 2002-05



African American Students

African American students are consistently overrepresented in disciplinary referrals made at the discretion of Texas school districts for violations of the student Code of Conduct. This is true of discretionary referrals to DAEPs, in-school-suspension (ISS), and out-of-school suspension (OSS). In some school districts, the discretionary referral rate of African American students is twice or more their representation in the overall student body.

Discretionary DAEP Referrals

Among Texas' school districts, 211 districts have disproportionately referred African American students to DAEPs for one or more academic years between 2001 and 2006.¹⁴² *Of these school districts, 45 districts disproportionately referred African American students each year during this five-year period.*

141 TEXAS EDUCATION AGENCY, 2001 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2002 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2004 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2005 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2006 ANNUAL REPORT.

142 In requesting disciplinary data from the Texas Education Agency, Texas Appleseed asked that the referrals be grouped according to the type of offense. TEA grouped the disciplinary referrals into five categories based on the seriousness of the offense and whether it resulted in a mandatory or discretionary referral. The only category of referrals that Texas Appleseed considered in determining whether a school district over-referred minority or special education students were discretionary referrals for Code of Conduct violations (excluding fighting and like offenses). For more information about methodology, see the *Appendix*. Data tables are available on the Texas Appleseed website at www.texasappleseed.net.

The following school districts had the highest rate¹⁴³ of disproportionate representation of African American students in discretionary DAEP referrals for 2005-06:

Overrepresentation of African American Students in DAEPs, 2005-06

Referred at More Than Twice Their Representation in Student Population

School District	African American Percentage in Student Body	African American Percentage in DAEP Discretionary Referrals
Amarillo ISD	11%	24%
Austin ISD	14%	37%
Bryan ISD	25%	56%
Carthage ISD	27%	63%
Corsicana ISD	23%	50%
Greenville ISD	25%	56%
Humble ISD	15%	38%
Huntsville ISD	28%	63%
Klein ISD	15%	40%
Lubbock ISD	15%	39%
Midland ISD	10%	21%
North East ISD	10%	23%
Temple ISD	29%	65%
Waxahachie ISD	14%	35%
Wichita Falls ISD	18%	43%

For a complete listing of schools with a disproportionate referral rate of African American students to DAEPs, visit the Texas Appleseed website at www.texasappleseed.net.

Discretionary Referrals to Out-of-School Suspension

Overrepresentation of African American students is an even greater problem in discretionary referrals for out-of-school suspension (OSS) and in-school suspension (ISS).

For one or more academic years between 2001 and 2006, 503 Texas school districts disproportionately referred African American students to OSS for Code of Conduct violations; 143 of these school districts disproportionately referred African American students in each of these five school years.¹⁴⁴

143 For a complete list of all Texas school districts with a disproportionate referral rate of African American students to DAEPs in each of the last five years, visit the Texas Appleseed website at www.texasappleseed.net.

144 Forty charter schools in Texas disproportionately referred African American students to out-of-school suspension (OSS) for one or more years between 2001 and 2006. For a list of school districts and charter schools that disproportionately referred African American students to out-of-school suspension (OSS) each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

Overrepresentation of African American Students in OSS, 2005-06

Referred at More Than Twice Their Representation in Student Population

School District	African American Percentage in Student Body	African American Percentage in OSS Discretionary Referrals
Alamo Heights ISD	2%	15%
Allen ISD	10%	38%
Amarillo ISD	11%	25%
Athens ISD	16%	41%
Austin ISD	14%	32%
Belton ISD	7%	16%
Brenham ISD	28%	64%
Bryan ISD	25%	55%
Burton ISD	25%	77%
Center ISD	27%	63%
Clear Creek ISD	9%	20%
College Station ISD	14%	40%
Columbus ISD	17%	56%
Commerce ISD	23%	51%
Conroe ISD	7%	18%
Corsicana ISD	23%	51%
Crandall ISD	5%	23%
Cypress-Fairbanks ISD	14%	30%
Dayton ISD	11%	28%
Denton ISD	13%	27%
Diboll ISD	14%	44%
Edna ISD	16%	47%
Elgin ISD	15%	32%
Fort Bend ISD	32%	65%
Frisco ISD	10%	28%
Georgetown ISD	4%	11%
Giddings ISD	15%	53%
Grapevine-Colleyville ISD	4%	11%
Greenville ISD	25%	55%
Hillsboro ISD	20%	59%
Humble ISD	15%	41%
Huntsville ISD	28%	60%
Jacksonville ISD	22%	48%
Katy ISD	9%	24%
Keller ISD	6%	19%
Kerrville ISD	4%	10%
Kilgore ISD	21%	45%
Klein ISD	15%	42%
La Porte ISD	10%	24%

School District	African American Percentage in Student Body	African American Percentage in OSS Discretionary Referrals
Lewisville ISD	9%	21%
Little Cypress-Mauriceville CISD	6%	34%
Lubbock ISD	15%	43%
Luling ISD	9%	21%
McKinney ISD	11%	32%
Midland ISD	10%	24%
Montgomery ISD	5%	16%
New Boston ISD	22%	49%
North East ISD	10%	25%
Palestine ISD	30%	62%
Pasadena ISD	8%	17%
Plano ISD	11%	35%
Richardson ISD	27%	67%
Rockdale ISD	14%	36%
San Antonio ISD	9%	19%
Sherman ISD	16%	36%
Shiner ISD	15%	56%
Snook ISD	34%	74%
Spring Branch ISD	8%	26%
Temple ISD	29%	61%
Tomball ISD	7%	23%
Vernon ISD	11%	35%
Waxahachie ISD	14%	45%
White Settlement ISD	8%	20%
Whitehouse ISD	11%	26%
Wichita Falls ISD	18%	44%
Willis ISD	9%	26%

Discretionary Referrals to In-School Suspension

In Texas, 347 school districts have disproportionately referred African American students to in-school suspension (ISS) for one or more academic years between 2001 and 2006, and 152 school districts have done so for each of these five school years.¹⁴⁵ The following school districts have the highest rate of disproportionate representation of African American students in discretionary ISS referrals for Code of Conduct violations for 2005-06:

¹⁴⁵ Three charter schools disproportionately referred African American students to in-school suspension (ISS) for one or more years between 2001 and 2006. For a list of school districts and charter schools that disproportionately referred African American students to ISS each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

Overrepresentation of African American Students in ISS, 2005-06

Referred at More Than Twice Their Representation in Student Population

School District	African American Percentage in Student Body	African American Percentage in Discretionary ISS Referrals
Alamo Heights ISD	2%	7%
Allen ISD	10%	23%
Boling ISD	15%	31%
Brownfield ISD	6%	15%
College Station ISD	14%	36%
Frisco ISD	10%	22%
Humble ISD	15%	35%
Keller ISD	6%	15%
Kerrville ISD	4%	11%
Klein ISD	15%	32%
Lexington ISD	12%	25%
McKinney ISD	11%	26%
Midway ISD	9%	20%
Montgomery ISD	5%	14%
Plano ISD	11%	26%
Round Rock ISD	10%	22%
Spring Branch ISD	8%	19%
Tomball ISD	7%	19%

Why are African American Students Referred at Higher Rates?

Nationally, studies show that the overrepresentation of African American students in disciplinary referrals is not related to a higher rate of misbehavior.¹⁴⁶ African American students are referred for misbehavior that is both less serious and more subjective in interpretation than white students.¹⁴⁷ These disparities exist when controlling for socioeconomic status.¹⁴⁸

African American students also are subjected to higher rates of more severe punishments, though they are referred for less serious offenses.¹⁴⁹ Differences in referral rates are due, not to disposition at the administrative level, but instead to differences in the rate of initial referral at the classroom level.¹⁵⁰ According to the American Psychological Association (APA), studies show teacher referral rates to be twice as high for African American students as for white students.¹⁵¹ Though a Texas-specific, long-term study of this type has not been done there is no reason to believe that Texas has somehow escaped the trend identified by the APA.

146 SKIBA ET AL, *supra* note 136; AM. PSYCHOL. ASS'N., *supra* note 70, at 58-62.

147 SKIBA ET AL, *supra* note 136; AM. PSYCHOL. ASS'N., *supra* note 70, at 59.

148 SKIBA ET AL, *supra* note 136; FLORENCE LINELLE CLARK, *supra* note 137, at 35-36; AM. PSYCHOL. ASS'N., *supra* note 70, at 57-58.

149 SKIBA ET AL, *supra* note 136.

150 *Id.*

151 AM. PSYCHOL. ASS'N., *supra* note 70, at 59-60.

Ill-defined offenses like “serious and persistent misconduct” invite cross-cultural misunderstanding and the possibility that racial stereotypes may unconsciously affect decision-making.

– Deconstructing the
School-to-Prison Pipeline (2003)

Sociologist Dr. Edward Morris has studied and documented disparate disciplinary procedures at a Texas middle school. His studies are based purely on observation and do not incorporate any data analysis. Dr. Morris’ research involved more than 18 months of regular visits to the school.¹⁵² During this time, he noted that “race, class, and gender interrelate to profoundly alter one another in guiding expectations and sanctions of young people.”¹⁵³ More specifically, Dr. Morris found:

*[A]dults saw many boys...as ‘bad’ and occasionally threatening. This was particularly true for Latino and African American boys. In my observations, members of these groups were the most likely to ‘get in trouble.’*¹⁵⁴

Dr. Morris concluded, “*the ‘blackness’ of students seemed to indicate aggression and forcefulness.*”¹⁵⁵ He suggests that “[s]chools employing disciplinary regimes steeped in race, class and gender assumptions (however well intentioned) risk pushing many students away and, ironically, reproducing the very inequalities they are attempting to change.”¹⁵⁶ He observed a similar dynamic between teachers and African American girls—noting “[t]heir assertive behaviors, which schools and families often subtly encouraged for white and middle-class children,...tended to be interpreted as abrasive and abrupt.”¹⁵⁷

The dynamics observed by Dr. Morris, and reflected by the overrepresentation of African American students in disciplinary referrals in the data produced by TEA, may be attributable to the lack of diversity in the teaching force, the high turnover rate of teachers at predominantly minority schools, and/or the lack of cultural sensitivity training for teachers. The APA notes that racial and cultural stereotypes likely play a role in the higher referral rate for African American students.¹⁵⁸ Discretionary referrals, in particular, often involve subjective decision-making. Ill-defined offenses like “serious and persistent misconduct” invite cross-cultural misunderstanding and the possibility that racial stereotypes may unconsciously affect decision-making.¹⁵⁹

152 Edward W. Morris, “Tuck in that Shirt!” *Race, Class, Gender, and Discipline in an Urban School*, *SOCIOLOGICAL PERSPECTIVES*, Vol. 48, No. 1, at 25-48 (2005); Edward W. Morris, “Ladies” or “Loudies”?: *Perceptions and Experiences of Black Girls in Classrooms*, 38 *YOUTH & SOC’Y* 490 (2007).

153 Morris, “Tuck in that Shirt!”, *supra* note 152, at 44.

154 *Id.* at 35-36.

155 *Id.* at 44.

156 *Id.* at 45-46.

157 Morris, “Ladies” or “Loudies”?, *supra* note 152, at 510.

158 *Id.* at 60.

159 See Rebecca Gordon et al, *Zero Tolerance: A Basic Racial Report Card*, in *ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS* 165, at 171 (2001); Ronnie Casella, *Punishing Dangerousness Through Preventive Detention: Illustrating the Institutional Link Between School and Prison*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 55, at 59 (2003).

According to a study recently released by the Harvard Civil Rights Project, white teachers comprise the overwhelming majority of the nation's teachers.¹⁶⁰ The report also notes that white teachers were "the least likely" to have much experience with racial diversity.¹⁶¹ Data was gathered from the southern region of the United States, including Texas. Though the southern region had the highest percentage of nonwhite teachers, whites comprised more than 70 percent of the teaching force and only about 50 percent of students.¹⁶²

Today, in Texas, that gap is slightly wider: about 70 percent of the state's teaching force is white, while about 40 percent of public school students are white.¹⁶³ In 1994, a study published by the Texas Education Agency recognized the importance of a diverse teaching force:

*[T]eachers may interact more successfully with students who have culturally similar backgrounds to their own... Consistent findings in unrelated studies suggest that Hispanic teachers are better able than white teachers to engage Hispanic students in learning. There are similar findings in studies of African American teachers and students.*¹⁶⁴

This report also notes that "teachers...report they do not always understand students ethnically different from themselves."¹⁶⁵ Though this report identified cultural sensitivity training as a strategy for incorporating multicultural education into teacher preparation programs,¹⁶⁶ this is still not a routine part of teacher training in Texas. In fact, it would appear that teachers receive very little training around disciplinary issues—even those that have nothing to do with cultural differences. According to the ATPE survey discussed above, almost half of all who responded never received training on the school's student Code of Conduct; an overwhelming 87 percent reported that they did not believe new teachers were adequately prepared to address disciplinary problems in the classroom.¹⁶⁷

Additional training of teachers may reduce DAEP referrals by providing tools to address behavioral issues before they escalate.

– Interviews with nine Texas school districts conducted by Texas Appleseed pro bono partners

160 HARVARD CIVIL RIGHTS PROJECT, THE SEGREGATION OF AMERICAN TEACHERS 3 (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf

161 *Id.*

162 *Id.*

163 According to TEA's most recent AEIS reports, Texas' teachers are about 70 percent white, 9 percent African American, and 20 percent Hispanic. This information is available through the AEIS database on TEA's website, <http://www.tea.state.tx.us/perfreport/aeis/>.

164 TEXAS EDUCATION AGENCY, TEXAS TEACHER DIVERSITY AND RECRUITMENT (1994), available at <http://www.tea.state.tx.us/research/pdfs/prr4.pdf>

165 *Id.*

166 *Id.*

167 ASS'N OF TEX. PROF'L EDUCATORS, *supra* note 73, at 3, 17-18.

The need for better teacher training is reinforced by a study examining the impact of teacher-student and teacher-parent relationships on student achievement.¹⁶⁸ This study found that “children’s background characteristics (gender and race-ethnicity) predict the quality of parent-teacher and student-teacher relationships and that the quality of these relationships has consequences for children’s achievement.”¹⁶⁹ The authors found that minority—especially African American students—and children of low socioeconomic status are less likely than Caucasian or children of higher economic status to enjoy supportive relationships with teachers.¹⁷⁰ This was true for minority students when controlling for socioeconomic status.¹⁷¹

The same pattern was found in parent-teacher relationships.¹⁷² This is significant given that studies have shown that schools with more parental involvement have lower rates of disciplinary referral and fewer incidents of violence on campus.¹⁷³ While African American parents report levels of parent involvement that are comparable to or higher than white parents, teachers rate African American parents’ involvement as less than that of white parents.¹⁷⁴ Both problems—poor student-teacher relationships and poor parent-teacher relationships—have a negative impact on student achievement.¹⁷⁵ The study concluded, “*rather than leveling the playing field, experiences in school may contribute to widening racial disparities in educational attainment.*”¹⁷⁶

In attempting to explain poor quality relationships between teachers and African American students and parents, researchers point to factors such as different styles of interacting, a more assertive and critical communication style for African American parents, and ethnic or racial stereotypes held by teachers.¹⁷⁷ They recommend that “*an increased focus on helping teachers connect with students and their parents*” become part of teacher preparation and teacher professional development.¹⁷⁸

The following chart documents the lack of diversity in the teaching staff in those districts that, in 2005-06, disproportionately referred African American students to DAEPs at more than double their percentage in the district’s student population.¹⁷⁹

168 Jan Hughes and Oi-man Kwok, *Influence of Student-Teacher and Parent-Teacher Relationships on Lower Achieving Readers’ Engagement and Achievement in the Primary Grades*, J. OF EDU. PSYCH., Vol. 99, No. 1, 39-51 (2007); see also Jan N. Hughes et al., *Relationship Influences on Teachers’ Perceptions of Academic Competence in Academically At-Risk Minority and Majority First Grade Students*, 43 J. OF SCHOOL PSYCHOL. 303 (2005).

169 Jan Hughes and Oi-man Kwok, *supra* note 168, at 39.

170 *Id.* at 40.

171 *Id.* at 46.

172 *Id.* at 47.

173 JUSTICE MATTERS INSTITUTE, *supra* note 120; AM. PSYCHOL. ASS’N, *supra* note 70; BAZELON CENTER FOR MENTAL HEALTH LAW, WAY TO GO SCHOOL SUCCESS FOR CHILDREN WITH MENTAL HEALTH CARE NEEDS (2006); U.S. DEP’T OF EDUCATION, SAFEGUARDING OUR CHILDREN AN ACTION GUIDE (2000).

174 Jan Hughes and Oi-man Kwok, *supra* note 168.

175 Jan Hughes and Oi-man Kwok, *supra* note 168, at 10.

176 *Id.*

177 *Id.* at 9.

178 *Id.* at 10.

179 For space reasons, Texas Appleseed opted to include this data only for those school districts with high DAEP referrals of African American students.

Profile of Teachers in Select School Districts, 2005-06

*Districts Referring African American Students to DAEPs
at More Than Twice Their Representation in Student Population*

School District	Percentage of White Teachers State average (69.4%)	Percentage of African American Teachers State average (9.1%)	Percentage of Hispanic Teachers State average (20.1%)
Amarillo ISD	90%	2%	7.6%
Austin ISD	66.7%	7.3%	24.2%
Bryan ISD	81.9%	5.4%	12.3%
Carthage ISD	88.9%	8.6%	1.5%
Corsicana ISD	90.5%	5.7%	3.3%
Goose Creek ISD	76.6%	9.7%	13.1%
Greenville ISD	84.3%	10.4%	4%
Humble ISD	88.5%	4.9%	6%
Huntsville ISD	88.1%	8.7%	3%
Klein ISD	86.8%	6.3%	6.1%
Lubbock ISD	84.1%	3.5%	11.8%
Midland ISD	78.8%	3.4%	17.4%
North East ISD	77.2%	2.2%	19.8%
Temple ISD	84.1%	7.6%	7.8%
Waxahachie ISD	90.3%	4.9%	4.6%
Wichita Falls ISD	90.2%	4.3%	4.5%

Texas Appleseed's research findings and national studies around this issue underscore the need for greater diversity within Texas' teaching profession and including cultural competency as a mandatory part of teacher training. To achieve this goal, the Texas Education Agency must assume a leadership role in helping districts improve their recruitment techniques and incentives and requiring cultural competency training for teachers—alerting those districts with large numbers of disciplinary referrals and those over-referring minorities for disciplinary action.

Hispanic Students

Hispanic students in Texas are overrepresented in disciplinary referrals, but not at as high a rate as African American students. This, too, reflects the national trend.¹⁸⁰ However, Texas Education Agency's annual reports document that the disproportionate referral of Hispanic students to DAEPs is much higher in grades 6 through 10.¹⁸¹

Discretionary DAEP Referrals

Forty Texas school districts have overrepresented Hispanic students in discretionary DAEP referrals—compared to their representation in the overall student body—for one or more academic years between 2001 and 2006. *Two districts—Lewisville ISD and Abilene*

180 AUGUSTINA H. REYES, *supra* note 95, at 25.

181 TEXAS EDUCATION AGENCY, 2001 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2002 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2004 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2005 ANNUAL REPORT; TEXAS EDUCATION AGENCY, 2006 ANNUAL REPORT.

ISD—disproportionately referred Hispanic students annually during this five-year period. For example, in 2006, Hispanic students made up 33 percent of Lewisville’s student body, but accounted for 43 percent of all discretionary DAEP referrals. In Abilene that same year, the student body was 18 percent Hispanic, but Hispanics accounted for 35 percent of discretionary referrals to DAEPs for student Code of Conduct violations. Both districts also over-represented African American students and special education students in discretionary DAEP referrals every year between 2001 and 2006.

Lewisville and Abilene also lack diversity in their teaching faculty.

Profile of Teachers in Select School Districts, 2005-06

Districts Disproportionately Referring Hispanic Students to DAEPs Annually (2001-06)

School District	Percentage of White Teachers State average (69.4%)	Percentage of African American Teachers State average (9.1%)	Percentage of Hispanic Teachers State average (20.1%)
Lewisville ISD	89.8%	3%	5.6%
Abilene ISD	90.7%	2.6%	6.5%

Discretionary Referral to Out-of-School Suspension

Hispanics are more significantly overrepresented in discretionary out-of-school suspensions compared to their percentage in the overall student population. Of Texas’ 1,037 school districts, 224 districts have disproportionately referred Hispanic students to OSS for one year or more between 2001 and 2006—and 28 districts disproportionately referred Hispanic students each year of that five-year period.¹⁸² Of those 28 districts, the following had the highest discretionary referral rates of Hispanic students to OSS in 2005-06:

Overrepresentation of Hispanic Students in OSS, 2005-06

Referred at Rates 10% or More Than Their Representation in Student Population

School District	Hispanic Percentage in Student Body	Hispanic Percentage in OSS Discretionary Referrals
Abilene ISD	33%	46%
Alamo Heights ISD	30%	62%
Calhoun County ISD	56%	67%
Carrollton-Farmers Branch	46%	60%
Cypress-Fairbanks ISD	33%	45%
Georgetown ISD	30%	47%
Katy ISD	26%	40%
Lamar CISD	46%	56%
Lewisville ISD	18%	35%

182 Eleven charter schools disproportionately referred Hispanic students to OSS for one or more years between 2001 and 2006. For a complete list of school districts and charter schools that disproportionately referred Hispanic students to OSS each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

School District	Hispanic Percentage in Student Body	Hispanic Percentage in OSS Discretionary Referrals
McKinney ISD	22%	35%
New Braunfels ISD	43%	62%
Plano ISD	15%	26%
Pleasanton ISD	66%	83%
Round Rock ISD	23%	35%
San Angelo ISD	51%	66%
Snyder ISD	49%	63%
Victoria ISD	55%	74%

Discretionary Referrals to In-School Suspension

Hispanic students are disproportionately represented in discretionary ISS referrals in a large number of Texas school districts. Ninety-two school districts over-referred Hispanic students to ISS for one or more years between 2001 and 2006—and 30 districts have disproportionately referred Hispanic students to ISS each year of that five-year period (rate at least 10 percent above their representation in student body):

Overrepresentation of Hispanic Students in ISS, 2005-06

Referred at Rates 10% or More Than Their Representation in Student Population

School District	Hispanic Percentage in Student Body	Hispanic Percentage in ISS Discretionary Referrals
Alamo Heights ISD	30%	44%
Boerne ISD	21%	35%
Frenship ISD	30%	42%
Gregory-Portland ISD	44%	56%
Lake Travis ISD	14%	25%
Levelland ISD	58%	73%
Lewisville ISD	18%	29%
McKinney ISD	21%	31%
Plano ISD	15%	25%

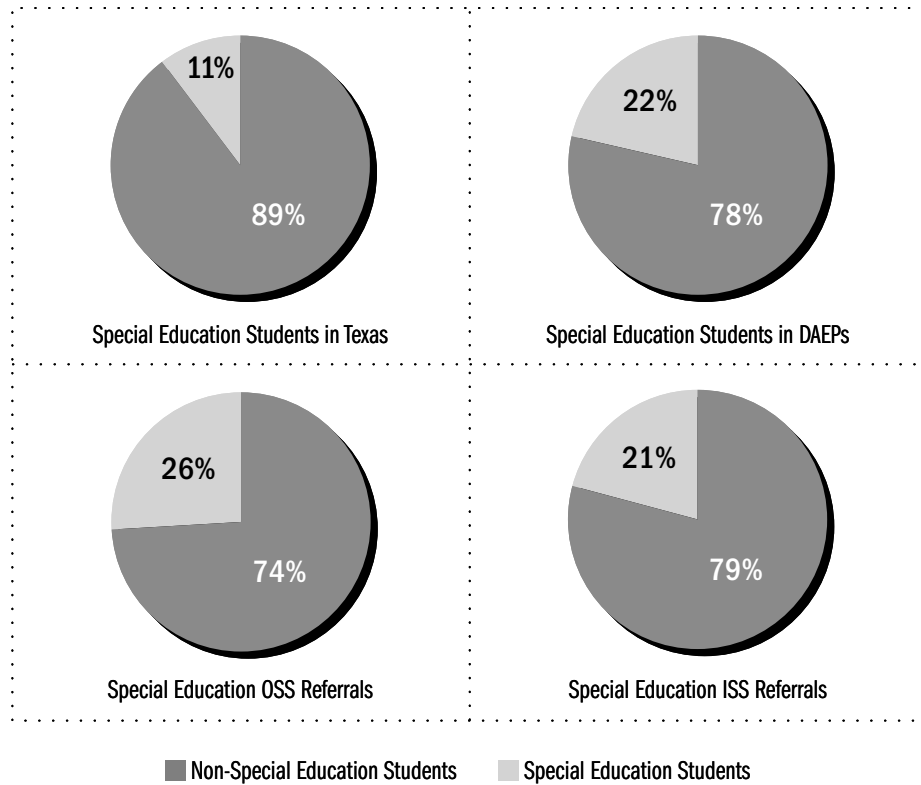
Overrepresentation of Special Education Students in Disciplinary Referrals

In 2004, the Hogg Foundation for Mental Health studied the disproportionate disciplinary referral of special education students in Texas.¹⁸³ It found that special education students in Texas were being disproportionately referred to DAEPs, out-of-school suspension (OSS), and in-school suspension (ISS).¹⁸⁴ The same is true today.

183 HOGG FOUND. FOR MENTAL HEALTH, SCHOOL DISCIPLINE AND CHILDREN WITH SERIOUS EMOTIONAL DISTURBANCES (2004).

184 *Id.*

Statewide Profile of Disciplinary Referrals of Special Education Students, 2005-06



In fact, the Texas Education Agency (TEA) has been cited by the federal Office of Special Education Programs (OSEP) of the U.S. Department of Education for its failure to comply with IDEA's requirement to monitor discrepancies between school districts' long-term suspension and expulsion rates for special education students and those of non-special education students.¹⁸⁵ OSEP is the federal agency responsible for monitoring and enforcing compliance with the Individuals with Disabilities Education Act (IDEA).¹⁸⁶ Where TEA finds a discrepancy, it is required to:

...review, and if appropriate, revise (or require the state agency or [school district] to revise) its policies, procedures, and practices relating to the development and implementation of Individual Education Plans (IEP)s, the use of behavioral interventions, and procedural safeguards to ensure that the policies, procedures, and practices comply [with IDEA].¹⁸⁷

185 Letter from Stephanie Smith Lee, Director, Office of Special Education Programs, to Honorable Shirley J. Neeley, Chief Commissioner, Texas Education Agency (December 13, 2004), available at <http://www.ed.gov/policy/speced/guid/Id.ca/monitor/index.html>

186 See website for Office of Special Education Programs, at <http://www.ed.gov/about/offices/list/osers/osep/index.html?src=mr>

187 *Id.* at 10.

