

Plugging the School to Prison Pipeline by Addressing Cultural Racism in Public Education Discipline

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I. Abstract

As timely as today's headlines,¹ I take a critical look at the failure of the public schools to educate our children. Criminalized and alienated, students of color and economic

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¹ See Greg Toppo, *Atlanta cheating scandal tied to pressure of high-stakes standardized tests*, DETROIT FREE PRESS, July 7, 2011, <http://www.ongo.com/v/1325402/-1/B376A3FACA1A90FD/atlanta-cheating-scandal-tied-to-pressure-of-high-stakes-standardized-tests>; Greg Toppo, Denise Amos, Jack Gillum, & Jodi Upton, *When test scores seem too good to believe*, U.S.A. TODAY, Mar. 17, 2011, http://www.usatoday.com/news/education/2011-03-06-school-testing_N.htm; Sara Lenz, *Report finds teachers helping students cheat to pass high-stakes testing*, DESERET NEWS, Mar. 10, 2011, <http://www.deseretnews.com/article/700117132/Report-finds-teachers-helping-students-cheat-to-pass-high-stakes-testing.html>; Rachel Monahan, *NYC drops controls to ferret out cheating on high-stakes standardized tests*, N.Y. DAILY NEWS, Aug. 3, 2011, http://www.nydailynews.com/ny_local/education/2011/08/03/2011-08-03_easier_for_cheaters_cuts_in_monitoring_of_city_school_tests.html?r=ny_local.

disadvantage are forced out of their schools and into the juvenile justice system as the first step to a life of reduced expectations and productivity. We are failing to prevent these children from becoming disengaged from society and its institutions that were designed for their benefit – specifically, the institution of a free public education. It is time we frankly acknowledge that our long stored history of racial conflict has matured into more subtle expressions of superiority and inferiority evidenced by the demographics of that large segment of our children that fail to complete the basic high school education. Over 1,000,000 young people each year do not graduate on time. Call it dropouts, call it “leavers,” call it “delayed graduation,” give it whatever bureaucratic label you wish, but a population of our youth as large as the tenth largest city in the United States fails to timely graduate high school EACH YEAR. This is a failure of monumental proportions and has led to societal restructuring inconsistent with our history. The systematic exclusion of children of color and of economic disadvantage from public education is the hole in the pipeline through which these children are forced—a pipeline which all too often leads from their public school to involvement with juvenile justice agencies and eventually prison as an adult. This is a problem that should not be ignored any longer. It must be dealt with now, not kicked down the road to the next generation, and the next, and the next.

In this article I look at school discipline, the past and the present, and how certain segments of the student population find themselves pushed out of an education from the overuse of suspensions, expulsions, and disciplinary alternate education, by a system that marks these students as low-achieving and a detriment to a school district’s accountability. So called “high-stakes” accountability forces districts to “game the system,” or cheat, to obtain an advantage at the expense of the ones they are charged to educate. In the end, the demise of the Disciplinary Alternate Education Programs is offered as a beginning step toward using evidence-based positive behavioral interventions and supports to address student behavior in every school, keeping more children in school, less discouraged and more engaged. These issues may appear

to be Texas specific, but they exist in virtually every public school, in every state. As Texas is often used as a public education barometer, the solutions in Texas can be used to improve public school education throughout the United States. There is no “Texas Miracle”² in public education, only a sad reminder of our past and a glimpse of our future responsibility of caring for those that fail.

² See Walt Haney, *The Myth of the Texas Miracle in Education*, 8 EDUC. POL’Y ANALYSIS ARCHIVES, no. 41, Aug. 2000, at 67-93, available at <http://epaa.asu.edu/ojs/article/view/432/828>.

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II. Introduction

Public Education is failing. Failing to educate large segments of our youth, failing to prevent these children from becoming disengaged from society and its institutions designed for their benefit, and failing to acknowledge that our long stored history of racial conflict has matured into more subtle expressions of superiority and inferiority. Nationwide it is reported by the U.S. Department of Education that 4.1%³ of those that could have graduated with the high school class of 2008 failed to do so. This is a small number – not particularly alarming—if it were true. If one uses the government’s non-graduating percentages, over 1,000,000 young people each year do not graduate on time.⁴ Call it dropouts, call it “leavers,” call it “delayed graduation,” give it whatever bureaucratic label you wish, but enough young people to populate the tenth largest city in the United States fail to graduate high school EACH YEAR.⁵ This is a failure of monumental proportions and has led to societal restructuring inconsistent with our history. The great American middle class is disappearing. As these children mature the loss in productivity falls on others to compensate in increased social expenses, incarceration costs, tax revenues, and class resentment which should not be consistent with our future. The systematic exclusion from public education of children of color and economic disadvantage is the hole in the pipeline these children are forced through—a pipeline which all too often leads from their pub-

³ See 2010 Nat’l Center for Educ. Stat. (NCES) Dig. of Educ. Stat. 178, tbl. 113, available at

<http://nces.ed.gov/pubs2011/2011015.pdf> [hereinafter 2010 NCES DIGEST]. The Texas dropout rate for grades nine through twelve for 2007-08 was 4% compared to the national average of 4.1%. *Id.*

⁴ See *id.* at 175, tbl. 110. The total graduating for 2008 was 3,313,818 which represents 74.7% of the freshman graduate cohort and 74.7% as a ratio of the seventeen year old population. *Id.* This calculates to 4,436,168 in the cohort which means 1,122,350 of the freshman cohort and the seventeen year old cohort did not graduate with their class. *Id.*

⁵ See Tann vom Hove & Josh J. Fecht, *The largest US cities: Nine cities with more than one million people Los Angeles and New York City grow fastest*, CITY MAYORS, <http://www.citymayors.com/gratis/us-census2000.html> (last visited Dec. 3, 2011).

lic school to involvement with juvenile justice agencies and eventually prison as an adult. This is a problem that should not be ignored any longer. It must be dealt with now, not kicked down the road to the next generation, and the next, and the next.

What began as my preoccupation—perhaps an obsession—on the treatment of juveniles within the juvenile justice system led to my study of how children first enter a juvenile system. This system all too often leads them into the adult criminal justice system, which culminates in incarceration and loss of privilege and opportunity. The public school, for many children, is the first institutional setting they experience. Logically, a child's public school experiences, successes, failures, perceptions, and productivity is axiomatic to their success in adult life. Being a seasoned father of two, I often faced discipline encounters as my own children fought their way through the public school maze.

Representing juveniles charged with crimes in Texas courts has given me a front row seat at the treatment of misbehaving adolescents. What my experiences have taught me is that many students – often children of color and from economic disadvantage – find themselves being excluded from their schools and alienated to such a degree that remaining in school becomes toxic.⁶ These students appear to be marked for exclusion from the one institution that was created for their benefit, “the great leveler,”⁷ a public school education.

This paper is the first in a series to address this problem. This first article will include an historical discussion of school discipline with an emphasis on how Texas specifically manages these issues. It will also explore the effects upon the students by the overuse of suspensions and expulsions and the

⁶ See *infra* Part VI.

⁷ See Isabel Sawhill, Policy Brief, *Opportunity in America: The Role of Education*, 16 *Future Child*. 1 (2006), available at http://www.futureofchildren.org/futureofchildren/publications/docs/16_02_PolicyBrief.pdf. Many have described education as the “great leveler.” For those of us in the United States, the public school education system, in my opinion, is the opportunity for all children to rise to their potential.

use of alternate placements to drive certain student populations from the public schools through dropouts, attrition, and criminalization. I will offer a solution to this problem by discussing the implementation by some public schools, penal institutions and juvenile justice institutions of a behavioral modification program that works. Completing this first work will be a recommendation for the Texas Legislature to eliminate the Disciplinary Alternate Education Programs and force all Texas's public schools to deal with their own behavioral issues by adopting the most productive tool yet devised for addressing school discipline, the Positive Behavior Interventions and Support (PBIS) model.⁸ In a later work I will argue for

⁸ The author is neither a behavioral psychologist nor an expert in education, only a student of the law and of the effects of the use by public schools of the Disciplinary Alternate Education Programs on children. This article recommends the mandated adoption of Positive Behavior Interventions and Support (PBIS) throughout Texas's public schools. PBIS' four key elements are a clear definition of outcomes, use of human behavioral and biomedical science, application of empirical data, and the implementation of validated practices to achieve those desired outcomes. See PBIS.ORG, <http://www.pbis.org> (last visited Dec. 3, 2011).

There are other programs available which improve absenteeism, standardized academic achievement, drop-out rates, rates of suspensions, disciplinary referrals, violence, drug and substance use, sexual acting out and crime related activities. See *Research Overview*, POSITIVE ACTION, <http://www.positiveaction.net/research/index.asp> (last visited Dec. 3, 2011); see also Brian R. Flay, Carol G. Allred, & Nicole Ordway, *Effects of the Positive Action Program on Achievement and Discipline: Two Matched-Control Comparisons*, 2 PREVENTION SCI. 71-89 (2001). Based on "theories of self-concept, learning, behavior, and school ecology," this program improved achievement and reduced disciplinary referrals with a "comprehensive approach that includes self-concept development, school-wide environmental change, and parental and community involvement. *Id.* at 71; See also Brian R. Flay, Carol G. Allred, *Long-term Effects of the Positive Action Program*, 27 AM. J. HEALTH BEHAV. 27 (S1), S6-S21 (2003), available at http://www.positiveaction.net/content/PDFs/Long-Term_Effects_of_PA.V5.pdf. In a recent study funded by the National Institute on Drug Abuse, "[t]he results provide evidence that a comprehensive school-based program, specifically developed to target student behavior and character, can positively influence school-level achievement, attendance, and disciplinary outcomes concurrently." See also Frank J. Snyder et al., *Impact of a Social-Emotional and Character Development Program on School-Level Indicators of Academic Achievement, Absentee-*

the complete overhaul of the DAEP's juvenile justice cousin, the Juvenile Justice Alternate Education Program (JJAEP),⁹ and discuss the final implementation of PBIS in the TYC school system as that evaluation is made available.¹⁰ These issues may appear to be Texas specific, but they exist in virtually every public school, in every state. As Texas is often used as a public education barometer, the solutions in Texas can be used to improve public school education throughout the United States.

It is time to stop kicking the can down the road. We cannot wait for another generation to miss out on this opportunity. A mature society should use science, not emotion or superstition, to lead the way. By using social science and evidence based behavioral modification techniques, we can deal

ism, and Disciplinary Outcomes: A Matched-Pair, Cluster Randomized, Controlled Trial, 3 J. RES. ON EDUC. EFFECTIVENESS 26 (2010).

The recommended use of PBIS herein neither excludes the effectiveness of other programs nor warrants PBIS as more effective than competing programs, this is for the social scientist to determine. The purpose of this article is to argue an evidenced-based modern approach to discipline in the public schools is preferential to current methods and systems which lead students, and in particular minority students and those from economically disadvantaged backgrounds, into contact with juvenile justice, law enforcement agencies and courts and prevents their completion of a basic secondary education.

⁹ Levin, Marc, *Policy Brief: Disciplinary Alternative Education Programs: What Is and What Should Be*, TEX. PUB. POL'Y FOUND., Dec. 2005, available at <http://www.texaspolicy.com/pdf/2005-12-DAEPs-pb.pdf>. Levin defines DAEP's as "alternative educational environments for students who commit virtually any disciplinary violation or certain criminal offenses. . . ." *Id.* JJAEP's are "boot camps operated by county juvenile boards and overseen by the Texas Juvenile Probation Commission. Generally, JJAEP's are for expelled students while DAEP's are for students whom districts either cannot expel or choose not to expel" under the Education Code. *Id.*

¹⁰ The Texas Legislature has mandated a report on the implementation and effectiveness of PBIS in the TYC school system by December 1, 2012. TEX. EDUC. CODE ANN. § 30.106(g) (2011). Although pre-PBIS data is available through February, 2011, Dr. Eugene Wang, who is preparing the evaluation, does not have post-PBIS findings at the time of preparation of this article. Telephone Interview with Dr. Eugene Wang, Assistant Professor, Texas Tech University (July 21, 2011).

with misbehavior in the classroom now. Instead of dealing later with the effects of a large and growing undereducated, mostly minority and poor subculture, public schools must once again be committed to educating every child. As a society, there must be a commitment to the value of education for all children. Otherwise, society should be honest and admit that an education is for the privileged, mostly white children whose good fortune it has been to be born within a caste system intellectually dishonest in its misanthropic, sardonic goals and ambitions. By highlighting the problem and suggesting solutions, it will be the purpose of these papers to encourage the legislative process to mandate systems of positive behavioral interventions and supports throughout our public schools statewide. I hope this will forever change the way educators treat students who heretofore have been discarded into alternate education programs. These programs have the effect, even though probably unintended, of isolating minority students—mostly male—creating the inevitable spiral of failure and withdrawal that leads to a class of children without the tools, both emotionally and educationally, to be productive adults.

It is my hope that those that have the power to make these changes will see the beneficial effects of my argument and dictate that changes are made. In doing so, not only will our children benefit, but to each leader that has ignored these warning signs of societal collapse, a challenge is made to end the continued waste in human and financial resources that kicking this problem down the road to the next generation will produce.

Some would argue that the current system of zero tolerance has evolved into the perfect balance of discipline and education effectively removing from the school environment all those that threaten its safety and effectiveness. During the 1990's the argument for less tolerance in adolescent behavior was brought about by the anxiety over what many saw as a skyrocketing juvenile crime problem and the ever increasing demands on the time and talents of teachers as they perceived themselves more as referees than the caretakers of our fu-

ture.¹¹ For those who see no problem here, let us not forget the byproduct of zero tolerance—the ever increasing failure of the public school system to educate all our children. It is to this issue this article is addressed.

But to preface this discussion, two disclaimers. First, I am not suggesting that we ignore the rights or sensitivities of crime victims. Those in the schools that are victimized at the hands of others should not have to experience further trauma by unnecessary and thoughtless continued exposure to their perpetrator. I believe that we will always have those that must be removed from society for everyone's benefit – children and adults. I wish it were not true, but it is. The construction of a perfect society where everyone behaves will never occur. But it is my wish that we reduce the number incarcerated by a more intelligent application of discipline beginning early in a child's education. Hopefully the necessity and frequency of penal segregation can be reduced and the number of those who would otherwise suffer will decline.

Second, it is not the intent here to indict those that work within the education system. Those that have chosen a career of education are always at the whim of politicians and an easily exploited population that all too often turns to society for answers to their own problems. If our society were still largely rural, agrarian and removed from the rest of the world in time and space, the problems outlined herein would be less impactful. As the last half century has proven, there is no longer in Western society a segment that is so far removed that its existence is not intertwined in the fabric of everyday life throughout the country. In Texas, there are many rural areas and school districts that some believe do not suffer the same influences that children in urban areas experience. In fact, it appears often our legislature believes that Texas is

¹¹ Although during the early 1990's violence by juveniles was on the rise, by 2009 the trend had reversed and juveniles arrested for serious crimes and in custody had never been lower. See Peter W. Greenwood & Susan Turner, *Juvenile Crime and Juvenile Justice*, in CRIME AND PUBLIC POLICY 88, 89 (James Q. Wilson, Joan Petersilia eds., 2d. ed. 2011).

locked in the pre-World War II rural mentality that so many believe is that Utopian dream of how society use to be.

Our educators throughout this State deal with the same influences of modern culture, drugs, sex, violence, racism, music, fashion, depression, mental illness, developmental disabilities, disease, and poverty despite the good or bad fortune of living in one of Texas's large metropolitan areas or in the most remote village or township. Those charged with the education of our children must be given the tools to deal with misbehavior without being charged with the responsibility for being policemen, prosecutors, or executioners. A better system must be created and mandated upon local school boards to change the perpetual creation of an underclass of mostly under educated males with little or no opportunity for adult success.

There is not a teacher in this State that would trade a quality education for every child for the luxury of teaching only the best behaved. Teachers believe it is their charge to educate every child. It is with this as a backdrop that the current method of educating our children—who find themselves being kicked down the road due to their own misbehavior, either perceived or imagined—is here described.

III. Kicking the Can Down the Road

January 30, 2003, Terry Carter was a seventeen-year old honor student at Ft. Worth's Dunbar High School, ranked sixth in his graduating class. For extra credit, Carter performed an original creative rap poem in his theater arts class which a fellow student believed to be threatening. For the next fifty-three school days Carter was denied admission to his school, which included serving a ten day sentence at the District's Alternate Education Program.¹² The United States

¹² See Selwyn Crawford, *Reinstated teen relishes 'new day': Classmates welcome FW honor student suspended for rap poem*, DALLAS MORNING NEWS, Apr. 24, 2003, at 2B. Carter was immediately removed from class and was not allowed back to his school until April 23, 2003, after the U.S. District Court issued an order finding the Fort Worth I.S.D., had violated procedural due process rights of the Fourteenth Amendment by their re-

District Court found Carter's "effective expulsion" was in violation of his rights to procedural due process and granted injunctive relief.¹³ By the time this matter worked its way through the school district and the District Court, the United States Court of Appeals, Fifth Circuit, found the issue moot because of Carter's graduation. Carter, as the prevailing party, was entitled to reasonable attorney's fees for the appeal,¹⁴ and for the due process violations he suffered at the hands of a system which victimizes students by charging them with criminal behavior and denying them an education.¹⁵ Any opportunity to address the real problem was avoided. The endemic concern here is not the predictable protection of the status quo, but what, for nearly a generation, has become known as the "criminalization" of student behavior.¹⁶ As Professor Reyes warns, "[w]hen adolescents are targeted by stringent zero tolerance policies and processed in practice as participants in the juvenile justice system, the period of transition from childhood to adulthood has been transformed into a preparation period for life as a criminal."¹⁷

Not all children are as fortunate as Terry Carter with a mother and legal counsel who would not accept the way the school district treated Terry. Not all children are as fortunate as Terry Carter, at the top of his class with plans to attend the

fusal to follow state law and their own policies which resulted in Carter's "transfer and banishment from his home school of Dunbar High." *See also* Brief for Appellees Shena Murphy (Carter's mother) at 2, *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470 (5th Cir. 2003).