Though OSEP first recognized this problem in 2004, Texas has not complied with this requirement to date.¹⁸⁸ In a June 2007 letter to TEA, OSEP noted that TEA acknowledges significant discrepancies in long-term suspension and expulsion rates for special education students in 58 school districts, but fails to describe what it is doing to ensure that these districts revise their policies and practices.¹⁸⁹ Once again, OSEP found TEA in noncompliance.¹⁹⁰

In 2004, TEA reported to OSEP that more than 43 percent of Texas' school districts had higher rates of long-term suspension or expulsions for special education students than for non-special education students.¹⁹¹ More than 25 percent of Texas school districts had higher rates of multiple suspension or expulsions exceeding 10 days for special education students.¹⁹² Remarkably, though TEA has not been able to show OSEP what it has done to address this problem (aside from creating a different mathematical formula to calculate the discrepancy), TEA notes in its latest Annual Performance Report to OSEP that only a little more than 4 percent of school districts in Texas had a "significant discrepancy" between long-term suspension and expulsion for special education and non-special education students.¹⁹³

Discretionary DAEP Referrals

Almost one-third of Texas' school districts—or 412 districts—have overrepresented special education students in discretionary referrals to DAEPs at rates exceeding their representation in the student body for one or more years between 2001 and 2006. *Seventy-nine districts disproportionately referred special education students to DAEPs annually for the five-year period between 2001 and 2006.*

In many of those school districts, the discretionary DAEP referral rate of special education students is two to three times that of their presence in the student body.

188 Letter from Patricia J. Guard, Acting Director, Office of Special Education Programs to Honorable Shirley J. Neeley, State Commissioner, Texas Education Agency (June 15, 2007); Letter from Alexa Posny, Director, Office of Special Education Programs to Honorable Shirley J. Neeley, Chief Commissioner, Texas Education Agency (May 22, 2006), Letter from Troy R. Justasen, Acting Director, Office of Special Education Programs to Honorable Shirley J. Neeley, Chief Commissioner, Texas Education Agency (September 1, 2005), all available at <http://www.ed.gov/policy/speced/guid/idea/monitor/index.html>

189 Letter from Patricia J. Guard, *supra* note 188 (see attached chart).

190 *Id.*

191 Letter from Stephanie Smith Lee, *supra* note 185, at 10.

192 *Id.*

193 TEXAS EDUCATION AGENCY, ANNUAL PERFORMANCE REPORT FFY 2005 (2007)(applying new formula for determining significant discrepancy and finding that in 2005-2006, 58 school districts – or 4.6 percent – had a significant discrepancy); TEXAS EDUCATION AGENCY, STATE PERFORMANCE PLAN (2006)(Outlining methodology for determining significant discrepancy, and indicating that a little more than 13 percent of districts had a significant discrepancy. TEA was allowed to revise its methodology again, after this performance plan was submitted, resulting in the lower percentage reflected in the APR submitted in 2007); Letter from Patricia J. Guard, *supra* note 188.

Overrepresentation of Special Education Students in DAEPs, 2005-06

Referred at More Than Double Their Representation in Student Population

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in Discretionary DAEP Referrals
Abilene ISD	17%	37%
Allen ISD	11%	37%
Arlington ISD	10%	24%
Austin ISD	12%	38%
Bastrop ISD	13%	39%
Brenham ISD	13%	28%
Brownsville ISD	12%	31%
College Station ISD	9%	23%
Dallas ISD	8%	19%
Desoto ISD	12%	27%
East Central ISD	12%	26%
Ector County ISD	11%	27%
Ennis ISD	16%	35%
Fort Worth ISD	9%	22%
Frenship ISD	10%	32%
Grapevine-Colleyville ISD	7%	26%
Greenville ISD	11%	28%
Harlandale ISD	13%	31%
Harlingen CISD	9%	20%
Huntsville ISD	11%	24%
Hurst-Euless-Bedford ISD	10%	27%
Katy ISD	9%	52%
Keller ISD	8%	17%
Kilgore ISD	12%	33%
La Joya ISD	9%	30%
Laredo ISD	12%	32%
Leander ISD	11%	36%
Lewisville ISD	11%	32%
Lockhart ISD	14%	30%
Longview ISD	13%	38%
Lubbock-Cooper ISD	18%	54%
Lubbock ISD	13%	32%
Lufkin ISD	14%	34%
Madisonville ISD	11%	33%
Mansfield ISD	10%	20%

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in Discretionary DAEP Referrals
Mesquite ISD	14%	28%
Midway ISD	10%	33%
Nacogdoches ISD	8%	17%
Nederland ISD	14%	46%
New Caney ISD	13%	31%
North East ISD	13%	32%
Northside ISD	13%	29%
Paris ISD	14%	33%
Pearland ISD	9%	20%
Plainview ISD	15%	33%
Plano ISD	11%	35%
Red Oak ISD	16%	33%
Round Rock ISD	9%	23%
San Benito CISD	10%	22%
Taylor ISD	12%	30%
Temple ISD	16%	36%
Terrell ISD	14%	33%
Texarkana ISD	16%	35%
Tomball ISD	8%	20%
Vidor ISD	18%	48%

For a complete list of schools over-referring special education students to DAEPs each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

Discretionary Referrals to Out-Of-School Suspension

Special education students are overrepresented in out-of-school suspensions (OSS) at even higher percentages than minority students. In Texas, 722 school districts disproportionately referred special education students to OSS at least one or more years between 2001 and 2006. And, 317 school districts disproportionately referred special education students to OSS each year of the five-year period ending 2005-06.¹⁹⁴ Some of these school districts referred special education students at more than *five times* their representation in the student body.

¹⁹⁴ Seventy-six charter schools disproportionately referred special education students to out-of-school suspension (OSS) at least one or more years between 2001 and 2006. For a list of school districts and charter schools that disproportionately referred special education students to OSS each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

Overrepresentation of Special Education Students in OSS, 2005-06

Referred at More than Triple Their Representation in Student Population

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in OSS Discretionary Referrals (Nonviolent Offenses)
Alamo Heights ISD	8%	33%
Aledo ISD	10%	54%
Allen ISD	11%	50%
Bellville ISD	15%	45%
Belton ISD	14%	43%
Brownwood ISD	13%	40%
Canyon ISD	12%	37%
Carroll ISD	11%	45%
Center ISD	11%	36%
College Station ISD	9%	34%
Columbus ISD	11%	47%
Coppell ISD	9%	39%
Cotulla ISD	11%	36%
Early ISD	16%	77%
Franklin ISD	8%	50%
Frisco ISD	8%	25%
Goliad ISD	14%	53%
Gonzales ISD	11%	38%
Grapevine-Colleyville ISD	7%	23%
Ingram ISD	9%	34%
Joshua ISD	11%	37%
Katy ISD	9%	31%
Keller ISD	8%	25%
Kerrville ISD	12%	46%
Klein ISD	9%	31%
La Joya ISD	9%	27%
La Vernia ISD	12%	57%
Lake Dallas ISD	12%	36%
Lake Travis ISD	9%	38%
Lampasas ISD	15%	51%
Laredo ISD	12%	37%
Lexington ISD	9%	53%
Little Cypress-Mauriceville CISD	15%	46%
Lockhart ISD	14%	42%

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in OSS Discretionary Referrals (Nonviolent Offenses)
Los Fresnos CISD	10%	31%
Lytle ISD	9%	27%
Marble Falls ISD	12%	43%
McKinney ISD	10%	37%
Midway ISD	10%	36%
Pearland ISD	10%	34%
Plano ISD	11%	35%
Pleasant Grove ISD	9%	37%
Poteet ISD	11%	35%
Robinson ISD	14%	45%
Rockwall ISD	10%	34%
Round Rock ISD	9%	27%
Royse City ISD	11%	45%
San Benito CISD	10%	33%
Sealy ISD	14%	59%
Sharyland ISD	6%	19%
Sherman ISD	14%	52%
Shiner ISD	15%	52%
Terrell ISD	14%	46%
Tomball ISD	8%	28%
Tuloso-Midway ISD	11%	35%
United ISD	12%	36%

Discretionary Referrals to In-School Suspension

In Texas, 699 school districts have overrepresented special education students students in discretionary ISS referrals one or more years between 2001 and 2006, compared to their overall representation in the district. *Almost half of those (328 districts) have over-referred special education students to ISS every year between 2001 and 2006.*¹⁹⁵

¹⁹⁵ Eleven charter schools disproportionately referred special education students to in-school suspension (ISS) at least one or more years between 2001 and 2006. For a list of school districts and charter schools that disproportionately referred special education students to ISS each year between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

Overrepresentation of Special Education Students in ISS, 2005-06

Referred at More Than Double Their Representation in Student Population

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in Discretionary ISS Referrals
Aledo ISD	9%	30%
Allen ISD	11%	29%
Athens ISD	11%	23%
Austin ISD	12%	25%
Boerne ISD	13%	31%
Borger ISD	14%	33%
Brownsville ISD	12%	25%
Buffalo ISD	13%	27%
Callisburg ISD	11%	25%
Cameron ISD	13%	32%
Canton ISD	10%	23%
Canutillo ISD	9%	20%
Carroll ISD	10%	30%
Clyde ISD	15%	33%
College Station ISD	9%	20%
Dawson ISD	13%	28%
East Chambers ISD	13%	27%
Ed Couch-Elsa ISD	8%	19%
Frisco ISD	10%	26%
George West ISD	11%	23%
Glen Rose ISD	13%	30%
Grapevine-Colleyville ISD	7%	18%
Gunter ISD	17%	41%
Henderson ISD	13%	27%
Highland Park ISD	8%	21%
Hudson ISD	11%	25%
Humble ISD	9%	20%
Huntington ISD	14%	29%
Jacksboro ISD	13%	29%
Kerrville ISD	12%	27%
Klein ISD	9%	19%
La Grange ISD	12%	28%
Lake Travis ISD	9%	24%
Laredo ISD	12%	27%
La Vernia ISD	12%	26%
Leander ISD	11%	24%
Lone Oak ISD	16%	47%
Lubbock ISD	18%	37%

School District	Percentage of Special Education Students in Student Body	Percentage of Special Education Students in Discretionary ISS Referrals
Lufkin ISD	14%	31%
Lumberton ISD	11%	27%
Manor ISD	12%	25%
McKinney ISD	10%	23%
Millsap ISD	16%	33%
Monahans-Wick ISD	15%	32%
Natalia ISD	13%	27%
New Braunfels ISD	10%	21%
Northwest ISD	12%	27%
Pampa ISD	12%	27%
Pearland ISD	9%	23%
Perryton ISD	9%	20%
Plano ISD	11%	25%
Pleasant Grove ISD	9%	29%
Port Neches ISD	11%	24%
Poth ISD	12%	36%
Rockwall ISD	9%	22%
Rogers ISD	13%	30%
Round Rock ISD	9%	20%
Stanton ISD	13%	30%
Stephenville ISD	10%	21%
Sulphur Springs ISD	13%	27%
Tomball ISD	8%	20%
Tyler ISD	12%	25%
United ISD	12%	28%
Van Alstyne ISD	12%	29%
West ISD	17%	37%
Wylie ISD (Collin County)	10%	22%
Wylie ISD (Taylor County)	10%	27%

Why are Special Education Students Referred at Higher Rates?

Some suggest that failing to identify a student's disability or misidentifying a disability may account for the overrepresentation of students with disabilities in disciplinary referrals. For example, a student who has a mental illness may be misidentified as having a learning disability.¹⁹⁶ Because resulting services, if any, are inappropriate, the misbehavior that results in a disciplinary referral is, in truth, a manifestation of a disability or mental illness.¹⁹⁷ Overrepresentation of special education students in discretionary disciplinary referrals may reflect inadequate implementation of a student's Individual Education Plan or Behavior Intervention Plan, or the failure of a school to successfully evaluate and implement

196 BAZELON CENTER FOR MENTAL HEALTH LAW, FAILING TO QUALIFY: THE FIRST STEP TO FAILURE IN SCHOOL? 4 (2003).

197 *Id.*

appropriate services and supports for students who have mental impairments.¹⁹⁸ In Pennsylvania, a report examining this issue in that state concluded that many students were not receiving the specialized instruction and related services (including psychological services) required by the Individuals with Disabilities Education Act (IDEA).¹⁹⁹ Often, a behavioral evaluation was not done and meaningful behavior plans were not put into place.²⁰⁰

Suspension or removal to a DAEP can have particularly profound consequences for special education students.²⁰¹ *Special education students are even less likely to succeed academically if they are suspended.*²⁰²

Disciplinary Referrals: Pre-Kindergarten, Kindergarten, and 1st Grade Students

Research shows that removal of very young children from school can have lasting academic consequences.²⁰³ Young children removed from school through disciplinary action are more likely to be ill-prepared for school and are among those most at risk for academic failure and dropping out of school.²⁰⁴

In Texas, children in pre-K, kindergarten, and 1st grade are being referred to DAEPs. There is no bar on suspending children this young, and²⁰⁵ there have been media reports of in-school suspension of pre-kindergarteners in Texas. In one case, a four-year-old student in Waco was placed in ISS for “inappropriate physical contact” after hugging his teacher.²⁰⁶ In another instance, a four-year-old girl was placed in ISS for coming to school with hair that had been dyed pink.²⁰⁷

Discretionary DAEP Referrals

In Texas, *103 school districts have referred about 500 pre-kindergarten and kindergarten students to DAEPs between 2001 and 2006*—even though the Education Code prohibits referring children under age 6 to DAEPs *unless they bring a firearm to school* (a mandatory referral under federal law).²⁰⁸ In 2005-06 alone, at least 112 pre-K and kindergarten students were sent to DAEPs—and 88 percent of those were discretionary referrals. *These discretionary referrals violated state law if the child was under age six.*

198 BAZELON CENTER FOR MENTAL HEALTH LAW, WAY TO GO SCHOOL SUCCESS FOR CHILDREN WITH MENTAL HEALTH CARE NEEDS 4 (2006).

199 PENNSYLVANIA PROTECTION & ADVOCACY, INC., ARRESTED DEVELOPMENT: STUDENT WITH DISABILITIES AND SCHOOL REFERRALS TO LAW ENFORCEMENT IN PENNSYLVANIA (2004).

200 *Id.* at 3.

201 BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 196, at 2 (study found 73 percent of youth identified with serious emotional disorders who dropped out of school are arrested within five years, and national study found 35 percent of such students arrested within two years of leaving school).

202 BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 196, at 2.

203 FOUND. FOR CHILD DEVELOPMENT, PRE-KINDERGARTENERS LEFT BEHIND: EXPULSION RATES IN STATE PREKINDERGARTEN PROGRAMS (2005).

204 *Id.*

205 TEX. EDUC. CODE § 37.005.

206 4-year-old Accused of Improperly Touching Teacher, KXXV-TV News Channel 25 (December 18, 2006), available at www.kxxv.com/global/story.asp?s=5785699

207 See www.natlyngracia.blogspot.com

208 TEX. EDUC. CODE §37.006(f)(1).

Some school districts repeatedly refer more young children than others. The following 15 school districts referred 10 or more students between 2001 and 2006:

**School Districts Referring More than 10
Pre-K & Kindergarten Students to DAEPs, 2001-06**

School District	Pre-K & Kindergarten Students Referred to DAEPs
Dallas ISD	13
Denton ISD	10
Ector County	12
Grand Prairie ISD	12
Irving ISD	14
Katy ISD	11
Killeen ISD	19
Leander ISD	19
Mesquite ISD	14
Northside ISD	19
Pasadena ISD	85
Plano ISD	10
Temple ISD	16
Waco ISD	17

These 14 school districts are responsible for *almost half* of the DAEP referrals of children in pre-K and kindergarten over this five-year period. For a list of school districts referring at least one Pre-K or kindergarten student between 2001 and 2006, visit the Texas Appleseed website at www.texasappleseed.net.

In addition, *more than 179 school districts together referred about 2,700 1st graders to DAEPs between 2001 and 2006*. In 2005-06 alone, at least 600 1st graders were sent to DAEPs—and 89 percent of these were discretionary referrals. Given the documented academic consequences of suspension, this practice raises serious concerns. The following 15 school districts referred *40 or more 1st graders* between 2001 and 2006:

**School Districts Referring More than 40
1st Graders to DAEPs, 2001-06**

School District	1st Graders Referred
Alief ISD	124
Arlington ISD	125
Conroe ISD	55
Cypress-Fairbanks ISD	42
Dallas ISD	148

School District	1st Graders Referred
Ector County	40
Harlingen CISD	44
Hurst-Euless-Bedford ISD	46
Irving ISD	46
Leander ISD	40
Mesquite ISD	153
North East ISD	147
Northside ISD	57
Pasadena ISD	345
Waco ISD	94

Variation in Disciplinary Referral Rates Across Texas

Zero tolerance was intended to create a level playing field for all students at all schools.²⁰⁹ The assumption was that instituting specific consequences for specified misbehavior would result in consistency in school discipline.²¹⁰ The huge variation in referral rates for school districts across Texas indicates the opposite has occurred.

DAEP Referrals

In Texas, school districts' average overall annual DAEP referral rate is 2 percent. However, for one or more years between 2001 and 2006, 167 school districts have referred students to DAEPs at two to six times the state average for one or more years between 2001 and 2006. One district, Benavides ISD, reported a 22 percent DAEP referral rate in 2004-05.

The following school districts have been on the "Top 10" list for highest overall DAEP referral rates between 2001 and 2006. See the *Appendix* for more detail about how these referral rates were calculated.

"TOP 10" LIST: Highest Overall DAEP Referral Rates, 2001-06

2001-02	2002-03	2003-04	2004-05	2005-06
Aransas Pass ISD 11%	Aransas Pass ISD 12%	Midland ISD 10%	Benavides ISD 22%	Midland ISD 11%
Galveston ISD 11%	Galveston ISD 11%	Pasadena ISD 10%	Laneville ISD 12%	Laneville ISD 10%
Marlin ISD 11%	Spring Branch ISD 11%	San Benito ISD 9%	Midland ISD 11%	Benavides ISD 9%
Spring Branch ISD 10%	Pasadena ISD 9%	Slaton ISD 9%	San Benito ISD 9%	Morton ISD 8%
Pasadena ISD 9%	Slaton ISD 9%	Marlin ISD 8%	Pasadena ISD 9%	Pasadena ISD 8%

209 AM. PSYCHOL. ASS'N, *supra* note 70, at 41.

210 *Id.*

2001-02	2002-03	2003-04	2004-05	2005-06
Katy ISD 8%	Cranfills Gap ISD 9%	Waskom ISD 8%	Marlin ISD 8%	Boys Ranch ISD 8%
La Vega ISD 8%	Masonic Home ISD 9%	Boys Ranch ISD 8%	Waelder ISD 7%	Alvin ISD 7%
Coldspring-Oakhurst ISD 8%	Midland ISD 8%	Carthage ISD 8%	Commerce ISD 7%	San Vicente ISD 7%
Nordheim ISD 8%	Katy ISD 8%	Katy ISD 8%	Jasper ISD 7%	Marlin ISD 7%
Laneville ISD 8%	Dime Box ISD 8%	McGregor ISD 7%	Morton ISD Munday ISD Goldberg ISD 6%	Waelder ISD 7%

Several school districts appear on this list more than once, and one school district—Pasadena ISD—has been on the “Top 10” list every school year between 2001 and 2006. These numbers indicate that *it is not the behavior that determines whether a student is referred to a DAEP—it is, in large part, the district where the child goes to school.*

In-School and Out-of-School Suspension

The same variation exists for disciplinary referrals to out-of-school and in-school suspension (OSS and ISS). Though the overall OSS referral rate averaged 14 percent statewide in 2005-06, *79 school districts in Texas referred students to OSS at a rate of 20 percent or higher—and four school districts’ exceeded 50 percent.*

“TOP 10” LIST: Highest Overall OSS Referral Rates, 2001-06

2001-02	2002-03	2003-04	2004-05	2005-06
Laneville ISD 48%	West Orange Cove ISD 46%	West Orange Cove ISD 61%	West Orange Cove ISD 58%	Lancaster ISD 58%
Sabine Pass ISD 40%	Desoto ISD 39%	Premont ISD 54%	Beaumont ISD 52%	Duncanville ISD 53%
Fort Worth ISD 38%	Fort Worth ISD 39%	Duncanville ISD 51%	Lancaster ISD 50%	West Orange Cove ISD 52%
Marshall ISD 37%	Port Arthur ISD 36%	Beaumont ISD 50%	Fort Worth ISD 45%	Beaumont ISD 51%
Karnack ISD 34%	Waco ISD 35%	Karnack ISD 45%	Desoto ISD 44%	Fort Worth ISD 47%
Hitchcock ISD 33%	Castleberry ISD 33%	Fort Worth ISD 44%	Duncanville ISD 40%	Corsicana ISD 45%
Desoto ISD 32%	Karnack ISD 32%	Temple ISD 43%	Laneville ISD 39%	Alief ISD 39%
Waco ISD 32%	Kingsville ISD 32%	Port Arthur ISD 40%	Tyler ISD 38%	Newton ISD 38%
West Orange-Cove ISD 32%	Hitchcock ISD 30%	Desoto ISD 39%	Castleberry ISD 38%	Tyler ISD 37%
La Joya ISD 30%	Alief ISD Robstown ISD 30%	Galveston ISD 38%	Temple ISD Alice ISD 37%	Waco ISD Robstown ISD 37%

Overall in-school suspension (ISS) referral rates averaged 17 percent statewide in 2005-06; however 326 school districts had ISS referral rates exceeding 20 percent—and the “Top 10” districts had ISS referral rates of 45 to 67 percent that year.

Highlighting the “Top 10” school districts in no way does justice to the large number of school districts that are over-referring students to ISS, however the chart below provides a snapshot of the highest overall ISS referral rates for a five-year period.

“TOP 10” LIST: Highest Overall ISS Referral Rates, 2001-06

2001-02	2002-03	2003-04	2004-05	2005-06
Slocum ISD 43%	Dime Box ISD 53%	Nordheim ISD 64%	Nordheim ISD 64%	Boys Ranch ISD 67%
Calvert ISD 41%	Laneville ISD 51%	Boys Ranch ISD 60%	Boys Ranch ISD 60%	Laneville ISD 65%
Union Hill ISD 40%	Calvert ISD 50%	Masonic Home ISD 60%	Karnack ISD 55%	Calvert ISD 55%
Boys Ranch ISD 39%	Karnack ISD 47%	Wharton ISD 53%	Duncanville ISD 48%	Newton ISD 49%
Coldspring-Oakhurst ISD 39%	Boys Ranch ISD 42%	Star ISD 52%	Trinidad ISD 48%	Duncanville ISD 47%
Masonic Home ISD 39%	Star ISD 41%	Bay City ISD 51%	Godley ISD 48%	Somerville ISD 46%
Pettus ISD 38%	Milford ISD 40%	Karnack ISD 50%	Wharton ISD 48%	Waco ISD 45%
Oglesby ISD 38%	Slocum ISD 39%	Godley ISD 47%	Spurger ISD 47%	Southside ISD 45%
Nordheim ISD 37%	Trinidad ISD 39%	Trinity ISD 47%	Lockhart ISD 46%	Wharton ISD 45%
Clarksville ISD Dime Box ISD Milford ISD 36%	Clarksville ISD 38%	Italy ISD Waelder ISD Waco ISD 46%	Waco ISD 46%	Kemp ISD 45%

There is some overlap between each of the three “Top 10” lists for highest overall DAEP, OSS, and ISS referral rates. When looking at all Texas school districts, *the huge variation in referral rates—from none to more than 60 percent—indicates a wide disparity in policy and application of discretionary disciplinary sanctions from district to district.*

Conclusion

Texas Appleseed’s analysis of quantitative disciplinary referral data—obtained from the Texas Education Agency as self-reported by school districts—raises serious concerns about the overrepresentation of minorities and special education students in discretionary disciplinary referrals. Equally troubling are data-driven indicators that the greater predictor of whether a student will be sent to a DAEP is where he or she attends school—and not the nature of the offense. Add to this mix some districts’ practice of referring very young children to DAEPs, and it becomes all the more imperative that, as a state, we assess how these policies contribute to the “criminalization” of student misbehavior that is removing large numbers of students from the classroom.

For too many juveniles, their disciplinary removals from school are an introduction to the “school-to-prison pipeline.” Whether the focus is on equity and fairness in the discipline process, or the link between discipline and academic failure or dropout, the numbers reported here are of grave concern. If Texas wants to meet its stated goals of reducing dropout, eliminating the achievement gap between white and minority students, and ensuring that its students are engaged and learning, better ways to maintain safety and order in classrooms must be found.²¹¹

211 See STATE BOARD OF EDUCATION, LONG-RANGE PLAN FOR PUBLIC EDUCATION 1996-2000 (1995).

SCHOOL DISTRICT / PARENT FOCUS GROUP INTERVIEWS: School Disciplinary Practices—What Works? What Needs to Change?

Texas Appleseed’s analysis of quantitative data on disciplinary referral rates in Texas public schools is supported by qualitative data—an analysis of interview responses from school district personnel and focus groups with parents and students held over the past year.

More than 40 volunteers at major law firms and corporate legal departments,²¹² working in partnership with Texas Appleseed, interviewed teachers, counselors, police officers, and principals at alternative schools and elementary, middle, and high schools in nine independent school districts across the state. The interviews focused on zero tolerance school discipline and related issues. In addition, Texas Appleseed staff conducted several focus groups with parents and teachers and reviewed materials posted on websites by parent interest groups reflecting their experiences with Disciplinary Alternative Education Program (DAEP) referrals and other school discipline.

School Selection & Confidentiality

Initially, 15 school districts were identified by the UT Population Research Center as representing a cross-section of Texas independent school districts. Among the variables considered were the number of special needs students, the percentage of students eligible for free or reduced lunch, the percentage of white students versus non-white students, the number of schools within the district, and the population density of the school district. Geographic location was also considered. The schools within each district were divided into four categories: elementary schools, middle schools, high schools, and DAEPs. Within each of these categories, schools were selected using a random number generator. No more than seven schools were selected for interviews within any single district.

212 Vinson & Elkins LLP lawyers took the lead in organizing the effort and assisting Texas Appleseed in drafting this report. Other firms that conducted interviews and provided invaluable assistance include Greenberg Traurig, LLP; Patton Boggs, LLP; Denton, Navarro, Rocha & Bernal, PC; Escamilla & Poneck, Inc.; Mayer Brown LLP; and the legal department of ExxonMobil. Texas Appleseed’s project partners also helped to develop questions, train volunteers, and conduct interviews.

Before interviews were conducted, pro bono attorneys working on this project contacted each school district to obtain permission to conduct interviews to investigate zero tolerance discipline policies. They explained that Texas Appleseed would not disclose the names of participating school districts or interviewees. When asked, Texas Appleseed volunteers sent school districts a list of questions in advance of the interviews. Even with these parameters, six school districts—Kerrville ISD, Lubbock ISD, Mineral Wells ISD, Plano ISD, Tenaha ISD, and Texas City ISD—refused to participate.²¹³

Zero Tolerance Policies

While a majority of Texas schools have not formally adopted zero tolerance policies, many school districts have exercised latitude under the Texas Education Code to take a zero tolerance approach to enforcing their own student Codes of Conduct.

According to the American Psychological Association’s Zero Tolerance Task Force, zero tolerance policies are:

Discipline policies that apply predetermined consequences, usually severe and punitive, without considering the severity of the student’s behavior, the student’s intent, or the situational context in which it occurred.

While some interviewees believed that zero tolerance policies could be effective, nearly all stated that at least some additional factors should be considered before imposing punishment.

- A school board member described zero tolerance policies as “knee-jerk reactions to the problem,” allowing school administrators “to be taken out of the loop, which is a big mistake.” A school counselor and former teacher said zero tolerance policies would be more effective if enforced more consistently, especially with repeat offenders.
- A DAEP counselor said that, before disciplining students, factors such as attendance record, discipline record, grades, and specific circumstances should be considered.
- “The effectiveness of zero tolerance policies varies among students. With some kids, zero tolerance is the only way to accomplish the goal, but it is not helpful with others,” a DAEP teacher said.
- A school counselor said discipline policies should provide more discretion—for example, giving students a warning if they bring prescription drugs to school, instead of sending them to a DAEP.
- A police officer suggested a case-by-case analysis should be done.
- A teacher said she does not think the APA definition of zero tolerance (see above) reflects accurately what is happening in schools. Individual circumstances are considered before a student is removed or suspended, she said. These circumstances are not consistent, and the rules need to be enforced without exception for certain defined offenses, she added.

²¹³ Before they refused to participate, Texas Appleseed volunteers informed the school districts that their refusal to participate would be noted in this report.

- A teacher said that he believes in zero tolerance, but “his concern is with the basically great kid who is at the wrong place at the wrong time and is sent to a DAEP and learns to be a criminal.”
- A DAEP principal stated that school administrators “must take a hard line to prevent a repeat of incidents like those that happened at Columbine High School, but they should take into account a student’s intent. If the rule is relaxed, it opens the door for future harm. Although the (zero tolerance) policy sometimes catches students who don’t belong in DAEPs, it is better to err on the side of caution.”
- A teacher noted “as teachers we should take a step back from the situation and try to analyze the problem to see exactly what is causing the student to behave in a disruptive manner.”
- A school attorney stated that some Texas school districts have adopted discipline policies that include the APA zero tolerance definition almost exactly, but most Texas school districts apply a modified version of zero tolerance: the nature of the punishment is not discretionary, but the length of the punishment is. He added that zero tolerance is effective as a front-end deterrent because students think twice before bringing a knife to school. However, it is less effective on the back-end because mitigating circumstances for behavior are not considered.
- A DAEP counselor did not think zero tolerance policies were effective. “When zero tolerance is applied, a school does not rely on its resources, and it does not address context or other circumstances surrounding the behavior.”
- A DAEP principal disagreed with zero tolerance policies, noting: “Schools must use common sense when taking action against students, and punitive measures do not work. Children who behave poorly should suffer consequences, but the action taken by the school should be a learning opportunity.”

Referrals to DAEPs

Principals and assistant principals generally make the decision to refer students to a DAEP. Administrators and teachers interviewed said referrals to DAEPs are commonly made when student behavior seriously jeopardizes the safety of many others or when disruptive behavior, such as fighting, occurs more than once. Parent and student focus groups cited fighting as the most common basis for referral to a DAEP, although they and many teachers suggested that a referral would be unfair if a student was merely defending himself. See the following observations:

- A counselor said that, for most students, a referral is the result of an accumulation of disruptive behavior including fighting, running away, and endangering themselves or other students.

- An assistant principal said that, “because of the high gang population in the school, we deal every day with kids that have Xanax, marijuana, and knives at school. However, discretionary referrals can also be made for things like slamming books and sexual harassment.”
- An assistant principal said, “The alternative school has limited space for students, and they can’t always make room for discretionary referrals. Discretionary referrals are usually made for persistent misbehavior.”
- Among examples of persistent misbehavior, a principal noted that a child was referred to the DAEP for repeatedly skipping class.

Most school principals and assistant principals interviewed said that nearly all discretionary referral decisions are made consistently, but others disagreed—observing that discipline for the same misconduct can vary between school districts or even within the same district. See below:

- A principal said referrals are not consistent, observing that some teachers do not monitor the students, lack an ability to communicate with them, and make more referrals than other teachers.
- A teacher said some students should not be removed or are removed for too long, especially younger children.
- A 10-year-old with no history of behavior problems stabbed another student with a pencil resulting in a slight injury. The school was not going to refer the student, but when the parents of the injured student complained, the counselor said, “the school had no choice but to remove” the student.
- A counselor said in one instance a student was referred to a DAEP for bringing her own prescribed medication to school. Another was referred for bringing over-the-counter medication with her to school. Neither had any history of behavior problems, and neither could be described as typical of students who are referred. When they arrived at the DAEP, the lesson they were taught was that “life is not fair, and they must learn to deal with that fact.”
- A teacher said several students are sent in error to a DAEP every semester. For example, several students were referred to a DAEP for the minor offense of “borrowing a school parking decal.” Another student was referred for “doodling on a paper during a class period and drawing a gun as a doodle.” Students feel a strong sense of injustice about these referrals, the teacher said.
- A Parent Focus Group noted that discipline is not always fairly applied, citing a case in which one student stole something and threatened two other students if they didn’t keep quiet about it. Later, the two who kept quiet were punished more harshly than the one who stole, a parent said.
- A counselor said that one middle school student drew graffiti on a bathroom wall and was referred to a program that allowed release before 30 days. Another middle school student did the same thing and was referred to a program without early release.

Many parents and students are critical of the disciplinary referral process and zero tolerance policies.

Parents have criticized zero tolerance policies in the press, in interviews for this report, and on websites. (See www.texaszerotolerance.com (TZT) and www.katzerotolerance.com (KZT).) These are examples of cases where parents strongly contested the discipline applied by the school:

- A young girl was repeatedly ticketed and sent to a DAEP for talking back to teachers and for using profanity. Beginning as early as elementary school, her mother’s repeated requests for an evaluation were ignored. In her 9th grade year, an attorney became involved, and the student was tested and found to have multiple disabilities qualifying her for special education.
- A 9th grader was referred to a DAEP for repeatedly talking in class. Since early elementary school, his father said his son has been disciplined by schools for “waving his hands” in class. Because both parents are deaf, the son, who is hearing, signs at home to communicate. The student is still taking speech therapy in school.
- A middle school student was referred to a DAEP for writing on a wall with a magic marker.
- A high school student was referred to a DAEP when he defended himself against a bully at school. (KZT posting)
- A 13-year-old was sent to a DAEP for “mooning” another student. (TZT posting)
- A 15-year-old was sent to a DAEP for uttering a curse word under his breath when a teacher refused to assist him.
- A 15-year-old was sent to a DAEP for flashing a “W” sign perceived to be a gang signal. (TZT posting)
- A 12-year-old was referred to a DAEP for throwing a tennis ball in the hall that narrowly missed another student. (TZT posting)
- A parent said that a calm and well-behaved student was called “gay” by another student. He got angry and hit the other student which resulted in referral to a DAEP for 45 days, even though he had no prior discipline problems.

Many counselors and DAEP principals indicated that referrals are often made without adequately addressing the reasons for the behavior or considering other approaches.

- A DAEP principal stated that before referring students to a DAEP, schools should make better use of behavior specialists to address problem behavior, develop behavior intervention plans, and focus on family background and other events in the child’s life that are the cause of most problems.
- A counselor observed that “the same teachers keep sending kids to DAEPs, and these teachers need some additional training to help them deal with situations better.”

- A counselor said that teachers need training on “how to de-escalate situations effectively and how to restrain kids safely,” particularly those teachers who regularly make disciplinary referrals resulting in students being sent to DAEPs.
- A DAEP principal said that mainstream teachers need better training on how to teach and work with kids from challenged environments. Some mainstream teachers are unprepared and unable to “deal with the baggage” of students who may be parents themselves. They also need better main campus alternative programs and better monitoring of at-risk students.

Many interviewees stated that school districts should take into account a student’s age when referring a student to a DAEP, in addition to the reasons for the behavior.

- A DAEP principal said that discipline needs to be individualized and zero tolerance policies need to differentiate between primary and secondary students. “For the younger students, discipline issues indicate that something is going on in the child’s life. For younger children, there is an opportunity to intervene. Schools need teams on campus to address concerns, research family issues, and provide behavior intervention plans.”
- Another DAEP principal said that “schools must use common sense when taking action against students...[T]he action taken by the school should be a learning opportunity.”

While school administrators and teachers generally denied any bias in connection with referrals to DAEPs, some acknowledged that the statistical data shows an overrepresentation of certain groups in DAEPs.

In contrast, some parents and students suggested cultural bias may figure into some disciplinary referrals.

- “Students most often referred are at-risk, minority boys from the lower socio-economic groups,” a counselor said. Saying that she was not sure why, she noted that “it may be that authorities are quicker to react to these students based on behavior that the students are doing or words they are using without really intending to be disrespectful.”
- Students interviewed said that when a group of students—some white, some “of other races”—all do the same thing, only the students “of other races” are punished.
- During a discussion of disciplining Hispanic children, one parent said, “Cultures, different cultures. We have to teach each other.”
- Students said that some kids get blamed more than other kids, and get punished more harshly. In their view, this practice is often based on a student’s reputation or on things that may have happened a long time ago—“once you get a certain reputation, it is hard to shake.”
- Parents said that students are stigmatized after they get into trouble and become targets, even for smaller infractions. They said some students are being unfairly targeted and their real needs are not being addressed.

Efforts to Reduce DAEP Referrals

Additional training of teachers may help reduce DAEP referrals by providing tools to address behavioral issues before they escalate.

Some school districts emphasize teacher training more than others. While a few principals and teachers interviewed think that the current level of teacher training is adequate, most believe that more training would be beneficial, especially for new teachers.

Some principals and teachers believe that behavior management training, such as the training associated with Positive Behavior Support (PBS), would be helpful while others would like teachers to receive more instruction on conflict resolution and methods of restraint. Other principals and teachers desire types of training that would help teachers better communicate with students from different backgrounds. Teachers and principals made the following observations about teacher training:

- A DAEP principal said school districts should “train mainstream school teachers in good intervention strategies with the students. Colleges succeed in training teachers in the subject matter, but not in teaching them how to teach and work with kids who come out of bad environments.”
- A high school principal noted that a “regional education center is essential for training in small schools that cannot afford to hire in-service trainers.”
- A high school principal said that his school had “a rough period about four years ago [but] changed it by instituting Positive Behavior Support.”
- An elementary school principal stated that, in addition to teacher training, his school has implemented “what is called ‘auxiliary training’ for the custodians, secretaries, all the way to the crossing guard.” According to the principal, this training takes place once a month and “teaches the people the students see every day...how to handle students in an at-risk situation.”
- A high school teacher said that he has had “no formal training since college.”
- A middle school principal said that “site-based decision-making is very helpful.”
- A high school teacher stated that the extent of her training is “only some in-service training which was not mandatory.”
- A DAEP principal said that all teachers should have training because “the most teachable moment is when the child’s behavior issues arise.”

Prevention and intervention programs may also help reduce DAEP referrals, but better quality programs (not greater quantity) are needed to obtain the desired results.

The majority of schools participating in interviews for this report have implemented one or more programs to reduce discipline problems, school violence, and dropouts—along with programs aimed at character education, anger management, mentoring, and elimination of bullying.

One elementary school formed an intervention assistance team to serve as a resource for teachers facing discipline problems. Principals specifically identified Positive Behavior Support, after-school programs, and anti-dropout programs as being successful. One principal also praised a program that uses peer mediation to teach students conflict management. Nevertheless, although most of the interviewees seem to be supportive of prevention/intervention programs, a few said some programs employed at their schools are not beneficial. For example, one elementary school teacher said some students are “too streetwise” for Project Class presentations, which are aimed at building social skills.

School prevention programs should be particularly attentive to students at risk of referrals for reasons relating to poverty, language difficulties, and other factors beyond the student’s control.

Most of the principals interviewed identified poverty as a significant challenge facing their students. Some principals said that more than half of the students in their schools are economically disadvantaged. While poverty appears to be the greatest challenge facing students, other challenges, such as drug and alcohol abuse, peer pressure, gangs, and bullying also exist. Some principals also cited language difficulties and other challenges related to educating a diverse pool of students. Principals offered the following observations:

- A middle school principal said that students’ “mindsets are out of the environment they live in. They are told that they can’t achieve anything, and they believe it.”
- A high school principal stated that the biggest challenges his students face are “poverty, neglect, and pressure from peers, including gangs.” He also said that his school “has 95 to 98 percent awesome students and about 3 percent that would kill you.”
- A high school principal said the students at his rural school must “learn how to think globally and think about their future and the consequences of their actions.”
- A middle school principal said students at her school lack “exposure to cultural opportunities outside of school.”
- A high school principal noted that his school has a “high gang population.” He added that “there are the hard core gang members and the wannabes, and once they become wannabes they are lost.”

Schools should consider formalized programs to monitor “at-risk” students.

Many of those interviewed try to monitor students considered at risk. Some schools use formal methods and procedures to keep track of students. For example, in one school, at-risk children’s grades and discipline record are reviewed periodically. Another school automatically considers bilingual children at risk and, as a result, all bilingual children have access to after-school programs and accelerated classes for at-risk students. In other schools, however, teachers and school administrators monitor at-risk children informally. In one such school, the principal requests that the campus police officer stay in daily contact with at-risk students.

- An elementary school principal said that “when a new student comes to school, he or she is assigned a buddy.” The principal noted that “this makes the new student feel included, and it also helps the principal and vice principal monitor the new student.”

- A high school principal said he “knows the at-risk students and keeps an eye on them...(by) reading MySpace pages on a regular basis to see what is going on.”

Regardless of what school programs are implemented, parental involvement plays a significant role in addressing and correcting behavioral problems.

The interviews indicated that lack of parental involvement is a widespread problem. One principal noted that students with parents who attend school events are more likely to participate in school activities themselves.

Some interviewed principals described the efforts they make to engage parents. Some principals hire parental involvement staff to help connect with the families of students. At one high school, parents are invited to dinners at the school, meetings with the school’s substance abuse monitor, and fundraising barbecues hosted by other parents. The principal of this school believes that parents benefit from these events because they are able to speak to teachers and school administrators individually. Additionally, some schools have implemented after-school programs to assist students with working parents.

- An elementary school principal said that she “would like to see increased parental involvement.” She also noted that her staff “is unified, but they need more support from the parents.”
- A middle school principal said that school officials are “at the mercy of what the parents tell them, [and] sometimes they will not know if a child is homeless or has had a death in the family.” This principal added that she “wishes that there was more communication on those matters.”
- A middle school principal described his school climate as “good” because of a “strong PTA and good parental involvement.”
- An elementary school principal stated that he “would like to see the culture of the community change and have it more community oriented.” According to this principal, “most of the students are raised by baby sitters as most parents work...[and] there needs to be more parental communications with the school and the students.”

Effectiveness of DAEP Programs

Those interviewed had differing views on the quality and effectiveness of Disciplinary Alternative Education Programs (DAEPs), which may be attributable to the varying quality of DAEPs in different school districts.

Schools are mandated to refer students to DAEPs for specific offenses outlined in state law (Texas Education Code, Chapter 37), and school administrators also exercise their discretion to refer students to DAEPs for other violations of the student Code of Conduct. The length of stay averages between 30 and 40 days, but can extend for an entire school year. In a DAEP, students take basic academic courses and participate in some type of behavior management program. There is little state oversight over DAEPs. Although state lawmakers passed legislation in 2007 requiring the Texas Education Agency to adopt minimum requirements for DAEPs, that legislation did not require monitoring or enforcement of those standards.

Many interviewees expressed a belief that the DAEPs could not help some students, but could be effective in many cases. DAEP administrators explained that students in DAEPs benefited from structured environments, low teacher-student ratios, at least five hours of instruction in basic academic subjects (typically excluding electives and foreign language courses), specialized classes for special education students, more individual instruction, and individual and group counseling to address behavior problems. Interviewees characterized the following as “strengths” of the DAEP schools:

- **Structure.** Most DAEPs are more structured than mainstream schools and impose a strict dress code. One DAEP principal described the structure: “Upon arriving at school, students are subjected to dress code inspection. They wear a uniform and are met at the doors by teachers. The different programs are separated by different entry doors. Pockets, uniforms, belts, shoes, hair, make-up are all inspected, and students may possess only a small amount of money. Students move through hallways without talking and no signing is permitted. Most students shake hands with adults or visitors. They may carry nothing but their white binders, two pencils (no mechanical pencils), and notebook paper into the building. There are no lockers, and all textbooks are kept at the school. Only tray lunches are offered, and there are no snack machines. Students are “wanded” and pass through metal detectors upon entry into the building.”
- **Focus on social skills.** At least one school requires students to shake hands with all adults they see each day. One DAEP teacher observed that “the dress code and hand shake rules are especially good,” noting that many students who went through the program adopted better dress and manners after their time there.
- **Rewards.** Some DAEPs use a point card system to make students aware of their behavior and their choices, and reward them for good choices. According to one teacher, the cards are “tailored to increase positive interaction between the students.”
- **Innovative programs.** One DAEP program includes a ropes course to reinforce the lessons on choices, trust, teamwork, and community.
- **Behavior management.** One DAEP school teacher explained that he developed a special curriculum to prepare students for interacting with other people and making better decisions. The course includes training in anger management and conflict resolution, which generally are not taught in the mainstream schools.
- **Counseling specialists.** Many DAEP administrators explained that the successful DAEP schools have more highly trained staff members and more specialized counselors who give more individual attention. For example, successful DAEPs have counselors who specialize in gang activity, chemical dependency, diversity issues, special needs, and violence.
- **Small classes.** The student/teacher ratio in DAEPs is generally lower than in mainstream schools. Interviewees cited ratios of 5:1 and 6:1.
- **Parental involvement.** Many DAEPs involve parents in the student’s program. In one school, all new students must attend a two-hour orientation class with their parents. Another program provides a special session for parents to learn parenting skills.

At the same time, DAEP administrators, counselors, teachers, and parents noted several challenges to implementing high quality DAEP programs and expressed concerns about some students who are sent to the program. Interviewees characterized the following as “challenges” some DAEPs face:

- **Poor facilities in some districts.** One teacher noted that the DAEP is “housed in old portables. These are sufficient but would be nice to be in building.” Another explained “the building is very old and part of it is condemned. There are no plans to move to a new facility, but some renovations are planned.” In other districts, however, the DAEPs are in new facilities. Sometimes these facilities house more than one program, however.
- **Not enough books and materials in some districts.** One teacher explained that the DAEP curriculum is the same as what is offered in the mainstream school, but the DAEP “does not have budget/money to purchase materials for students.” In one school, when books are needed, the principal is able to check out books from a short-term suspension group at the adjacent elementary school.
- **Transportation issues.** In one district, elementary school students must find their own transportation to a DAEP. In some districts, DAEP students must start their day later because the buses must take students to mainstream schools first.
- **Inadequate communication with main campuses.** A DAEP principal said that mainstream schools and the alternative school need better communication about the needs of the students—during and after the referral.
- **Inconsistency in DAEP referral process.** Students and parents interviewed reported that DAEP referrals can be unfair or too harsh. One counselor spoke for a number of interviewees by noting that inconsistencies in the application of discipline “make students and parents angry.”
- **Inappropriate referrals.** DAEP administrators and teachers said at least some students, who are referred to DAEPs, do not need to be there. One counselor explained that, although she has seen very few instances in which she believed a student’s referral to a DAEP was unmerited, she has seen some—including referral of students who inadvertently brought their own prescription medication or over-the-counter medicine to school.

DAEP teachers and administrators noted improvements in grades and the behavior of students while attending DAEPs, however many teachers and administrators on mainstream campuses—as well as parents—question these gains.

- One parent, who also works at a local high school, described the DAEP as follows: “It’s like a free day at times. It just depends on where the child attends.”
- A counselor said that DAEPs are like “a prison system—education is not there.” Students are punished by being removed from their home school, but that is the principle lesson learned.”

- An assistant principal said that students take the same classes, but he views it as “babysitting,” saying “the student’s grades usually go up, but are they really learning anything while there?”
- A teacher said that students sent to DAEPs “are not being taught up to the standards of the regular school, and the atmosphere is not conducive to learning but more like being disciplined.”
- Another teacher said she doesn’t think students in DAEPs receive a quality education.
- A principal said that returning students are not fully prepared to keep up with the rest of their class.
- Some interviewees did note improvement in the alternative schools. One principal said that “in the past, referral to a DAEP would have disrupted a student’s education. Now, the curriculum is the same so they can keep up.”

Working With Students After They Attend DAEPs

DAEP administrators and teachers almost uniformly suggested that mainstream campuses should pay greater attention to students during the transition back from DAEPs to prevent recidivism and avoid additional problems for “at-risk” students.

DAEP administrators and teachers, as well as some main campus administrators and teachers, believe DAEP students need more counseling and attention when transitioning back to a mainstream campus from an alternative placement. A majority said increased counseling and attention could lead to a reduction in recidivism rates and avoid additional problems for “at-risk” students.

Many schools do have a transition counselor, however some counselors interviewed on mainstream campuses indicated they are too busy with other duties to monitor students as closely as DAEP administrators and students expect. Others commented on the lack of a formal program for returning students and the need for more planning and procedures to help a DAEP student transition back to his regular classes

- One principal said, “The fact that there is not a formal procedure in place [is] a weakness. Teachers can request that the counselor talk to the child and [that] the assistant principal touch base with the child to make sure the child learns why he/she was sent to DAEP.”
- One school principal believes [a] counselor should meet with the child to set goals and maybe put the child on a positive behavior contract.
- One principal said that when there is no counselor available, he monitors and gives the student verbal encouragement.

However, some schools did have an assigned counselor or transition counselor on staff to assist with DAEP students. In those schools, administrators did notice a positive impact.

- One DAEP principal noted that, before the DAEP added a counselor to help with transitions and interventions, 27 percent of the students were recidivists. Since then, the percentage has dropped to 7 percent.
- One DAEP principal said that 10 percent of students in the DAEP were recidivists in the same year. He said the majority of DAEP students in any one year have probably attended a DAEP previously in their school career, although this information is not tracked.
- One counselor explained that the school had a high rate of recidivism last year until another counseling position was added. A counselor is now able to mediate disputes before referrals are made, and recidivism rates are lower.
- One principal commented that students “bounce back and forth between campuses,” leading to a yo-yo effect. Students “should be assigned for a longer period or not come back for the remainder of the school year,” he said.
- A DAEP counselor said that the connection between the main school and the student in the DAEP should be improved so the transition is easier. More specialists in the home school, more funding, and more parent involvement are needed to make this happen.

Students who attend DAEPs may be at greater risk for academic problems.

Most interviewees generally concluded that the DAEP students fall behind in curriculum when away from their home school. A few teachers commented that the curriculum is the same, so the student does not fall behind. Many observed that the curriculum is not taught at the same pace. Below are some responses from principals related to the curriculum issue:

- One DAEP school principal said they attempt to coordinate what is taught by the DAEP teacher and by the student’s regular classroom teacher by sharing lesson plans.
- One principal noted that the campuses do “calendar” so that all campuses can stay at approximately the same point.
- One principal believed that returning students are fully prepared for the most part, but that the DAEP teacher “never does as good a job as the in-classroom teacher.”
- Sometimes students need specialized tutoring after attending a DAEP, a principal said.
- One principal said that the school had never had a situation where a student was so far behind that they couldn’t catch up, noting that students receive instruction in the DAEP school.

Some interviewees suggested that students referred to DAEPs are more likely to skip school or drop out than other students.

Research shows that *DAEPs have five times the dropout rate* as mainstream schools. Specific comments include:

- One DAEP principal noted that attendance in the alternative program was 70 to 80 percent below the district average. “Although these students are provided transportation to the school, many are not motivated to attend,” he said.
- A parent participating in a focus group explained that her son was sent to a DAEP for 45 days. When he returned to school, the school threatened to expel him and ultimately did. Her son then went to work rather than return to school. The parent felt like the school didn’t want her son there and was only likely to expel him if he went back.

Parent involvement is critical to ensuring students’ successful transition from a disciplinary placement to the regular classroom.

Parent involvement was mentioned in almost every interview as essential to students’ making progress in a DAEP, transitioning successfully to the regular classroom after a DAEP placement, and avoiding future discipline problems.

CONCLUSION

The views expressed by a majority of school administrators, teachers, counselors and staff in interviews conducted for this report—combined with input from parent focus groups—support the need for change in the way student discipline is administered in Texas public schools. Recurring themes include the need for **improved transitional support** for at-risk students returning from disciplinary placements to the regular classroom, **more training for teachers** in discipline policies and better classroom management strategies, balancing zero tolerance with **some consideration of intent**, **focused programs to monitor at-risk students**, and **improved parent involvement**. These observations correlate with the research by educational and mental health experts cited in this report—and are supported by our analysis of discretionary disciplinary referrals in Texas public schools.

BEST PRACTICE MODEL: A Multi-layer Approach to Successful School Discipline

Research-based programs exist that are effective in reducing both disciplinary referrals and school violence. Studies show that successful programs do the following:

- Target all students;
- Use well-coordinated methods and approaches that are “research-based” and deemed effective;
- Implement positive behavioral expectations and supports school-wide;
- Provide adequate training and ongoing support to ensure effective implementation;
- Involve school administrators, teachers, students, parents, mental health professionals, and community resources; and
- Incorporate regular, rigorous evaluation to determine if the programs to improve behavior are continuing to work.

Unfortunately, far too many programs, including many that are state or federally funded, have been shown to be ineffective in reducing the very problem behaviors they are supposed to target.²¹⁴ A federal report on the quality of school violence and prevention programs concluded:

*[O]n the whole, the quality of...prevention activities is poor. These findings...suggest that schools need to improve the quality of prevention programming through attention to needs assessment, planning, increased use of research-based approaches, and monitoring of implementation.*²¹⁵

214 U.S. DEP’T OF EDUC., PLANNING AND EVALUATION SERVICE, WIDE SCOPE, QUESTIONABLE QUALITY: DRUG AND VIOLENCE PREVENTION EFFORTS IN AMERICAN SCHOOLS (2002); U.S. DEP’T OF EDUC., OFFICE OF THE UNDER SECRETARY, PLANNING AND EDUCATION SERVICE, PROGRESS IN PREVENTION REPORT ON THE NATIONAL STUDY OF LOCAL EDUCATION AGENCY ACTIVITIES UNDER THE SAFE AND DRUG FREE SCHOOLS AND COMMUNITIES ACT (2000).

215 U.S. DEP’T OF EDUC., PLANNING AND EVALUATION SERVICE, WIDE SCOPE, QUESTIONABLE QUALITY, *supra* note 214, at i.

This same U.S. Department of Education report found that, nationally, schools generally did well in communicating and documenting school rules and in tracking student behavior, but needed to improve their range of responses to student conduct and to make discipline more predictable and consistent.²¹⁶ Of the more than 1,200 schools that the federal government studied, only a third of them used documented best methods for addressing discipline problems—and only 61 percent incorporated content shown to be effective through sufficient research.²¹⁷ The U.S. Department of Education study also revealed that:

- Counseling and mentoring programs are particularly weak in using best practice methods.²¹⁸
- Programs targeting individual behavior change are often poorly implemented.²¹⁹
- When trying to address student discipline problems, schools across the country are more likely to focus on implementing security and surveillance systems than on involving parents in programs to reinforce positive behavior.²²⁰

The U.S. Department of Education (DOE) report concluded that schools must shift their focus from *quantity* to *quality* when it comes to the disciplinary and behavioral support methods used.²²¹ **Also encouraged was an increase in the amount of resources allocated to planning and monitoring prevention activities.**²²²

This report only confirmed findings in another DOE study released two years earlier. At that time, more than 500 school districts were surveyed to determine how funds flowing to local education agencies from the Safe and Drug Free Schools Act were being used.²²³ Though far fewer school districts were sampled, the survey findings were similar:

- Almost half of participating school districts reported needing more technical assistance to identify research that could substantiate the effectiveness of methods to improve behavior in schools.
- Seventy percent of district employees, designated as program coordinators for safe school and drug prevention activities, spent no more than 20 percent of their time on these efforts.²²⁴
- Districts failed to use needs assessments or research as a basis for selecting programs to improve school behavior and reduce drug involvement.
- Only 9 percent of school districts used violence prevention efforts that were research-based.²²⁵

216 *Id.* at 33.