¹³ *See* *Murphy v. Fort Worth Indep. Sch. Dist.*, 258 F. Supp. 2d 569 (N.D. Tex. 2003).

¹⁴ *See* *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470 (5th Cir. 2003) ("[Carter] is clearly the prevailing party and is entitled under 42 U.S.C. § 1988 (2000) to a reasonable attorney's fee.").

¹⁵ *See* Bernadine Dohrn, "Look Out Kid, It's Something You Did" *The Criminalization of Children*, in *THE PUBLIC ASSAULT ON AMERICA'S CHILDREN, POVERTY, VIOLENCE AND JUVENILE INJUSTICE* 157, 160-62 (Valerie Polakow ed., 2000).

¹⁶ *See* Augustina H. Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 *ST. JOHN'S J. LEGAL COMMENT.* 73 (2007).

¹⁷ *Id.* at 91.

University of Texas.¹⁸ But the Texas Youth Commission and the Texas Department of Criminal Justice, Institutional Division, are full of examples of children, not like Terry Carter. This is why his story is important. We had an opportunity with Terry Carter to fix what is wrong with discipline in the Texas public school system. Instead, we just kicked the can down the road, allowing 100,000 Texas children per year since 2003 to be denied their opportunity at leveling the racial and economic playing field. It is past time to address the problem.

IV. The Evolution of School Discipline

The modern era in school discipline began in 1994 when Congress passed legislation which required states that received federal funding for education to implement a zero tolerance policy (hereinafter ZT) for children who bring weapons to school.¹⁹ This ZT attitude soon spread to the use

¹⁸ See Selwyn Crawford, *How a rap rocked a teenager's world: Honor student appeals suspension for poem district calls 'terroristic'*, DALLAS MORNING NEWS, Feb. 12, 2003, at 23A.

¹⁹ See *Cathe A. v. Doddridge Cnty. Bd. of Educ.*, 490 S.E.2d 340 (W. Va. 1997); *Gun-Free Schools Act of 1994 ("GFSA")*, 20 U.S.C.A. §§ 8921–8923 [§§ 8921 to 8923. Repealed. Pub.L. 107-110, Title X, § 1011(5)(c), Jan. 8, 2002]. Originally meant to address the problem of guns in the public schools, the *GFSA* and its progeny have evolved into addressing all students who violate local or state rules of conduct including those who are disruptive to the education of other students; Institute for the Study of Students at Risk [ISSR], 2001; BRIAN KLEINER, REBECCA PORCH, & ELIZABETH FARRIS, NAT'L CTR. FOR EDUC. STAT., PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000-01 (2002); Zweig, 2003. The original *GFSA* required states that received federal funds to require a minimum of a one-year expulsion for any student who is caught with a gun at school. See 20 U.S.C.A. § 8921(b)(1) (repealed 2002); 20 U.S.C.A. § 7151(b)(1) (passed in conjunction with *No Child Left Behind Act of 2001 (NCLBA)*, 20 U.S.C.A. § 6301 (2002)). Interestingly enough, the *GFSA* tacitly encouraged States to continue their requirements to provide a free public school education to these expelled students (20 USCA § 8921(b)(2) (repealed 2002); 20 U.S.C.A. § 7151(b)(2)), while the *NCLBA* stated its purpose "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State aca-

and possession of drugs and alcohol, acts of violence, threats and a whole host of other problems, which the original act was not designed to address. These additional problems include subjective discretionary behavioral problems, relatively minor infractions that often do not involve weapons or the safety of the school, truancy, continual academic failure, disruptive verbal behavior, teen pregnancy, and mental health issues.²⁰ As classrooms and school populations became larger

demographic achievement standards and state academic assessments.” 20 U.S.C.A. § 6301 (2002) (emphasis added). So the basic concept of a free appropriate public education for *all* children, using individualized education programs where necessary, is once again affirmed as set out in the *Individuals with Disabilities Education Act (IDEA) of 2004*, 20 U.S.C. § 1401 *et seq.*, from its roots in the *Education of the Handicapped Act (1970)*. There is no conflict in the language of *NCLBA* or *IDEA*. *Bd. of Educ. of Ottawa Tp. High School Dist. 140 v. Spellings*, 517 F.3d 922 (7th Cir. 2008). The mission of the Texas public education system “is to ensure that *all* Texas children have access to a quality education.” TEX. EDUC. CODE ANN. § 4.001 (2011) (emphasis added). The basic guarantee is from the Texas Constitution, Article VII, section 1 wherein it says, “A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” These guarantees of an education must include those deemed too incorrigible to remain in their own classrooms, such as those expelled under the mandates of the *GFSA* or expelled for other rule violations or State laws, or those sent to disciplinary alternate education programs or suspended from school under the rules of the local school districts. This education must meet State academic achievement standards and State academic assessments under the *NCLBA*. Texas must not fail in its charge, to educate *all* our children. Children in Texas have a property right in their education, protected by the due process clause, which arises from these statutes and our Constitutions that promise equal access to a quality education for *all* children. *See Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647 (W.D. Tex. 2000). The State has created an entitlement to free public education. *See also Stafford Mun. Sch. Dist. v. L.P.*, 64 S.W.3d 559 (Tex. App. 2001). The education of *all* children is the mandate.

²⁰ *See* Cecil R. Reynolds, Russell J. Skiba, Sandra Graham, Peter Sheras, Jane Close Conoley, Eneida Garcia-Vazquez, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852 (2006). In this Zero Tolerance Task Force Report are numerous anecdotal examples of the extremes to which school districts have pushed their Zero Tolerance policies—the ten year old

and more diverse, school discipline evolved from the subservience of the individual student, at public schools infancy, to the will of the teacher imposed by corporal punishment, to the use of administrator imposed corporal punishment.²¹

girl expelled for having a small knife for cutting an apple placed in her lunch box by her mother; the high school junior expelled for talking to his mother on his cell phone; fifteen students expelled for watching a fight; an eleven year old boy charged with theft of a lollipop; a five year old suspended for “sexual harassment” for hugging classmates; a student with Asperger’s Syndrome suspended for making threats after being teased; suspensions for a ten inch novelty chain attached to a Tweety Bird wallet, for possession of a plastic knife to cut cake, for bracelets and necklaces, and for a screwdriver used to fix band instruments; a seventh grade boy suspended for bringing a toy gun for a class skit with permission of the teacher; and a fifteen year old girl expelled for possession of one Advil tablet, just as a few examples. *Id.* at 17-32. This phenomenon is continuing as school districts continue to strictly apply Zero Tolerance. Recent examples are a twelve year old girl removed from her school in handcuffs for doodling her name on her desk in erasable marker, a thirteen year old arrested for writing “okay” on her desk, a five year old handcuffed and sent to a psychiatric ward for throwing a fit in kindergarten. *See Rachel Monahan, Queens girl Alexa Gonzalez hauled out of school in handcuffs after getting caught doodling on desk*, N.Y. DAILY NEWS, Feb. 5, 2010, available at http://articles.nydailynews.com/2010-02-05/local/27055388_1_desk-doodling-handcuffs. Or, see the story of the six year old who was punished by suspending him for five days plus requiring he attend forty-five days at an alternative school for bringing a camping utensil that was part knife, fork and spoon to school. Oren Dorell, *Schools’ Zero-Tolerance Policies Tested*, U.S.A. TODAY, Nov. 2, 2009, available at http://www.usatoday.com/news/nation/2009-11-01-zero-tolerance_N.htm. *See* JANINE M. ZWEIG, VULNERABLE YOUTH: IDENTIFYING THEIR NEED FOR ALTERNATIVE EDUCATIONAL SETTINGS 7 (The Urban Institute, Washington, D.C. 2003), available at http://www.urban.org/UploadedPDF/410828_vulnerable_youth.pdf.

Zweig defines youth disconnected from society and estimates their number to be up to ten million. *Id.* He argues for the use of alternative education schools and further research to determine if these youth can be reconnected. *Id.* “Many youth development experts believe that students who leave the education system early as a result of choice or punishment become disconnected from society, losing much more than their diploma and a chance for economic productivity.” *Id.* at 17.

²¹ *See* Troy A. Adams, *The Status of School Discipline and Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 142-143 (2000) [hereinafter Adams].

A. Corporal Punishment

This use of corporal punishment has been upheld by the U.S. Supreme Court finding the cruel and unusual punishment provision of the Eighth Amendment to the United States Constitution is not designed to protect students from disciplinary alternatives.²² In the United States, the effectiveness and the popularity of corporal punishment waned with the growth of the size of school districts during the 1960's and 1970's.²³ Throughout the industrialized world, except for the Australian outback and twenty-one States in the United States, corporal punishment is now forbidden and has been systematically banned by law as a practice.²⁴ Many have pushed for the complete abolition of the use of corporal punishment as a tool for modifying children's impulses and conduct to achieve obedience to rules.²⁵ Corporal punishment

²² See *Ingraham v. Wright*, 430 U.S. 651 (1977).

²³ See Cindy S. Moelis, *Banning Corporal Punishment: A Crucial Step Toward Preventing Child Abuse*, 9 CHILD. LEGAL RTS. J. 2, 4 (1988); Adams, *supra* note 21, at 144.

²⁴ See David R. Dupper & Amy E. Montgomery Dingus, *Corporal Punishment in the U.S. Public Schools: A Continuing Challenge for School Social Workers*, 30 CHILD. & SCH. 243 (2008) [hereinafter Dupper].

²⁵ See SOC'Y FOR ADOLESCENT HEALTH & MED., <http://www.adolescenthealth.org>; PROJECT NO SPANK, <http://www.nospank.net>; ABLECHILD.ORG, <http://www.ablechild.org>; ALICE MILLER: CHILD ABUSE & MISTREATMENT, <http://www.alice-miller.com>; ATTACHMENT PARENTING INT'L, <http://http://www.atlc.org/www.attachmentparenting.org>; AWARE PARENTING INST., <http://www.awareparenting.com>; THE CTR. FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com>; CTR. FOR THE IMPROVEMENT OF CHILD CARING, <http://www.ciccparenting.org>; CTR. FOR NONVIOLENT COMM'N, <http://www.cnvc.org>; LAURIE A. COUTURE, <http://www.laurieacouture.com>; CHILD TRAUMA ACAD., <http://www.childtrauma.org>; CHILDREN ARE UNBEATABLE! ALLIANCE, <http://www.childrenareunbeatable.org.uk>; CHURCHES' NETWORK FOR NON-VIOLENCE, <http://www.churchesformon-violence.org>; COMM. FOR SAFETY OF FOREIGN EXCH. STUDENTS, <http://www.csfes.org>; THE NATURAL CHILD PROJECT, <http://http://www.isaccorp.org/www.naturalchild.org>; NURTURING GOD'S WAY, <http://www.nurturinggodsway.com>; NURTURING PARENTING, <http://www.nurturingparenting.com>; PARENTING IN JESUS' FOOTSTEPS, <http://www.parentinginjesusfootsteps.org>; GLOBAL INITIATIVE TO END

with respect to children, often has the unintended consequence of reinforcing that physical aggression is an appropriate means of obviating misbehavior in others.²⁶ This dichotomy cannot be overlooked. Dr. Anthony Troy Adams warns that “school violence and discipline are mutually constitutive of the problem and need to be considered in relationship to each other in any serious discussion on either topic.”²⁷

Many research studies show corporal punishment is associated with (1) lifelong psychological outcomes such as conduct disorders, (2) rational problem solving abilities, (3) increased aggressiveness—being defiant and oppositional, (4) lower academic achievement, (5) lower social competence, (6) feelings of inadequacy and resentment, (7) higher rates of child abuse fatalities in the community, (8) more school shooting deaths, (9) states with more youth on death row, (10) higher student behavioral problems, (11) more violence, aggression, and homicide by children, (12) increased alienation, misbehavior and revenge seeking by students, and a host of other problems.²⁸ Additionally, although an incredible 1.5

ALL CORPORAL PUNISHMENT OF CHILDREN,
<http://www.endcorporalpunishment.org>; NOPADDLE.COM,
<http://www.nopaddle.com>; PEOPLE OPPOSED TO PADDLING STUDENTS,
<http://www.nospankingzone.org>; THE STRAIGHTS.COM,
<http://www.thestraights.com>; TEEN ADVOCATES U.S.A.,
<http://www.teenadvocatesusa.homestead.com>; TEENLIBERTY.ORG,
<http://www.teenliberty.org>; PERSONS AGAINST NON-STATE TORTURE,
<http://www.ritualabusertorture.org>; PSYCHEALTH, LTD.,
<http://www.psychhealthltd.com>; THE ASS'N FOR PSYCHOHISTORY,
<http://www.psychohistory.com>; THE ORIGINS OF LOVE & VIOLENCE,
<http://www.violence.de>; NEVERHITACHILD.ORG,
<http://www.neverhitachild.org>; REPEAL 43 COMM.,
<http://www.repeal43.org>; THE SENTENCING PROJECT,
<http://www.sentencingproject.org>; Convention on the Rights of the Child,
 Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M.
 1456<http://www.voicesforchildren.ca/report-June2003-2.htm>.

²⁶ *Id.*

²⁷ See Adams, *supra* note 21, at 144.

²⁸ See Dupper, *supra* note 24, at 245-46 (including a list of the studies with these and other findings). Dupper and Montgomery Dingus also see a correlation with school corporal punishment and states, such as Texas, that have more conservative politics and religious beliefs, where people adhere

million incidents of corporal punishment are reported each year in the public schools, researchers estimate between two to three million cases of corporal punishment actually occur, with approximately 10,000 to 20,000 school children obtaining medical attention as a result of those events.²⁹ During the last thirty years, the number of corporal punishment reports have declined, even with the dramatic increase in student population. Disturbingly however, there is an ever increasing disproportionate application of corporal punishments upon minority students, particularly African American children, and a decrease, proportionately, of the corporal punishments upon White students.³⁰ Further, other groups of students ag-

to more evangelical protestant values interpreting Biblical teachings as requiring the use of corporal punishment, making the abolition of such practices more unlikely. During the Victorian Era, misbehavior was seen as alienating God, and corporal punishment was tied, and still is among many, to a literal interpretation of Proverbs 23:13-14, in the Christian Old Testament, [Hebrew Bible] King James Version, wherein it says, "Withhold not correction from the child: for if thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell." Another more modern Christian English interpretation is, "Do not withhold discipline from a child; if you punish him with the rod, he will not die. Punish him with the rod and save his soul from death." New International Version. See Dupper, *supra* note 24, at 244.

²⁹ See Donald E. Greydanus et al., *Corporal Punishment in Schools: Position Paper for the Society for Adolescent Medicine*, 32 J. OF ADOLESCENT HEALTH 386 (2003).

³⁰ As the rate of overall corporate punishment in schools has declined from 1,521,896 incidents in 1976 to 223,190 in 2006, the rate of African American students so disciplined rose from 29% to 36% of the total disciplined during this same period, with the highest percentage of 39% occurring as recent as 2000; *U.S.: Corporal Punishment and Paddling Statistics by State and Race*, THE CTR. FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=statesbanning> (last visited Aug. 15, 2011). *Top Ten Pupil-Battering States: 1997-98 School Year*, PROJECT NO SPANK, <http://www.nospank.net/cpchart2.htm> (last visited Aug. 15, 2011) (showing that during the 1997-1998 school year, Texas ranked eighth among the states that discipline children in the schools by hitting them, at a rate of 2.07% of Texas students equating to 81,373 school children). By the 2006-2007 school year, although Texas had moved up to seventh in the nation in corporal punishment, only 1.1% of Texas students were struck by educators, with the actual number being 49,197 students so disciplined. Texas and Mississippi account for almost

gregated by their special needs find the use of corporal punishment particularly harmful, much like the harm in the removal from class whether through suspension or expulsion.³¹

B. *Expulsion & Suspension*

As student populations grew with the post-World War II baby boom, increased student unrest led school administrators to use expulsion and suspension as their response to the growing ineffectiveness of these traditional corporal punishment discipline techniques.³² During the 1960's and 1970's, public schools took a cue from the ever increasing popularity of the philosophy of incarcerating criminals to protect society, and began the widespread use of out-of-school suspensions and expulsions to remove disruptive children from the learning environment.³³ The removal of students from the classroom by these techniques alienated students from education. This resulted in more drop-outs and students feeling increasingly self-defeated, powerless, isolated and disenfranchised.³⁴ With *Goss v. Lopez* (1975), the Supreme Court reaffirmed the

40% of all occurrences of corporal punishment in the United States. To place this in context, according to the 2006 Civil Rights Data Collection of the U.S. Department of Education, African American students represented 17.13% of enrolled students, but comprised 35.67% of students receiving corporal punishment, 37.40% of students who received out of school suspensions, and 37.86% of students who were expelled all at more than twice these students population within the schools. Press Release, U.S. Dep't of Educ., Anniversary of Title VI Marks Progress and Reminds us that Every Child has the Right to an Education (July 1, 2009), available at <http://www2.ed.gov/news/pressreleases/2009/07/07012009a.html>.

³¹ Although not the focus of this paper, foster children in Texas are almost twice as likely to be disciplined in school, and the use of corporal punishment with children that are in the care of the state because of abuse or neglect is "especially inappropriate" because of their past experiences. The removal of foster children from the classroom for disciplinary behavior "exacerbates rather than ameliorates the special needs of students in foster care." JANE BURSTAIN, THE TEXAS SCHOOL DISCIPLINARY SYSTEM AND FOSTER CARE CHILDREN No. 09-392 at 5 (Center for Public Policy Priorities, April 2009).

³² See Adams, *supra* note 21, at 144.

³³ *Id.*

³⁴ *Id.* at 145.

rights to a public education and due process within the educational environment.³⁵

As a response to *Goss*, school districts moved to the use of in-school suspensions as a disciplinary alternative to the previous over-use of expulsion and out-of-school suspensions.³⁶ During the late 1970's and 1980's, this more enlightened and humane form of discipline, at least during the school day, kept the unruly student away from the behaving students in the classroom. At the same time, it kept them away from the community where they were exposed to others who would encourage continued misbehavior, and provided an opportunity for more educational instruction.³⁷ These models were an evolving attempt to address the ever changing make-up of the classroom, the ever increasing demands upon the teacher's time and resources, and the changing attitudes of society about children and the role of discipline in their education.