217 *Id.* at 39, 41.

218 *Id.* at 41.

219 *Id.* at 42.

220 *Id.* at 43.

221 *Id.* at 59.

222 *Id.*

223 *Id.*

224 *Id.* at 1-2.

225 *Id.* at 22.

- Only 40 percent of school districts reported that federal funding of programs helped to reduce school violence.²²⁶

This report noted that “[w]ell-planned prevention programs unite district needs for prevention with goals and objectives for preventing and reducing problem behavior.”²²⁷

Several other federally funded studies reviewed the research and identified those prevention programs or approaches that **do not reduce** delinquency or school violence. Findings include:

- Peer group counseling of adolescents frequently *reinforces* substance abuse and the delinquent behaviors it is attempting to eliminate.
- Individual counseling, if not cognitively based and if offered in isolation from other types of comprehensive support services, is ineffective in correcting problem behaviors.
- Arresting juveniles for minor offenses increases the likelihood for future delinquency. The opposite trend was observed when campus police issued warnings or used alternatives to formal charges.
- Correctional boot camps using traditional military basic training approaches have been shown ineffective in changing behavior.
- “Scared Straight” programs that arrange visits to adult prisons for minor juvenile offenders do not reduce these juveniles’ recidivism rates.
- Instructional programs focusing on information dissemination, fear arousal, moral appeal, and affective education do not produce results²²⁸

The widespread failure of these types of programs is reflected in large numbers of in-school and out-of-school suspensions (ISS and OSS) and referrals to Disciplinary Alternative Education Programs (DAEPs) in Texas. In particular, the fact that large percentages of students are recycled in and out of ISS, OSS, and DAEPs underscores the need for finding new ways of addressing behavioral issues and keeping more students in school.

A Closer Look: Characteristics of Successful Programs

Several federal government publications, including the U.S. Department of Education’s Guide to Safe Schools,²²⁹ discuss the characteristics of programs that work.²³⁰ These publications are supported by independent research²³¹ and have been endorsed by the American Psychological Association (APA).

226 *Id.* at 44.

227 *Id.* at 9.

228 Lawrence W. Sherman et al, *Preventing Crime: What Works, What Doesn’t, What’s Promising* (National Institute of Justice 1998).

229 U.S. DEP’T OF EDUC., *EARLY WARNING TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS* (1998).

230 LAWRENCE W. SHERMAN ET AL., *PREVENTING CRIME: WHAT WORKS, WHAT DOESN’T, WHAT’S PROMISING, A REPORT TO THE UNITED STATES CONGRESS* (1997); U.S. DEP’T OF EDUC., *EARLY WARNING TIMELY RESPONSE*, *supra* note 229; U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *COMBATING FEAR AND RESTORING SAFETY IN SCHOOLS* (1998); BIPARTISAN WORKING GROUP ON YOUTH VIOLENCE, *FINAL REPORT TO THE 106TH CONGRESS* (1999); U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *PREVENTING SCHOOL VIOLENCE* (2000); U.S. DEP’T OF EDUC., *SAFEGUARDING OUR CHILDREN: AN ACTION GUIDE* (2000).

231 See AM. PSYCHOL. ASS’N, *supra* note 70.

Early Intervention

Intervening early in a child's life increases the chance of correcting problem behavior successfully.²³² In its Final Report to the 106th Congress, The Bipartisan Working Group on Youth Violence noted, "preschool experiences are vital...Programs targeting young children, even infants and toddlers, could provide a way to reduce the likelihood of juvenile violence."²³³ This report emphasized the need for continued and additional funding for programs like Head Start, which provide comprehensive early childhood educational, developmental, health, nutritional, and social services to low-income preschool children and their families.²³⁴

Community Partnerships

Researchers recognize that successful behavioral supports in schools rely on strong community partnerships.²³⁵ The participation of both students' families and community leaders is crucial to the success of a violence prevention program.²³⁶ Schools can tap into many valuable resources if they have close ties to families, support services, community policing, the faith-based community, and local employers, and a volunteer base.²³⁷ Community involvement promotes a sense of ownership and gives administrators and teachers an understanding of their students in the context of the communities in which they live.²³⁸

Improving School Climate

A **positive** school climate is an important factor in creating a **safe** school environment.²³⁹ Some suggest that this is "possibly more important" than the physical security of the school.²⁴⁰ A good school climate makes students feel safe, connected, and supported so that they can learn.²⁴¹ Building positive school bonding to prevent alienation is a method that has been shown to defuse misconduct.²⁴²

Treating students with equal respect, both by staff and peers, is also critical.²⁴³ A major source of conflict in many schools is the perceived or real problem of bias and unfair treatment of students on the basis of ethnicity, gender, race, social class, religion, disability, nationality, sexual orientation, physical appearance, or some other factor.²⁴⁴

Improving Mental Health Services for Students

The need for additional school counselors, or "wraparound" mental health services for students, has also been cited.²⁴⁵ The Bipartisan Report noted that, at the time of

232 U.S. DEP'T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230, at 28.

233 BIPARTISAN WORKING GROUP ON YOUTH VIOLENCE, *supra* note 230, at 22.

234 *Id.* at 23.

235 *Id.* at 2.

236 *Id.* at 7.

237 U.S. DEP'T OF EDUC., EARLY WARNING TIMELY RESPONSE, *supra* note 229, at 3.

238 *Id.* at 7, 33; BAZELON CENTER FOR MENTAL HEALTH LAW, WAY TO GO SCHOOL SUCCESS FOR CHILDREN WITH MENTAL HEALTH CARE NEEDS 47 (2006).

239 BIPARTISAN WORKING GROUP ON YOUTH VIOLENCE, *supra* note 230, at 24.

240 *Id.*

241 *Id.*

242 U.S. DEP'T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230 at 30.

243 U.S. DEP'T OF EDUC., EARLY WARNING TIMELY RESPONSE, *supra* note 229, at 4.

244 *Id.*

245 *Id.* at 26.

publication, there were only 90,000 school counselors for approximately 41.4 million students in the nation’s public schools—or about one counselor for every 513 students.²⁴⁶ Providing mental health services, coupled with other school programs aimed at reducing disciplinary referrals, can reduce discipline problems.²⁴⁷ “Wraparound” mental health services—based on a family-centered, strength-based philosophy of care—involves a team that works to identify underlying needs, interests, and limitations of families and service providers, and to develop a plan that addresses these factors using community-based supports whenever possible.²⁴⁸ This approach has been shown effective in improving student behavior and finding lower cost alternatives to providing mental health care.²⁴⁹

Parental involvement

Parental involvement is instrumental in reducing school violence for several reasons.²⁵⁰ First, it allows for parents or guardians to intervene at home in setting expectations for a child’s behavior.²⁵¹ It is important to enlist the help of parents to give children the positive feedback needed to sustain desirable behavior.²⁵² Students whose families are involved in their growth in and outside of school are more likely to succeed in school and less likely to become involved in antisocial activities.²⁵³

School Discipline: Responsibilities of Parents & Guardians

- Review your school’s student Code of Conduct at the beginning of the school year.
- Be aware of the school’s behavior expectations for your child—and the process the school *must* follow when imposing any disciplinary sanction.
- Alert your child’s principal and teachers to any external changes (a move, divorce, illness or other family situation) that could impact your child’s behavior at school.
- Contact your child’s teacher or principal if you think a disciplinary action is unfair—and know your legal rights to file an administrative or court appeal (see *Resource List* at the back of this report).
- Collaborate with your child’s teachers to set the same behavior expectations for your child at home and at school.
- Request that any meetings/disciplinary hearings involving your child’s behavior be scheduled when you can attend.

246 BIPARTISAN WORKING GROUP ON YOUTH VIOLENCE, *supra* note 230, at 26.

247 BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 238.

248 SAFE & RESPONSIVE SCHOOLS PROJECT, EFFECTIVE RESPONSES – WRAPAROUND (2002), available at www.indiana.edu/~safeschl.

249 *Id.*

250 *Id.*

251 U.S. DEP’T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230, at 18.

252 U.S. DEP’T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230, at 29.

253 U.S. DEP’T OF JUSTICE, EARLY WARNING TIMELY RESPONSE, *supra* note 229, at 3.

When schools reach out to involve parents, then families are more likely to view themselves as equal partners in disciplinary practices at school.²⁵⁴

Model Discipline Programs Focus on the Entire School

Because research shows that youth violence and conduct problems are “socially embedded,” educational and behavioral experts stress the need for schools to move away from focusing solely on individual students with behavioral issues.²⁵⁵ Studies show that school-wide programs that clarify and consistently implement disciplinary procedures—and substitute positive reinforcement strategies for strategies that rely solely on punishment—are effective in reducing school violence.²⁵⁶

A school safety guide developed by the U.S. Department of Education encourages schools to develop programs aimed at the entire campus instead of focusing only on “at risk” students or students who already have disciplinary problems:

[R]esearch suggests that some of the most promising prevention and intervention strategies involve the entire educational community—administrators, teachers, families, students, support staff, and community members—working together to form positive relationships with all children.²⁵⁷

This is rooted in research which shows that “[p]revention requires understanding and changing social environments, more so than targeting specific individuals.”²⁵⁸

A Model That Works

After publishing its *Guide to Safe Schools*, the U.S. Department of Education created an action guide to help schools create programs implementing these kinds of successful schoolwide discipline programs.²⁵⁹ This action guide notes that the benefit of these comprehensive violence prevention and response plans extends beyond reducing student misbehavior to include improved academics, fewer disciplinary referrals, improved school climate, better staff morale, more efficient use of human and financial resources, and enhanced safety.²⁶⁰

This approach also has been embraced by mental health experts.²⁶¹ The Bazelon Center for Mental Health Law discusses this model, in conjunction with the use of school-wide positive behavioral supports, as a best practice that reduces disciplinary referrals.²⁶²

The three-tiered model below has been endorsed as the most efficient and cost-effective way to reduce the risk of violence.²⁶³

254 BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 238, at 41 (2006).

255 U.S. DEP’T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230, at 29.

256 SHERMAN ET AL, *supra* note 230, at 12.

257 U.S. DEP’T OF EDUC., EARLY WARNING, TIMELY RESPONSE, *supra* note 229, at ii.

258 U.S. DEP’T OF JUSTICE, PREVENTING SCHOOL VIOLENCE, *supra* note 230, at iii.

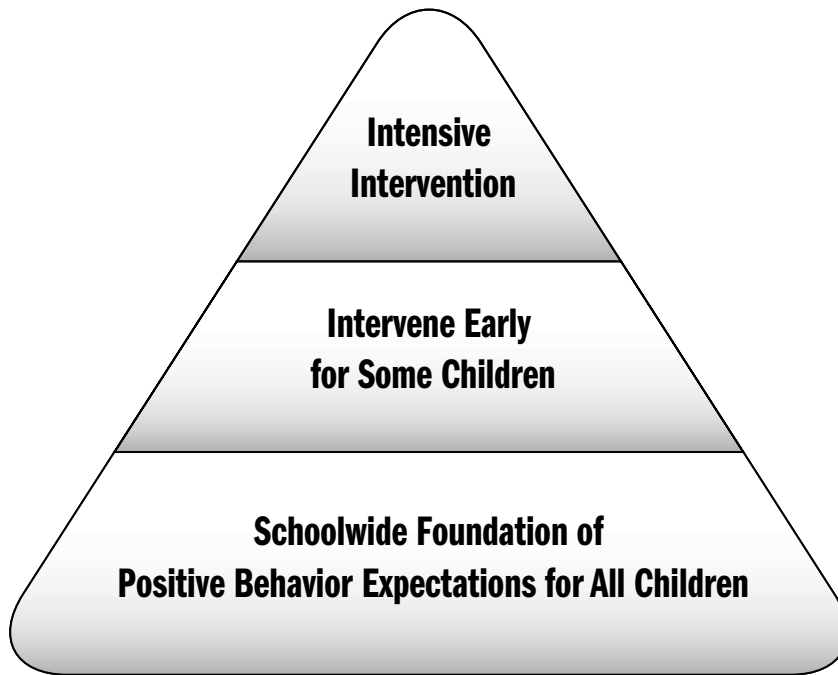
259 U.S. DEP’T OF EDUCATION, SAFEGUARDING OUR CHILDREN, *supra* note 230.

260 *Id.* at 2.

261 *See* AM. PSYCHOL. ASS’N, *supra* note 70, at 87; BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 238.

262 BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 238.

263 *Id.*



The different tiers within the triangle represent the levels of needed intervention. While the overwhelming majority of students will do well with a relatively low level of intervention (represented by the base of the triangle), other students will exhibit early warning signs for problem behaviors and will need early interventions at a slightly higher level. A few will need intensive intervention in order to succeed in the school environment.²⁶⁴ The U.S. Department of Education emphasizes that **all three tiers must be in place**, noting “[a] school that builds a school-wide foundation will still fail if it ignores the needs of children at risk of severe academic or behavioral problems or children who are seriously troubled.”²⁶⁵

Implementation of the model requires the creation of a school-wide team to assess the school’s academic and behavior programs and school climate.²⁶⁶ The school-wide team sets short-term and long-term goals to improve the quality of the school.²⁶⁷ It also establishes general disciplinary policies and procedures and selects programs to implement in the school.²⁶⁸ It shares members with the Student Support Team, whose role is to assess the needs of students who exhibit early warning signs of behavioral problems.²⁶⁹ The Student Support Team should have members with expertise in: diagnosing mental health problems; evaluating academic difficulties; conducting a functional assessment of student behavior; consulting with and supporting school staff, students, and families; coordinating school and community services; and collaborating with students and families.²⁷⁰

²⁶⁴ *Id.* at 4.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 41.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 5.

²⁷⁰ *Id.*

The essential components for each of the three-tiered interventions are discussed below, with some specific examples of research-based programs or strategies that work. It is important to note that educational experts repeatedly caution against “cherry-picking” among these programs to fashion a school discipline plan.

Ignoring any one element of the three-tiered model can undermine its successful implementation.

First Tier: Building a School-wide Foundation

There are several key components of a comprehensive, effective school-wide plan to prevent school violence.²⁷¹

Component 1: Create a caring community in which all members feel connected, safe, and supported.

This component focuses on creating a good school climate that helps students feel bonded to their schools.²⁷² Some ways to foster a positive climate include creating small learning communities within schools and developing effective programs to prevent harassment, bullying, and conflict. The following are research-based options with a track record of success:

- **Bullying Prevention Programs.** These school-wide efforts are designed to send a message that bullying will not be accepted in school.²⁷³ The American Psychological Association (APA) says, “*well-designed programs can reduce, eliminate, and prevent bully-victim problems, and significantly improve overall school climate.*”²⁷⁴ Bullying prevention programs have been shown to reduce bullying behavior by as much as 50 percent, and have also been shown to reduce the intensity of bullying and the number of new victims.²⁷⁵ Research-based programs include the Olweus Bullying Prevention Program, the Sheffield Anti-Bullying Project, and the Safer-Schools-Safer Cities Project.²⁷⁶
- **“Schools-within-Schools” Programs.** Programs like Student Training Through Urban Strategies (STATUS) group students into smaller units for more supportive interaction or flexibility in instruction, and have been found to have a positive effect on school climate.²⁷⁷

271 *Id.* at 7.

272 *Id.* at 7.

273 SAFE & RESPONSIVE SCHOOLS, EARLY IDENTIFICATION AND INTERVENTION – BULLYING PREVENTION, available at www.indiana.edu/~safeschl.

274 AM. PSYCHOL. ASS’N, *supra* note 70, at 87.

275 THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, DEVELOPING AN ANTI-BULLYING PROGRAM: INCREASING SAFETY, REDUCING VIOLENCE, available at <http://www.theiacp.org/Training/bullyingbrief.pdf>.

276 SAFE & RESPONSIVE SCHOOLS, BULLYING PREVENTION, *supra* note 273; AM. PSYCHOL. ASS’N, *supra* note 70, at 87.

277 SHERMAN ET AL, *supra* note 230, at 10 (cited as a “promising” program).

Component 2: Teach appropriate behaviors and social problem-solving skills.

This entails encouraging and teaching students to interact appropriately and use problem-solving and conflict-resolution skills. The U.S. Department of Education action guide recommends social skills instruction taught directly through structured lessons or indirectly by integrating problem-solving themes into other curricula. It cites the need to develop an infrastructure to support the ongoing use of the program, which includes three main elements—training all school staff, designating school support leaders, and monitoring and supporting the teaching of social skills.

Research-based programs include:

- **Resolving Conflict Creatively Program.** These are school-based, conflict prevention programs that begin in kindergarten and continue through 12th grade. These programs teach children different choices for dealing with conflict, help them develop skills for making those choices, encourage children’s respect for their own cultural background and those of others, teach children how to identify and reject prejudice, and make children aware of their role in creating a more peaceful world. There is a classroom curriculum component and a student-based peer mediation component.²⁷⁸
- **Promoting Alternative Thinking Strategies (PATHS).** This classroom-based curriculum for kindergarten through 5th grade students is designed to teach students social and emotional competence and problem-solving skills to prevent violence, aggression, and other problem behaviors. The curriculum uses group discussion, role-playing, art activities, stories, and education games.²⁷⁹
- **Second Step Curriculum.** This violence prevention social skills curriculum is designed to enable preschool through junior high students to change the attitudes and behaviors that contribute to violence. The curriculum also employs a video-based parent program and a series of parent group meetings.²⁸⁰

Component 3: Implement positive behavior support systems.

Effective discipline systems must be simple, proactive, and positive. Simplicity is important so that all faculty, staff, and students understand them. Behavior management systems should be proactive and positive, because **research shows that proactive approaches—such as intervening before a verbal dispute escalates into a physical fight—and positive support are far more effective than reactive approaches that emphasize punishment.**

Proven programs include:

- **Positive Behavior Interventions and Support (PBIS or PBS).** This comprehensive school-wide prevention and intervention program provides behavioral support to students and consultation support to teachers.²⁸¹ This program is endorsed by the American Psychological Association (APA) and by the Bazelon Center for Mental

278 U.S. DEP’T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 9.

279 *Id.*

280 *Id.* at 10.

281 U.S. DEP’T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 13.

Health Law as an effective, research-based best practice.²⁸² Implementation of this program has been shown to decrease rates of office referrals, suspensions, and expulsions and to improve school climate.²⁸³

- **Project ACHIEVE.** This school-wide, comprehensive early intervention program for students in elementary and middle schools emphasizes social skills, conflict resolution, improving student achievement and academic progress, facilitating positive school climates, and increasing parental involvement and support.²⁸⁴ A formal evaluation of the program found a decrease in disciplinary referrals, a decrease in out-of-school suspensions (OSS), a significant decrease in the retention of students, and a significant increase in the number of students who scored above the 50th percentile on end-of-year achievement tests.²⁸⁵

Component 4: Provide appropriate academic instruction.

Disruptive or violent student behavior can result from ongoing academic frustration and failure, and extra support may be needed to minimize that frustration and ensure greater chances for academic success. Three school-wide interventions have been proven effective, and are feasible for teachers to implement: Class-Wide Peer Tutoring, cooperative learning, and direct instruction.²⁸⁶

- **Class-Wide Peer Tutoring.** This is a method of same-age, reciprocal peer tutoring. The program incorporates a game structure. Students earn points for themselves and their team. Tutors learn to help, prompt, and care about how their partners perform.²⁸⁷
- **Cooperative Learning.** Small groups of learners work together as a team to solve a problem.²⁸⁸ Lessons are created in such a way that students must cooperate in order to achieve their learning objectives.²⁸⁹ Research based models of cooperative learning include Circles of Learning, Student Teams Achievement Division (STAD), Jigsaw, Group Investigation, and the Structural Approach.²⁹⁰ Studies have shown that cooperative learning techniques increase academic achievement for students with and without disabilities.²⁹¹

282 AM. PSYCHOL. ASS'N, *supra* note 70, at 92; BAZELON CENTER FOR MENTAL HEALTH LAW, *supra* note 238.

283 AM. PSYCHOL. ASS'N, *supra* note 70, at 92.

284 U.S. DEP'T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 13.

285 *Id.*

286 *Id.* at 7-15.

287 *Id.* at 15.

288 SAFE & RESPONSIVE SCHOOLS, COOPERATIVE LEARNING, available at www.indiana.edu/~safeschl.

289 *Id.*

290 *Id.*

291 *Id.*

Second Tier: Early Intervention for Children Exhibiting Warning Signs of Problem Behavior

Only about 10 to 15 percent of students will exhibit behaviors requiring early intervention.²⁹² Successful early intervention programs will have the following basic components:

Component 1: Review the early warning signs of violence and develop the capacity to address them.

These behavioral signs include a student's social withdrawal; excessive feelings of isolation or being alone; excessive feelings of rejection; being a victim of violence; feelings of being picked on and persecuted; low school interest/poor academic performance; expressions of violence in writings and drawings; uncontrolled anger; patterns of impulsive and chronic hitting, intimidating, and bullying behaviors; history of discipline problems; history of violent and aggressive behavior; intolerance for differences and prejudicial attitudes; drug use and alcohol use; affiliation with gangs; inappropriate access to, possession of, and use of firearms; and serious threats of violence.

However, a "*balance must be found between responding to the signs of a child who may need help and being harmful by labeling or overreacting to a situation.*"²⁹³ The principles for addressing early warning signs of problem behavior include "do no harm," understand violence and aggression within a context, avoid stereotypes, view warning signs within a developmental context, and understand that children typically exhibit multiple warning signs.

All school staff must be familiar with the early warning signs of more serious behavioral problems. This requires adequate resources, ongoing faculty and staff training, and school procedures that encourage all campus personnel to raise concerns about observed early warning signs and to report all observations of imminent danger immediately. It is critical these early reports of potential behavioral problems only be used for preliminary identification and referral purposes. If a school provides opportunities for faculty and staff to establish close, caring, and supportive relationships with children and their families, it is more likely that problem behaviors will be identified earlier—along with appropriate interventions.

The American Psychological Association suggests that, rather than resort to profiling in an attempt to identify those who may be at risk for serious violence in schools, schools instead should use research-based "threat assessment" techniques.²⁹⁴ Threat assessment is based on the premise that those who are most likely to be seriously violent in schools will communicate their intention first by making a threat.²⁹⁵ A threat assessment technique evaluates the threat to determine its potential for being carried out.²⁹⁶ This approach not only safeguards those who may be in danger, it examines the circumstances and context of the threat so that a plan can be created to deal with the student who made it in a sensitive and systematic way.²⁹⁷

292 *Id.* at 17.

293 *Id.* at 17.

294 AM. PSYCHOL. ASS'N, *supra* note 70, at 88.

295 *Id.*

296 *Id.*

297 *Id.*

Component 2: Establish a Student Support Team to connect the early warning signs to early intervention.

A Student Support Team of trained professionals should be assembled to work with teachers, children, and parents to develop interventions that address a child's specific problem behaviors. A referral process should incorporate these six principles:

- **Give scheduling preference to urgent referrals.** The Student Support Team should convene as soon as possible to discuss urgent referrals. A high-risk child should not be placed on a waiting list for a referral.
- **Encourage informal consultations.** This gives teachers, staff, students, and parents a sounding board if they are unsure of the need for a referral.
- **Inform and listen to parents when early warning signs are observed.** Parents should be involved as soon as possible.
- **Move to intervene promptly after referrals.** If at all possible, the Student Support Team should convene promptly, involve parents immediately and, at their first meeting, decide on actions or steps to take.
- **Maintain confidentiality and parents' rights to privacy.** Federal laws regarding privacy of education records must be observed when sharing information with other community agencies.
- **Circumvent the referral process in cases of imminent warning signs of destructive behavior.** Safety must always be the primary consideration. Principals may find it helpful to consult with the Student Support Team when taking immediate action and notifying the student's parents.²⁹⁸

Component 3: Develop a response process, an early intervention plan, and decide on appropriate research-based strategies for addressing problem behaviors.

The initial meeting following a referral likely will involve problem-solving, consultation, and preliminary planning. It is helpful to discuss the factors contributing to the student's behaviors, the child's strengths and weaknesses, his or her coping skills in the classroom and in interactions with teachers and peers, what teaching methods are used with the student, and the outcomes of previously tried behavior strategies.

The U.S. Department of Education recommends using a "functional behavioral assessment," a process already applied in situations involving students with disabilities, as a way to collect information about the factors underlying the student's behavior. Once this information has been gathered, a step-by-step plan is developed to replace a specific negative behavior with a positive one. Each step of the plan must be implemented as planned or written. The team must continue to monitor implementation to determine its success, and to decide whether it should be continued, scaled back, or applied to other behaviors.

298 U.S. DEP'T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 21.

No one behavior intervention strategy will work for all students. An effective program has the flexibility to use different strategies with different students, recognizing that each student will have an individual set of strengths and weaknesses.²⁹⁹

Some evidence-based early interventions that schools might consider implementing at this level include:

- **Mentoring.** Matching volunteer adult mentors with at-risk students has been shown, not only to enrich children’s lives, but also to reduce behavior problems.³⁰⁰ A number of different programs exist across the nation, with Big Brothers/Big Sisters as perhaps the best known.³⁰¹ An 18-month study of BB/BS found that youth in the program were less likely to start using drugs or alcohol or to hit someone, and had improved school attendance, attitudes, and performance, as well as peer and family relationships.³⁰²
- **First Step to Success.** This is an early intervention program for kindergarten children identified as having antisocial or aggressive behavioral problems.³⁰³ It includes three components: a kindergarten screening process, a classroom-based skills training curriculum called CLASS, and a family intervention plan called HomeBase.³⁰⁴ The program uses trained consultants who work directly with students, teachers, and parents to help coordinate intervention efforts between home and school.³⁰⁵ An evaluation found the program was effective in creating lasting improvements in the student’s behavior and social adjustment.³⁰⁶
- **Positive Adolescent Choices Training (PACT)** – PACT is a culturally sensitive violence prevention curriculum designed to be implemented in an intensive, small group setting with African American middle and high school students at risk of becoming victims or perpetrators of violence.³⁰⁷ This approach uses a cognitive-behavioral group training method that includes instruction in social and anger management skills.³⁰⁸
- **Anger Management Programs.** These programs teach students strategies that enable them to control their anger when involved in conflict.³⁰⁹
- **Peer Mediation Programs.** These school-wide programs employ a negotiation-based strategy that teaches student mediators alternatives to help resolve conflict among their peers.³¹⁰ Students trained as conflict managers assist their peers in settling disputes. There is evidence that implementing peer mediation programs is associated with

299 *Id.* at 17-29.

300 U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, MENTORING – A PROVEN DELINQUENCY PREVENTION STRATEGY (1997).

301 *Id.*

302 SAFE & RESPONSIVE SCHOOLS, MENTORING, *available at* www.indiana.edu/~safeschl.

303 U.S. DEP’T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 26.

304 *Id.*

305 *Id.*

306 *Id.*

307 *Id.*

308 *Id.*

309 SAFE & RESPONSIVE SCHOOLS, ANGER MANAGEMENT, *available at* www.indiana.edu/~safeschl.

310 U.S. DEP’T OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230.

fewer fights, fewer referrals to the office, and a decreased rate of suspension. Learning the mediation process has been shown to increase self-esteem, and even improve academic achievement.

Third Tier: Intensive Interventions for Troubled Students

The remaining three to 10 percent of students may need still more focused, intensive help to change problem behaviors.³¹¹ The intensity of the intervention should depend on the nature, severity, and frequency of the student’s emotional and behavioral problems.³¹² Students who need these interventions often are experiencing moderate to severe emotional and behavioral disorders and, in many situations, are eligible for special education services.³¹³ Again, the focus is on tailoring services and supports to each child and his or her family instead of using a “one size fits all” approach.³¹⁴ This top tier of intensive intervention should include these components:

Component 1: Initiate planning and delivery of wraparound services—utilizing school district mental health and special education professionals, where appropriate, along with a range of community services to address a student’s severe emotional and behavior problems and to provide family support.

This approach involves the Campus Support Team as well as the student and family, community agencies, and school personnel.³¹⁵ The result is a unique set of school and community services and supports tailored to meet the needs of the child and family.³¹⁶ Studies have shown that children and youth who are supported by wraparound services demonstrate improvements in behavioral adaptation and emotional functioning.³¹⁷

A coordinated continuum of easily accessible community mental health and related services should be identified to give children and adolescents with serious emotional disturbances and their families the help they need.

Effective school-based mental health programs rely on school psychologists, counselors, social workers, and other mental health professionals. They provide a comprehensive range of services to students and their families and should have strong collaborative ties with multiple community agencies.

The Student Support Team and school administrators should consider developing interagency agreements with mental health providers to facilitate integration and coordination of services.

311 *Id.* at 31.

312 *Id.*

313 *Id.*

314 *Id.*

315 U.S. DEPT OF EDUC., SAFEGUARDING OUR CHILDREN, *supra* note 230, at 38.

316 *Id.*

317 *Id.*

Component 2: Creating and/or referring to alternative education programs and schools is recommended for students with serious behavioral support needs.

The U.S. Department of Education (DOE) emphasizes *that effective alternative programs are not custodial and should collaborate with regular schools to facilitate reintegration*. In Texas, the Disciplinary Alternative Education Programs (DAEPs) are charged with this role. The DOE has identified the following as characteristics of effective alternative programs:

- Intensive individualized instruction in credit-earning coursework;
- Continuation of special education services for students with Individual Education Plans;
- Positive behavioral supports—including social skills and anger management/abatement—within a structured school environment;
- Psychological and mental health consultation and counseling;
- Active family involvement;
- Transition services that support the return to regular school;
- Community agency involvement (e.g. mental health programs, social services, law enforcement, juvenile justice);
- Caring staff committed to building relationships with students; and
- Effective, engaging instructional techniques with curriculum demands that match each student’s academic skills.

Court-Involved Student Discipline

Schools have an important role to play when courts become involved in addressing student’s behavior problems. For example:

- **Treatment Foster Care** – When out-of-home placement is mandated, treatment foster care extends the model of intensive, family-focused intervention. It includes every major aspect of the youth’s life in the intervention: the individual, family, peers, and school. Treatment foster care has been shown to reduce repeat offenses and increase the number of successful youth who return to living with relatives.
- **School-Based Probation Officers** –School-based officers provide more direct and immediate supervision for students who are on probation.³¹⁸ This has been shown to have a favorable impact on school attendance and day-to-day school conduct.³¹⁹ Absenteeism and dropping out, as well as detentions and suspension among probationers, decreased where school-based probation officers were involved.³²⁰

318 SAFE & RESPONSIVE SCHOOLS, SCHOOL-BASED PROBATION OFFICERS, *available at* www.indiana.edu/~safeschl

319 *Id.*

320 *Id.*

- **Teen Courts** – Teen courts administer justice for selected juvenile offender or school discipline cases, often for drug and alcohol abuse and related offenses.³²¹ Most do not determine guilt or innocence—instead, the youth must admit to the offense in order to qualify for teen court.³²² The teen court then determines the sanctions.³²³

Promising Practices

Reducing Referrals in Austin Schools³²⁴

Sixty Austin schools—40 elementary schools, 14 middle schools, five high schools, and the local Disciplinary Alternative Education Program—will implement the Positive Behavior Support (PBS) program before the end of 2007.

It is a school-wide program—a base upon which to begin building the three-tiered model discipline program endorsed by the U.S. Department of Education. Ten schools began using Positive Behavior Support five years ago—and already disciplinary referrals are dropping.

An Austin elementary school with the highest number of discretionary referrals to the DAEP *decreased its referral rate to one of the lowest in the district* after instituting PBS, according to Jane Nethercut, Positive Behavior Coordinator for Austin ISD.

Data for 2004-05 documents a greater awareness of school rules, a drop in bullying, and an increased percentage of students reporting they “feel safe” in school on Austin campuses implementing Positive Behavior Support.

A PBS team on each campus develops global themes for the school—such as “show respect”—along with a set of behavioral expectations to reinforce those themes. Teachers and staff discuss these in class, provide examples, and positively reinforce positive behaviors.

Interventions with students with problem behaviors are creative and individualized. For example, a student who is physically aggressive at school might be referred to counseling by an outside group, such as SafePlace, which offers shelter to women who are physically abused. Another student might be paired with an on-campus mentor who offers advice and models positive behavior.

Accurate tracking of disciplinary data helps identify repeat offenders and adapt strategies to reach them.

The Austin school district plans to implement PBS in every school in the district by the year 2010.

Amarillo ISD Targeting Behavior Change³²⁵

Amarillo ISD began implementing Positive Behavior Support (PBS) in middle schools two years ago and expects all elementary schools to implement PBS by the end of this school year.

321 SAFE & RESPONSIVE SCHOOLS, TEEN COURTS, *available at* www.indiana.edu/~safeschl

322 *Id.*

323 *Id.*

324 Information provided through pro bono partner interviews with Austin ISD administrators.

325 Information provided through pro bono partner interviews with Amarillo ISD officials.

Why begin there? Every teacher in the district’s middle schools identified student discipline issues as one of the “top three” problems at their school. PBS is expanding to Amarillo high schools beginning this fall.

Amarillo is still at the first, school-wide tier in implementing Positive Behavior Support to achieve a model school discipline program—yet creative strategies are already at work.

For the student lacking a positive male role model, a teacher is designated to serve as that student’s informal mentor. Amarillo’s PBS themes—The Three R’s: Respect Yourself, Respect Others, Respect Your School—are posted prominently and emphasized often in the schools.

One participating campus has created the “Bear Club” using the “Three R’s” as the club’s foundation. Teachers and staff who see students behaving appropriately are encouraged to give out bear tokens, which in turn entitle the students and teachers to a small prize and inclusion in a random drawing for larger prizes.

The Amarillo district’s goal for PBS is to eliminate referrals to alternative education programs and eliminate out-of-school suspensions (OSS). Their next goal: reduce referrals to in-school suspension (ISS).

Flour Bluff ISD Teaches Students Behavior Expectations³²⁶

Five years ago, Flour Bluff ISD began implementing Positive Behavior Support (PBS) in two schools with high disciplinary referral rates. Today, PBS can be found in all Flour Bluff elementary and middle schools.

Campuses are already reporting a decrease in disciplinary referrals to the principal’s office.

Flour Bluff’s PBS team believes adopting a small set of universal rules that apply to students in all schools is critical to building a set of behavior expectations that eliminates confusion for students as they change schools or move from one grade to another.

Rewarding well-behaved students with “big” prize drawings and early release on designated school days gets students on board.

Flour Bluff also believes it is important to train teachers and personnel in behavior management and to provide them with resources when they encounter challenges. Accurate and detailed data gathering on disciplinary referrals is also key to the success of Positive Behavior Support.

When the district realized that they were experiencing a disproportionate number of referrals related to student behavior on school buses, they responded by setting a goal to train all bus drivers in PBS by the beginning of the 2007-08 school year.

³²⁶ Information provided through pro bono partner interviews with Flour Bluff ISD officials and an article in the November 2005 edition of “*The Hive Keeper*,” the school district’s newsletter.

Restorative Justice: Repairing Harm and Building Community

Restorative justice places responsibility on students themselves to collaborate to find an appropriate response to wrongdoing that meets the needs of all stakeholders—instead of defaulting to more authoritarian punishments meted out under zero tolerance policies.³²⁷ Restorative practices in schools include peer mediation, classroom circles to resolve conflicts, victim-offender mediation, and family group conferencing.³²⁸ These groups decide collectively on ways to repair harm done, which may include restitution, community service, or a shortened suspension time based on completion of other restorative measures.³²⁹

This process strengthens both a sense of community and safety within schools.³³⁰ At Palisades Middle School in Kintnersville, Pennsylvania, Principal Ed Baumgartner credits restorative justice for changing the nature of relationships at his school stating, “We get along here, and that’s because the kids are respected and they know it.... We’ve grown a culture of mutual collaboration and trust.... Just [expelling] kids doesn’t work, it doesn’t solve problems it merely postpones them.”³³¹ Restorative justice practices teach students to take responsibility for and learn from their actions, taking advantage of a “teachable moment” to provide the type of guidance and instruction that zero tolerance policies do not embrace.³³²

CONCLUSION

While a range of research-based program options are available to districts looking to improve school discipline, it is critical that no one “piece”—be it mentoring programs, counseling, or school-wide Positive Behavioral Supports—be embraced as a substitute for a *well-designed three-tiered program that supports school-wide positive discipline while offering ever-increasing systems of support tailored to meet the needs of at-risk students with identified behavior problems.*

327 Carol Chmelynski, *Schools find Restorative Justice More Effective than Expulsion*, SCHOOL BOARD NEWS (Nat’l School Board Assoc., Alexandria, VA), May 17, 2005, http://nsba.org/site/doc_sbn_issue.asp?TRAC KID=&VID=55&CID=682&DID=35966; AM. PSYCHOL. ASS’N, *supra* note 70, at 90.

328 CENTER FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE PRACTICES AND PRINCIPLES IN SCHOOLS (2005) available at http://rjp.umn.edu/img/assets/13522/Restorative_Justice_in_Schools.pdf; see also Chmelynski, *supra* note 327.

329 AM. PSYCHOL. ASS’N, *supra* note 70, at 92; see also Nancy Riestenberg, *Applying the Framework: Positive Youth Development and Restorative Practices* (2006), available at http://fp.enter.net/restorativepractices/beth06_riestenberg.pdf

330 AM. PSYCHOL. ASS’N, *supra* note 70, at 90.

331 Chmelynski, *supra* note 327, at 4.

332 AM. PSYCHOL. ASS’N, *supra* note 70, at 90.

CONCLUSION & POLICY PROPOSALS:

School Discipline Policy and Alternatives to “Criminalizing” Student Behavior

This report, the first in a series examining *Texas’ School-to-Prison Pipeline: Dropout to Incarceration*, analyzes a school discipline system where:

- ❖ High recidivism and dropout rates underscore the failure of Disciplinary Alternative Education Programs (DAEPs) to meet the needs of large numbers of students—a problem compounded by the lack of state oversight.
- ❖ Where a child attends school—and not the nature of the offense—is the greater predictor of the likelihood of a student’s receiving a disciplinary referral.
- ❖ African American students—and to a lesser extent Hispanic students—are significantly overrepresented in discretionary suspensions and DAEP referrals compared to their percentage in the overall student population.
- ❖ Special education students are significantly overrepresented in discretionary referrals for nonviolent behaviors compared to their percentage in the overall student population.
- ❖ Large numbers of pre-K, kindergarten, and 1st graders are being sent to DAEPs even though Texas law restricts referral of children under age 6 to those who *bring a gun to school*.
- ❖ The Texas Education Agency collects disciplinary data from districts across Texas, but does not use this data to inform districts or to target those with high numbers of referrals for additional teacher training or intervention techniques.

Based on its quantitative data analysis, a review of qualitative data gathered from school district interviews and parent/student focus groups, and in working with our Consulting Committee, Texas Appleseed has developed the following policy recommendations to promote school discipline programs that work, are fairly applied, and have the greatest potential to reverse the trend toward higher rates of school dropouts and incarceration:

Amend the Texas Education Code to achieve the following:

- **Provide state oversight of DAEPs.** Require the Texas Education Agency (TEA) to monitor and enforce standards for Disciplinary Alternative Education Programs (DAEPs). In 2007, TEA was mandated to develop the state’s first standards for DAEPs, but not required to monitor or enforce those standards.
- **Factor “intent” into discipline decisions.** Require districts to consider a student’s “intent” when applying discipline for nonviolent, non-criminal offenses. Currently, districts *may* consider intent when exercising its discretion suspend a student or refer to a DAEP, but are not required to do so.
- **Place a cap on suspensions.** Place a cap on the number of days that a student may be referred to in-school and out-of-school suspension (ISS and OSS) in an academic year.
- **Notify districts with disproportionate disciplinary referrals.** Require the Texas Education Agency (TEA) to notify and provide guidance to districts that exceed the prior year’s statewide average referral rate to ISS, OSS, and DAEP or are at high risk for referring a disproportionate number of minority or special education students for disciplinary action. The TEA already collects this disciplinary data.
- **Compliance with federal laws.** Require TEA to monitor DAEPs to ensure compliance with federal and state statutes governing English as a Second Language instruction and education of students with disabilities.
- **Improve DAEP academic standards and course offerings.** Require TEA to improve academic standards and range of course offerings—and *explore the use of technology* to more closely link curriculum offered at DAEPs and mainstream schools.
- **Early parent notification requirements.** Require schools to alert parents *immediately* when disciplinary action is taken. Current policy requires notification within three days.
- **Rights and responsibilities.** Require the Texas Education Agency to create a model student and parent “Bill of Rights and Responsibilities” for inclusion in a school’s Code of Conduct.

In addition, the State of Texas should provide **funding for expanded school-based mental health services** and encourage partnerships between schools and community mental health providers to support students and families.

The Texas Education Agency should create a **discretionary grant program** to help fund implementation of research-based practices proven successful at reducing the number of school discretionary referrals.

Policy recommendations at the school district and campus level include:

- **Research-based discipline strategies.** Develop, implement, and regularly evaluate a school-wide disciplinary plan that employs *research-based strategies* that have been shown to reduce the number of disciplinary referrals.

- **Positive behavior support.** Ensure that expectations for behavior and consequences for misbehavior are well-defined, easily understood, and well-publicized to faculty, staff, students, and parents. Regularly recognize and *positively reward* good behavior.
- **Teacher/staff training.** Provide ongoing teacher and staff training in positive behavior management, as well as training to enhance cultural competency and the ability to form a positive relationship with parents and students.
- **Formalized plans to monitor at-risk students.** Adopt formalized, campus-based programs to monitor at-risk students to prevent escalating disciplinary action and support their success in school.
- **Transition planning.** Strengthen transition planning, monitoring, and support of students upon their return to school from a disciplinary suspension or alternative school placement.
- **Parent involvement.** Engage parents as partners in reinforcing positive behaviors at school— notifying them immediately when a disciplinary action is taken, and offering them the opportunity to enter into a signed agreement establishing a plan to address the student’s behavior as an alternative to a discretionary referral to a DAEP for nonviolent, non-criminal behavior.
- **Improve administrative oversight of ISS academics.** Ensure that students assigned to ISS are given daily assignments to keep them *on track in regular classes*.

Deserving of scrutiny is the manner in which school discipline is applied in Texas school districts—to ensure that discipline programs are fair, equitable, and research-based to optimize their effectiveness. The over-reaching goal is to support educators and school administrators in successful efforts to best manage classrooms so that the greatest number of students—including those at-risk for failure—have opportunities to learn.

APPENDIX

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QUANTITATIVE METHODS

An Overview of School Disciplinary Data

Data used in this report was obtained from the Texas Education Agency's (TEA) Public Education Information Management System (PEIMS) unless otherwise noted. Three sets of data were requested from TEA. Texas Applesseed analyzed this data in partnership with the University of Texas Population Research Center.

TEA Data Set #1: Enrollment

The first data set, obtained from TEA in summer 2006, included enrollment information by all reporting school districts for four school years: 2001-02, 2002-03, 2003-04, and 2004-05. Listed below is the number of Texas school districts included for each of the four school years. NOTE: TEA counts each charter school as a "district." Charter school referral data has been included in report footnotes, but backed out of the main report text on school district disciplinary referrals.

2001-02	2002-03	2003-04	2004-05
1,221	1,224	1,227	1,229

Enrollment information included student counts by:

- Ethnicity (White, Black/African American, Hispanic, Other);
- Gender;
- Special education status;
- Economically disadvantaged status; and
- Limited English Proficiency status.

In addition, TEA supplied graduation counts and drop out counts for each school district.

Texas Appleseed obtained enrollment data for 2005-06 from National Center for Education Statistics' Common Core of Data (website: <http://nces.ed.gov/ccd/bat/>).

TEA Data Set #2: Disciplinary Data

TEA supplied a second data set in October 2006 that included the following information:

Type of Disciplinary Data	Level	Years (Number of school districts in sample)	Characteristics of Students Referred
Referral to In-School Suspension (ISS)	School District	2001-02 (998) 2002-03 (1,002) 2003-04 (1,030) 2004-05 (1,041) 2005-06 (1,044)	<ul style="list-style-type: none"> · Reason for referral to suspension · Special Education status · Race/Ethnicity · Gender
Referral to Disciplinary Alternative Education Program (DAEP)	School District	2001-02 (879) 2002-03 (887) 2003-04 (882) 2004-05 (889) 2005-06 (888)	<ul style="list-style-type: none"> · Reason for referral to DAEP · Special Education status · Race/Ethnicity · Grade · Gender
Referral to Juvenile Justice Alternative Education Program (JJAEP)	School District	2001-02 (211) 2002-03 (201) 2003-04 (204) 2004-05 (225) 2005-06 (235)	<ul style="list-style-type: none"> · Reason for referral to JJAEP · Special Education status · Race/Ethnicity · Grade
Referral for Expulsion	School District	2001-02 (543) 2002-03 (519) 2003-04 (544) 2004-05 (565) 2005-06 (532)	<ul style="list-style-type: none"> · Reason for referral for Expulsion · Special Education status · Race/Ethnicity · Gender

For the purposes of the Texas Appleseed analysis and to manage the volume of data, the “reason for referral” codes, assigned by the Texas Education, were consolidated into five groups based on the type of infraction and/or the discretionary/mandated response to the infraction.

Group A: Mandatory Expulsion

11	Used, exhibited, or possessed a firearm. - TEC §§37.007(a)(1)(A) and 37.007(e) and/or brought a firearm to school - TEC §37.007(e)
12	Used, exhibited, or possessed an illegal knife - TEC §37.007(a)(1)(B) (Knife blade longer than 5.5 inches.)
13	Used, exhibited, or possessed a club - TEC §37.007(a)(1)(C)
14	Used, exhibited, or possessed a prohibited weapon under Penal Code §46.05 - TEC §37.007(a)(1)(D)
16	Arson - TEC §37.007(a)(2)(B)

17	Murder, capital murder, or criminal attempt to commit murder or capital murder - TEC §37.007(a)(2)(C)
18	Indecency with a child - TEC §37.007(a)(2)(D)
19	Aggravated kidnapping - TEC §37.007(a)(2)(E)
29	Aggravated assault under Penal Code §22.02 against a school district employee or volunteer - TEC §37.007(d)
30	Aggravated assault under Penal Code §22.02 against someone other than a school district employee or volunteer - TEC §37.007 (a)(2)(A)
31	Sexual assault under Penal Code §22.011 or aggravated sexual assault under Penal Code §22.021 against a school district employee or volunteer - TEC §37.007(d)
32	Sexual assault under Penal Code §22.011 or aggravated sexual assault under Penal Code §22.021 against someone other than a school district employee or volunteer - TEC §37.007(a)(2)(A)
36	Felony controlled substance violation - TEC §37.007(a)(3)
37	Felony alcohol violation - TEC §37.007(a)(3)
46	Aggravated robbery - TEC §37.007(a)(2)(F)
47	Manslaughter - TEC §37.007(a)(2)(G)
48	Criminally negligent homicide - TEC §37.007(a)(2)(H)

Group B: Mandatory DAEP Referral

02	Conduct punishable as a felony - TEC §37.006(a)(1)
04	Possessed, sold, used, or was under the influence of marijuana or other controlled substance - TEC §§37.006(a)(3), 37.007(b), and 37.007(a)(3)
05	Possessed, sold, used, or was under the influence of an alcoholic beverage - TEC §§37.006(a)(4), 37.007(b), and 37.007(a)(3)
06	Abuse of a volatile chemical - TEC §37.006(a)(2)(E)
07	Public lewdness or indecent exposure - TEC §37.006(a)(6)
08	Retaliation against school employee - TEC §37.006(b) and 37.007(d) Note: This can be an offense which requires mandatory expulsion if retaliation is coupled with TEC 37.007 (a) and (d) offense.
09	Based on conduct occurring off campus and while the student is not in attendance at a school-sponsored or school-related activity for felony offenses in Title 5, Penal Code - TEC §37.006(c) and TEC §37.007(b)(4)
26	Terroristic threat - TEC §37.006(a)(2)
27	Assault under Penal Code §22.01(a)(1) against a school district employee or volunteer - TEC §37.007(b)(3)
28	Assault under Penal Code §22.01(a)(1) against someone other than a school district employee or volunteer - TEC §37.006(a)(2)
35	False alarm/false report - TEC §§37.006(a)(1) and 37.007(b)
23	Emergency placement/expulsion - TEC §37.019. <u>Note:</u> This reason can be cited for either a DAEP placement or an expulsion. The underlying offense, however, is an offense that requires a DAEP placement.

Group C: Discretionary Disciplinary Referrals (Student Code of Conduct Violations and Permanent Removals from Class by a Teacher)

Code	Translation
01	Permanent removal by a teacher from class (Teacher has removed the student from classroom and denied the student the right to return. TEC §37.003 has been invoked.) - TEC §37.002(b)
20	Serious or persistent misconduct violating the student Code of Conduct while placed in a disciplinary alternative education program - TEC §37.007(c)
21	Violation of student Code of Conduct not included under TEC §§37.002, 37.006 or 37.007 (does not include student Code of Conduct violations covered in Groups D and E below)

Group D: Discretionary Disciplinary Referrals (Truancy & Tobacco)

33	Possessed, purchased, used, or accepted a cigarette or tobacco product as defined in the Health and Safety Code, Section 3.01, Chapter 161.252
42	Truancy (failure to attend school) - Parent contributing to truancy - TEC §25.093(a)
43	Truancy (failure to attend school) - Student with at least three unexcused absences - TEC §25.094
44	Truancy (failure to attend school) - Student with 10 unexcused absences - TEC §25.094
45	Truancy (failure to attend school) - Student failure to enroll in school - TEC §25.085

Group E: Other Discretionary Disciplinary Referral Reasons

10	Based on conduct occurring off campus and while the student is not in attendance at a school-sponsored or school-related activity for felony offenses not in Title 5, Penal Code - TEC §37.006(d) and TEC §37.007(b)(4)
22	Criminal mischief - TEC §37.007(f)
34	School-related gang violence - Action by three or more persons having a common identifying sign or symbol or an identifiable sign or symbol or an identifiable leadership who associate in the commission of criminal activities under Penal Code §71.01
41	Fighting/Mutual Combat - Excludes all offenses under Penal Code §22.01
49	Engages in deadly conduct
50	Used, exhibited, or possessed a non-illegal knife as defined by student Code of Conduct and as allowed under TEC 37.007. (Knife blade equal to or less than 5.5 inches.)

http://www.tea.state.tx.us/adhocrpt/Disciplinary_Data_Products/Disciplinary_Data_Products.html

TEA Data Set #3: Disciplinary Data

The third data set received in February 2007 included the following information for Out-of-School Suspensions (OSS) only.

Type of Disciplinary Data	Level	Years (Number of school districts in sample)	Characteristics of Students Referred
Referral to Out-of-School Suspension (OSS)	School District	2001-02 (978) 2002-03 (1,002) 2003-04 (1,012) 2004-05 (1,020) 2005-06 (1,017)	· Reason for referral to OSS · Special Education status · Race/Ethnicity · Gender

APPENDIX

*Quantitative
Methods*

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Cross-tabs and the Masking of Data

The Texas Education Agency forwarded the requested disciplinary data in the form of “cross-tabs.” This means that, within each school district, counts of students were given for each of the possible combinations of the various student characteristics. For example, the Out-of-School Suspension data was broken down by: (1) the reason for referral (*See Groups A-E above*), special education status (yes or no), race/ethnicity (African American, Hispanic, White, or Other), and gender (male or female). The total possible number of combinations of student characteristics for OSS Data is:

5 (Referral Reason Groups) x 2 (Special Ed) x 4 (Race/Ethnicity) x 2 (Gender) = 80 possible combinations of student characteristics

Because counts were broken down with such specificity, some smaller school districts had very few students fitting one or more combinations of student characteristics. For example, a small school district might have only two Hispanic, non-special education, male students referred to OSS for a Type D offense.

In instances where fewer than five students shared particular characteristics within a school district, the data was “masked” to ensure the privacy of individual students as mandated by the Family Educational Rights and Privacy Act (FERPA).

Dealing with Masked Data: Using “Low Estimates”

For every student count that was masked, both high and low estimates were generated. For high estimates, all masked counts were replaced with the number 4—the highest possible value for masked data. For low estimates, all masked counts were replaced with the number 1—the lowest possible value. More information about how high and low estimates were used within specific sections of the report is detailed below; however, as a general practice, only low estimates were utilized in this report.

Given that only low estimates were used when presented with “masked” data, *it is probable that our data underestimates the gravity of disproportional disciplinary actions within Texas school districts.*

Detailed Description of Data Use

Below we describe more specifically how the data obtained from the Texas Education Agency was used in the context of this report. The headings below correspond to the headings used within the body of the publication.

Texas School Discipline Policies: Impacting the School-to-Prison Pipeline

Visit the Texas Appleseed website at www.texasappleseed.net to see the corresponding data file: Statewide Discretionary & Mandatory Referrals, by Category of Offense, 2001-06.

This chapter includes data on the number of discretionary and mandatory disciplinary referrals made during the five academic years between 2001 and 2006. The totals were obtained by aggregating low estimate DAEP referral counts by reason code for all school districts for which we received data from TEA.

To generate the chart “Statewide DAEP Referral Rate by Grade Level, 2005-06” low estimates of DAEP referrals for each school district were generated by grade. Low estimates for each grade were then aggregated to generate a statewide estimate for total DAEP referrals by grade, including pre-K and kindergarten. The low estimates for total referrals for each school district were aggregated. For each grade level, the aggregated statewide low estimate of grade level referrals was divided by the aggregated statewide low estimate for total referrals. This made it possible to see how DAEP referrals are distributed across grade levels—and identify the grades in which more DAEP referrals occur.