This trend continued so that during the 2007-2008 school year there were more than twice as many students receiving discretionary in-school suspensions in Texas than discretionary out-of-school suspensions.³⁸ These students had almost three times the number of discretionary in-school suspensions than the number of discretionary out-of-school sus-

³⁵ See *Goss v. Lopez*, 419 U.S. 565 (1975).

³⁶ See Adams, *supra* note 21, at 145-146.

³⁷ *Id.*

³⁸ See Texas Education Agency, State Level Annual Discipline Summary: PEIMS Discipline Data for 2007-2008, http://ritter.tea.state.tx.us/cgi/sas/broker?_service=marykay&_program=ad hoc.download_static_summary.sas&district=&agg_level=STATE&referrer=Download_State_Summaries.html&test_flag=&_debug=0&school_yr=08&report_type=html&Download_State_Summary=Generate+Report (PEIMS stands for the Public Education Information Management System and is the TEA's statewide education data base). For this year 654,667 students received discretionary in-school suspensions and 311,718 students were given discretionary out-of-school suspensions. Of the total out-of-school suspensions, both mandatory and discretionary of 643,853, 35% were African American and 48% were Hispanic, a total of 83% of the out-of-school suspensions from traditionally underserved minorities. *Id.* Remember, while out-of-school the students are not doing school work and are falling behind.

pensions.³⁹ This seeming improvement though is contrasted with the expulsion statistics. During 2007-2008, there were 235% more discretionary expulsions than mandatory expulsions yielding a discretionary expulsion rate of 70% of the total expulsions.⁴⁰ Of the total students expelled, although 64% were expelled to an alternate education program, 36% were expelled to the streets.⁴¹ By definition, discretionary suspensions and expulsions factor in judgment calls and policy decisions by school administrators and have reached shocking levels. In a recent report, it was found that almost 60% of public school students in Texas, sometime during their seventh through twelfth grade, were suspended or expelled for discretionary reasons at least one time.⁴² The suspension or expulsion rate for special education students is at almost 75%.⁴³ Further, even within the same school district, it appears where a student attends school, and how school officials approach the use of suspensions and expulsions, has little to do with academic success and everything to do with the avoidance of disciplinary actions.⁴⁴

C. Texas Disciplinary Alternate Education Programs

To understand the beginnings of this movement, and

³⁹ *Id.* (During the 2007-2008 school year there were a total of 1,733,586 discretionary in-school suspensions in Texas compared to 618,680 discretionary out-of-school suspensions.).

⁴⁰ *Id.* (There were 16,076 total expulsions for the subject year which included mandatory expulsions of 4,792 and discretionary expulsions of 11,284.).

⁴¹ *Id.* (During this same school year, 2007-2008, a total of 9,306 students were expelled in Texas with 5,911 students expelled to the Juvenile Justice Alternate Education Program (JJAEP). Of the 16,076 total expulsions for the year, 23% were African American and 54% were Hispanic, a total of 77% of the total expulsions from traditionally underserved minorities. *Id.*

⁴² See TONY FABELO ET AL., COUNCIL OF STATE GOV'TS JUSTICE CTR. & PUB. POLICY RESEARCH INST. AT TEX. A&M UNIV, BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 35 (2011) [hereinafter FABELO].

⁴³ *Id.* at 47.

⁴⁴ See *Id.* at 73-83.

to place it in proper context, one must have an understanding of the current state of public education in the ZT era. Because of the requirements of the Texas Safe Schools Act of 1995,⁴⁵ all Texas public school districts had to adopt a student code of conduct for the district and post it at each school campus.⁴⁶ Additionally, they had to specify the circumstances under which a student may be removed from a classroom, campus, or disciplinary alternative education program, specify conditions that authorize or require transfer of a student to a disciplinary alternative education program, outline conditions under which a student may be suspended or expelled, including notification of parents.⁴⁷ They were also to provide methods and options for managing students in the classroom and on school grounds, for disciplining students, and for preventing and intervening in student discipline problems, among other things.⁴⁸ The Texas Education Code gives teachers the right to “remove” a student from class if the teacher believes the student’s behavior is “so unruly, disruptive, or abusive that it seriously interferes” with her ability to “communicate effectively” with the other students or their ability to learn.⁴⁹ Once “removed” the principal may change the student’s classroom, place him in an in-school suspension, or in a disciplinary alternative education program (DAEP).⁵⁰

A teacher shall remove a student for placement in a DAEP, or expulsion, if the student commits the offense of false alarm or report, terroristic threat, a felony, assault, a drug or alcohol crime, abuse of a volatile chemical, public lewdness, indecent exposure, retaliation against a school employee, or if the presence of the student in the classroom will

⁴⁵ See Texas Safe Schools Act of 1995, TEX. EDUC. CODE ANN. § 37.001 *et seq.* (2011).

⁴⁶ See TEX. EDUC. CODE ANN. § 37.001(a) (2011)

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See TEX. EDUC. CODE ANN. § 37.002(b)(2) (2011). The subjective nature of this provision is what is the most striking. The teacher defines the terms unruly, disruptive, abusive, seriously, ability, communicate, and effectively. The consequences of this “removal” follow.

⁵⁰ See TEX. EDUC. CODE ANN. § 37.002(c) (2011).

threaten the safety of others or will be detrimental to the educational process.⁵¹

These and a whole host of violations will lead to expulsion.⁵² A student may be expelled while in a DAEP if he continues to engage in “serious or persistent misbehavior that violates the district’s student code of conduct.”⁵³ In accordance with the GFSA⁵⁴ a student shall be expelled “from the student’s regular campus” for a period of at least one year if he brings a firearm to school.⁵⁵ If the child is younger than ten years of age it is mandatory to provide him educational services in a DAEP, and if the child is ten years or older, educational services are permitted but are not required.⁵⁶

Once the student is removed from the classroom, the teacher, under most circumstances, may refuse to allow them to return to the classroom.⁵⁷ The teacher may not be coerced

⁵¹ See TEX. EDUC. CODE ANN. § 37.006 (2011). This is merely a summary of the many different ways in which a child may be reassigned to a DAEP. Some of these behaviors, even if they occur off school premises, will result in the student’s removal. The prime example of a ZT policy as is the next section.

⁵² See TEX. EDUC. CODE ANN. § 37.007 (2011). This list additionally includes the use, exhibit, or possession of a firearm, an illegal knife (or legal if against local policy), a club, a prohibited weapon, and the commission of aggravated assault, sexual assault, aggravated sexual assault, arson, murder, capital murder, criminal attempt to commit murder or capital murder, indecency with a child, aggravated kidnapping, aggravated robbery, manslaughter, criminally negligent homicide, continuous sexual abuse of young child, felony drug or alcohol crime, felony criminal mischief, and deadly conduct.

⁵³ See TEX. EDUC. CODE ANN. § 37.007(c) (2011).

⁵⁴ See 20 U.S.C. § 7151 (2006); *supra* note 19.

⁵⁵ See TEX. EDUC. CODE ANN. § 37.007(e) (2011). There are provisions for the local superintendent to modify the length of expulsion in accordance with 20 U. S.C. Section 7801. TEX. EDUC. CODE ANN. § 37.007(e)(1) (2011).

⁵⁶ See TEX. EDUC. CODE ANN. § 37.007(e)(2), (3) (2011).

⁵⁷ TEX. EDUC. CODE ANN. § 37.002(d). Although the statute gives deference to the wishes of the teacher, under the provisions of the Texas Education Code section 37.003 a three-member placement review committee is established in each school to determine placement of a student when a teacher refuses the return of a student to the teacher’s class and can place

to consent to the return of the student.⁵⁸

Although the statute dictates DAEPs must meet education and behavioral needs of the students,⁵⁹ the program design and content is left to the local school district.⁶⁰ There is a wide variety of programs, some with teacher-oriented classrooms, some with self-paced instruction, and many different types of behavior management techniques—including the dated use of boot-camps and the old reward-punishment model.⁶¹ The Texas Education Agency describes the purpose of DAEPs “is to provide temporary student placements for behavior management, often as alternatives to suspension or expulsion.”⁶² The local student code of conduct, adopted by the trustees of the school district, provides guidelines for setting the length of a term of placement in a DAEP or the length of expulsion.⁶³ The only statutory guidance on suspensions is

the child back in the original classroom if it is the best or only alternative available. Also, for some reason, the terms of the removal may isolate the student further by prohibiting the attendance or participation in school-sponsored or school-related activities. TEX. EDUC. CODE ANN. § 37.002(c) (2011).

⁵⁸ TEX. EDUC. CODE ANN. § 37.002(d) (2011).

⁵⁹ TEX. EDUC. CODE ANN. § 37.008(a)(5) (2011).

⁶⁰ *Id.* Faithful to the traditions of Texas, there are only a few basic guidelines in the Texas Education Code as to the nature of what is required in DAEPs. The Code sets out broad guiding principles, for the most part, as a framework for the basic DAEP educational setting.

⁶¹ TEX. EDUC. AGENCY 2008 COMPREHENSIVE ANN. REP. ON TEX. PUB. SCH. 53, *available at* http://ritter.tea.state.tx.us/research/pdfs/2008_comp_annual.pdf [hereinafter TEA 2008 ANN. REP.].

⁶² TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17: DISCIPLINARY ALTERNATIVE EDUCATION PROGRAM PRACTICES 1 (2007), *available at* <http://ritter.tea.state.tx.us/research/pdfs/prr17.pdf>. Sadly, this report was an overview of DAEP and “best practices” in these settings. Using research from 1999, 2001 and from another state, little was offered other than “old school” attempts to “change” behavior by the use of structured rewards and sanctions to reinforce behavioral rules. Although this report was written in 2007, there is no indication in it of the developing trends in behavioral modification through the application of evidenced based programs such as positive behavioral interventions and support.). *Id.*

⁶³ *See* TEX. EDUC. CODE ANN. § 37.001(a)(5) (2011).

that if a child is suspended from school for a violation of the student code of conduct, the out-of-school suspension shall not be longer than three days.⁶⁴ As to the education needs of the students, the standardized tests given to DAEP students are lower than the average student statewide, with the reading/ELA test passing rate in 2007 at 68%, twenty percentage points lower than the statewide average of 88%, and the mathematics passing rate in 2007 at 38%, thirty-eight percentage points lower than the statewide passing rate of 76%.⁶⁵

The goal is “for students to return to, and succeed in, their regularly assigned classrooms and schools.”⁶⁶ Herein lies one problem addressed by this article – the removal of children from their classrooms for disciplinary violations, often for discretionary reasons, and the resulting isolation from their educational campus. Such isolation retards the student’s otherwise normal educational and social development, and in turn encourages withdrawal and continued negative disciplinary problems leading to the likelihood of involvement with crime and the juvenile justice system.⁶⁷ In fact, even a single contact with school discipline authorities creates a clear “threshold effect” that greatly increases a student’s chance of

⁶⁴ See TEX. EDUC. CODE ANN. § 37.005 (2011).

⁶⁵ See TEA 2008 ANN. REP., *supra* note 61, at 55.

⁶⁶ See TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 1.

⁶⁷ PUB. POLICY RESEARCH INST., TEX. A&M UNIV., STUDY OF MINORITY OVER-REPRESENTATION IN THE TEXAS JUVENILE JUSTICE SYSTEM FINAL REPORT (2005), *available at*

http://txchildren.org/Images/Interior/juvenile%20justice%20roundtable/a&m%20ppri_dmr%20final%20report%20%283%29.pdf. For children, the single most important predictor for eventual referral to the juvenile justice system is a history of disciplinary referrals at school. Students having one or more disciplinary incidents are 23.4% more likely to have a juvenile justice referral than students with no school disciplinary history. The more severe the disciplinary contact, the higher the probability of a referral becomes. Those most at risk are males with a history of disciplinary involvement at school. Other risk factors are not excelling academically, being economically disadvantaged, with often a mental or emotional disability.

a referral to the juvenile justice system,⁶⁸ with the effect upon African American students being even more pronounced.⁶⁹ Removal of a child from a classroom may occur when the student's behavior repeatedly or seriously interferes with a "teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn."⁷⁰

Since the implementation of DAEPs, school districts have not significantly changed their treatment of students in the alternate education programs. But, improvements are beginning to be seen as the legislature recognizes that there are mitigating factors to behavioral problems.⁷¹ The State of Texas can express its concern for the welfare of children in the

⁶⁸ *Id.* at 24 (These statistics have been confirmed as 23% of children with at least one disciplinary action during the seventh through twelfth grades will have a juvenile justice contact while only 2% of those children without disciplinary actions will have such contact); see FABELO, *supra* note 42.

⁶⁹ See generally FABELO, *supra* note 42 (whereas African American males were only 7.3% of the sample (67,919), 25.6% had at least one juvenile justice contact (17,306) – a 350% over-representation of their population within the sample. By contrast, White males were 22.1% of the sample (205,519), and 28,642 had at least one juvenile justice contact – a 63% under-representation of their population within the sample); see also Augustina H. Reyes, Professor, Univ. of Houston, Presentation at Symposium at the American Educational Research Association, *Where Have All the Young Men Gone?* (Apr. 11-14, 2007) (on file with author).

⁷⁰ See TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 3.

⁷¹ See H.R. 603, 79th Leg. (Tex. 2005) (amended Texas Education Code section 37.001(a)(4), allowing the consideration of self-defense, intent or lack of intent at the time of the conduct, a student's disciplinary history or a disability that may impair the capacity to appreciate the wrongfulness of their conduct in the decisions to order removal of a child to a DAEP). Also the Texas Behavior Support Initiative was developed to meet the requirements of Texas Administrative Code section 89.1053 to provide information on Positive Behavior Support which is one of the solutions suggested herein to remedy the recidivism problem in DAEP and in TYC. See *infra* Section VIII.B; See also, Marc Levin, Commentary, *A New Texas Pipeline: Zero Tolerance for Texas Kids*, TEX. PUB. POL'Y FOUND. (July 6, 2006), http://www.texaspolicy.com/commentaries_single.php?report_id=1140.

public schools by compelling better treatment and moving away from the corporal, harsh punishment model of the past.⁷² Parental involvement and knowledge of disciplinary procedures and alternatives is essential to preventing mistreatment.⁷³ Even the Texas Youth Commission (TYC) has recently begun to modify their harsh treatment of behavior problems by implementing the ReDirect Program,⁷⁴ establishing strict policies on the use of force,⁷⁵ isolation,⁷⁶ and se-

⁷² See TEX. EDUC. CODE ANN. § 37.0021 (2011) (forbidding students from being placed in seclusion by a school district employee or volunteer or an independent contractor of a district). This restriction is also applicable to open-enrollment charter schools under Texas Education Code section 12.104(b)(J). Texas Administrative Code §89.1053 sets out procedures adopted by the Commissioner of the Texas Education Agency for the use of restraints and time-out which first became effective August 1, 2002, required by Senate Bill 1196 77th Legislative Session (2001) which added Texas Education Code section 37.0021 and made other changes to the treatment of children by educators.

⁷³ Organizations such as Advocacy, Inc., the American Civil Liberties Union of Texas, the Council on At-Risk Youth and Texas Appleseed provide needed assistance to parents and students. Texas Appleseed has produced a publication entitled “When My Child is Disciplined at School: A Guide for Families” (2009) which provides concise information and answers, including a Parent/Guardian Bill of Rights, to empower families in the discipline process. ERICA TERRAZAS, TEXAS APPLESEED, WHEN MY CHILD IS DISCIPLINED AT SCHOOL: A GUIDE FOR FAMILIES (Deborah Fitzgerald Fowler & Janis Monger eds. 2009), available at [http://www.texasappleseed.net/index.php?option=com_docman&task=doc_view&gid=60&Itemid=\[hereinafter WHEN MY CHILD\]](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_view&gid=60&Itemid=[hereinafter WHEN MY CHILD]).

⁷⁴ See TEX. YOUTH COMM’N, GENERAL ADMINISTRATIVE POLICY MANUAL § 95.17 (2011), available at <http://austin.tyc.state.tx.us/Cfinternet/gap/95/gap9517.htm>. The ReDirect program provides intensive interventions only in a high restriction TYC facility. This program is limited to a maximum of forty-two days, requires education, daily counseling, mental health exams and other specific measures. Placement is only for serious rule violators (assault, escape, vandalism, sexual misconduct, weapons, chunking or tampering with safety equipment), and only after a hearing. Policy Manual is available at <http://austin.tyc.state.tx.us/Cfinternet/gap/index.html>.

⁷⁵ *Id.* § 97.23. The GAP prefers non-physical intervention techniques to force should be used whenever practical. The staff are “prohibited from using profanity or slang based on race, gender, sexual orientation, or ethnicity to manage youth behavior.” Although the use of force, restraint and pepper spray is allowed, their use is strictly delineated.

curity units,⁷⁷ and the specific enumeration of the rules in the ninety-nine page TYC Youth Handbook.⁷⁸

Our society continues – or some would say begins—the slow climb out of its reactionary past, with new and innovative ideas immersing, using science and evidence-based practices to modify and rehabilitate children’s behavior.⁷⁹ This is a new approach which is in diametric opposition to the former retributive practices which have historically maintained our social, political and ethnic institutions to benefit the White former majority.⁸⁰ The prime example of education’s maturing response is the ever increasing use of positive behavioral supports and interventions (PBIS). As a more enlightened approach to discipline, PBIS offers to swing the corporal punishment pendulum away from the recent strict application of ZT policies which have not worked.⁸¹ It is to this movement that the Texas Legislature must commit, as to do otherwise will continue the disparate treatment of public

⁷⁶ *Id.* § 97.39. This GAP limits isolation to certain circumstances for short term confinement under the close watch of a supervisor.

⁷⁷ *Id.* § 97.40. The use of the high security facilities has strict limitations and policies and cannot be used as punishment or as a convenience for staff.

⁷⁸ The TYC Youth Handbook is available at

http://www.tyc.state.tx.us/programs/TYC_Youth_Handbook.pdf. The rewards for good behaviors, the ways TYC changes bad behaviors, and a full explanation of security and control measure are set out. TEX. YOUTH COMM’N, TYC YOUTH HANDBOOK 40-49 (1st ed. Jan. 2010), *available at* http://www.tyc.state.tx.us/programs/TYC_Youth_Handbook.pdf.

⁷⁹ *See* NASMHPD RESEARCH INST., INC., PROMOTING AN EVIDENCE-BASED CULTURE IN CHILDREN’S MENTAL HEALTH: A RESOURCE GUIDE, *available at*

<http://www.systemsofcare.samhsa.gov/ResourceGuide/index.html> (“The purpose of this resource guide is to provide families and youth, practitioners, and administrators with information and resources that can lead to continuous quality improvement within an evidence-based culture in children’s mental health service systems and organizations.” The basic model is to include all child-serving stake holders, including juvenile justice and education, to meet children and families’ needs.)

⁸⁰ *Id.*

⁸¹ *See infra* Part VIII (explaining PBIS, its guiding tenets and implementation throughout Texas and the nation).

school students unable to receive an education elsewhere. But before PBIS can be understood, a look at disciplinary statistics should put into context, even for the most resistant reader, how our history has failed to educate all our students. We have allowed the classroom environment to alienate and criminalize those who our law requires to be educated. Our education system must be redesigned with a sophisticated, evidence-based approach to disciplinary concerns.

V. Texas Public Schools Disciplinary Statistics

In 2007, Texas had more than 4.4 million students attending public schools in 1,037 school districts.⁸² Of these,

⁸² See TEXAS APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION 26 (2007), available at <http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf> [hereinafter SCHOOL-TO-PRISON PIPELINE]. The term "school-to-prison-pipeline" has been coined to describe "the punitive and overzealous tools and approaches of the modern criminal justice system ... serving to remove children from mainstream education environments and funnel them onto a one-way path toward prison." NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 2 (New York, N.Y. 2005), available at http://naacpldf.org/files/case_issue/Dismantling_the_School_to_Prison_Pipeline.pdf. In addition, there is the work of the Children's Defense Fund. In the words of Marian Wright Edelman, President of the Children's Defense Fund:

What's wrong with our children? We are what's wrong with our children. And I hope God will help us to repent, to open our eyes and ears and see and hear our children's cries for help and guidance, and act to save them all – now!

The most dangerous place for a child to try to grow up in America is at the intersection of poverty and race. That a Black boy born in 2001 has a 1 in 3 chance and a Latino boy a one in six chance of going to prison in their lifetime is a national disaster and says to millions of our children and to the world that America's dream is not for all.

CHILDREN'S DEFENSE FUND, AMERICA'S CRADLE TO PRISON PIPELINE 2, 4 (2007), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-report-2007-full-lowres.pdf>. As of the 2010-2011 school year, the number of school districts in Texas grew to 1,258, a 21% growth in just four years. See TEX. EDUC. AGENCY, TEXAS PUBLIC SCHOOL DISTRICTS AND CHARTERS, ALPHABETIC INDEX (Oct. 2010), available at

more than 100,000 students are sent to alternate education programs annually.⁸³ Of this number, over 60,000 are sent for discretionary, non-violent offenses.⁸⁴ Students from all grades are referred to DAEP.⁸⁵ During the 2005-2006 school year, the TEA reported the recidivism rate in DAEP's was 19.6% with 14,760 students returning twice, 3,165 students returning three times, and 1,729 returning four or more times during the year.⁸⁶ Overall, 64.7% of children referred to DAEP's are for

http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2011/not_tagged/school_district_index.pdf.

⁸³ See TEX. EDUC. AGENCY 2006 COMPREHENSIVE ANN. REP. ON TEX. PUB. SCH. 52, tbl. 3.1, *available at* http://ritter.tea.state.tx.us/research/pdfs/2006_comp_annual.pdf [hereinafter TEA 2006 ANN. REP.].

⁸⁴ See TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 8. The report actually shows during the 2005-2006 school year, 64.7% of assignments to DAEPs were for violation of student code of conduct, with the other 35.3% including assignments for controlled substances, fighting, mutual combat, assault, misconduct while in DAEP, alcoholic beverages, felony conduct, possession of a knife, criminal mischief and other.

⁸⁵ *Id.* at 4, tbl. 1.

⁸⁶ *Id.* at 5. Interestingly, in the Texas Education Agency's report it shows the recidivism rates as a coefficient of the total number of children referred to DAEPs not the total number of assignments, which would include children who returned to the DAEP program. The total assignments to DAEPs during that year were 128,319. The report showed 80,408 students to have only been referred once during the year at a rate of 80.4%. *Id.* at 5, tbl. 2. Compared only to the number of children referred, instead of the total assignments, this purports to show a recidivism rate of 19.6% for children referred more than once during the year. The number of children referred only once should be compared to the total assignments (128,319), which equates to 62.7% of children being referred only once. This calculates to 37.3% of the total children returning two or more times during the year. This 37.3% is the true recidivism rate of Texas DAEP – of 128,319 assignments, 37.3% of the time (47,863), the assignments were a failure, based on recidivism. Even more disturbing than the Agency's presumed unintentional misrepresentation of these figures is that the percentage of children assigned and returning more than once. The Texas Education Agency shows students returned twice were 14.8% of the children assigned but in reality, compared to the total assignments of 128,319, their recidivism rate was 23% (14,760 students x 2 assignments = 29,520 assignments / 128,319 assignments = 23% recidivism). Children returning three times (3,165) compared to total assignments (3,165 x 3 / 128,319)

discretionary, non-violent offenses.⁸⁷ So, in real terms, 64,740 children in Texas during the 2005-2006 school year were sent to DAEP's, and thus removed from their assigned classrooms and schools, because someone within the district, either a teacher or administrator or both, gave up on improving the behavior of these children, washed their hands of them and sent them to fail in their school district's disciplinary alternate education program.⁸⁸

The statewide referral rate to DAEPs is a little over 2%.⁸⁹ However, from 2001 through 2006, 167 districts referred students at two to six times the average.⁹⁰ During the 2005-2006 school year the ten school districts with the most referrals to DAEPs, on average sent 8.2% of their student populations to DAEPs – which is over 400% of the statewide average.⁹¹ During the 2004-2005 school year, the Benavides

shows a 7.4% recidivism not the 3.2% implied by the Texas Education Agency (a 231% underrepresentation). Those children with four or more assignments (1,729) would be the balance of 8,896 assignments or 6.9% ($8,896 / 128,319 = 6.9\%$), not the 1.7% shown by the Texas Education Agency's report. *Id.* at 5, tbl. 2. These figures are much more dramatic when viewed in terms of the total assignments. Statewide, DAEP's are 37.3% ineffective toward meeting their stated goals of student success after being returned to their regular assigned classrooms and schools. As will be discussed below, Positive Behavioral Interventions and Supports (PBIS) is up to 95% effective in preventing behavioral incidents either at the primary or secondary level with only 5% of the student population needing the individualized tertiary interventions and supports. Compared to the 37.3% failure rate of DAEP, if we save 32.3% ($37.3\% - 5\% = 32.3\%$) of the children sent to DAEP, we are talking about 32,320 students in real human terms that can be left in their classrooms to improve their chances of completing school.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 6. The number disciplinary incidents for violation of student code of conduct is 74,024 out of a total of 114,338 incidents (64.7%) involving 100,062 students equates to 64,740 students referred for these minor infractions of the student code of conduct. *Id.* at 4-6.

⁸⁹ See TEA 2008 ANN. REP., *supra* note 61, at 54.

⁹⁰ See SCHOOL-TO-PRISON PIPELINE, *supra* note 82, at 58.

⁹¹ *Id.* at 58-59. These ten districts and their rates are: Midland 11%, Llanillo 10%, Benavides 9%, Morton 8%, Pasadena 8%, Boys Ranch 8%, Alvin 7%, San Vincente 7%, Marlin 7% and Waelder 7%. From 2001 through 2006, the Pasadena I.S.D. has been on this "top-ten list" every

ISD, with a total enrollment of about 450 students,⁹² sent a full 22% of their student body to DAEP.⁹³ The systemic overuse and misunderstanding of the purpose of DAEPs is illustrated further by looking at grade school statistics. During the 2005-2006 school year, 112 pre-kindergarten (ages four and five) and kindergarten (ages five and six) students⁹⁴ and more than 600 first graders (ages six and seven)⁹⁵ were referred by Texas public school districts to DAEPs, 88-89% of which were for discretionary reasons.⁹⁶

year. *Id.*

⁹² See Benavides Indep. Sch. Dist., <http://www.benavidesisd.net>.

⁹³ See SCHOOL-TO-PRISON PIPELINE, *supra* note 82, at 58.

⁹⁴ *Id.* at 56. The TEA reports that the number is over 160 kindergarten and pre-kindergarten students assigned to DAEP for this year. TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 1.

⁹⁵ See SCHOOL-TO-PRISON PIPELINE, *supra* note 82, at 57. The TEA reports 886 students in the 1st grade were assigned to a DAEP during the 2005-2006 school year. TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 1.

⁹⁶ WHEN MY CHILD, *supra* note 73, at 56-57. TEX. EDUC. CODE ANN. § 37.006(f) states: “Subject to Section 37.007(e) [the mandatory expulsion for bringing a gun to school], a student who is younger than 10 years of age shall be removed from class and placed in a disciplinary alternative education program under Section 37.008 [the DAEP statute] if the student engages in conduct described by Section 37.007 [the statute setting out all the violations of the law, see note 32, *supra*]. An elementary school student may not be placed in a disciplinary alternative education program with any other student who is not an elementary school student.” Paragraph (l) reads: Notwithstanding any other provision of this code, other than Section 37.007(e)(2) [section requiring education for elementary student placed in a DAEP], a student who is younger than six years of age may not be removed from class and placed in a disciplinary alternative education program.” It is unlawful to assign children under six years of age to a DAEP. During 2001 to 2006, the Pasadena ISD alone sent eighty-five Pre-K and Kindergarten students to DAEP. Of the districts that referred the most first Graders to DAEP between 2001 to 2006, the Pasadena ISD more than doubled the district nearest their total. WHEN MY CHILD, *supra* note 73, at 57-58.



Even more disturbing is that minority students are over represented in DAEPs and have been for many years.⁹⁸ During the 2005-2006 school year, there were 4.5 million students in Texas public schools.⁹⁹ Broken down by ethnicity

⁹⁷ Photographs were retrieved from the Project Intercept DAEP website, Lubbock Independent School District on June 22, 2009 at: <http://www.lubbockisd.org/pi/home.htm>. Project Intercept website now located at:

<http://pi.lubbockisd.org/modules/cms/announce.phtml?sessionid=a73acb54cd4b0410a8127277f0a9bd89>, (last visited July 31, 2011). Interestingly, as part of its mission statement, Project Intercept says “[t]he teaching and learning environment will provide and strengthen academic skills that would help close learning gaps found in each individual student.” *Id.* Does this presuppose only children with “learning gaps” violate the district’s code of conduct?

⁹⁸ See Augustina H. Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, *supra* note 16, at 86.

⁹⁹ See TEA 2006 ANN. REP., *supra* note 83, at 30 (African American 664,242, Hispanic 2,040,449, White 1,644,308, Native American 14,984,

this is 45.3% Hispanic, 14.7% African American, 36.5% White, and 3.4% Native American, Asian and Pacific Islanders.¹⁰⁰ During that year, the Texas Education Agency reports that there were 100,062 separate students assigned to Disciplinary Alternative Education Programs, a total of 126,319 times. Of these 126,319 assignments, Hispanics were



48%, African Americans were 25.8%, Whites were 25.2%, and Native American, Asian and Pacific Islanders were 1.0%.¹⁰¹ By TEA's own count, this means that on the average, Hispanic students were over represented by almost 6% and African American students were over represented by over 75% to their population in the schools as a whole. White students were under represented by 31% and Native American, Asian and Pacific Islanders were under represented by

and Asian/Pacific Islander 141,589.).

¹⁰⁰ *Id.*

¹⁰¹ See TEX. EDUC. AGENCY, POLICY RESEARCH REPORT NO. 17, *supra* note 62, at 5.

71%.¹⁰² Special education students are represented in DAEP at more than twice their population in the school enrollment as a whole.¹⁰³ TEA, in their reports on assignments to DAEPs, makes no differentiation between discretionary and mandatory referrals.¹⁰⁴ Between 2001 and 2006, just short of half of Texas's school districts disproportionately assigned African American, Hispanic, or special education students to DAEPs for one or more years.¹⁰⁵

A. Students of African American Origin

As to the discretionary referral of African American students, 211 Texas school districts disproportionately referred them to DAEPs for at least one year between 2001 and 2006.¹⁰⁶ Of these districts, forty-five disproportionately assigned African Americans all five years.¹⁰⁷ During the 2005-2006 school year alone, fifteen districts referred African American's at more than twice their population. The largest of these referrals was up to 65% of the total students assigned to DAEP within the district.¹⁰⁸ Across the fifteen districts,

¹⁰² TEA 2006 ANN. REP., *supra* note 83, at 52.

¹⁰³ *Id.* at 53. ("Special Education students were 11.1% of the student population or 500,037. Total assignments to DAEP of Special Education students was 30,606 which is 23.9% of the total of all students referred.")

¹⁰⁴ *Id.*

¹⁰⁵ SCHOOL-TO-PRISON PIPELINE, *supra* note 82, at 36.

¹⁰⁶ *Id.* at 37.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 38. In fairness, the Temple Independent School District has an African American student population of 29% which is almost twice the State average of 14.7%. *See* TEA 2006 ANN. REP., *supra* note 83. The most dramatic statistics are the three school districts that refer African American students for discretionary reasons at or above 2.6 times their representation. Those districts are Lubbock ISD at 2.6 times representation, Austin ISD at 2.64 times representation, and Klein ISD at 2.67 times representation. That is 37%, 39% and 40% respectively, which is remarkably about the same percentage of African Americans by percentage in the Texas Department of Criminal Justice, Institutional Division during the same period, that being 38.1%. The total population of Texas prisons during FY2005 was 152,213 of which 57,932 were African American. TEX. DEP'T. OF CRIMINAL JUSTICE, STAT. REP. FOR FISCAL YEAR 2005 8, *available at*

84.7% of the teachers are White and 5.7% are African American compared to the statewide average of 69.4% White and 9.1% African American respectively.¹⁰⁹ It is curious to note that statewide, on average, African American children in grades one through five are 41% of the children assigned to DAEP's and almost 47% of the children assigned to DAEP's in first grade.¹¹⁰ Further, African American population in DAEP rises steadily through the grades with significant jumps in sixth and ninth grade, a dramatic peak in the ninth grade and a sharp drop-off during tenth through twelfth grades.¹¹¹

African American student's over-representation in the state disciplinary models is even more dramatically represented in out-of-school and in-school suspensions.¹¹² For the same five year period, 503 districts imposed out-of-school suspensions disproportionately. Further, 143 of these districts sus-

http://www.tdcj.state.tx.us/publications/executive/FY2005_Statistical_Report.pdf (website last visited January 29, 2010). Interestingly, the percentage of African American's on death row in Texas is close to the same, being 38.5%. TEX. DEP'T. OF CRIMINAL JUSTICE, GENDER STAT. OF DEATH ROW OFFENDERS (2010) *available at*: <http://www.tdcj.state.tx.us/stat/racial.htm> (website last visited Jan. 29, 2010). During the last five fiscal years, the statistics of African American youth in the Texas Youth Commission has been in the 33-35% range. TEX. YOUTH COMM'N., COMMITMENT PROFILE FOR NEW COMMITMENTS FISCAL YEARS 2005 - 2009 (2009) *available at*: <http://www.tyc.state.tx.us/research/profile.html>. Further study should be done to determine if these statistics are truly coincidental or if there is a bias that extends throughout the population that can be predicted and the systems of incarceration appropriately adjusted.

¹⁰⁹ WHEN MY CHILD, *supra* note 73, at 45.

¹¹⁰ TEA 2008 ANN. REP., *supra* note 61, at 54.

¹¹¹ *Id.*

¹¹² So as to not paint this as a Texas problem, in 2004, out of 49,000,000 school children nationwide, there were 3,279,745 school suspensions and 106,222 expulsions, with African American children accounting for 37% of the suspensions and 35% of expulsions even though they are only 17% of the public school population. Testimony of Holly A. Thomas, Assistant Counsel, NAACP Legal Defense & Educational Fund, Inc., November 10, 2009, to the New York City Council Committee on Public Safety, Education, and Juvenile Justice, Hearing on the Student Safety Act, *available at*: <http://www.naacpldf.org/content.aspx?article=1484>.

pended African American students disproportionately for all five years.¹¹³ Sixty-six districts over-represented these students in out-of-school suspensions at more than 200% of their population. The Alamo Heights ISD removed African American students an incredible 750% to their population, while boasting that 93.2% of their 2008 graduation class was college bound.¹¹⁴ Just as dramatic are the 347 districts that disproportionately refer these students to in-school-suspension for at least one year during this five year period, and 152 of these districts are on the list for each of the five years.¹¹⁵ Interestingly, only eighteen districts sent African American students to in-school-suspensions at more than 200% of their population. Alamo Heights ISD once again had the highest percentage, with 350% more than the student representation within the school population.¹¹⁶



¹¹³ WHEN MY CHILD, *supra* note 73, at 38.

¹¹⁴ *Id.* (Alamo Heights ISD 2008 Annual Performance Report, available at:

http://www.ahisd.net/General/genpdf/2008_annual_report.pdf).

¹¹⁵ WHEN MY CHILD, *supra* note 73, at 40.

¹¹⁶ *Id.* at 41.