Overrepresentation of Minority and Special Education Students in Disciplinary Referrals

Visit the Texas Appleseed website at www.texasappleseed.net to see the following corresponding data files:

- Overrepresentation of Minority and Special Education Students in Discretionary Referrals to ISS, 2001-06
- Overrepresentation of Minority and Special Education Students in Discretionary Referrals to OSS, 2001-06
- Overrepresentation of Minority and Special Education Students in Discretionary Referrals to DAEPs, 2001-06
- Statewide Enrollment & Overall Disciplinary Referral Rates, 2001-06
- Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to ISS, 2001-06
- Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to OSS, 2001-06
- Districts with High Percentage of Discretionary Referrals of Minority and Special Education Students to DAEPs, 2001-06

In the chapter entitled *Texas School Discipline Policies*, the data in the charts reflects overrepresentation of minority students in discretionary referrals only to DAEPs and suspension (ISS and OSS)—*See Group C referral reasons above*. While the report only references disproportional rates of disciplinary action for Hispanic and African American students, Texas Applesseed also examined the data for potential over-referral of white students to ISS, OSS, and DAEPs. **However, no Texas school district disproportionately represented white students in disciplinary referrals.** The data available for Asian students and Native American students was too small to yield conclusive results.

To further refine the method of identifying school districts with disproportionate disciplinary referrals of minority students to DAEPs, we utilized the Chi Squared Statistic. Use of the Chi Squared Statistic is common in academic and statistical analysis when trying to discern if two variables are independent of each other. For the purposes of this report, we are interested in whether or not race and disciplinary referral are independent of each other (i.e., that the student’s race does not appear to influence referral to disciplinary action.) When using a Chi Squared Statistic, we are concerned with the difference between the number of referrals we would *expect* for a certain population (based on their proportion within the general population) and the *actual number of referrals* for that population. While it can be said that anytime there is a difference between expected number of referrals and actual number of referrals, there is a disproportionate rate of referral, the Chi Squared Statistic is *a more rigorous test* of disproportionality because it alerts us to disproportionality that is extreme enough to draw the conclusion that independence does not exist between race and disciplinary referrals. Because values vary between each school district and within in each school district from year to year, the Chi Squared Statistic was calculated for each school district and for each school year for which we had data using the following steps:

STEP ONE: Determine the proportion of the target group within the student body.
Number of students in Target Population/Number of students enrolled in district
= Proportion of Target Population

STEP TWO: Generate the low and high “expected” number of “Group C” referrals for the target population.
Proportion of Target Population
x Low Estimate of Referrals for Target Population
= Low Estimate of Expected Number of Group C Referrals

AND

Proportion of Target Population x High Estimate of Referrals for Target Population = High Estimate of Expected Number of Group C Referrals

STEP THREE: Generate the Chi Squared Statistic

$$\begin{aligned} & [\text{Number of Actual Referrals (Low Estimate)} \\ & - \text{Number of Expected Group C Referrals (Low Estimate) squared}] \\ & \div \text{Expected C Referrals (Low Estimate)} \\ & = \text{Chi Squared Statistic} \end{aligned}$$

AND

$$\begin{aligned} & [\text{Number of Observed Group C Referrals (High Estimate)} \\ & - \text{Number of Expected Group C Referrals (High Estimate) squared}] \\ & \div \text{Expected Group C Referrals (High Estimate)} \\ & = \text{Chi Squared Statistic} \end{aligned}$$

STEP THREE: Delete the cases in which there are less than three observed Group C referrals. (With such a small number of referrals, it is difficult to determine if there is a relationship between race and disciplinary referral.)

STEP FOUR: Select nine as the “cut off” value for the Chi Squared Statistic (see explanation below); select cases where both the high and the low Chi Squared Statistic is nine or greater.

The Chi Squared Statistic is sometimes used to test a hypothesis, but here it is used to measure which schools are referring students for disciplinary action at disproportionate rates. A cut off value of nine was used to identify the most extreme cases of disproportionality. All school districts that had chi squared statistical values greater than nine are statistically highly significant (at a level of .01 or better)—meaning it is highly likely that race and disciplinary referrals are *not* independent of each other.

Only those school districts that had the highest Chi Squared Statistics for 2005-06 were included in the listings for the top districts over-representing African American and Hispanic students in discretionary disciplinary referrals to ISS, OSS, and DAEPs.

Over-representation of Special Education Student in Disciplinary Referrals

The Chi Squared Statistic also was used to identify school districts referring special education students for disciplinary action at disproportionate rates. See discussion above for details.

Disciplinary Referrals: Pre-Kindergarten, Kindergarten & 1st Grade Students

Visit the Texas Appleseed website at www.texasappleseed.net to see the corresponding data file: Districts with Discretionary Disciplinary Referrals for Pre-K, Kindergarten, & 1st Grade Students, 2001-06.

For each school district, low estimates of DAEP referrals were generated for pre-kindergarten, kindergarten, and 1st graders for each academic year between 2001 and 2006. We added the total number of these referrals over that five-year period to generate the numbers included in the charts in this report.

Variation in Disciplinary Referral Rates across Texas

Visit the Texas Appleseed website at www.texasappleseed.net to see the corresponding data files:

- Overall ISS Referral Rates by School District, 2001-06
- Overall OSS Referral Rates by School District, 2001-06
- Overall DAEP Referral Rates by School District, 2001-06

To obtain the state referral rate, low estimates of school district’s overall DAEP referrals (Reason for Referral Groups A-E above) were aggregated to generate a low statewide estimate of total referrals that included a conservative accounting for masked data. Low estimates of enrollment data for all school districts with DAEP data also were aggregated to generate a low statewide estimate of total enrollment. The statewide low estimate of total referrals was divided by the low statewide estimate of total enrollment to determine the statewide referral rate.

A similar process was undertaken at the school district level: a low estimate of total DAEP referrals for each school district was divided by the low estimate of total enrollment for that school district. This process resulted in a disciplinary referral rate for each school district.

The referral rates generated for each school district were then compared with the statewide referral rate to discern how many school districts have referral rates higher than that of the state.

The same process was undertaken for out-of-school suspensions (OSS) and in-school suspensions (OSS).

A HISTORY: Zero Tolerance & School Discipline in Texas

Until 1947, the State generally did not involve itself with public education—the education of Texas’ youth was left largely to local governments to finance and organize. Though a “per capita” system of state funding was in place, this funding left wide disparities between rich and poor school districts.¹ Post World War II, the State’s public school system began to be perceived as inadequate to meet the challenges of that era.²

Consequently, the Gilmer-Aiken Study Committee was created by the 50th Legislature to study public education in Texas and recommend changes.³ These changes were focused on fundamental issues such as financing and designing a “new” system, encouraging a better plan for teacher education and certification, and equalizing funding for the State’s school districts.⁴ The Committee’s final report to the legislature did not include any recommendations related to student discipline.⁵ State lawmakers continued to focus on school funding in the years following the enactment of the reforms recommended by the Gilmer-Aiken Committee, but little attention was paid to school discipline issues.

In the mid-1960s, however, the legislature began to consider problems associated with juvenile crime. At about the same time, the legislature began to focus on community-based mental health initiatives, resulting in the creation of the Texas Department of Mental Health and Mental Retardation in 1965. The legislation passed in 1965 included provisions for creating and funding community mental health/mental retardation centers.⁶

1 Marilyn Kuehlem, *Education Reforms from Gilmer-Aiken to Today*, in TEXAS PUBLIC SCHOOLS SESQUICENTENNIAL HANDBOOK 60 (Texas Education Agency 2004).

2 HOUSE RES. ORG., DIGEST – 68TH LEGISLATIVE SESSION 5 (1983); GILMER-AIKEN COMM., FINAL REPORT, 50th Leg. R.S. (1947).

3 Marilyn Kuehlem, *supra* note 1; GILMER AIKEN COMM., *supra* note 2, at 3.

4 Marilyn Kuehlem, *supra* note 1; GILMER-AIKEN COMM., *supra* note 2.

5 GILMER-AIKEN COMM., *supra* note 2.

6 See Texas Council of Community Mental Health & Mental Retardation Centers, Inc., *About the Council*, available at http://www.txcouncil.com/about_the_council.aspx.

As a result of this concurrent look at juvenile crime and better community-based mental health services, many of the recommendations coming out of juvenile crime committees focused on intervention and prevention at the school level. For example, in 1967, the Interim Committee on Juvenile Crime made the following recommendation to the legislature:

Testimony and data gathered for the committee indicated that, while delinquency as such might not appear until fairly late in adolescence, indications that a child might become delinquent could appear early in life. Some sociologists believe that it can be predicted on the basis of infant behavior. Many witnesses felt that those predelinquent children needed guidance early in life. Few schools have the personnel or funds available to do the kind of diagnosis and counseling that may be required, but we believe that the resources they now have could be better utilized and extended.

What counseling that is done in the elementary grades is usually done by the teacher. There is a real need for a highly skilled person who can offer support when the knowledge and skills of the classroom teacher, if such are available, have been exhausted. This person, in addition to handling the especially difficult problem children, would help develop inservice training programs to improve the counseling knowledge and skills of the classroom teacher, the elementary counselor, the high school counselor, and the visiting teacher.

The committee encountered many instances, especially in high schools, where counselors did very little, if any, counseling and what counseling they did was largely of a vocational nature. Their time too often was burdened with chores such as text-book inventory, handling football tickets, or record-keeping.

The committee, therefore, recommends the creation of a new position within the minimum foundation program of counselor-consultant...His responsibilities would include the development of improved programs of diagnosis and evaluation of children, counseling, home visitation, and institution of inservice training programs for visiting teachers, classroom teachers, and elementary and secondary school counselors...The counselor-consultant or one of his staff would also be responsible for liaison with the local juvenile authorities for court related children.⁷

The Interim Committee on Juvenile Crime recommended that the Texas Education Agency (TEA) develop a civics unit as part of the public school curriculum, based on its finding that many juvenile offenders were not familiar with Texas laws.⁸ It also recommended that school districts create vocational and occupational training programs for students who were not interested in going to college.⁹

The Interim Committee also recommended that TEA develop a system of reporting and dissemination of information on programs being developed in school districts around

7 INTERIM COMM. ON JUV. CRIME, JUVENILE CRIME IN TEXAS A REPORT TO THE 60TH LEGISLATURE, at 4-5 (1967).

8 *Id.* at 6.

9 *Id.*

the State related to “reading retardation, dropouts and delinquency.”¹⁰ The Committee recommended that school districts that had established policies prohibiting corporal punishment reconsider this decision and “avoid the excesses of coddling.”¹¹ Aside from the creation of the new counselor-consultant position, all of these recommendations were simply that—recommendations for action on the part of local school districts or TEA.

Creation of the Texas Education Code

In 1969, the State passed an omnibus education bill creating the Texas Education Code.¹² Subchapter I of the Code, entitled “*Discipline; Law and Order*,” included provisions allowing the board of trustees of a school district to suspend “any pupil found guilty of incorrigible conduct.”¹³ The Code also allowed the school attendance officer to bring proceedings in juvenile court against any student “who is reported to him as being insubordinate, disorderly, vicious, or immoral in conduct, or who persistently violates the reasonable rules and regulations of the school...or who otherwise persistently misbehaves in such a manner as to render himself an incorrigible.”¹⁴ The juvenile court judge was given the power to parole the student, conditioned on his or her attendance in school and compliance with school rules and regulations.¹⁵ If the child violated the terms of parole more than once, the judge was given the authority to commit the child to a “training school.”¹⁶ The Code did not contain provisions regarding expulsion.

This section of the Education Code remained largely unchanged for the next 10 years, most likely because, as the Texas House of Representatives Committee on Public Education found in its Interim Report to the 65th Legislative Session, the consensus was that “disciplinary procedures...are best handled at the local level.”¹⁷ However, as in the mid-1960s, the legislature remained interested in methods that could be employed in schools to prevent emotional disorders and delinquency problems. In 1971, the Committee to Study the Psychiatric Problems of Youth presented its report to the legislature. The Committee concluded that “the problems of youth are to a large extent, in their beginnings, emotional and psychiatric problems.”¹⁸ The report included discussion of a Community Guidance Center program in San Antonio.¹⁹ According to the report, this program utilized teachers and school personnel as “mental health scouts” whose focus was to recognize emotional problems which might respond to counseling or treatment.²⁰ Based on its study of this program, the Committee recommended that teachers and other personnel in the public schools be trained in spotting “incipient mental health problems.”²¹

10 *Id.* at 7.

11 *Id.* at 9.

12 Tex. HB 534, 61st Leg., R.S. (1969).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 TX. HOUSE OF REP. COMM. ON PUB. EDUC., INTERIM REPORT 5 (1976).

18 COMM. TO STUDY THE PSYCHIATRIC PROBS. OF YOUTH, REPORT 2 (1971)

19 *Id.* at 4-5.

20 *Id.* at 4.

21 *Id.* at 5.

The legislature's prevention efforts also focused on placing alcohol and drug education programs into the curriculum of public schools.²² This was done in response to the rising number of drug-related arrests.²³

In 1979, the legislature amended the Texas Education Code to allow teachers to remove a pupil from the classroom "to maintain effective discipline."²⁴ The amendment also allowed a teacher to immediately remove a student who assaulted the teacher, or "repeatedly interfere[d] with that teacher's ability to communicate effectively with the majority of students in the class."²⁵ Under this section, the teacher could recommend the student for suspension, and the student could be suspended by the principal after a due process hearing.²⁶

Attorney General's Model Code of Student Conduct

In 1980, Attorney General Mark White hosted a conference intended to encourage school districts to adopt a student Code of Conduct. As a result of that conference, his office published a proposed "Voluntary Student Code of Conduct."²⁷ At that time, there were already provisions in place in the penal code and the Education Code making it illegal to bring guns or weapons onto campus.²⁸ The Education Code also prohibited hazing. Use of tobacco was prohibited on school campuses, except in designated areas, as was possession, using, selling, or being under the influence of drugs or alcohol.²⁹ The Education Code prohibited "disruptive activities"—primarily aimed at student demonstrations.³⁰

The model Code of Conduct also listed these guidelines for disciplining students:

- *The district's objective is to educate students. Discipline shall be administered only when necessary to protect students, school employees, or property, or to maintain essential order and discipline.*
- *Disciplinary action should not be "punitive" per se, but should be designed to correct the misconduct of the individual student and to promote compliance of all students with district rules and regulations.*
- *Students shall be treated fairly and equitably. Discipline shall be based on a careful assessment of the circumstances of each case, i.e., the seriousness of the offense, the student's age, the frequency of misconduct, the student's attitude, and the potential effect of the misconduct upon the school environment.*
- *Discipline shall never be administered so as to ridicule a student, nor be imposed maliciously.*³¹

22 STUDY COMM. ON DRUG ABUSE EDUC., INTERIM REPORT (1976); SELECT COMM. ON DRUG AND ALCOHOL ABUSE, INTERIM REPORT 16 (1978).

23 STUDY COMM. ON DRUG ABUSE EDUC., *supra* note 22, at 4.

24 TEX. EDUC. CODE § 21.301 (West Supp. 1979).

25 *Id.* at § 21.301.

26 *Id.*; the due process requirements were likely included in response to *Goss v. Lopez*, 419 U.S. 565 (1975), the U.S. Supreme Court decision requiring a due process hearing prior to suspension.

27 ATT'Y GEN. MARK WHITE, THE ATTORNEY GENERAL'S PROPOSED VOLUNTARY STUDENT CODE OF CONDUCT (1980).

28 *Id.* at 4-5.

29 *Id.* at 7.

30 *Id.* at 8.

31 *Id.* at 10.

The model code notes, “Disciplinary responses shall be determined after thorough consideration of all relevant facts and circumstances. Discipline shall be appropriate to the offense committed.”³² Of suspension, the model Code of Conduct states, “Suspension is a severe disciplinary measure which shall ordinarily be imposed only when a student has committed a serious misconduct or has persisted in other misconduct despite previous, less severe disciplinary measures.”³³

Governor’s Advisory Committee on Education

In 1979, the legislature asked the State Board of Education to study curriculum reform and competency testing of teachers during the interim.³⁴ In response, Governor Clements created the Governor’s Advisory Committee on Education. In the executive order creating the Committee, the Governor specifically named “discipline in the classrooms” as one of the issues to be explored.³⁵ In its report, the committee included a section entitled “Fostering Responsible Student Behavior.”³⁶ This section focused on two concerns: the need for a written student Code of Conduct and better enforcement of student attendance. In its discussion of “Successful Programs,” the committee said:

*Some school districts operate successful instructional and related support programs specifically designed to address the needs of disruptive and potentially disruptive students. In-building suspension programs in which disruptive students attend classes (in a classroom or facility separate from other students) are usually effective and receive support from parents and teachers. Systematic intervention programs (in which students with potential behavioral and academic problems are identified and specially supported) and alternative learning centers have significantly reduced the number of instances requiring discipline in some schools. The initiative for implementing such programs rests with the district.*³⁷

The recommendations made by the Committee included:

1. *implement alternative learning programs which provide instructional and related support to disruptive or potentially disruptive students. The focus of such programs should be on early identification and prevention.*
2. *adopt, consistent with State Board of Education accreditation standards, comprehensive policies regarding student behavior which provide:*
 - *a code of student conduct (student participation in development promotes peer enforcement);*
 - *a method for communicating school district rules and procedures to parents, students, and employees; and*

32 *Id.* at 11.

33 *Id.* at 12.

34 HOUSE RES. ORG., *supra* note 2, at 6.

35 Tex. Gov. Exec. Order No. WPC-6 (June 7, 1979).

36 GOVERNOR’S ADVISORY COMM. ON EDUC., REPORT AND RECOMMENDATIONS 8 (1980).

37 *Id.*

- *a procedure for maintaining written documentation that each parent and/or guardian and each student has read, understands, and has signed the district's code of student conduct and compulsory attendance provisions.*³⁸

The committee also recommended that parents read and support the school district's Code of Conduct.³⁹

Select Committee on Public Education (SCOPE)

In 1981, during the first called session of the 67th Legislature, the Texas Legislature appointed the Select Committee on Public Education (SCOPE) to study “the issues and concerns relating to public education.” Though the primary concerns explored by SCOPE were related to curriculum reform and teacher competency,⁴⁰ one of their reports focused specifically on “alternative instructional arrangements.”⁴¹ This report included a section on alternative programs for “disruptive students.”⁴²

The report discusses the results of a study of six pilot “school-community guidance centers,”⁴³ SCOPE felt the results of the study showed the programs to be an effective alternative to suspension.⁴⁴ During the 1979-80 school year, these centers served 2,043 students; of those students, 1,890 returned to their regular school programs exhibiting improved performance and behavior.⁴⁵ Of the students who attended the centers, only 21 were reported to have dropped out before returning to their regular campus.⁴⁶ The Governor's Advisory Committee, discussed above, reviewed the results of these pilot programs and endorsed them—resulting in the 67th Legislature's passage of a bill aimed at encouraging school districts to establish new centers in school districts with an average daily attendance of at least 6,000 students.⁴⁷

By the time the SCOPE report was published, 11 centers had been funded.⁴⁸ The section on alternative programs for disruptive students was devoted to an analysis of 10 of these programs. The report notes that the centers had several objectives, including “(1) helping students with assignments from their home schools or conducting an alternative curriculum; (2) counseling; (3) coordinating services with other agencies; (4) encouraging parental involvement in the school and with the student; and (5) follow-up with students once they returned to the regular school.”⁴⁹ The report concluded that the centers “appear[ed] to be successful because students are not dropping out of school while at the center and because most students assigned to the centers return to the

38 *Id.* at 8.

39 *Id.* at 9.

40 HOUSE RES. ORG., *supra* note 2.

41 SELECT COMM. ON PUBLIC EDUC., ALTERNATIVE INSTRUCTIONAL ARRANGEMENTS (1981).

42 *Id.* at 18-20.

43 *Id.* at 18.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 19.

regular classroom.”⁵⁰ When the report was released, it showed that 10 of the centers had served a total of 5,310 students and that only 97 of those students were “repeaters.”⁵¹

The report also discussed the use of in-school suspension (ISS), noting that 90 percent of districts with an average daily attendance of more than 5,000 operated ISS centers.⁵² Eight percent of the school districts’ ISS centers had an average daily attendance of 50 or more; 73 percent averaged less than 10 students daily.⁵³

Finally, SCOPE noted the importance of having a student Code of Conduct.⁵⁴ The report mentioned the Attorney General’s model code, which was endorsed by the State Board of Education.

In its conclusion, the Committee included the following:

In alternative instructional arrangements dealing with disruptive students, the success rate of returning these students to the normal classroom environment rather than out-of-school suspension (OSS) appears to be significant. Clearly, there are a number of factors affecting this success rate—the root of the problem behavior, parental involvement, support services available, and the student’s attitude about himself.

*Care should be taken in identifying and evaluating disruptive students since the primary goal of the school should be the normal progression of the student in a healthy environment. . . It is in certain cases where support services are required in addition to those found in the regular classroom, however, that some type of alternative instructional arrangement appears to become feasible.*⁵⁵

In all, SCOPE issued six interim reports, each focused on a separate topic, as well as a final report. Though the final report included a series of recommendations arising out of the committee’s study of alternative education programs, none of these recommendations focused on programs related to disruptive students.⁵⁶ Nor did the committee recommend requiring the creation of alternative learning programs—rather, the report encouraged the State to provide school districts with the resources they needed to create programs that would allow districts “to focus on their own needs, and. . . fin[d] solutions to their own problems.”⁵⁷

The 1983 Legislature did not make any significant revisions to the disciplinary provisions of the Texas Education Code as a result of the SCOPE report on alternative learning programs. Changes made during this session were focused almost exclusively on school finance.⁵⁸

50 *Id.*

51 *Id.*

52 *Id.* at 20.

53 *Id.*

54 *Id.*

55 *Id.* at 22.

56 SELECT COMM. ON PUBLIC EDUC., EXECUTIVE SUMMARY AND REPORT OF THE EDIT AND REVIEW COMMITTEE 23 (1982).

57 *Id.*

58 HOUSE RES. ORG., *supra* note 2.

The Perot Committee

At the end of the 1983 Legislative Session, there was yet another call to examine the Texas public school system. Though Governor White's proposal to increase taxes to fund a teacher pay raise failed during the 1983 regular legislative session, Speaker Gib Lewis proposed a comprehensive study of the needs of the public education system as part of considering whether a tax increase was needed.⁵⁹ Consequently, the Select Committee on Public Education (SCOPE) was reconstituted, with H. Ross Perot, an influential businessman, named chair of the Committee.⁶⁰ At about the same time, a widely-cited report was released by the National Commission on Excellence in Education entitled "*A Nation at Risk: The Educational Imperative for Educational Reform*."⁶¹ The report indicated that U.S. students lagged those in other nations, and warned of "a rising tide of mediocrity."⁶²

Though the legislature's charge to SCOPE focused almost exclusively on school finance, the Committee "sought conscientiously to examine every aspect of [the] public education system."⁶³ Consequently, its final report to the legislature included a discussion of disciplinary issues. The Committee recommended that a Code of Conduct be developed, and that parents acknowledge agreement with the code when they enrolled their children in public schools.⁶⁴ The Committee also recommended maintaining and increasing appropriations for school-community guidance centers and alternative schools.⁶⁵ In addition, SCOPE made the following recommendations regarding guidance centers and alternative schools:

C. Upon enrollment in a guidance center/alternative program, the district, parent and student shall develop a "contractual agreement" that specifies responsibilities of both parent and student to include:

- 1. student behavioral and learning objectives;*
- 2. parent required attendance at specified meetings/conferences for teacher review of student progress;*
- 3. parent written acknowledgement of understanding and accepting outlined responsibilities to attend conferences and to meet other objectives as defined by the district to aid student remediation;*
- 4. district superintendent authority to seek a district court order requiring parental compliance with the contractual agreement, enforced with court power of contempt.⁶⁶*

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ Marilyn Kuehlem, *supra* note 1, at 65; HOUSE RES. ORG., *supra* note 2, at 7.

⁶² Marilyn Kuehlem, *supra* note 1, at 65.

⁶³ SELECT COMM. ON PUBLIC EDUC., RECOMMENDATIONS 3 (1984).

⁶⁴ *Id.* at 19.

⁶⁵ *Id.* at 23.

⁶⁶ *Id.* at 23.

The SCOPE report included a section on “Discipline Management Programs.” In this section, the Committee recommended:

- A. *The (Central Education) Agency shall review and approve a variety of discipline management programs to be implemented by school districts. School districts shall adopt an Agency approved discipline management program by 1986. An approved discipline management program shall include but not be limited to:*
 - 1. *Commitment, cooperation, and involvement of school district administrators, teachers, parents, and students in the program development.*
 - 2. *Development of a Student Code of Conduct that is clearly defined and enforced. This Code shall establish district expectations and provide for the specific consequences for violation. This Code shall at least contain the provisions established under the Attorney General’s Code of Conduct in 1980.*
 - 3. *Designation of the person(s) in each school with specific training for discipline management implementation and program assessment, and for the specific identification and referral of students for alternative school/ community guidance centers.*
 - 4. *Encouragement of the Regional Education Service Center for assistance in the development of appropriate discipline management and inservice training for the district.*
 - 5. *Parental responsibility as an integral part of the discipline management program, and specifically outlined roles and responsibilities for parent, student, and administration such that school districts shall require:*
 - a. *the presence of a parent or guardian to enroll a student each year;*
 - b. *a minimum of two parent/teacher conferences during the school year;*
 - c. *parent training workshops for home reinforcement of student study skills and specific curriculum objectives;*
 - d. *written acknowledgement by the parents that they understand and accept all of the above.*
- B. *The Agency shall assist school districts in the development of discipline management programs by recommending specific training programs available at institutions of higher education such as the Southwest Texas Discipline Training Institute.*
- C. *The Agency shall monitor the enforcement of an approved discipline management program through the accreditation process. The Agency shall make specific recommendations for improvement in a district’s discipline management program and establish procedure for follow up.*

D. The teacher performance evaluation process required for career ladder implementation shall include specific measures for evaluating discipline management procedures used by the classroom teacher.

E. School districts shall verify to the Agency by year 1986 that every teacher in the district has received specific training in the approved discipline program. This training shall occur either through inservice or other special instructional arrangement by the district. School districts shall use inservice programs to reinforce teacher training in discipline management.⁶⁷

These recommendations reflect a shift away from the assumption that discipline issues were best handled at the local level. The amendments to the Education Code arising out of the Perot Committee's recommendations also reflect this shift, and included substantial changes in the way student discipline was to be handled. The amendments eliminated extended out-of-school suspension (OSS) as an option for disciplining a student, requiring instead that students be removed to an "alternative education program." The following section was added to the Education Code:

SUBCHAPTER R. DISCIPLINE MANAGEMENT PROGRAMS

Sec. 21.701. ADOPTION AND APPROVAL OF PROGRAMS. Each school district shall adopt and implement a discipline management program. Before implementation, the proposed program must be submitted to the Central Education Agency, which shall review and approve or reject the program.

Sec. 21.702. CONTENT OF APPROVED PROGRAMS. To be approved, a discipline management program must:

- (1) encourage the commitment, cooperation, and involvement of school district administrators, teachers, parents, and students in the development of the program;*
- (2) encourage the use of the regional education service center to assist in developing the program and providing training to teachers and administrators;*
- (3) require the designation of a person in each school with special training in discipline management to implement and assess the program in that school and to identify and refer appropriate students to school-community guidance programs;*
- (4) require the development of a student Code of Conduct that clearly describes the district's expectations with respect to student conduct, including provisions similar to the Attorney General's Proposed Voluntary Student Code of Conduct of 1980, and specifies the consequences of violating the code;*

⁶⁷ *Id.* at 24-26.