B. Students of Hispanic Origin

Looking at Hispanic students, they too are over represented in assignments to DAEPs, out-of-school suspensions and in-school suspensions. Although their numbers are certainly smaller than those of African American students, still, forty districts over-represented Hispanics in DAEPs for at least one year from 2001 to 2006, with only two districts referring during all five years at a disproportionate rate.¹¹⁷ The two districts that were the repeat offenders had an Hispanic teacher population of 6% compared to the statewide average of 20.1% and a White teacher average of 90% compared, once again, to the statewide average of 69.4%.¹¹⁸ In out-of-school discretionary suspensions, 224 districts were disproportionate in their referrals for at least one year during the five year study period. Once again, the Alamo Heights ISD boasted the highest percentage of students sent to out-of-school suspension. Hispanic students were 62% of those suspended for discretionary reasons, being an over-representation of 207%.¹¹⁹ As to in-school suspensions, ninety-two districts over-assigned Hispanics for at least one year between 2001 and 2006 with thirty districts making the list all five years.¹²⁰

C. Special Education Students

Special education students are over represented by

¹¹⁷ *Id.* at 45-46.

¹¹⁸ *Id.* at 46.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 47.

200% to their population, whether it is to DAEPs, out-of-school suspensions, or in-school suspensions.¹²¹ Between 2001 and 2006, 412 school districts referred special education students above their representative population. Seventy-nine school districts referred annually during this period, and fifty-five of these districts referred at more than double the student's population during the last year of the study.¹²² As to out-of-school suspensions, during the 2001 to 2006 school years, 722 districts, out of 1037, suspended special education students disproportionately during at least one year, with 317 districts suspending disproportionately annually during the study period.¹²³ During the last year of the study, fifty-six districts suspended at more than 300% of population, with several rural districts referring at 400-625% of population.¹²⁴ As to in-school suspensions of special education students, 699 schools over-represented these students with 328 districts being on the list annually during the study.¹²⁵ During the last year of the study sixty-seven districts referred special education students at more than 200% of their population.¹²⁶

This article argues for the elimination of the Disciplinary Alternate Education Programs in Texas and, if for no other reason, the disciplinary statistics and the disparate impact on Special Education students and students of color just discussed should be sufficient. In addition though, the correlation between drop-out rates and DAEP referrals further illustrate why children must not continue to be removed from their home classrooms for the reasons currently used.¹²⁷ Dropouts

¹²¹ WHEN MY CHILD, *supra* note 73, at 48.

¹²² *Id.* at 49-51. Katy ISD had the largest percentage of over-referring Special Education students to DAEPs, at a whopping 577%.

¹²³ *Id.* at 51.

¹²⁴ *Id.* at 52-53. Examples are Franklin ISD 625%, La Vernia ISD 467%, and Lexington ISD 589%. Noticeably absent from the list are the large school districts.

¹²⁵ *Id.* at 53.

¹²⁶ *Id.* at 54-55.

¹²⁷ Daniel Losen et al., *Confronting the Graduation Rate Crisis in Texas*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., Oct. 2006, at 16, 31, available at

become the population base of those that find themselves in the criminal justice system. Eighty percent of those in Texas prisons are high school dropouts,¹²⁸ a third of those sent to the Texas Youth Commission are already school dropouts¹²⁹ and more than a third of Texas public school students drop out.¹³⁰ Most students drop out during their ninth grade year when the greatest number of students are referred to DAEP.¹³¹ DAEPs have five times the dropout rate of mainstream schools.¹³² So, to understand the effect of dropouts on our failure to educate our children, one must look first to those who interpret the enrollment statistics for the State and the Nation, the Texas Education Agency and the U.S. Department of Education.

<http://centerforeducation.rice.edu/Research/dc/CRPdropout2006.pdf> (“Texas’s failure to graduate so many of its students is a tragic story of wasted human potential and tremendous economic loss. When high numbers of youth leave school ill-prepared to contribute to our labor force and to civic life, our economy and our democracy suffer. Life opportunities for these youth and for their offspring are dramatically curtailed.”).

¹²⁸ WHEN MY CHILD, *supra* note 73, at 14, *available at*

<http://tdcj.state.tx.us/publications/executive/FY2010StatisticalReportFiscalYear2010.pdf> (Texas prison officials report that only about half this number are dropouts. The Texas Department of Criminal Justice shows that 43.9% of those incarcerated in their facilities on August 31, 2010, did not have a verifiable high school diplomas or GED.). One study showed that almost one of every ten male drop outs, between the ages of sixteen and twenty-four, were in institutions (mostly prisons) at any one time in 2006-2007. Andrew Sum, et. al., *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers: 22% Daily Jailing Rate for Young Black Men Who Drop Out of High School* (Ctr. for Labor Mkt. Studies, Northeastern University, Bos., Mass. 2009), *available at*

[http://www.northeastern.edu/clms/wp-](http://www.northeastern.edu/clms/wp-content/uploads/The_Consequences_of_Dropping_Out_of_High_School.pdf)

[content/uploads/The_Consequences_of_Dropping_Out_of_High_School.pdf](http://www.northeastern.edu/clms/wp-content/uploads/The_Consequences_of_Dropping_Out_of_High_School.pdf).

¹²⁹ *Id.* at 1. One author claimed 85% of juvenile justice cases were dropouts. Rebecca P. Stanard, *High School Graduation Rates in the United States: Implications for the Counseling Profession*, 81 J. COUNSELING & DEV. 217, 219 (2003).

¹³⁰ *See supra* Part. V.

¹³¹ TEA 2008 ANN. REP., *supra* note 61, 54.

¹³² WHEN MY CHILD, *supra* note 73, at 27 (citing TEA 2006 ANN. REP., *supra* note 83).

VI. Drop-out Rates

A. National Statistics

Nationwide, for 2007-08, it was projected 3,313,818 high school students were expected to graduate¹³³ and we know 429,000 passed the GED test during 2007.¹³⁴ The U.S. Department of Education placed the National dropout rate for 2007-08 at 4.1%, which compared to forty-nine other states and the District of Columbia, placed Texas twenty-fifth in dropouts¹³⁵ and thirty-fifth in the number of grade nine students that graduated (freshman graduation rate).¹³⁶ For a larger cohort of sixteen to twenty-four-year-olds, the national dropout rate for 2007 was 8.7% for all students, 5.3% for White students, 8.4% for African American students, and 21.4% for Hispanic students.¹³⁷ Compare those statistics to one non-governmental study that showed the National Drop-out Rate to be 32%, with African American students dropping out at 50%, Hispanic students at 47%, and African American and Hispanic males dropping out at 57% and 52% respectively.¹³⁸ This dramatic difference in interpretation of the same

¹³³ 2010 NCES DIGEST, *supra* note 3, at 175, tbl. 110, available at <http://nces.ed.gov/pubs2011/2011015.pdf> (“High school graduates, by sex and control of school: Selected years, 1869-70 through 2019-20”). The total included 2,999,508 from public schools and 314,310 from private schools. *Id.*

¹³⁴ *Id.* at 179, tbl. 114.

¹³⁵ TEX. EDUC. AGENCY SECONDARY SCH. COMPLETION & DROPOUTS TEX. PUB. SCH., 2008-09 (2010) 82, available at www.tea.state.tx.us/acctres/DropComp_2008-09.pdf [hereinafter TEA 2008-2009 DROPOUT]; 2010 NCES DIGEST, *supra* note 3, at 178, tbl. 113 (The Texas dropout rate for grades nine through twelve for 2007-08 was 4% compared to the national average of 4.1%).

¹³⁶ TEA 2008-2009 DROPOUT, *supra* note 135, at 82; 2010 NCES DIGEST, *supra* note 3, at 177, tbl. 112 (The Texas Freshman graduation rate grades nine through twelve for 2007-08 was 73.1% compared to the national average of 74.7%).

¹³⁷ SNYDER, T.D., MINI-DIGEST OF EDUCATION STATISTICS 35 (National Center for Education Statistics, Institute of Education Sciences, U.S. 2009); 2010 NCES DIGEST, *supra* note 3, at 179, tbl. 114.

¹³⁸ GARY ORFIELD ET AL., CIVIL RIGHTS PROJECT AT HARVARD UNIV., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND

numbers has created quite a controversy among those that study education. The reason given for such a discrepancy will be addressed below,¹³⁹ but first to more fully understand the controversy, the Texas Education Agency's report of Texas's dropout rates must first be explored

B. Texas Education Agency Annual Dropout Report

The Texas Education Agency publishes an annual report with completion and dropout statistics.¹⁴⁰ The most recent report is for the 2008-2009 school year and although the statistics are mind boggling, for the purposes of this article a few points stand out.

In grades seven and eight, the rate of dropout for African American students was five times higher and the rate for Hispanic students was four times higher than the dropout rate for White students.¹⁴¹ Of the students in grades nine through twelve,¹⁴² the TEA reports the annual dropout rate for these grades as 2.9%.¹⁴³ This means the number of actual students that dropped out last year was an amazing 38,720,¹⁴⁴ of which 8,876 are African American and 22,493 are Hispanic – a total

BY THE GRADUATION RATE CRISIS (2004), *available at* http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf [hereinafter ORFIELD].

¹³⁹ *See infra* Part V.C-E.

¹⁴⁰ TEA 2008-2009 DROPOUT, *supra* note 135.

¹⁴¹ *Id.* at 44.

¹⁴² The number of students in grades nine through twelve is reported by the TEA at 1,356,249 for the 2008-09 school year. *Id.* at 48. The total school population for grades seven through twelve is shown by the TEA as 2,060,701 on p. 51 of the report, and 704,452 students in seventh and eighth grade. *Id.* at 46.

¹⁴³ *Id.* at 44.

¹⁴⁴ *Id.* To put this number in perspective, this is more people turned loose on the streets without a high school education each year than live in some of Texas's more well-known cities – San Marcos (34,733), Huntsville (35,078), Del Rio (33,867), Pearland (37,640), Sherman (35,082), New Braunfels (36,494) and Conroe (36,811) – there being only fifty-nine cities in Texas that are larger. Texas State Library and Archives Commission, *2000 Census: Population of Texas Cities Arranged in Descending Order*, <http://www.tsl.state.tx.us/ref/abouttx/popcity32000.html>.

of 31,369 minority children who quit school in one year.¹⁴⁵ The dropout rate for African American students was three times higher, and for Hispanic students almost three times higher, than the rate for White students.¹⁴⁶ Put another way, African American students comprise 14.8% of the student population, but 22.9% of the dropouts, with Hispanic students making up 43.9% of the total student population and 58.1% of the dropouts.¹⁴⁷

1. Distinguished Achievement High School Program

Sadly, African American students were almost four times less likely to graduate through the Distinguished Achievement High School Program (DAP) – the true college preparatory program. As there are 2.5 times more White students than African American students, by population, there were 12,978 more white students graduating through the DAP or 5191 fewer African American students graduating through DAP than should have been compared to their representative population.¹⁴⁸

2. Underreported Students

Also, it is interesting to note separate statistics are kept on “underreported students” – these are the students that had not been accounted for in the fall.¹⁴⁹ Of the students who were underreported, African American and Hispanic students were

¹⁴⁵ TEA 2008-2009 DROPOUT, *supra* note 135, at 47.

¹⁴⁶ *Id.* at 48.

¹⁴⁷ *Id.* at 47.

¹⁴⁸ The Texas Education Agency’s 2008-2009 Secondary School Completion and Dropouts in Texas Public Schools report shows 16,353 White students and 1,350 African American students graduating DAP. As there are 2.5 times the White students (TEA 2008-2009 DROPOUT, *supra* note 135, at 45), adjusted to population, there should have been 6541 African American students graduate DAP – only 1350 did so. Worded another way, as only 1350 African American students graduated DAP, there should have only been 3375 White students graduate DAP and there were 16,353, an over population of 12,978.

¹⁴⁹ TEA 2008-2009 DROPOUT, *supra* note 135, at 74.

67.7% of the total.¹⁵⁰

3. Class of 2009, Longitudinally

When viewed longitudinally, looking at the Class of 2009 cohort, African American students had a graduation rate of 73.8%, which means a non-graduation rate of 26.2%, with Hispanic students a graduation rate of 73.5% or a non-graduation rate of 26.5%.¹⁵¹ The TEA says the longitudinal dropout rate for African American students is 14.8% and for Hispanic students at 12.4%.¹⁵² As the longitudinal dropout rate for White students is 4.5%, the longitudinal dropout rate for African American students is just over three times and the longitudinal dropout rate for Hispanic students is just under three times the dropout rate for White students using the TEA statistics.¹⁵³ So which is the correct number to interpret dropouts and how does the TEA account for the large number of students missing in the longitudinal study?

4. Attrition Rates

Stuck in the back of all these statistics are the TEA's attrition rates.¹⁵⁴ Although the TEA gives reasons justifying the high numbers, the attrition rate for all the students in the state is 28.6%. Yet, for African American students it is 34.4% and for Hispanic students 34.6%.¹⁵⁵ For whatever reason, in the fall of 2008, the Class of 2009 had 112,007 fewer students than it had in the fall of grade nine, according to the TEA's

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 59. The use of the term "non-graduation rate" used herein includes students who did not graduate with their class. TEA carries those that continue school the following year as still achieving and not dropouts or leavers. This is using the national dropout definition adopted in 2005-06.

¹⁵² *Id.* at 60, Table 22.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 71. "An attrition rate is the percentage change in fall enrollment between two grades across years. . . . [T]he rate is calculated by subtracting the number of students enrolled in grade twelve in the fall from grade nine three years earlier, and dividing by the grade nine enrollment."

¹⁵⁵ *Id.*

own figures.¹⁵⁶ It would seem that the three year dropout rate would be close to one-third of 112,007, or 37,336 annually, around a 3% lower figure than the TEA dropout figure of 38,720.¹⁵⁷ However, McNeil, *et. al.*, place the annual dropout figure in Texas at over 3.5 times the TEA's rate of 38,720 – around 135,000 annually.¹⁵⁸

C. Economic Impact and Other Interpretations of Dropout Data

From the year 1986, when 86,000 students did not graduate in Texas, until 1998, researchers have reported the cumulative total of dropouts in Texas to be more than 1,200,000.¹⁵⁹ The dropout number in 1998 alone is at 150,965,¹⁶⁰—a cumulative loss of “\$319 billion in foregone income, lost tax revenues and increased criminal justice, welfare, unemployment and job training costs.”¹⁶¹ A recent study looked at the economic implications of dropouts.¹⁶² Projecting

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; see *supra* n. 134.

¹⁵⁸ Linda McSpadden McNeil et al., *Avoidable Losses: High-Stakes Accountability and the Dropout Crisis*, 16 EDUC. POL'Y ANALYSIS ARCHIVES, no. 3, Jan. 2008, at 16, available at <http://epaa.asu.edu/ojs/article/view/28/154> [hereinafter McNeil] (citing Roy L. Johnson, *Texas Public School Attrition Study 2006-07: Texas School Holding Power Worse than Two Decades Ago*, INTERCULTURAL DEV. RES. ASS'N NEWSL. (Intercultural Dev. Research Ass'n, San Antonio, Tex.), Oct. 2007, at 1, available at http://www.idra.org/images/stories/Newsltr_Oct2007.pdf).

¹⁵⁹ JOSIE D. SUPIK, & ROY L. JOHNSON, MISSING: TEXAS YOUTH. DROPOUT AND ATTRITION RATES IN TEXAS PUBLIC HIGH SCHOOLS. A POLICY BRIEF 4 (Intercultural Dev. Research Ass'n 1999), available at <http://eric.ed.gov/PDFS/ED434959.pdf>.

¹⁶⁰ *Id.* at 15.

¹⁶¹ *Id.* at 9.

¹⁶² Roman Alvarez, et al., *The ABCD's of Texas Education: Assessing the Benefits and Costs of Reducing the Dropout Rate*, THE BUSH SCHOOL OF GOVERNMENT & PUBLIC SERVICE TEXAS A&M UNIVERSITY, 2009, available at

<http://bush.tamu.edu/research/capstones/mpsa/projects/2009/TheABCDs.pdf>.

The Appendices to this study can be found at:

the dropout rate for the Class of 2012,¹⁶³ taking into account the resulting loss of wages by not completing high school,¹⁶⁴ the lifetime loss of sales tax revenue to the state,¹⁶⁵ the increase in welfare and incarceration costs that dropouts incur,¹⁶⁶ and allowing for the cost to educate the cohort through two more years of high school,¹⁶⁷ the dropouts for the Class of 2012 alone will create a negative financial impact of between \$5.4 and \$9.6 billion¹⁶⁸ during their lifetime – and this is just one class, one cohort, one group of dropouts.

Some report that by 2001, 45% of African American students were failing to graduate (52% for African American males), 46% of Hispanic students were dropping out, and most major urban school districts were accused of graduating less than half their students.¹⁶⁹ By some accounts, from 1985

<http://bush.tamu.edu/research/capstones/mpsa/projects/2009/TheABCDSAppendices.pdf>

¹⁶³ *Id.* at 37. (“When applying the demographic dropout rates from the class of 2007 to the cohort of 2012, we found that, if nothing changes between now and their graduation, the class of 2012, whose cohort consists of over 300,000 students, would have between 40,519 and 73,692 dropouts—or around 12.2 percent to 22.2 percent.”).

¹⁶⁴ *Id.* at 52. (“We multiplied this number by the lower and upper bound number of dropouts in each ethnic group from the cohort, and found that the dropouts from the class of 2012 will all together lose between \$5.0 billion and \$9.0 billion (in lost wages) over the course of their working lives.”).

¹⁶⁵ *Id.* at 53. (\$279 million to \$507 million). *Id.*

¹⁶⁶ *Id.* at 89. (\$1.1 to \$1.8 billion). *Id.* One author claims dropouts are 52% of welfare recipients. Stanard, *High School Graduation Rates in the United States: Implications for the Counseling Profession*, *supra* note 129, at 219.

¹⁶⁷ *Id.* (\$0.6 and \$1.13 billion).

¹⁶⁸ *Id.* at 57.

¹⁶⁹ Walt Haney, *The Myth of the Texas Miracle in Education*, *supra* note 2, at 69-70 (These figures are based on 2000-2001 statistics). One study shows that 54-87% of the major urban high schools failed to promote less than half of their Freshman class for the students to graduate on time, and these are districts with 55-89% minority population. Robert Balfanz & Nettie Legters, *How Many Central City High Schools Have a Severe Dropout Problem, Where Are They Located, and Who Attends Them?*, THE CIVIL RIGHTS PROJECT, Jan. 13, 2001, at 29, 31, available at <http://civilrightsproject.ucla.edu/research/k-12-education/school->

through 2008, 2.9 million students¹⁷⁰ have dropped out of public education in Texas of which 82.1% were ethnic minorities.¹⁷¹

Whereas the TEA claimed the three year attrition rate for all students in the Class of 2009 was 28.6%, the Intercultural Development Research Association (IDRA) set the annual attrition rate at 31%,¹⁷² interpreting the attrition rates for African American and Hispanic students differently than did the TEA. The IDRA found the annual attrition rates for African Americans was 35%—not the TEA three year rate of 34.4%—and found the annual attrition rates for Hispanics at

dropouts/how-many-central-city-high-schools-have-a-severe-dropout-problem-where-are-they-located-and-who-attends-them-initial-estimates-using-the-common-core-of-data/balfanz-central-high-schools-2001.pdf.

¹⁷⁰ Although not the focus of this article, an entire body of research has looked at these “disconnected” students and rise of alternative educational settings to help them reconnect to mainstream institutions such as education and employment. See Brian Kleiner et al., *Public Alternative Schools and Programs for Students At Risk of Education Failure: 2000-01*, U.S. DEP’T OF EDUC., NAT’L CTR. FOR EDUC. STAT. 2002, available at <http://nces.ed.gov/pubs2002/2002004.pdf>; Laudan Y. Aron & Hanine M. Zweig, *Educational Alternatives for Vulnerable Youth: Student Needs, Program Types, and Research Directions*, URBAN INST. (2003), available at http://www.urban.org/UploadedPDF/410898_vulnerable_youth.pdf; Laudan Y. Aron, *An Overview of Alternative Education*, URBAN INST. (2006) available at http://www.urban.org/UploadedPDF/411283_alternative_education.pdf; A. James Artesani, *Alternatives to Suspension and Expulsion: A Report on Current Practices in Behavioral Support and Intervention*, INST. FOR STUDY OF STUDENTS AT RISK, COLL. OF EDUC. & HUM. DEV., UNIV. OF ME. (2009); Dignity in Schools Campaign (2007), <http://www.dignityinschools.org>.

¹⁷¹ Roy L. Johnson, *Overall Attrition Rate Declines, But Gaps Persist Among Racial and Ethnic Groups*, INTERCULTURAL DEV. RES. ASS’N NEWSL. (Intercultural Dev. Research Ass’n), Oct. 2009, at 4, available at http://www.idra.org/images/stories/Newsltr_Oct2009.pdf. “Hispanic students account for 63.6 percent of the students lost to attrition. Black students account for 16.7 percent of all students lost from enrollment due to attrition over the years. White students account for 17.9 percent . . .” *Id.* The report claims “Texas public schools are failing to graduate one out of every three students . . . [and] disparities in educational opportunity and outcomes continue to divide our society based on class and color.” *Id.*,

¹⁷² *Id.*

42%—while the TEA found the Hispanic attrition rate over three years to be 34.6%.¹⁷³ Just for the 2008-2009 school year, the IDRA reported the total number of students lost with the Class of 2009 was 125,508,¹⁷⁴ not the 38,720 reported by the TEA.¹⁷⁵

D. *The Dropout Controversy*

In 2007, The Center for Education at Rice University prepared a resource page and fact sheet for legislative analysis of dropouts, entitled “The Graduation Rate Crisis in Texas.”¹⁷⁶ Using four different studies, it was reported that “[s]tudents are graduating at significantly lower rates than those officially report by the Texas Education Agency. As reported by multiple researchers, approximately 67% of all students are graduating statewide which includes 60% of the African American students and 58% of the Hispanic students.”¹⁷⁷ One group of researchers called the TEA school completion and dropout statistics “unjustifiably inflated,”¹⁷⁸ further characterizing TEA’s figures as “inaccurate,” “seriously inflated,” “dramatically inflated,” “grossly inflated,”

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ TEA 2008-2009 DROPOUT *supra* note 135.

¹⁷⁶ Eileen Coppola & Linda McNeil, *Fact Sheet*, LEGISLATIVE BRIEFING ON THE TEXAS DROPOUT CRISIS, Jan. 23, 2007, *available at* <http://centerforeducation.rice.edu/Research/dc/FactSheet.pdf>.

¹⁷⁷ *Id.* (quoting CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., HIGH SCHOOL GRADUATION IN TEXAS: INDEPENDENT RESEARCH TO UNDERSTAND AND COMBAT THE GRADUATION CRISIS 3 (2006), *available at* http://www.edweek.org/media/texas_eperc.pdf). Swanson says, “Official graduation rates for black and Hispanic students are overestimated by 20 percentage points or more, relative to CPI estimates.” *Id.* at 2. CPI is the Cumulative Promotion Index method used to calculate graduation rates.

The CPI represents graduating from high school as a process rather than a single event. Specifically, it captures the four key steps a student must take in order to graduate: three grade-to-grade promotions (9 to 10, 10 to 11, and 11 to 12) and ultimately earning a diploma (grade 12 to graduation).

Id. at 6; *see* Losen, *supra* note 127, at 18-19.

¹⁷⁸ Losen, *supra* note 127, at 16.

and “misleading.”¹⁷⁹ A six year longitudinal study of the Houston Independent School District (HISD) found their Class of 2001 had an overall number that graduated within five years at only 32.7%.¹⁸⁰

The reasons for this discrepancy are partly blamed on accounting practices brought about by high-stakes testing of students and the labeling of children as “leavers” which allows the schools to take certain children off their rolls thereby improving test scores.¹⁸¹ In one study of a large urban school district, the researchers attributed the local district not reporting a “large number of disappearances of students from the data set” as unreported dropouts and said the “low-achieving students . . . were discouraged from entering and staying in school.”¹⁸²

E. Dropouts and High-Stakes Accountability

Researchers point to the use of a high-stakes accountability system in Texas to measure performance of the public schools through a centralized application of rules and sanctions using state mandated standardized tests as having a direct impact on the severity of Texas’s dropout crisis.¹⁸³ Also, the practice of disaggregating students by race marks minority students for practices which push minority children out of school all to insure a measureable annual improvement in the schools.¹⁸⁴ Students that cannot further the improvement of

¹⁷⁹ *Id.* at 4, 5, 9, 10, 18, 19.

¹⁸⁰ Julian Vasquez Heilig, *Progress and Learning of Urban Minority Students in an Environment of Accountability* (2006) (dissertation, Stanford University) [hereinafter Heilig 2006].

¹⁸¹ Losen, *supra* note 127.

¹⁸² Julian Vasquez Heilig & Linda Darling-Hammond, *Accountability Texas-Style: The Progress and Learning of Urban Minority Students in a High-Stakes Testing Context*, 30 EDUC. EVALUATION & POL’Y ANALYSIS 75, 106 (2008) [hereinafter Heilig 2008].

¹⁸³ McNeil, *supra* note 158.

¹⁸⁴ *Id.* at 37. “Pushout” is a term that has been coined for the denial of educational opportunities because of system inequality which degrades school environments through such practices as harsh disciplinary measures and policies forcing certain children from the public schools. *See* Dignity

the schools are seen as liabilities.¹⁸⁵ Additionally, as schools can be rewarded or punished based on the success or failure of the students taking these tests, school districts “game the system” to exclude children who may negatively affect positive outcomes.¹⁸⁶

Three factors, about the Texas school system, have been identified that create disincentives for students to stay in school and often push students to drop out.¹⁸⁷ First, the curriculum is now influenced by the high-stakes testing and accountability. Teaching to the test (the use of high-stakes accountability) fragments students causing many to disengage.¹⁸⁸ Second, the practice of holding students back in the ninth grade to keep them from the tenth grade test has created confusion and frustration among students and parents.¹⁸⁹ Holding children back, at the most vulnerable time for dropping out, seems counterintuitive to success and supportive of failure.¹⁹⁰ Third, the zero-tolerance (ZT) policies of the schools have added to the bureaucratic and punitive nature of the schools. The widespread use of ZT policies has contributed to the criminalizing of many students creating even more disincentives for them to remain in school.¹⁹¹

in Schools Campaign, National Resolution for Ending School Pushout, *available at* http://www.dignityinschools.org/files/DSC_National_Resolution.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ Heilig 2008, *supra* note 182, at 75-110.

¹⁸⁷ McNeil, *supra* note 158, at 27.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 29; Heilig 2008, *supra* note 182, at 106. “At its peak, more than 30% of 9th-grade students were retained for one or more years. Of those who were retained, only 12% ever took the (test), and only 8% passed it. A majority of retained students left school as dropouts or disappearances.”

¹⁹⁰ McNeil, *supra* note 158, at 29 (“[H]igh schools that retained greater numbers of students in the ninth grade – and those with more student disappearances – were able to boost their tenth-grade exit (test) scores and state accountability ratings.”).

¹⁹¹ *Id.* at 32.

Dropping out can be attributed to several factors.¹⁹² Student's disengagement and frustration with education based upon the way schools deal with discipline is the primary focus of this article—and the underlying theme of the dropout student.¹⁹³ One must be offended that some school districts, for their own purposes, have manipulated placements and data by the creation of a non-supportive environment in the schools to push out low-achieving – often minority – students, because high-stakes accountability testing created incentives for the schools to cheat.¹⁹⁴ The practice of sending low-achieving students to alternate placements, such as to the Texas's Disciplinary Alternate Education Programs, “criminalizes” those with academic problems and minor, academically related behavioral infractions.¹⁹⁵ The next section will explain further the direct correlation between disciplinary problems as they relate to grade level and failure to graduate under the current testing scheme.¹⁹⁶

¹⁹² ORFIELD, *supra* note 138.

¹⁹³ Quoting McNeil:

Considerable prior research has found that dropping out is associated with such factors as income level, disengagement from or frustration with school, family demands, pregnancy, interest in gangs, or illegal methods of making money. ...[T]he accountability system (high-stakes testing) adds further to these causes by creating an environment that is highly punitive and where adults at the school level experience strong incentives to simply allow students to exit the system.

The triaging of minority youth out of our schools becomes not a side effect of standardized accountability, but an avoidable loss to make the system look successful. It is this shift in thinking about the youth in our schools as assets or liabilities to the system rather than (as) having innate worth—that is our more sobering finding. It most directly challenges the rhetoric that such a system is essential for educating all youth, for leaving no children behind.

McNeil, *supra* note 158, at 26-27, 37.

¹⁹⁴ Heilig 2008, *supra* note 182, at 107.

¹⁹⁵ Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 FORDHAM URB. L.J. 539, 540, 554 (2001).

¹⁹⁶ See *infra* subsection entitled “Seeing Staars,” in Section X. *Conclusion*, for a discussion of the unfortunate implementation of the next generation of high-stakes accountability testing beginning in the fall of 2011 in Texas, called the State of Texas Assessments of Academic Readiness

F. Disciplinary Contacts: Grade Level and Graduation Statistics

On the issue of dropouts as it relates to students who are no longer on grade level, 63% of students dropped out when they were one year behind; 68.2% dropped out when they were two years behind; 61.9% were in grade nine or ten when they dropped out; and 29% of “leavers” (students that leave school for reasons other than dropping out) were not on grade level when they withdrew.¹⁹⁷ Of the almost 60% of public school students that receive a suspension or expulsion in their secondary education, 31% are held back at least one time and not passed along to the next grade and 10% drop-out.¹⁹⁸ This means a secondary student in Texas who experiences any disciplinary contact is more than six times more likely to have to repeat at least one grade and five times more likely to drop-out than the 40% of the students with no disciplinary actions.¹⁹⁹ Where this manifests itself as a particular problem is with students who have eleven or more disciplinary involvements. The students with this “very high involvement,” are over ten times more likely to have to repeat at least one grade and almost seven times more likely to drop-out than the students with no disciplinary violations.²⁰⁰

Graduation statistics, as they relate to disciplinary contacts, are also very revealing. Of the students with no disciplinary violations, 18.2% did not graduate.²⁰¹ But of those students with at least one minor involvement, on the average, 40.4% did not graduate, and that number increases to 59.3% of the “very high involvement” students not graduating.²⁰²

(STAARS).

¹⁹⁷ FABELO, *supra* note 42, at 64.

¹⁹⁸ *Id.* at 54-56.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 57. (Only 5.3% of students with no disciplinary violations repeat a grade and 2.2% drop-out. Whereas 55.6% of students with “very high involvement”—eleven or more—repeat a grade and 15.3% drop-out).

²⁰¹ *Id.* at 58.

²⁰² *Id.* at 56-59. (There were 928,940 students in the study. The number of students not graduating from all groups was over 31% of the total sam-

These statistics illustrate that the method used by Texas public school personnel to deal with discipline violations was a causal factor in a significant number of students' failure to timely complete their public school education and in many of them failing to graduate at all.

VII. Toxic Classrooms

Since the implementation of zero-tolerance policies in Texas public schools, the research shows that a punitive, no tolerance approach to discipline, additionally applied to non-violent behavior, makes the classroom "toxic to the emotional, physical, and academic health" of many students.²⁰³ Hyman & Snook (2000) found that 50% to 60% of students surveyed reported stress as a result of psychological maltreatment by educators in the classroom stemming from the law enforcement model adopted with zero tolerance policies.²⁰⁴ These harsh and punitive discipline practices, Hyman & Snook (2000) argue, create a school climate that contributes to school violence and erodes school safety. This problem can be corrected by training students and staff to properly understand to respect one another's rights and gain a sense of shared responsibility for the safety of all by the use of participatory democracy.²⁰⁵

Additionally, researchers have found that suspension

ple, which is over 290,000 students without the basic tool of a high school diploma).

²⁰³ Irwin A. Hyman & Pamela A. Snook, *Dangerous Schools and What You Can Do About Them*, 81 PHI DELTA KAPPAN 488, 488-501 (2000).

²⁰⁴ *Id.*

²⁰⁵ *Id.* Hyman and Snook believe the use of participatory democracy within the school will encourage students to participate in democracy as adults. The "dictatorship of the majority," evidenced by the policies and regulations set in each school district by the elected school boards, in the area of discipline, leads to punitive and authoritarian use of discipline techniques, such as the removal of students from the classrooms by suspensions and expulsions (and arguably assignment to Disciplinary Alternate Education Programs). These can easily affect the student's attitude toward the promise of democracy by what Hyman and Snook call the "maltreatment in disciplinary situations in dysfunctional, authoritarian schools." *Id.*

rates, including expulsions (which would include all disciplinary removals from the classroom), correlate to a reduction in growth of in academic achievement levels, an increase in the dropout rate, lower social achievement, greater grade retention, and student feelings of personal alienation and being less worthy than other students; this is especially prevalent with urban African American males compared to their suburban and rural counterparts.²⁰⁶ One study showed that 69% of those that had been removed from class by suspension found it did not help solve the problem that led to their suspension; that they would probably be suspended again; and that the whole technique was of little use and no deterrence to further misbehavior.²⁰⁷ As would be expected, suspended students had less interest in school work and more problems with rule compliance than other students, leading the researchers to suggest positive, non-punitive behavioral management techniques prior to considering suspension. They question the efficacy of suspensions as a deterrence that results in improved behavior.²⁰⁸ Further, compared to those students not subject to these

²⁰⁶ James Earl Davis & Will J. Jordan, *The Effects of School Context Experiences on African American Males in Middle and High School*, 63 J. NEGRO EDUC. 570 (1994); see also L. Rodney, B. Crafter, E. Rodney, and R. Mupier, *Variables Contributing to Grade Retention Among African American Adolescent Males*, 92 J. EDUC. RES. 185 (1999). This study looked at 243 African American, thirteen through seventeen year old, boys, in a mid-western city. It found that the strongest predictor of grade retention was the number of suspensions from school, arguing that grade retention may lead to frustration, disciplinary problems, further suspensions and failure but definitely confirming the correlation of grade retention and violence against others. The authors argued that as suspensions lead to academic failures that schools should change the use of suspensions and the school environment for African American boys. Schools should implement prevention programs that encourage positive behavioral and social skills. Certainly Positive Behavior Interventions and Support would meet those requirements. *Id.*

²⁰⁷ Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 76 (1998).

²⁰⁸ *Id.* The solutions suggested by the researchers were from a 1998 study that did not directly address Positive Behavior Interventions and Support; however it would be such a non-punitive approach suggested in the study. Significant review of literature as it existed at the time is contained within the paper suggesting repeated suspensions correlate to grade retention,

discretionary removals, the negative correlation that exists between the removals and lower academic achievement comes with corresponding lower standardized test scores.²⁰⁹

A recent study confirmed that African American students are more likely to be disciplined than Hispanic or White students in the public schools.²¹⁰ It is clear the use of conduct violations—or discretionary disciplinary rule violations—is almost always the first disciplinary action students of all backgrounds experience.²¹¹ However, whereas only 46.9% of the White students had one or more disciplinary actions during the seventh through twelfth grades, 64.8% of Hispanic students, and 75.1% of African American students were involved with at least one disciplinary violation.²¹² African American male students had the highest percentage (83%) of at least one discretionary violation, Hispanic males had 74% and White males had 59%.²¹³ Females followed a similar pattern with African Americans at 70%, Hispanic females at 58% and White females the lowest at 37%.²¹⁴

The most telling statistic is the use of out-of-school suspensions for these types of violations. Whereas Whites suffered a slight rise in placement in DAEP for their first violation (3.5% for first violation compared to 2.2% for African

lower school attendance, recidivism, and higher drop-outs. *Id.*

²⁰⁹ Florence L. Clark, *Zero-Tolerance Discipline: The Effect of Teacher Discretionary Removal on Urban Minority Students* (Aug. 2002) (unpublished Ph.D. dissertation, University of Texas at Austin), <http://repositories.lib.utexas.edu/bitstream/handle/2152/513/clarkfl026.pdf> (Doctoral dissertation to study the effect and impact of teacher discretionary removal on minority elementary students in an environment of expanded zero tolerance discipline policy). <http://repositories.lib.utexas.edu/bitstream/handle/2152/513/clarkfl026.pdf;jsessionid=B4180FAA97476CBE62A5AB814C6048CE?sequenc>

²¹⁰ FABELO, *supra* note 42, at 40.