- (5) *specifically outline the responsibilities of teachers, administrators, parents, and students in the discipline management program; and*
- (6) *make parental involvement an integral part of the discipline management program, requiring:*
 - (A) *at least two parent-teacher conferences during each school year;*
 - (B) *parent training workshops for home reinforcement of study skills and specific curriculum objectives; and*
 - (C) *a written statement by each parent that the parent understands and consents to the responsibilities outlined in the program.*⁶⁸

The amended statute also included a section that required teacher training in “the discipline management program that is adopted in the district.”⁶⁹ It called for reinforcement of the training during inservice sessions.⁷⁰

The amendments arising out of the Perot Committee also established the use of alternative education programs in lieu of suspension or expulsion. The Code was amended to include the following:

Sec. 21.301 REMOVAL OF INCORRIGIBLE PUPILS; ALTERNATIVE EDUCATION PROGRAM. (a) The board of trustees of a school district or the board’s designate, on finding a pupil guilty of incorrigible conduct, may remove the pupil to an alternative education program. The board or its designate may not suspend or expel the pupil except as provided by Section 21.3011 of this code.

(b) To find a pupil guilty of incorrigible conduct, the board of trustees or the board’s designate, at a hearing that provides procedural due process, must find:

- (1) *that the pupil’s continued presence in the regular classroom program or at the home campus presents a clear, present, and continuing danger of physical harm to the pupil or to other individuals; or*
- (2) *that:*
 - (A) *the pupil has engaged in serious or persistent misbehavior that threatens to impair the educational efficiency of the school;*
 - (B) *the misbehavior violates specific, published standards of conduct for the school district; and*
 - (C) *all reasonable alternatives to the pupil’s regular classroom program, including a variety of discipline management techniques, have been exhausted.*

68 Tex. HB 72, 69th Leg., R.S. (1985).

69 *Id.*

70 *Id.*

- (c) *The pupil's parent or representative is entitled to notice of and to participate in a disciplinary proceeding under this section.*
- (d) *Except as provided by this subsection, the term of a removal under this section may not exceed the end of the semester during which the conduct that directly led to the removal occurred. If the conduct occurred during the final six-week reporting period of a semester, the term of the removal may exceed the end of that semester but may not exceed the end of the next semester.*
- (e) *The board of trustees or its designate shall make reasonable efforts to provide for the continuing education of a pupil removed under this section, including providing for the pupil to be in:*
- (1) *a supervised educational setting, such as:*
 - (A) *in-school suspension;*
 - (B) *reassignment of classes;*
 - (C) *transfer to a different school campus;*
 - (D) *transfer to a school-community guidance center; and*
 - (E) *assignment to a community-based alternative school; or*
 - (2) *an unsupervised educational setting, including home-based instruction.*
- (f) *a pupil who is removed for being truant or tardy may not be placed in an unsupervised educational setting.*
- (g) *A teacher may remove a pupil from class in order to maintain effective discipline in the classroom. The principal shall respond by employing disciplinary alternatives consistent with local policy.⁷¹*

This section also included a provision requiring school districts to develop an alternative education program for pupils found guilty of incorrigible conduct that “provide[d] for keeping the pupils in an educational environment with the school district’s supervision.”⁷² Every school district was required to submit an outline of its discipline management program to the State Board of Education for approval.⁷³

Finally, the disciplinary revisions included a section allowing expulsion:

Sec. 21.3011. EXPULSION OF INCORRIGIBLE PUPIL. (a) A pupil who has assaulted a teacher or other individual on school property may be removed immediately from class and expelled without resort to an alternative education program under Section 21.301 of this code if, in the opinion of the board of trustees or the board's designate, the pupil's continued presence in the class presents a clear, present, and continuing danger of physical harm to the pupil or to other individuals on school property.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

(b) *If the board of trustees or the board's designate determines that a pupil, after having been placed in an alternative education program under Section 21.301 of this code, has continued to be guilty of incorrigible conduct to the extent that keeping the pupil in the program or the schools would seriously impair the ability of the program or the schools to provide education to other students and that no further reasonable efforts to provide for the continuing education of the pupil can be made, the board or its designate by written order may expel the pupil from the school system. The board or its designate shall set a term for the expulsion, which may not extend beyond the current term of the school year except as provided by Section 21.301(d) of this code.*

(c) *A decision to expel a pupil under this section may be appealed to the board of trustees.*

(d) *The board or its designate shall deliver a copy of the order expelling the pupil to the pupil and pupil's parent or guardian. The board or its designate shall also deliver a copy of the order to the authorized officer of the juvenile court in the county in which the pupil resides. The officer shall determine whether a petition should be:*

(1) filed alleging that the pupil is in need of supervision; or

(2) referred to an appropriate state agency.

(e) *Each school district shall provide each teacher and administrator with a copy of Section 21.301 of this code and this section and a copy of any local policies related to those sections.⁷⁴*

In 1986, during a special session of the 69th Legislature, the disciplinary section of the Code was amended to allow local school boards to suspend a student for up to six days without referring them to an alternative education program.⁷⁵ It also added drug and alcohol offenses, as well as possession of a firearm, illegal knife, or club to the list of offenses for which a school district could expel a student.⁷⁶ However, rather than allowing school districts to expel these students to the street, the amendment required that the student be placed in an alternative education program.⁷⁷

Despite these changes to the Education Code, the emphasis remained on keeping the decision-making authority in the hands of local authorities. It was left to teachers, principals, and school boards to determine when and how a student should be disciplined. Under the amended Code, no offense was identified as a “mandatory” removal from school. However, a more direct link between schools and the juvenile justice system began to form: under the 1984 and 1986 amendments to the Education Code, the juvenile court officer is to be notified in cases of expulsion.

74 *Id.*

75 HOUSE RES. ORG., SPECIAL LEGISLATIVE REPORT, WRAP-UP OF THE 1986 SPECIAL SESSIONS (1986); TEX. EDUC. CODE ANN. § 21.301(Vernon 1987).

76 TEX. EDUC. CODE ANN. § 21.3011 (Vernon 1987).

77 *Id.*

It was not until “zero tolerance” policies began to be applied to the school setting that there began a shift away from local control and toward a regimented, detailed statute establishing a laundry list of the “offenses” for which a student must or could be disciplined, and the consequences for those offenses. This shift was the result of an application of tough-on-crime laws to education policy in the 1990’s, first by the federal government and then by the State of Texas.

Zero Tolerance Policy and School Discipline

In Texas and across the nation, the way that students were disciplined at school changed drastically in the mid-1990’s. The history of this legislation is deeply rooted in the “war on drugs” and criminal justice reform that began at the federal level in the 1980’s.

In response to growing fear around gang violence and school shootings, the federal government passed a series of criminal justice reform bills meant to “crack down” on what the media characterized as a growing crime problem. “Zero tolerance” became a part of the rhetoric used to describe this tough-on-crime approach.⁷⁸ The term was first used to justify the government’s seizure of boats, automobiles, and passports of anyone crossing the border into the United States with even trace amounts of drugs.⁷⁹

The “war on drugs” became a target for education reform, too, with Education Secretary William J. Bennett suggesting in 1986 that Congress withhold federal funding from schools unless they adopted expulsion policies for students using or dealing drugs on campus.⁸⁰ Bennett said, “We need to get tough as hell and do it right now.”⁸¹ Congress declined to enact the legislation that Bennett suggested, but did enact the Drug-Free Schools and Communities Act which required schools to have policies prohibiting alcohol and drug use by students, but did not include punishment provisions or tie school funding to its requirements.⁸² Tough-on-crime legislation also continued to make its way through Congress.

This criminal justice reform effort led to passage of the Gun Free School Zones Act as part of the Crime Control Act of 1990. The Gun Free School Zones Act made it a crime to have a firearm on or within 1,000 feet of a school campus. The “Drug Free School Zones” provision also was part of this legislation, providing funding for school districts for Drug Abuse Resistance Education (D.A.R.E.) programs as well as teacher training around drug issues. President George H. Bush complained about both these provisions in the statement he made upon signing the act,

I am...disturbed by provisions...that unnecessarily constrain the discretion of State and local governments. Examples are found in... Title XV’s “drug-free school zones” program...Most egregiously, [the Gun Free School Zones Act] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could

78 Kathy Koch, *Zero Tolerance: Is Mandatory Punishment in Schools Unfair?*, CQ RESEARCHER, Vol. 10, No. 9, 185 (2000); AM. PSYCHOL. ASS’N., ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 20 (2006).

79 Koch, *supra* note 78, at 188.

80 *Id.* at 194.

81 *Id.*

82 *Id.*

*legitimately be adopted by the States, but they should not be imposed on the States by the Congress.*⁸³

The United States Supreme Court agreed with President Bush. In 1995, the Court issued an opinion finding Congress had acted outside its authority in enacting the Gun Free School Zones Act.⁸⁴ In anticipation of the Court's finding, Congress had already passed the Gun Free Schools Act of 1994, a second piece of legislation tying federal funding of schools to compliance with the federal statute.⁸⁵

The Gun Free School Act was part of the Goals 2000: Educate America Act. It tied federal funding to the requirement that students be expelled for one year for bringing a gun to school—essentially the same legislation that Secretary of Education Bennett sought around drugs eight years earlier.⁸⁶ Goals 2000 also included the Safe Schools Act which gave funding to schools for programs to reduce school violence.⁸⁷ The Act identifies both as efforts to achieve Goal 7 of the Act:

(7) Safe, Disciplined, and Alcohol-and-Drug-Free Schools –

- (A) By the year 2000, every school in the United States will be free of drugs, violence, and the unauthorized presence of firearms and alcohol and will offer a disciplined environment conducive to learning.*
- (B) The objectives for this goal are that –*
 - (i) every school will implement a firm and fair policy on use, possession, and distribution of drugs and alcohol;*
 - (ii) parents, businesses, governmental and community organizations will work together to ensure the rights of students to study in a safe and secure environment that is free of drugs and crime, and that schools provide a healthy environment and are a safe haven for all children;*
 - (iii) every local educational agency will develop and implement a policy to ensure that all schools are free of violence and the unauthorized presence of weapons;*
 - (iv) every local educational agency will develop a sequential, comprehensive kindergarten through twelfth grade drug and alcohol prevention program;*
 - (v) drug and alcohol curriculum should be taught as an integral part of sequential, comprehensive health education;*
 - (vi) community-based teams should be organized to provide students and teachers with needed support; and*
 - (vii) every school should work to eliminate sexual harassment.*⁸⁸

83 Statement by President George Bush Upon Signing S. 3266, 26 WEEKLY COMP. PRES. DOC. 1944 (December 3, 1990).

84 *United States v. Lopez*, 514 U.S. 549 (1995).

85 Koch, *supra* note 78, at 195.

86 *Id.* at 197.

87 Goals 2000: Educate America Act, H.R. 184, 103rd Cong. (1994).

88 *Id.*

Though this Act had a substantial impact on Texas' education policy, the election of George W. Bush as Texas' governor and his emphasis on "zero tolerance" policies may have had a greater impact on the state's shift in policy.

Texas Roots—Zero Tolerance Discipline

The State Board of Education (SBOE) began to call for inclusion of "zero tolerance" for school violence and drug abuse as early as 1992,⁸⁹ reflecting a shift in the dialogue among Texas' school administrators surrounding school discipline similar to the concerns expressed at the national level. The same year, the SBOE created the Roundtable on School Safety and Violence Prevention.⁹⁰ In 1993, the SBOE and Texas Juvenile Probation Commission created a joint task force to look at problems and needs associated with juvenile crime and violence.⁹¹ Also in 1993, Texas Federation of Teachers endorsed a "zero tolerance" policy for violence at schools, foul and profane language on school grounds, and drugs or weapons at school.⁹² Governor Ann Richards launched a safe schools initiative in January 1994, organizing open forums for high school students across the state to give recommendations for addressing school violence.⁹³ However, inclusion of "zero tolerance" policy in state legislation did not begin to gain traction until after George W. Bush was elected Governor in November 1994.

During his election campaign, George W. Bush promised to help crack down on juvenile offenders, promising "tough love" for young people who broke the law.⁹⁴ After he was elected, his State of the State Address to the 74th Legislature—the first legislative session following his election—included the following:

Another major priority must be the education of our children. Education is to our state what national defense is to the federal government. If we do not do the job well, we risk our entire future. During my campaign, I met many dedicated and talented teachers, administrators, and school board members. Texas has the best education professionals in the country. We do not need to change the people. We must change the system.

We face two major issues: how to fund our schools and how to govern them...Texas must...have safe classrooms. We must adopt one policy for those who terrorize teachers or disrupt classrooms – zero tolerance.

School districts must be encouraged, not mandated, to start "Tough Love Academies." These alternative schools would be staffed by a different type of teacher, perhaps retired Marine drill sergeants, who understand that discipline and love go hand in hand.

⁸⁹ TEXAS EDUCATION AGENCY, SAFE TEXAS SCHOOLS: POLICY INITIATIVES AND PROGRAMS (1994).

⁹⁰ *Id.* at 11.

⁹¹ *Id.*

⁹² *Id.* at 18.

⁹³ *Id.*

⁹⁴ See On the Issues, *George W. Bush on Education*, available at http://www.ontheissues.org/celeb/George_W_Bush_Education.htm

If we are going to save a generation of young people, our children must know they will face bad consequences for bad behavior. Sadly, too many youths are not getting that message. Too many juveniles do not respect the law.

Our new juvenile justice system must say to our children: We love you, but we are going to hold you accountable for your actions.

To send that message, Texas must immediately confront the critical shortage of juvenile detention beds. We must be smart and creative by converting existing space to house violent juveniles.

We must also build community-based boot camps and detention centers. I envision a juvenile detention system that requires juvenile offenders to perform community service as part of their sentences.

I commend Senator Harris and Representative Goodman for their efforts to rewrite the juvenile code. Texans must lower to 14 the age at which the most violent juveniles can be tried as adults. We should expand the determinate sentencing statute. And our law enforcement and education officials must have the ability to share juvenile information and records across jurisdictional boundaries.

Discipline, strong values, and strict rules go hand in hand with our love for our children. And make no mistake, these reforms are designed to save children. I believe they can be saved.⁹⁵

In addition, in its Final Report to the 74th Legislature, the Joint Select Committee to Review the Central Education Agency made the following recommendation:

There should be zero tolerance for unruly, disruptive, or threatening students, and teachers should have the authority to remove these students from the classroom. School districts should establish a plan to implement this zero tolerance policy, including placing these students in an alternative education setting as an option to suspension or expulsion. Students found guilty of specified criminal offenses should not be returned to the public school system until successful completion of the sentence imposed by the court. Finally, the legislature should allocate sufficient funds to fully implement these policies.⁹⁶

This report indicates a shift away from local control over these issues, and a move toward state involvement. The report notes, “[T]he programs and services required to assist... students cannot and should not be the sole responsibility of local school districts. The people of Texas must recognize that stemming juvenile crime, making schools safe, reducing the dropout rate, and increasing all students’ chances of success are challenges that should be addressed by the entire community.”⁹⁷ It also indicates, along with Governor Bush’s address, a shift toward melding school discipline and juvenile justice practices and policies.

95 S.J. of Tex., 74th Leg., R.S. 235-40 (1995)(State of the State Address by the Honorable George W. Bush).

96 JOINT SELECT COMM. TO REVIEW THE CENTRAL EDUC. AGENCY, FINAL REPORT TO THE 74TH LEGISLATURE, at iv (1994).

97 *Id.* at 17.

The report specifically recommends adoption of “zero tolerance” policies for “unruly or disruptive” behavior, and suggests that “all relevant state statutes should be reviewed and modified to . . . implement zero tolerance policy and to provide latitude for educators who oversee alternative education settings, authorizing them to use appropriate physical means to control students who cannot otherwise be controlled.”⁹⁸

During the 74th Legislative Session, an omnibus bill was introduced—Senate Bill 1—which rewrote the Texas Education Code. The changes included many of the “accountability” requirements that have been so controversial, and which are often cited as the blueprint for the federal No Child Left Behind Act.

The rewrite also included the Texas Safe Schools Act, now included as Chapter 37 of the Education Code, in much the same form that it exists today. It included a list of “mandatory” reasons for referral to a Disciplinary Alternative Education Program (DAEP) or Juvenile Justice Alternative Education Program (JJAEP), as well as a list of “discretionary” reasons for which a school district could refer a student. Ironically, while this chapter represented the most sweeping school discipline reform instituted by the State, virtually eliminating local control over disciplinary policy, the rest of the Education Code rewrite was said to follow an “overriding theme” of “returning operational control of the public schools to the local communities.”⁹⁹

Chapter 37 has been controversial from its inception. In its Final Report to the 75th Legislature, the Senate Education Committee cites these changes as “the most widely discussed and the most difficult to implement.”¹⁰⁰

The policy debate did not end with the passage of Chapter 37, however. In fact, school discipline and amendments to Chapter 37 have been a focus of the legislature and policy makers for the last 10 years. Advocates are concerned by the spike in disciplinary referral rates that followed the passage of the 1995 legislation, the quality of DAEP programs, and the overrepresentation of certain groups of students in disciplinary referrals.¹⁰¹

The state’s policy makers and school administrators also have continued to consider school discipline issues. In its 1995 Long Range Plan for Public Education, the State Board of Education (SBOE) included as Objective 7, “School campuses will maintain a safe and disciplined environment conducive to student learning.”¹⁰² As one of the initiatives for this objective, the SBOE included, “Promote zero tolerance guidelines for behaviors and actions that threaten school safety.”¹⁰³ In 1999, Attorney General John Cornyn created the School Violence Prevention Task Force. The Final Report issued by

98 *Id.* at 20.

99 SENATE EDUC. COMM., FINAL REPORT TO THE 75TH LEGISLATURE, at 9 (1996).

100 *Id.* at 8.

101 See INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, DAEPs IN TEXAS – WHAT IS KNOWN; WHAT IS NEEDED (1999); CENTER FOR PUBLIC POLICY PRIORITIES, VIOLENCE AND WEAPONS IN TEXAS SCHOOLS (1999); AM. BAR ASS’N, REPORT ON THE LEGAL NEEDS OF HARRIS COUNTY CHILDREN (2004); HOGG FOUNDATION FOR MENTAL HEALTH, SCHOOL DISCIPLINE AND CHILDREN WITH SERIOUS EMOTIONAL DISTURBANCE (2004); TEXAS PUBLIC POLICY FOUNDATION, DISCIPLINARY ALTERNATIVE EDUCATION PROGRAMS: WHAT IS AND WHAT SHOULD BE (2005); TEXAS PUBLIC POLICY FOUNDATION, SCHOOLING A NEW CLASS OF CRIMINALS? BETTER DISCIPLINARY ALTERNATIVES FOR TEXAS STUDENTS (2006).

102 STATE BOARD OF EDUCATION, LONG-RANGE PLAN FOR PUBLIC EDUCATION 1996-2000 (1995).

103 *Id.* at 37.

the Task Force in 2000 included general recommendations as well as recommendations aimed at students, parents, schools, and communities.¹⁰⁴

Professional organizations of teachers and school administrators continue to consider school discipline issues. A brochure written by Texas Federation of Teachers outlines the provisions of Chapter 37 and notes that the legislature responded to TFT’s campaign for zero tolerance by “enacting tough laws that gave educators new tools for responding to students who are violent, abusive, or chronically disruptive”—encouraging teachers to enforce these laws because they are not “self-enforcing.”¹⁰⁵ The Association of Texas Professional Educators conducted a survey on student discipline in 1996, and again in 2006.¹⁰⁶

School discipline policy continues to evolve as educators, administrators, policy makers, and advocates engage in this dialogue. During the 2007 legislative session, more than 60 bills were introduced on issues related to school discipline. Of these 60, only six passed:

- HB 8 – requires mandatory expulsion of a student who engages in elements of the Penal Code offense of continuous sexual abuse of a young child;¹⁰⁷
- HB 121 – requires school districts to adopt and implement a dating violence policy;
- HB 278 – repealed the Chapter 37 provision that allowed school districts to charge students with a Class C Misdemeanor for any Code of Conduct violation;¹⁰⁸
- HB 426 – requires TEA to develop minimum standards for DAEPs;¹⁰⁹
- HB 2532 – allows a school district to expel a student if he or she is arrested for or charged with a Title V felony;¹¹⁰and
- SB 6 – requires removal of student required to register as a sex offender to either a JJAEP or DAEP; removal is discretionary if the student is not under court supervision.¹¹¹

Though a proposed omnibus rewrite of Chapter 37 did not pass, Chapter 37 has been amended nearly every legislative session since legislation creating Chapter 37 was signed into law in 1995.¹¹² This trend is likely to continue for years to come.

104 ATTORNEY GENERAL’S SCHOOL VIOLENCE PREVENTION TASK FORCE, FINAL REPORT (2000).

105 TEXAS FEDERATION OF TEACHERS, A PRIMER ON THE TEXAS SAFE SCHOOLS LAW (2006), available at www.tx.aft.org

106 ASSOCIATION OF TEXAS PROFESSIONAL EDUCATORS, REPORT ON THE 2006 ATPE DISCIPLINE SURVEY (2006).

107 Tex. H.B. 8, 80th Leg., R.S. (2007).

108 Tex. H.B. 278, 80th Leg., R.S. (2007).

109 Tex. H.B. 426, 80th Leg., R.S. (2007).

110 Tex. H.B. 2532, 80th Leg., R.S. (2007).

111 Tex. S.B. 6, 80th Leg., R.S. (2007).

112 House Comm. on Educ., Bill Analysis, Tex. CSHB 2835, 80th Leg. Sess., R.S. (2007).

LEGISLATIVE ANALYSIS:

Texas Education Code, Chapter 37, Discipline; Law & Order

Chapter 37 of the Texas Education Code was passed in 1995, establishing for the first time a detailed state policy for applying discipline in public schools. Chapter 37 lists a range of disciplinary measures for student misconduct and mandates the offenses which trigger these measures. At the same time, school districts are given wide discretion to impose these same disciplinary measures for other types of violations of schools' student Code of Conduct. The provisions of Chapter 37, which have been amended almost every session since 1995, are summarized below.

Student Code of Conduct

Section 37.001(a) requires each school to adopt a student Code of Conduct each school year.¹ The student Code of Conduct must be prominently displayed at each school campus or made available for review at the office of the campus principal.² While establishing standards for student conduct, the Code of Conduct must also:

- specify the circumstances under which a student may be removed from a classroom, campus, or disciplinary alternative education program;
- specify conditions under which a school may transfer a student to a disciplinary alternative education program;
- outline conditions under which a student may be suspended or expelled;
- specify whether the following must be factored into a decision for suspension, removal to a disciplinary alternative education program, or expulsion of a student:
 - ◆ self-defense;
 - ◆ intent or lack of intent at the time the student engaged in the conduct;

¹ TEX. EDUC. CODE § 37.001(a).

² *Id.*

- ♦ a student's disciplinary history; or
 - ♦ a disability that substantially impairs the student's capacity to appreciate the wrongfulness of the student's conduct; and
- provide guidelines for setting the length of a term of removal from the classroom or expulsion.³

It also must address notifying a student's parent or guardian of a violation of the student Code of Conduct that results in suspension, removal to a DAEP, or expulsion.⁴ The student Code of Conduct is also supposed to discuss methods and options for managing students in the classroom and on school grounds, disciplining students, and preventing and intervening in student discipline problems.⁵ These methods must comply with the Admission, Review and Dismissal (ARD) meeting requirements for special education students.⁶

The Texas Association of School Boards has created a Model Student Code of Conduct.⁷ Many school districts, primarily those in rural areas, simply adopt this model as their own.⁸

Removal from the Classroom

Under Section 37.002, a teacher may send a student to the principal's office to "maintain effective discipline in the classroom."⁹ The principal must employ one of the discipline management techniques outlined in the student Code of Conduct.¹⁰

In addition, this section gives teachers the ability to *permanently remove* a child from their classroom.¹¹ A teacher may remove a student:

- who has been documented by the teacher to repeatedly interfere with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn; or
- whose behavior the teacher determines is so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn.¹²

A principal may place a student who is removed under section 37.002(b) into another classroom, in-school suspension (ISS), or a DAEP.¹³ The student may not be returned

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 TEXAS ASSOCIATION OF SCHOOL BOARDS, MODEL CODE OF CONDUCT, available at <http://www.tasb.org/services/policy/publications/discipline/mscoc.aspx>

8 See KERRVILLE INDEPENDENT SCHOOL DISTRICT, STUDENT CODE OF CONDUCT; TENAHA INDEPENDENT SCHOOL DISTRICT, STUDENT CODE OF CONDUCT; MINERAL WELLS INDEPENDENT SCHOOL DISTRICT, STUDENT CODE OF CONDUCT.

9 TEX. EDUC. CODE § 37.002(a)(2006).

10 *Id.*

11 *Id.* at § 37.002(b).

12 *Id.*

13 *Id.*

to the removing teacher's class without the teacher's permission unless the placement review committee (discussed below) determines that it is the best or only alternative.¹⁴

If a student engages in conduct described as grounds for mandatory DAEP placement or expulsion (discussed below), Section 37.002(d) requires a teacher to remove a student from class and send him or her to the principal for disciplinary action. If the student was removed for having assaulted the teacher, the student may not be returned to that teacher's class without the teacher's consent.¹⁵

Under Section 37.003, each school must establish a three-member placement review committee made up of two teachers and a member of the professional staff.¹⁶ This committee determines placement of a student when a teacher refuses the student's return to the classroom.¹⁷ This committee also makes recommendations to the district regarding readmission of expelled students.¹⁸

Suspension

Section 37.005 authorizes local school districts to identify acts warranting suspension in their student Code of Conduct.¹⁹ A suspension may not exceed three days.²⁰ Out-of-school (OSS) and in-school suspension (ISS) are not distinguished from one another in this section, though this section of Chapter 37 is widely interpreted to apply only to OSS. Most school districts do not place a limit on the number of days a student may spend in ISS.

Disciplinary Alternative Education Programs

Under Section 37.008, each school district is required to provide a DAEP that:

- Is in a setting other than a student's regular classroom;
- Is located on or off a regular school campus;
- Separates students who are assigned to the DAEP from other students not assigned to the program;
- Focuses on English, mathematics, science, history, and self-discipline;
- Provides for a student's educational and behavioral needs; and
- Provides supervision and counseling.²¹

A school district may enter into an arrangement to provide a DAEP jointly with one or more school districts.²²

14 *Id.* at § 37.002(c).

15 TEX. EDUC. CODE § 37.002(d).

16 *Id.* at § 37.003 (2006).

17 *Id.*

18 *Id.*

19 *Id.* at § 37.005 (2006).

20 *Id.*

21 *Id.* at § 37.008(a)(2006).

22 *Id.* at § 37.007(d).