²¹¹ *Id.* at 41. (African American students' first disciplinary action was a conduct violation in 94.2% of the time, Hispanic students' 92.7%, and White students' 93.3%. There is no significant difference between the three groups).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

Americans and 2.7% for Hispanics), the use of in-school suspension—where the student continues to learn—was favored for White students for their first violation (86.5% for Whites, 71.5% for African Americans, and 79.1% for Hispanics).²¹⁵ The first violation for minority students resulting in out-of-school suspension—where the students do no learning – was at a much higher rate for non-Whites versus that of Whites (9.9% of Whites, 26.2% of African Americans, and 18.0% of Hispanics).²¹⁶ All of this in light of the fact that African American students are less likely than Hispanic or White students to commit a violation that will result in a mandatory expulsion from school.²¹⁷

So, “principals seem to face a tough choice between keeping their school safe and ensuring that all students have continued educational opportunity.”²¹⁸ It seems logical that purging schools of such students will improve the academic performance or school climate for the remaining students. However, practice indicates otherwise.²¹⁹ Could this overrepresentation of minority children in disciplinary referrals, suspensions and expulsions be tied to a breach in logic, or could the logic be an expression of factors of which society is unaware – the unintended consequences of hundreds of years of racial and cultural strife?

This overrepresentation of minority students in disciplinary contacts appears to affect “students whose race and gender distance them from their teachers.”²²⁰ This is shaped by sociocultural relations in the classroom which the teachers

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 46.

²¹⁸ Russell Skiba & Jeffrey Sprague, *Safety Without Suspensions*, 66 POSITIVE CLASSROOM 38 (2008), available at <http://www.ascd.org/publications/educational-leadership/sept08/vol66/num01/Safety-Without-Suspensions.aspx>.

²¹⁹ See *supra* note 318.

²²⁰ Frances Vavrus & KimMarie Cole, “*I Didn’t Do Nothin’*”: *The Discursive Construction of School Suspension*, 34 THE URBAN R. 87, 109 (2002).

often “unconscious[ly] process,” leading the teacher to single out a student for disciplinary action.²²¹ “[S]uspensions are inextricable from the sociocultural context. . . ,”²²² and school districts must design and foster schools, classrooms and disciplinary systems that address these issues and are not toxic to the children.²²³ Presently, the mindset is to treat misbehaviors as society does, by criminalizing and isolating the offender; assuming “out of sight, out of mind” will correct or at least delay having to deal with the problem, but in reality just kicking the can down the road.

VIII. Criminalization of Children: The Pipeline

A. *The Prison Model and Effectiveness of Treatment Therein*

Beyond the unwelcome, even toxic, classroom environment, this evolution of institutional responses to child misbehavior in the classroom, and the resulting statistics just described, indicate a more severe crisis with today’s school age children. This is particularly apparent with children who are easily identified as coming from historically disadvantaged demographics with low student achievement, creating the crisis of criminalizing children.²²⁴ The adults who designed the current system made the children “the victims of

²²¹ *Id.*

²²² *Id.*

²²³ See, e.g., D.R. Holley, *Is Brown Dying? Exploring the Resegregation Trend in Our Public Schools*, 49 N.Y.L. SCH. L. REV. 1085 (2005). One disturbing trend in the last generation is the re-segregation of the public schools. For a decade now, the public schools are as racially segregated as they were in the late 1960’s. School districts should be encouraged to keep the schools integrated to foster diversity, to provide equal opportunity and to improve graduation statistics, without the intervention of the courts that was required in our recent past. See also, GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 58-72 (2004). Researchers have concluded that the resegregation of our public schools helps contribute to low graduation rates. *Id.*

²²⁴ Reyes, *supra* note 195, at 555. “By isolating students with low achievement and persistent misbehavior, . . . has public education given up on the promise of equal educational opportunity for all?” *Id.* at 556.

adult mistreatment, indifference, neglect, even violence.”²²⁵ For example, there has been a dramatic increase in the criminal prosecution of juveniles for minor law violations over the past decade.²²⁶

The misdeeds of children – acts that in the near recent past resulted in trips to the principal’s office, corporal punishment, or extra laps under the supervision of a middle school or high school coach, now result in criminal prosecution, criminal records, and untold millions of dollars in punitive fines and hefty court costs being imposed against children ages 10 through 16.²²⁷

Some blame Chapter 37 of the Texas Education Code as the reason so many school children have been charged with crimes while at school²²⁸—what with the “over-infusion of

²²⁵ Henry A. Giroux, *Occasional Thoughts. Ten Years After Columbine: The Tragedy of Youth Deepens*, 7 POLICY FUTURES IN EDUC. 356 (2009), available at <http://dx.doi.org/10.2304/pfie.2009.7.3.356>. Professor Giroux makes a passionate argument that American society now treats school age children as a “generation of suspects” making them “the risk” instead of “at risk,” turning its collective back on society’s responsibility “to protect and nourish” our youth. *Id.*

²²⁶ See Doug Nelson, *2008 Kids Count Essay: A Road Map for Juvenile Justice Reform* (2008), <http://www.aecf.org/~media/PublicationFiles/2008EssaySummaryCharts.pdf>. For example, in the years from 1995 to 2004 there was a doubling of the juveniles adjudicated for disorderly conduct, a very minor misdemeanor. The Annie E. Casey Foundation found that focusing on juvenile justice reform, the Fact Sheet includes six challenges and proven reform solutions. *See id.*

²²⁷ Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children’s Criminal Cases*, STATE BAR OF TEXAS: THE SPECIAL EDUCATION ISSUES AND JUVENILE SYSTEMS IN TEXAS, June 25, 2010, available at

<http://www.texasbarcle.com/Materials/Events/9181/121465.pdf>.

²²⁸ Miriam Rozen, *Counsel Assist with Report that Alters Education Code*, TEXAS LAWYER (June 11, 2007),

<http://www.texasappleseed.net/pdf/Altered%20Education%20Code.pdf>. In 2007, section 37.102(c), Texas Education Code, was amended by HB 278, limiting the complaints a school district could file with prosecutors for violation of the school’s code of conduct as a Class C Misdemeanor to the operation and parking of vehicles on school property. Prior to this amendment, school districts would use this section to file criminal com-

law enforcement in public school, the misapplication of the crime control model, and the zeal for zero tolerance²²⁹

Within the public schools, using the methodology of prisons as a model for disciplinary response,²³⁰ children are now arrested at alarming rates for “crimes” which are merely bad acts not traditionally calling for the extreme response of an arrest.²³¹ Many times these children are sent to alternate education programs for reasons unrelated to actual criminal behavior, but due to more traditional adolescent misbehavior. These “crimes” are often labeled as “status offenses” or violations of the student code of conduct.²³² In Texas, the 60% of

plaints seeking Class C misdemeanor charges on students for various minor violations of the school’s code of conduct overloading many municipal and justice courts. This abuse by certain districts was stopped. *Id.*; see also Keith S. Hampton, et. al., *2007 Legislative Summary for the 80th Legislative Session*, VOICE FOR THE DEFENSE, Sept. 1, 2007, at 38, available at <http://www.voiceforthedefenseonline.com/newsletters/2007/Sept07.pdf>. Under section 37.105 of the Texas Education Code it is the power and responsibility of the district and its employees to report to law enforcement a whole host of violations of the law occurring on school property or during school activities, on or off school property, including some misdemeanors. *Id.*

²²⁹ Turner & Goodner, *supra* note 217, at 13.

²³⁰ CHRISTOPHER G. ROBBINS, *EXPPELLING HOPE: THE ASSAULT ON YOUTH AND THE MILITARIZATION OF SCHOOLING* (State University of New York Press, Albany 2008).

²³¹ E.g. Todd Spivak, *Cut Short: A Model Student-Athlete Unthinkingly Brings a Knife to School and Ends Up in Jail, Then Expelled, Why One-Size-Fits-All Discipline Fails Kids*, THE HOUSTON PRESS, June 29, 2006, available at <http://www.houstonpress.com/2006-06-29/news/cut-short/> (The story of the High School Senior in Missouri City, Texas, a model student-athlete in two sports and honor student, who was arrested and placed in jail, expelled, and sent to JJAEP, readmitted and sent to DAEP. He spent most of his senior year in a private school, for merely possessing a small single-edged switchblade received as a gift while visiting family in Greece; the student in Katy, Texas, who was suspended for a possession of a pencil sharpener with an attached two-inch folding blade; the student from the Woodlands, Texas, where the student was expelled and placed in juvenile detention for forty-five days for accidentally having his Boy Scout knife in his pocket); see SAWHILL, *supra* note 8; see e.g. *supra* Section I. Many other examples of children being arrested, expelled, and suspended from school, (similar to Terry Carter) are available.

²³² TEX. FAM. CODE ANN. § 51.02(15) (West 2010) (“‘Status offender’

public school students with at least one disciplinary action are more than eleven times more likely to have contact with the juvenile justice system during the seventh through twelfth grade, as compared to the 40% of the students with no disciplinary action.²³³ Furthermore, almost half of the students classified as having “an emotional disturbance” in school go on to have contact with juvenile justice.²³⁴ It is also argued we are creating an “adolescent criminal class” by combining status offender children with those children who are delinquent and segregating the entire group from the rest of the class.²³⁵ Moreover, when the public schools and their alternative education programs resemble prison or detention environments, it is only logical that the child exposed to this begins to identify with the “adolescent criminal class.”

One problem with basing public school disciplinary programs on the prison model has been the increased use of segregation within prisons as the rehabilitative method of choice.²³⁶ Segregation creates psychological issues and recid-

means a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult, including: (A) truancy, (B) run away, (C) fine only juvenile offenses, (D) failure to attend school, (E) violation of school’s standards of student conduct, (F) curfew, (G) violation of the Alcoholic Beverage Code applicable to minors only, (H) any other fineable juvenile offense.”); *see also* WHEN MY CHILD, *supra* note 73, at 26 (showing that during the 2005-2006 school year, assignments to DAEPs for violation of student code of conduct outnumbered other discretionary referrals six-to-one. The actual number of students removed to DAEP for these discretionary reasons -- which would include nonviolent students and other code of conduct violations, including status offenses -- for the 2005-2006 school year was 62,981).

²³³ FABELO, *supra* note 42, at 66. The “very high involvement” students were over nineteen times more likely than the no disciplinary group to have juvenile justice involvement during their secondary education. *Id.* at 69.

²³⁴ *Id.* at 68.

²³⁵ Soma R. Kedia, *Creating An Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 543 (2007).

²³⁶ Thomas B. Benjamin and Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison*, 9 CLEARINGHOUSE REV. 83 (1975-76).

ivism concerns within the affected prison population and there is no reason to assume this same effect is not experienced by children segregated from their peers.²³⁷ Further, by segregating these students, who are mostly minority and economically disadvantaged, and housing them altogether away from their home campuses, a primary purpose of public education is thwarted—the goal of exposing every child to a diverse, heterogeneous student body and curriculum.²³⁸ Although the use of seclusion as a disciplinary technique has been forbidden in the public schools in recent years,²³⁹ the segregation of children from their peers and home school campuses by the use of the Disciplinary Alternate Education Program is none the less a removal from the child's normal school environment for disciplinary reasons or concerns for safety – the same rationale used to justify segregation in the adult prison.²⁴⁰

This segregation model ignores the science that behavioral treatment of adult offenders can be beneficial as part of a return to the philosophy that prison can be an environment in which true rehabilitation is possible.²⁴¹ To illustrate the suggestion that rehabilitation is still a viable option in corrections, one can look to the work within the corrections com-

²³⁷ Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124 (2003).

²³⁸ Reyes, *supra* note 195, at 539.

²³⁹ E.g. TEX. ED. CODE ANN. § 37.0021 (West 2010) (prohibiting the use of isolation as a punishment for disabled students in special education).

²⁴⁰ See Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax"*, *supra* note 237, at 128. Haney also suggests the rise in the use of solitary confinement may be a function of the tremendous growth in population of those incarcerated. This resulting overcrowding and the move away from rehabilitation during the 1970's creating management problems with a population less engaged, idle, and under a "pressure cooker-like atmosphere" during the last thirty years. *Id.*

²⁴¹ Caroline Friendship et al., *Cognitive-Behavioural Treatment for Imprisoned Offenders: An Evaluation of HM Prison Service's Cognitive Skills Programmes*, 8 LEGAL & CRIMINOLOGICAL PSYCHOL. 103 (2003) (The meta-analytical outcome studies noted in the paper and the results of the article's effectiveness evaluation of prison-based cognitive-behavioral treatment programs show such treatment can have a significant effect, and be cost-effective, in reducing recidivism).

munity that shows the effectiveness of treatment programs for the most serious offenders²⁴²—the “life-course-persistent” offenders.²⁴³ In addition, those working with juvenile offenders would do well to distinguish between those whose life course appears to be wrought with violations of the law and the person whose criminal life is “adolescence-limited.”²⁴⁴

In 1990, the Texas Department of Criminal Justice implemented its Program for the Aggressive Mentally Ill Offender (PAMIO) for those with antisocial personality disorder, narcissistic personality disorder, borderline personality disorder and other criteria showing dangerous, predatory or aggressive tendencies.²⁴⁵ Using biological and psychosocial interventions such as extensive biopsychosocial assessments,

²⁴² See Nana A. Landenberger & Mark W. Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment*, 1 J. EXPERIMENTAL CRIMINOLOGY 451 (2005) (“A meta-analysis of 58 experimental and quasi-experimental studies of the effects of cognitive-behavioral therapy . . . on the recidivism of adult and juvenile offenders . . .” that confirmed prior positive findings on the successful rehabilitation of serious offenders through cognitive-behavioral therapy.).

²⁴³ See Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993) (arguing that “life-course-persistent” antisocial behavior has its origins in a child’s neuropsychology continuing persistently after adolescence. The other category of offender in this developmental “duel taxonomy” is the “adolescence-limited” antisocial behavior whose genesis is in children mimicking antisocial behavior in social settings.); see also Alex R. Piquero et al., *Are Life-Course-Persistent Offenders at Risk for Adverse Health Outcomes?* 44 J. RES. IN CRIME & DELINQUENCY 185 (2007) (This article finds those that fall into the “life-course-persistent” offender group are “more likely to experience adverse physical and mental health outcomes.” This article is particularly instructive as it first gives a history of Moffitt’s “duel taxonomy” theory and references the addition of “family-adversity risk factors” into the taxonomy’s key predictors, along with other findings over the years and the argument that perhaps there are other groups of offenders, such as those that “recover” and those that “re-offend”).

²⁴⁴ Moffitt, *supra* note 243, at 275-76.

²⁴⁵ See, e.g., Eugene W. Wang et al., *The Effectiveness of Rehabilitation with Persistently Violent Male Prisoners*, 44 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 505, 509 (2000).

psychotropic medications, individual and group therapies, habilitation therapies, and behavioral cognitive-behavioral therapeutic techniques, the median annual rate of total disciplinary problems in the sample group of “life-course-persistent” offenders dropped 71%; inmate assaults and assaults on staff dropped to zero; and the loss of good time²⁴⁶ because of misbehavior decreased from an annual loss of 311 days down to only seven days after the PAMIO treatment.²⁴⁷

An underlying theme of this article is if behavioral modification in a prison environment is effective, – and also, as shown later, in the juvenile justice setting—surely the program can be effective in the public schools with children K-12, if properly implemented. So, is there a program that will effect such dramatic change in misbehavior in public school children that remains consistent with the current Zero Tolerance (ZT) mindset, or does the overall approach to public school discipline require overhauling?

IX. Positive Behavior Interventions and Support

ZT policies assume that by removing disruptive stu-

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 512. The sample group of “life-course-persistent” offenders had an average of ten arrests and four incarcerations, 85% had been in prison for a violent crime, 62% had multiple violent offenses, 20% had committed murder or attempted murder, 20% sexual assault, 23% aggravated assault, and 12% aggravated robbery. Of those with available records, 95% had a personality disorder, either antisocial personality disorder, narcissistic personality disorder, borderline personality disorder, and a non-specified personality disorder. Researchers labeled the amount of decrease in the rates of disciplinary offenses after treatment as “startling.”

Decreases in disciplinary offenses subsequent to treatment for these most intractable adult repetitive offenders could have important ramifications for the correctional system and hopefully for society after the prisoner is released. An intensive treatment program for anger and aggression appears to be a viable correctional response to disciplinary problems in general and aggression specifically. Thus, rehabilitative treatment could offer an alternative to incapacitative efforts such as administrative segregation . . . ,” mitigating “concerns about the psychological effects of administrative segregation

Id. at 510, 511-12.

dents from the classroom that the remaining students will be deterred from disruption and consequently the learning environment for those remaining will improve.²⁴⁸ However, the opposite effect occurs. Schools with higher suspensions and expulsions have less satisfactory learning environments and spend inordinate resources on disciplinary matters.²⁴⁹

Effective strategies for dealing with school discipline have now evolved into a three tier model of intervention and support.²⁵⁰ “As schools have moved beyond simply excluding children with problem behavior to a policy of active development of social behaviors, expectations for discipline sys-

²⁴⁸ See Skiba, *supra* note 218, at 854.

The report addresses “five key assumptions of zero policies: (1) School violence is at serious level and increasing, thus necessitating forceful, no-nonsense strategies for violence prevention. . . . (2) Through the provision of mandated punishment for certain offenses, zero tolerance increases the consistency of school discipline and thereby the clarity of the disciplinary message to students. . . . (3) Removal of students who violate school rules will create a school climate more conducive to learning for those students who remain. . . . (4) The swift and certain punishments of zero tolerance have a deterrent effect upon students, thus improving overall student behavior and discipline. . . . (5) Parents overwhelmingly support the implementation of zero tolerance policies to ensure the safety of schools, and students feel safer knowing that transgressions will be dealt with in no uncertain terms.”

Id. at 853-56; see also *supra* Part III.

²⁴⁹ See Skiba, *supra* note 218, at 854.

²⁵⁰ *Id.* at 856.