The statute requires that teachers at DAEPs be certified according to the same requirements imposed on teachers in mainstream programs.²³ Off-campus DAEPs are exempted from all other requirements imposed on mainstream schools under the Education Code.²⁴ This includes exemption from curriculum requirements aside from those listed in Chapter 37. The 80th Legislature passed a bill in 2007 that requires DAEPs to provide a seven-hour school day (prior to the bill's passage, DAEPs were exempt from the mainstream instructional time requirement).²⁵ The bill also requires TEA to develop "minimum standards" for the operation of DAEPs, including standards relating to student/teacher ratios, training for teachers in behavior management, and planning for transition back to the home campus.²⁶ However, the bill does not require TEA to monitor or enforce the standards it creates; instead, TEA must deliver a report to the legislature in 2009 that estimates the cost of monitoring and enforcing the standards.²⁷

Students younger than 10 years old who commit an expellable offense (detailed below) are to be placed in a DAEP for elementary aged students.²⁸ Under state law, students younger than six years old cannot be placed in a DAEP for any reason other than bringing a firearm to school.²⁹

Chapter 37 gives school districts broad discretion in determining offenses for which a student *may* be removed to a DAEP (referred to as "discretionary referrals"), but also includes a list of offenses for which a student *must* be removed to a DAEP ("mandatory referrals").³⁰ Expelled students cannot be sent to a DAEP; instead they are referred to a Juvenile Justice Alternative Education Program (JJAEP) and, if one is not available in less populated counties, expelled students are referred to the custody of their parents or legal guardian.

Mandatory Removal to DAEP

The Texas Education Code requires a student's mandatory removal from a public school and placement in a DAEP if a student engages in conduct that contains the elements of a false alarm or report, or terroristic threat under the Penal Code.³¹ A student also must be removed if he or she commits the following acts on or within 300 feet of school property or while attending a school-sponsored or school-related activity:

- Engages in conduct punishable as a felony;
- Engages in conduct that contains the element of assault that causes bodily injury;
- Sells, gives, or delivers to another person or possesses, uses, or is under the influence of marijuana, a controlled substance, or a dangerous drug;

²³ *Id.*

²⁴ *Id.* at § 37.008(c).

²⁵ HB 426, 80th Leg. Sess., R.S. (2007).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at §§ 37.006(f); 37.007(f) (2006).

²⁹ *Id.* at 37.006(f)(1).

³⁰ *Id.* at §§ 37.001; 37.006.

³¹ *Id.* at § 37.006(a)(2006).

- Sells, gives, or delivers an alcoholic beverage to another person, or possesses, uses, or is under the influence of an alcoholic beverage;
- Engages in conduct with the elements of an offense relating to abusable volatile chemicals;
- Engages in conduct with the element of the offense of public lewdness or indecent exposure; or
- Engages in conduct that contains the elements of the offense of retaliation against a school employee.³²

Under Section 37.006(c), mandatory removal is also required if the student either receives deferred adjudication, a court or jury finds a student has engaged in delinquent conduct, OR the school superintendent or his or her designee has a reasonable belief that the student has engaged in conduct *defined as a felony under Title 5* (for example, felony assault and felony sexual offenses).

If the off-campus conduct requiring removal occurred more than a year before the principal or other administrator became aware of it, the principal *may* remove the student to a DAEP, but is not required to do so.³³ As discussed below, the superintendent may elect to keep a student in a DAEP even if the prosecutor does not pursue conviction, the student is found not guilty, or the case is dismissed.³⁴

Discretionary Removal to DAEP

Section 37.001 allows districts to “specify conditions that authorize or require a principal or other appropriate administrator to transfer a student to a Disciplinary Alternative Education Program (DAEP).”³⁵ The typical list of “discretionary” removals includes:

- Possessing or using “look-alike” weapons;
- Possessing or using air guns or BB guns;
- Possessing or using razors, box cutters, pocket knives, or chains;
- Possessing or using various other dangerous objects;
- Fighting or scuffling;
- Threats against students, staff, or school property;
- Inappropriate exposure of body parts;
- Sexual harassment or sexual abuse;
- Inappropriate sexual conduct toward a student or employee;

32 *Id.*

33 *Id.* at § 37.006(n).

34 *Id.* at § 37.006(h).

35 *Id.* at § 37.001(2).

- Possessing or using tobacco products;
- Possessing, selling, or using drug paraphernalia;
- Possessing or selling seeds or pieces of marijuana in less than a usable amount;
- Possessing or selling look-alike drugs or items attempted to be passed off as drugs;
- Mandatory offenses that school officials learned of more than a year after the conduct occurred;
- Improper use, possession, or being under the influence of prescription drugs;
- Non-felony criminal mischief;
- Bullying, harassment, and making hit lists;
- Stealing;
- Directing profanity or obscene gestures at students or staff;
- Hazing; and
- Other local offenses listed in the student Code of Conduct.³⁶

Under Section 37.006(d), a student also may be removed from their main campus and placed in a DAEP based on conduct occurring off campus and while the student is not attending a school-sponsored or school-related activity if:

- The superintendent or his or her designee has a reasonable belief that the student has engaged in conduct defined as a felony offense *other than* those defined as a felony in Title 5 of the Penal Code (for example, felony assault and felony sexual offenses);³⁷ and
- The continued presence of the student in the regular classroom threatens the safety of the other students or teachers or will be detrimental to the education process.³⁸

The superintendent or his or her designee may consider “all available information” in determining whether there is a reasonable belief that a student has committed a felony offense off campus.³⁹ Even when the prosecutor opts not to pursue prosecution or notifies the school that the student was found not guilty or his or her case was dismissed, the superintendent may elect to keep the student in the DAEP if “there is reason to believe that the presence of the student in the regular classroom threatens the safety of other students or teachers.”⁴⁰ This decision may be appealed to the board of trustees, and the decision of the board of trustees may be appealed to the state’s Commissioner of Education.⁴¹

³⁶ TEXAS ASSOCIATION OF SCHOOL BOARDS, CHAPTER 37 OFFENSES AND CONSEQUENCES (2006).

³⁷ TEX. EDUC. CODE § 37.006(d)(2006)(Title 5 of the Texas Penal Code, labeled Crimes Against The Person, includes criminal homicide, kidnapping and unlawful restraint, trafficking of persons, sexual offenses, and assaulting offenses. TEX. PENAL CODE, TITLE V (2006)).

³⁸ *Id.*

³⁹ *Id.* at § 37.006(e).

⁴⁰ *Id.* at § 37.006(h).

⁴¹ *Id.* at § 37.006(i)-(j).

A student who receives deferred prosecution or is adjudicated delinquent *may* still be placed in a DAEP regardless of:

- The date on which the student’s conduct occurred;
- The location at which the conduct occurred;
- Whether the conduct occurred while the student was enrolled in the district; or
- Whether the student has successfully completed any court disposition requirements imposed in connection with the conduct.⁴²

Expulsion

Section 37.007 outlines the terms for mandatory and discretionary expulsion to a Juvenile Justice Alternative Education Program (JJAEP). If no JJAEP exists in less populated counties, expelled students are released to the oversight of their parents or guardian. As with DAEP placement, the statute includes a list of offenses for which a student must be expelled, but also allows a school district some discretion in determining other expellable offenses.

Mandatory Expulsion

Under Section 37.007(a), a student will be expelled from a school if the student commits the following offenses on school property or while attending a school-sponsored or school-related activity on or off school property:

- Uses, exhibits, or possesses a firearm, illegal knife, club, or prohibited weapon as defined under the Texas Penal Code. An illegal knife, as defined by a local policy, can also subject the student to mandatory expulsion.
- Engages in conduct, as defined under the Texas Penal Code, that contains the elements of the offense of:
 - ♦ Aggravated assault, including sexual assault
 - ♦ Arson
 - ♦ Murder/attempted murder
 - ♦ Indecency with a child
 - ♦ Aggravated kidnapping
 - ♦ Aggravated robbery
 - ♦ Manslaughter
 - ♦ Criminally negligent homicide

A student also *must* be expelled if he or she sells, gives, or delivers marijuana, a controlled substance, a dangerous drug, or an alcoholic beverage to another person on or within 300 feet of school property, if that offense is punishable as a felony.⁴³ Most offenses that

42 *Id.* at § 37.0081(a).

43 *Id.* at § 37.007(a)(3).

mandate expulsion are defined in the Texas Penal Code; however, the reference to “use, exhibition, or possession” is not defined.⁴⁴

Section 37.007(e) outlines the expulsion requirements mandated by the Federal Gun-Free Schools Act. Under this provision, a student *must* be expelled for at least one year if he or she brings a firearm to school.⁴⁵ The federal law defines a firearm as a gun, a bomb, rocket, missile, grenade, or similar device.⁴⁶

Discretionary Expulsion

Under Section 37.007(b), a student *may be expelled* if he or she engages in conduct that contains the elements of the offense of false alarm or report, or commits the following within 300 feet of school property or while attending a school-sponsored or school-related activity:

- Sells, gives, or delivers to another person or possesses, uses, or is under the influence of marijuana, a controlled substance, or dangerous drug;
- Sells, gives, or delivers an alcoholic beverage to another person, or possesses, uses, or is under the influence of an alcoholic beverage;
- Engages in conduct with the elements of an offense relating to abuse of glue or aerosol paint or relating to volatile chemicals;
- Assaults a school employee or volunteer;
- Engages in conduct with the element of the offense of public lewdness or indecent exposure; or
- Engages in conduct that contains the offense of deadly conduct according to the Texas Penal Code.⁴⁷

A student *may also be expelled* if he or she commits the following within 300 feet of a school:

- Engages in conduct requiring expulsion if committed on campus;
- Possesses a firearm, as defined by the Gun-Free Schools Act, discussed above; or
- Assaults another student, or commits an aggravated robbery against another student.⁴⁸

A student *may* also be expelled for engaging in “serious and persistent misbehavior that violates the district’s student Code of Conduct” while attending a DAEP.⁴⁹

⁴⁴ See *Tarkington ISD v. Ellis*, 2206 WL 2289837 at 4.

⁴⁵ TEX. EDUC. CODE § 37.007(e).

⁴⁶ Safe Schools Act, 18 USC § 921.

⁴⁷ TEX. EDUC. CODE § 37.007(b)(2006).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 37.007(c).

Juvenile Justice Alternative Education Program (JJAEP)

Students who are expelled are required to attend a JJAEP, rather than a DAEP, unless no JJAEP exists in less populated counties. Then, expelled students are removed from school and placed in the custody of their parents or legal guardians. Section 37.011(a) provides that a juvenile board of a county with a population greater than 125,000 shall develop a JJAEP, subject to the approval of the Texas Juvenile Probation Commission.⁵⁰ The juvenile board of a county with a population of 125,000 or less may develop a JJAEP, but is not required to do so.⁵¹ Section 37.011(b) requires a juvenile court in a county with a population of 125,000 or more to order an expelled student to a JJAEP if a court finds the student engaged in conduct requiring mandatory expulsion under Section 37.007 and engaged in delinquent conduct under Title 3 of the Family Code (juvenile justice provisions).⁵²

Curriculum requirements for JJAEPs mirror those of DAEPs under the Texas Education Code. Both are required to provide instruction in English, mathematics, science, social studies, and self-discipline.⁵³ The juvenile board or its designee is required to review the student's academic progress with his or her parents on a regular basis, and if the student is in high school, a graduation plan will be developed.⁵⁴ JJAEPs are required to operate at least seven hours per day, 180 days per year.⁵⁵ For purposes of accountability, a JJAEP student's test scores are attributed to his or her home campus.⁵⁶

Removal of a Student to a DAEP

Section 37.009 outlines the procedures for removal to a DAEP.⁵⁷

Before a student may be removed to a DAEP, the principal or assistant principal must conduct a hearing.⁵⁸ Prior to the hearing, the student's parents or legal guardians will be notified in writing of their opportunity to be present.⁵⁹ At the hearing, the student is entitled to written or oral notice of the reasons for the removal, an explanation for the basis of the removal, and an opportunity to respond to the basis for removal.⁶⁰ The hearing will take place even if the student and his or her parents or guardians do not attend assuming valid attempts to require their attendance have been made.⁶¹

The period of removal must be consistent with the terms of the student Code of Conduct.⁶² The DAEP placement may not exceed one year unless, after a review, the

50 *Id.* at § 37.0011(a).

51 *Id.*

52 *Id.* at § 37.011(b).

53 *Id.* at § 37.011(d).

54 *Id.*

55 *Id.* at § 37.011(f).

56 *Id.* at § 37.011(h).

57 *Id.* at § 37.009.

58 *Id.*

59 *Id.*

60 *Id.* (the requirements set out in the statute essentially follow those set out in *Goss v. Lopez*, 419 U.S. 565 (1975) which requires schools to hold an informal hearing prior to suspension of a student).

61 *Id.*

62 *Id.*

district determines that: (1) the student is a threat to the safety of other students or to the district employees; or (2) extended placement is in the best interest of the student.⁶³

A student may not be placed in a DAEP for a period extending beyond the end of the school year unless the school board or its designee determines that: (1) the student's presence in the regular classroom program or at the student's regular campus presents a danger of physical harm to the student or to another individual; or (2) the student has engaged in serious or persistent misbehavior that violates the district's student Code of Conduct.⁶⁴ These limitations on the length of placement do not apply to students who have committed a sexual assault against another student.⁶⁵

A student is entitled to a review of his or her status every 120 days.⁶⁶ At this review, if the student is in high school, the board's designee will consider the student's progress toward meeting graduation requirements and will establish a graduation plan for the student.⁶⁷ However, the district is not required to provide a course needed for graduation that is not part of the core curriculum required for DAEPs.⁶⁸ The district is required to allow a student to complete any missed coursework before the beginning of the next school year.⁶⁹

Expulsion of a Student

Section 37.009 also outlines procedures that must be followed when expelling a student from school. Before a student may be expelled, the school board or its designee "must provide the student a hearing at which the student is afforded appropriate due process as required by the federal constitution and which the student's parent or guardian is invited, in writing, to attend."⁷⁰ At the hearing, the student is entitled to be represented by their parent or guardian, or another adult who can provide guidance to the student and who is not an employee of the school district.⁷¹

If the school district makes a good-faith effort to inform the student and the student's parent or guardian of the time and place of the hearing, the district may hold the hearing regardless of whether the student or the student's representative attends.⁷² If the decision to expel a student is made by the school board's designee, the decision may be appealed to the school board.⁷³ The decision of the board may be appealed by trial *de novo* to a district court of the county in which the school district's central administrative office is located.⁷⁴

⁶³ *Id.*

⁶⁴ *Id.* at § 37.009(c).

⁶⁵ *Id.* at § 37.0051(b).

⁶⁶ *Id.* at § 37.009(f).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at § 37.008(l).

⁷⁰ *Id.* at § 37.009(f).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

An expulsion may not exceed one year unless the district determines that:

- The student is a threat to the safety of other students or to district employees; or
- Extended placement is in the best interest of the student.⁷⁵

If the length of the expulsion is inconsistent with the district’s Code of Conduct, the order must give notice of the inconsistency.⁷⁶

A student’s parents are responsible for his or her supervision during expulsion.⁷⁷

Emergency Placement or Expulsion

The principal or his or her designee may order a student’s expulsion or immediate placement in a DAEP if he or she:

- Reasonably believes the student’s behavior is so unruly, disruptive, or abusive that it seriously interferes with a teacher’s ability to communicate effectively with the students in a class, or with the ability of a student’s classmates to learn, or with the operation of school or a school-sponsored activity; or⁷⁸
- Reasonably believes that action is necessary to protect persons or property from imminent harm.⁷⁹

The student who is subject to an emergency DAEP placement or expulsion must be given oral notice of the reason for the action.⁸⁰ A student may not be removed from school on an emergency basis for any infraction other than one listed in the Education Code under sections on expulsion and DAEP placement⁸¹ The student must be accorded appropriate due process for removal within a “reasonable time,” but no later than 10 days after the student’s placement.⁸²

Discipline of Special Education Students

Under the Individuals with Disabilities Education Act (IDEA) of 2004, the federal government outlines the process that school districts must follow when a special education student is disciplined.⁸³ A special education student cannot be suspended, expelled, or referred to a DAEP resulting in a change of placement lasting more than 10 days *unless it is determined*

75 *Id.* at § 37.009(h).

76 *Id.*

77 *Id.*

78 *Id.* at § 37.019.

79 *Id.* at § 37.019.

80 *Id.*

81 *Id.*

82 *Id.*

83 Lucy Wood, *The Special Education Due Process Hearing – Discipline and Behavioral Issues Under the New IDEA*, in STATE BAR OF TEXAS, CLE MATERIALS FOR SPECIAL EDUCATION ISSUES AND THE JUVENILE JUSTICE SYSTEM (June 2006).

that the misconduct was not related to the student's disability.⁸⁴ A series of disciplinary removals may be considered a change of placement if the removals total more than 10 school days in a year and either the behavior that resulted in the removals was substantially similar or the disciplinary removals occurred close in time.⁸⁵

The alleged misconduct is a manifestation of the child's disability if:

- The conduct in question was caused by, or had a direct and substantial relationship to the child's disability; or
- The conduct in question was the direct result of the district's failure to implement the student's Individual Education Plan (IEP).⁸⁶

Determining whether or not a child's behavior is related to his or her disability is a process called a "manifestation determination."⁸⁷ This review is carried out by the district, the parent, and relevant members of the child's IEP team within 10 school days from the decision to change the child's school placement for behavioral reasons.⁸⁸ These protections may be triggered, even if a student has not yet been provided special education services, if the parent earlier expressed a concern regarding their child in writing, requested an evaluation, or if a teacher expressed a concern directly to the director of special education.⁸⁹

If the manifestation determination committee decides that the behavior was a manifestation of the child's disability, the student is returned to the placement from which he or she was removed.⁹⁰ In these circumstances, the student's IEP team must conduct a functional behavioral assessment and implement a behavioral intervention plan. If a behavior intervention plan already exists, the team must review and make any necessary modifications.⁹¹ The only exceptions to this rule exist in cases involving weapons, drugs, or serious bodily injury. In such cases, a school district may place a student in an alternative educational setting for up to 45 school days even if the behavior is deemed a manifestation of the child's disability.⁹² A district also may request a hearing on the issue of a special education student's placement if it believes that the current placement is substantially likely to result in injury.⁹³

If the committee determines that the behavior was not a manifestation of the student's disability, the special education student may be disciplined in the same manner as a

84 *Id.* at 2. An "IEP" is the Individualized Education Program, created for a special education student to effect goals and objectives for the student and describing supports and services that will be provided by the district.

85 Kathryn J. Lewis, *An Overview of Disciplining Students with Disabilities under IDEA 2*, in STATE BAR OF TEXAS, CLE MATERIALS FOR SPECIAL EDUCATION ISSUES AND THE JUVENILE JUSTICE SYSTEM (June 2007). Though ISS is not typically considered a change in placement, it is considered the equivalent of an exclusion from school if the student is not provided with educational services while in ISS. *Id.* at 3.

86 *Id.* at 5.

87 *Id.* at 3.

88 *Id.* at 6-7.

89 *Id.*

90 *Id.* at 7.

91 *Id.* at 7-8.

92 *Id.* at 9.

93 *Id.* at 12.

student without a disability.⁹⁴ However, while a special education student attends an alternative educational placement, he or she must receive a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior that caused the referral.⁹⁵ IDEA also requires school districts to continue educational services to all special education students who are expelled or removed from their home school for more than 10 days.⁹⁶

IDEA includes an appeal process for parents who disagree with a manifestation determination.⁹⁷ The Texas Administrative Code sets out the appeal process for Texas students.⁹⁸ It includes the right to appeal the administrative hearing officer's decision to a state court or federal district court.⁹⁹ The parent may also request mediation of a dispute over placement.¹⁰⁰

Chapter 37 of the Texas Education Code speaks to procedures involving special education students in several sections. Section 37.003 predicates a school's placement review committee's decision regarding a special education student on compliance with IDEA.¹⁰¹ In addition, Section 37.004 outlines the requirements for reviewing possible disciplinary actions involving a special education student. Under this section, alternative placement decisions may only be made by a "duly constituted admission, review, and dismissal (ARD) committee."¹⁰² This committee is tasked with making manifestation determinations in accordance with federal law.¹⁰³ This section specifies also that a special education student may not be placed in an alternative education program "solely for education purposes."¹⁰⁴ It requires teachers in alternative education programs who have a special education assignment to hold an appropriate certificate or permit for the assignment.¹⁰⁵

Chapter 37 also speaks to the use of confinement, restraint, seclusion, and time out practices for students with disabilities.¹⁰⁶ Section 37.0021 includes the following restrictions on discipline of students with disabilities:

- A student with a disability, who receives special education services, may not be confined in a locked box, locked closet, or other specially designed locked space as either a discipline management technique or behavior management technique.
- A school district employee or volunteer or independent contractor may not place a student in seclusion (which is defined as a behavior management technique in which a student is confined in a locked box, closet, or room that is designed to seclude a person in less than 50 square feet of space).

94 *Id.*

95 *Id.* at 8.

96 *Id.*

97 *Id.* at 9-10.

98 TEX. ADMIN. CODE § 89.1165 (2006).

99 Lucy Wood, *supra* note 83, at 11.

100 *Id.* at 12.

101 TEX. EDUC. CODE § 37.003.

102 *Id.* at § 37.004. These committees are commonly referred to as "ARD" committees.

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.* at § 37.0021.

The Commissioner of Education must adopt procedures for the use of restraint and time-out on special education students by a school district employee, volunteer, or independent contractor. These procedures must be consistent with professionally accepted practices and standards of student discipline and techniques for behavior management, and with relevant health and safety standards.

- The Commissioner of Education is also tasked with identifying when training in relevant discipline or behavior management techniques is needed.
- The section does not prevent a student's locked, unattended confinement in an emergency situation while awaiting the arrival of law-enforcement personnel if the student possesses a weapon, and the confinement is necessary to prevent the student from causing bodily harm to the student or another person.
- The section also does not apply to a peace officer who is performing law enforcement duties or to juvenile probation, detention, or corrections personnel.¹⁰⁷

Resources for Students

Chapter 37 includes several provisions creating resources for students who have been disciplined, aside from alternative education programs. They include:

- Court-related Children Liaison Officers. Each school district must appoint at least one educator to act as liaison officer for court-related children. This officer must provide counseling and services for the student and the child's parents, with the goal of reestablishing normal attendance and progress in school.¹⁰⁸
- School-Community Guidance Centers. School districts may establish a school-community guidance center designed to locate and assist children with problems that interfere with education, including juvenile offenders and children with severe behavioral problems or character disorders. These centers are to coordinate the efforts of school district personnel, local police departments, school attendance officers, and probation officers in working with students, dropouts, and parents to identify and correct factors that adversely affect a student's education.¹⁰⁹
- Cooperative Programs. School districts may develop cooperative programs with state youth agencies for children found to have engaged in delinquent conduct.¹¹⁰

The Texas Education Agency does not make data available on the number of school districts that have opted to establish guidance centers and cooperative programs.

Case Law Interpreting Chapter 37

Most cases reviewing transfer of a Texas student to an alternative education program either result in a finding that the transfer did not deny the student his or her property interest in an education, or that a trial court lacked jurisdiction to review the disciplinary

¹⁰⁷ *Id.* at § 37.0021.

¹⁰⁸ *Id.* at § 37.014.

¹⁰⁹ *Id.* at § 37.051.

¹¹⁰ *Id.* at § 37.052.

decision.¹¹¹ Early cases focused on the failure of a school district to satisfy the due process requirements set out for students who are expelled. In *Nevares v. San Marcos I.S.D.*, the Fifth Circuit U.S. Court of Appeals found that a transfer to a DAEP pursuant to Chapter 37 of the Texas Education Code did not deprive a student of access to public education sufficient to trigger the more formal due process procedure required when a student is expelled from school.¹¹² According to the Court, since Timothy Nevares was transferred to a Disciplinary Alternative Education Program (DAEP), he was never denied access to public education, but instead was simply transferred from one school program to another.¹¹³ In the wake of *Nevares*, several state appellate courts found that students transferred to a DAEP are not entitled to review by a trial court under Chapter 37.¹¹⁴ These cases note that under Chapter 37, the school board's decision on a DAEP referral is final and may not be appealed.¹¹⁵

More recently, in *Ponce v. Socorro I.S.D.*, a federal District Court found that a student had standing to raise a first amendment claim after being suspended for three days and transferred to a DAEP for the offense of terroristic threat.¹¹⁶ The student claimed that the writing for which he was suspended was fictional.¹¹⁷ The District Court distinguished the facts in *Ponce* from *Nevares* and its progeny, noting that plaintiffs did not raise a due process claim but instead argued that the school district's imposition of any punishment was a violation of legally protected rights.¹¹⁸

Just as recently, in *Tarkington I.S.D. v. Ellis*, a state court of appeals upheld a trial court's temporary injunction prohibiting a school district from continuing to enforce an order expelling a student where the district had adopted the provisions allowing consideration of a student's intent in making disciplinary decisions, but failed to consider evidence of the student's intent.¹¹⁹ During the disciplinary hearings, the school district repeatedly maintained that under the district's "zero tolerance" policy it did not have any choice but to expel the student.¹²⁰ The appellate court found this decision to be in error since it conflicted with the district's adoption of the Education Code's intent provision.¹²¹

Whether *Ponce* and *Tarkington* represent a shift in the way courts view school discipline issues remains to be seen. While both cases appear to deviate from the deference courts generally give to school districts' disciplinary practices, both *Ponce* and *Tarkington* were careful to distinguish the facts and the law in these cases from earlier decisions.

111 See *Nevares v. San Marcos ISD*, 1997 U.S. App. LEXIS 14955 (5th Cir.); *Aledo I.S.D. v. Reese*, 987 S.W.2d 953 (1999); *Hankins v. P.H.*, 1 S.W.3d 352 (1999); *Friona I.S.D. v. King*, 15 S.W.3d 653 (2000); *Stafford Municipal School District v. L.P.*, 64 S.W.3d 559 (2001); *Flour Bluff I.S.D. v. R.S.*, 2006 Tex. App. LEXIS 3031 (2006); see also Att'y Gen. John Cornyn, Opinion No. JC-0504 (May 15, 2002) (finding that proof of intent is required to sustain a "conviction" under Texas Education Code §37.123, entitled "disruptive activity").

112 *Nevares*, 1997 U.S. App. LEXIS 14955 at 6; see also *Stafford Municipal School District*, 64 S.W.3d at 563.

113 *Nevares*, 1997 U.S. App. LEXIS 14955 at 4.

114 *Aledo I.S.D.*, 987 S.W. 3d at 957; *Hankins*, 1 S.W.3d at 354; *Flour Bluff I.S.D.*, 2006 Tex. App. LEXIS at 9.

115 *Id.*

116 *Ponce v. Socorro I.S.D.*, 432 F. Supp. 2d 682, 684 (2006).

117 *Id.*

118 *Id.* at 691.

119 *Tarkington I.S.D. v. Ellis*, 200 S.W.3d 794, 802 (2006).

120 *Id.* at 802.

121 *Id.*

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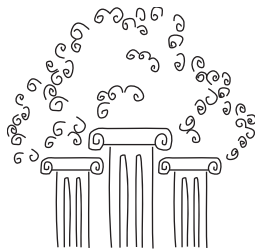
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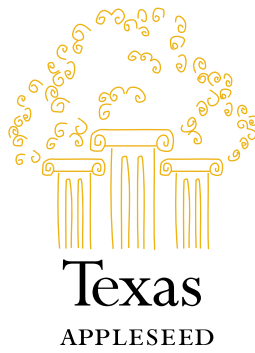
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