In 1993, the American Psychological Association released its report *Violence and Youth: Psychology’s Response* (APA, 1993) addressing what was then widely perceived as an epidemic of youth violence. That report framed youth violence prevention efforts in terms of a three-tiered primary prevention model. Since the publication of that report, a large number of researchers, policymakers, and professional organizations have articulated similar three component prevention models as applied to mental health . . . , youth violence in general . . . , or school violence in particular. . . . The model became the centerpiece for efforts of the U. S. Department of Education to address school violence in a series of publications intended to provide guidance to America’s schools concerning the prevention of violence”

Id.

tems have changed.”²⁵¹ This model is most commonly referred to as “positive behavioral intervention and support” (PBIS).²⁵² School districts are encouraged to adopt this program because it is consistently recognized nationwide as an effective strategy to handle school behavioral problems.²⁵³

²⁵¹ George Sugai & Robert Horner, *The Evolution of Discipline Practices: School-Wide Positive Behavior Supports*, 24 CHILD & FAM. BEHAV. THERAPY 23 (2002).

²⁵² See Timothy J. Lewis & George Sugai, *Effective Behavior Support: A Systems Approach to Proactive Schoolwide Management*, 31 FOCUS ON EXCEPTIONAL CHILD. 1 (1999). PBIS is also known as PBS (positive behavioral supports), SWPBS (School-wide positive behavioral supports), and Effective Behavior Support (EBS). These acronyms are used interchangeably throughout this article and the literature. “The school-wide EBS effort has six essential elements: (a) statement of purpose, (b) school-wide expectations, (c) procedure for teaching school-wide expectations, (d) continuum of procedures for encouraging school-wide expectations, (e) continuum of procedures for discouraging problem behaviors, and (f) procedures for monitoring the impact of the school-wide EBS implementation.” *Id.* at 5 (including a relatively early discussion of PBIS (referred to as EBS in 1999)).

²⁵³ Scott A. Spaulding et al., *Implementation of School-wide PBS across the United States*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Nov. 2008), http://www.pbis.org/evaluation/evaluation_briefs/nov_08_%282%29.aspx. As of October 1, 2008, the total number of schools implementing PBIS is 7,953 out of a total number of schools of 100,627 throughout the United States. *Id.* Texas is beginning to participate with sixty-one schools including one preschool, forty elementary, fourteen middle school/junior high, and six high schools. These figures are increasing every year. The use of behavioral modification in preschool and elementary schools are particularly exciting. Nicholas Zill et al., *Head Start FACES 2000: A Whole-Child Perspective on Program Performance*. Fourth Progress Report. Administration for Children, Youth, and Families (DHHS), Washington, D.C. Head Start Bureau; Administration for Children, Youth, and Families (DHHS), Washington, D.C. Office of Research and Evaluation (2003), *available* at

http://www.acf.hhs.gov/programs/opre/hs/faces/reports/faces00_4thprogress/faces00_4thprogress.pdf (discussing that the benefits to children and families participating in the Head Start program shows that children with higher “cooperative behavior” and lower “problem behavior” do better on cognitive assessments at the end of Kindergarten and that Head Start protects children from negative family risks, including depression, violence, alcohol use and criminal justice involvement.); K. Brigid Flannery,

A. *PBIS: Brief Developmental History*

In response to the Individuals with Disabilities Educa-

George Sugai & Cynthia M. Anderson, *School-Wide Positive Behavior Support in High School: Early Lessons Learned*, 11 J. POSITIVE BEHAV. INTERVENTIONS 177 (2009) (finding that implementation of PBIS at the high school level is particularly difficult and presents similar yet unique challenges not applicable to middle and elementary school environments); *but see* Spaulding, *supra*. Interestingly, the Spaulding study, shows that Missouri has not participated in the PBIS movement. Missouri's model for treatment of juvenile offenders is highlighted herein as a resource for Texas to emulate. Certainly Missouri's success in the treatment of the juvenile offender without the implementation of PBIS should be considered. *See infra* Part VIII.E.

For a better understanding of the current state of PBIS visit the PBIS website at http://pbis.org/evaluation/evaluation_briefs/default.aspx (last visited January 2, 2010) for its 2008 evaluations. Issue 1: Claudia G. Vincent, *Do Schools Using SWIS Take Advantage of the "School Ethnicity Report"?*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Nov. 2008), [http://www.pbis.org/evaluation/evaluation_briefs/nov_08_\(1\).aspx](http://www.pbis.org/evaluation/evaluation_briefs/nov_08_(1).aspx); Issue 2: Spaulding, *Implementation of School-wide PBS across the United States*, *supra* note 253; Issue 3: Scott A. Spaulding & Jennifer L. Frank, *The Relation Between Office Discipline Referrals and School Enrollment Status: Do Rates Differ Based on Enrollment Size?*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Jun. 2009), [http://www.pbis.org/evaluation/evaluation_briefs/june_09_\(1\).aspx](http://www.pbis.org/evaluation/evaluation_briefs/june_09_(1).aspx); Issue 4: Scott A. Spaulding & Jennifer L. Frank. *Comparison of Office Discipline Referrals in U.S. Schools by Population Densities: Do Rates Differ According to School Location?*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Jun. 2009), [http://www.pbis.org/evaluation/evaluation_briefs/june_09_\(2\).aspx](http://www.pbis.org/evaluation/evaluation_briefs/june_09_(2).aspx); Issue 5: Claudia G. Vincent, Gwendolyn Cartledge, Seth May & Tary J. Tobin, *Do Elementary Schools that Document Reductions in Overall Office Discipline Referrals Document Reductions across All Student Races and Ethnicities?*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Oct. 2009), http://www.pbis.org/evaluation/evaluation_briefs/oct_09.aspx; and Issue 6: Claudia Vincent, Robert Horner & Seth May, *What are the Patterns of Office Discipline Referrals across Grade Levels?*, OSEP TECHNICAL ASSISTANCE CTR. ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS (Dec. 2009), [http://www.pbis.org/evaluation/evaluation_briefs/dec_09_\(1\).aspx](http://www.pbis.org/evaluation/evaluation_briefs/dec_09_(1).aspx).

tion Act (IDEA)²⁵⁴ in 1997, the Office of Special Education Programs of the United States Department of Education, created the National Technical Assistance Center on Positive Behavioral Interventions and Supports.²⁵⁵ This office was established to give schools “capacity-building information and technical assistance for identifying, adapting, and sustaining effective school-wide disciplinary practices.”²⁵⁶ PBIS, also referred to as Positive Behavior Support (PBS), is the only behavior model mentioned in IDEA.²⁵⁷ In the 2004 amendments

²⁵⁴ Individuals with Disabilities Education Act, Pub. L. 101-476, 104 Stat. 1142 (2004) (codified as amended 20 U.S.C.A. § 1400 et seq. (West 2010)). The 2004 Amendment still emphasizes functional assessment and positive encouragement to students for good behavior. *See id.*

²⁵⁵ OSEP TECHNICAL ASSISTANCE CENTER ON POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS: EFFECTIVE SCHOOLWIDE INTERVENTIONS, [hereinafter PBIS WEBSITE] www.pbis.org (follow “About Us” hyperlink) (last visited January 2, 2010) (“The Center (a) provides the technical assistance to encourage large-scale implementation of PBIS; (b) provides the organizational models, demonstrations, dissemination, and evaluation tools needed to implement PBIS with greater depth and fidelity across an extended array of contexts; and (c) extends the lessons learned from PBIS implementation to the broader agenda of educational reform.”).

²⁵⁶ *Id.* According the PBIS website, directed by Dr. George Sugai (University of Connecticut), Dr. Rob Horner, (University of Oregon), and Dr. Tim Lewis (University of Missouri), for ten years the Center has defined, implemented, and evaluated PBIS in more than 9,000 schools in forty states. The figure of 9,000 is taken from the PBIS website, and it would indicate a substantial growth from the 7,953 schools as of the October 1, 2008. *See id.*; Zill et al., *supra* note 253. The front page of the PBIS website shows that over 10,000 schools are now participating. Yet another source indicates that as of 2009, 11,000 schools have implemented School-Wide Positive Behavior Supports. *See PBS Across Florida, POSITIVE OUTLOOK* (Fla.’s Positive Behavior Support RtI for Behavior Project, Tampa, Fla.), Fall 2009, at 2, available at <http://flpbs.fmhi.usf.edu/> http://flpbs.fmhi.usf.edu/pdfs/PBS_Volume_19_final_web_092409.pdf.

²⁵⁷ 20 U.S.C. §1401(c)(5)(F) (2006) (“(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by ... (F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.”). *Id.*; *see also*, PBIS

to IDEA, Congress saw PBIS as a useful way to improve educational results and reduce student exclusion.²⁵⁸ These changes emphasize the modern trend away from the zero-tolerance policies of the near past and toward the use of PBIS.²⁵⁹ Originally developed for the benefit of disabled children, PBIS is applicable to a wide range of adolescent behavioral problems.²⁶⁰ PBIS, and its first cousin Responsiveness to Intervention (RtI), are both three-tier, school-wide prevention models to improve academic and social behaviors, not just for the intellectually disadvantaged student, but for “all students across academic. . .and social. . .behavior domains” and environments.²⁶¹ To encourage implementation of PBIS, Congress authorized states to use professional development funds for PBIS training.²⁶² The implementation of PBIS emphasizes the organization of multiple schools to put forth a common vision and to develop language and experiences that improve the ef-

WEBSITE, *supra* note 255 (follow “PBIS and the Law” hyperlink) “The IEP [Individualized Education Program] team to consider the use of Positive Behavioral Interventions and Supports for any student whose behavior impedes his or her learning or the learning of others.” *Id.* (citing 20 U.S.C. § 1414(d)(3)(B)(i)); States are authorized to use professional development funds to “provide training in methods of . . . positive behavioral interventions and support to improve student behavior in the classroom.” *Id.* (citing 20 U.S.C. § 1454(a)(3)(B)(iii)(I)).

²⁵⁸ See 20 U.S.C. § 1401(c)(5)(F) (2006).

²⁵⁹ Heidi Von Ravensberg & Tary J. Tobin, *IDEA 2004: Final Regulations and the Reauthorized Functional Behavioral Assessment* (2006), http://pbis.org/common/pbisresources/publications/SSRN_d1151394.pdf.

²⁶⁰ Jeffrey R. Sprague & Robert H. Horner, *School Wide Positive Behavioral Supports*, in *THE HANDBOOK OF SCHOOL VIOLENCE AND SCHOOL SAFETY: FROM RESEARCH TO PRACTICE* (Shane R. Jimerson & Michael J. Furlong eds., 2006).

²⁶¹ Brandi Simonsen et al., *A Schoolwide Model for Service Delivery: Redefining Special Educators as Interventionists*, 31 *REMEDIATION AND SPECIAL EDUCATION* 17, 17-18 (February 2010).

²⁶² 20 U.S.C. § 1454(a)(3)(B)(iii)(I) (2006). Grant funding is available to train special educators in PBIS (20 U.S.C. § 1464(a)(6)(D), (f)(2)(A)(iv)(I) (2006)), to develop PBIS models that address conduct that impedes learning (20 U.S.C. § 1464(b)(2)(H) (2006)) and to provide training in the use of PBIS to entire school personnel and systems to encourage involvement of entire school districts in adopting PBIS (20 U.S.C. § 1483(1)(C)-(D) (2006)).

efficiency of resources and organizational management.²⁶³ A sustained reduction in discipline referral rates is indicated with a continuum of behavior supports school and district wide.²⁶⁴

B. Texas Behavior Support Initiative

Texas, in the 2001 legislative session passed changes to the Texas Education Code (TEC) prohibiting seclusion as a disciplinary technique in Texas public school districts and in open-enrollment charter schools.²⁶⁵ In response to these changes the commissioner of the Texas Education Agency adopted rules for the use of restraints and time-out.²⁶⁶ To respond to the training requirements established by the TEA commissioner in the Texas Administrative Code, § 89.1053, the Texas Behavior Support Initiative was created to provide Positive Behavior Support (PBS or PBIS) information through the Statewide Behavior/Discipline Management Network.²⁶⁷ This was the beginning of the PBIS movement in Texas. As of January 2010, there were more than 800 school campuses participating in this initiative²⁶⁸ out of a total 9,260

²⁶³ See PBIS WEBSITE, *supra* note 255 (follow “School” hyperlink, then follow “District Level” hyperlink). “Multiple schools” is most usually defined as school districts, but could be statewide or departmental implementation such as is argued here to be required by the Texas Education Agency for all Texas public schools or as recently implemented within the Texas Youth Commission for all their education facilities. TYC EDUCATION PLAN: IMMEDIATE ACTION ITEMS FOR THE UPCOMING 2009-2010 SCHOOL YEAR 3, available at http://www.tyc.state.tx.us/programs/educ_action_plan.pdf.

²⁶⁴ Carol Sadler & George Sugai, *Effective Behavior and Instructional Support: A District Model for Early Identification and Prevention of Reading and Behavior Problems*, 11 J. POSITIVE BEHAV. INTERVENTIONS 35 (2009).

²⁶⁵ TEX. EDUC. CODE ANN. § 37.0021 (2011).

²⁶⁶ TEX. ADMIN. CODE ANN. §89.1053 (2011).

²⁶⁷ See generally, TEXAS BEHAVIORAL SUPPORT, <http://www.txbsi.org/default.aspx?name=about.hb1314> (last visited January 23, 2010).

²⁶⁸ Email from Amie Young, State Coordinator for the Texas Behavior Support Initiative (Jan. 7, 2010) (on file with author).

schools statewide in Texas.²⁶⁹

C. *How PBIS Works*

School-wide PBS (SWPBS or PBIS)²⁷⁰ involves proactive strategies for defining, teaching and supporting student's good behavior²⁷¹ for the purpose of creating a positive school climate.²⁷² The goal is to prevent misbehavior by teaching good behaviors and reinforcing compliance.²⁷³ Rather than individualized management plans that emphasize reaction to negative behavior, all students are encouraged toward positive behavior in classroom and non-classroom settings.²⁷⁴ PBIS is a behaviorally-based systems approach designed for effective learning environments supported by research validated practices.²⁷⁵ As to the commission of major offenses, however, PBIS is not a substitute for negative consequences.²⁷⁶ The mission of PBIS is an evidence-based ap-

²⁶⁹ *Texas School Directory 2009-10*, TEXAS EDUCATION AGENCY 45 (Feb. 2010),

http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2010/not_tagged/texas_school_directory_2009-10.pdf.

²⁷⁰ Positive Behavior Support (PBS) is often referred to as Positive Behavioral Interventions and Supports (PBIS) and occasionally as School-wide Positive Behavior Support (SwPBS). PBS, PBIS, and SwPBS are used, herein, interchangeably but refer to the same process.

²⁷¹ PBIS WEBSITE, *supra* note 255. (follow "School" hyperlink) (last visited January 2, 2010).

²⁷² Lori Newcomer & Tim Lewis, *Building Connections Between Individual Behavior Support Plans and Schoolwide Systems of Positive Behavior Support*, PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Ore.), available at http://www.pbis.org/pbis_newsletter/volume_1/issue4.aspx.

²⁷³ Therese Sandomierski et al., *Response to Intervention and Positive Behavior Support: Brothers from Different Mothers or Sisters with Different Mistakes?* PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Ore.), June 2007, available at http://www.pbis.org/pbis_newsletter/volume_4/issue2.aspx.

²⁷⁴ PBIS WEBSITE, *supra* note 255 (follow "School" hyperlink).

²⁷⁵ PBIS WEBSITE, *Frequently Asked PBS Questions*, available at http://www.pbis.org/common/pbisresources/publications/C_FAQs_final.pdf

²⁷⁶ See POSITIVE OUTLOOK, *supra* note 256, at 1.

proach to resolving significant student behavioral problems at three tiers: (1) at the school-wide level, (2) in the classroom and/or (3) with the individual student.²⁷⁷

1. *Tier 1.*

The three tier approach focuses on creating and sustaining universal systems of support, targeted group supports, and individual supports for the purpose of improving the lives of all children with respect to behavioral problems.²⁷⁸ The universal curriculum of Tier 1 uses school-wide rules and procedures expected of all children and the lesson plans needed to teach them.²⁷⁹ This practice of teaching and reinforcing school-wide expectations of good behavior is a “universal intervention,” reinforcing good behavior for those who generally act appropriately and is a proactive intervention for those who may have a history with misbehavior.²⁸⁰ The faithful collection and analysis of disciplinary contacts, referrals, and environments for the students that externalize their negative behavior combined with proper identification of at-risk students who are more internal in their expressions is essential to identifying students who may need more “support.”²⁸¹

²⁷⁷ See PBIS WEBSITE, *supra* note 255, *Is School-Wide Positive Behavior Support an Evidence-Based Practice?* (follow “Research” hyperlink; for an extensive bibliography of studies on Measures, follow “Primary” hyperlink, then follow “Measures” hyperlink; for Secondary Information on Tier 2 Interventions, follow “Secondary” hyperlink, then follow “Check & Connect” hyperlink; for the Prevention Tier (Tier 1), Evaluation studies, Secondary Tier Interventions (Tier 2), Check & Connect (Drop-out Prevention), and for information on Tier 3, follow “Tertiary” hyperlink).

²⁷⁸ Sandomierski, *supra* note 273, at 2-5.

²⁷⁹ *Id.* at 3.

²⁸⁰ See *id.*; Lori Newcomer, *Universal Positive Behavior Support for the Classroom*, PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Ore.), Mar. 2009, available at

http://www.pbis.org/pbis_newsletter/volume_4/issue4.aspx. (This article sets out specific ideas on the implementation of Tier 1 Universal supports for the classroom).

²⁸¹ Sandomierski, *supra* note 273, at 3.

Core Elements of Tier 1*

- “Behavioral expectations defined
- “Behavioral expectations taught
- “Reward system for appropriate behavior
- “Continuum of consequences for problem behavior
- “Continuous collection and use of data for decision-making.”

*Available at: <http://pbis.org/research/default.aspx>

2. Tier 2.

After a student at Tier 1 shows a need for additional support, Tier 2, evidence-based interventions are used. These are easy to administer to small groups of students, and they are not too time consuming for the educator.²⁸² Once at-risk students are identified, their attention must be returned to the school-wide expectations of Tier 1 by once again instructing on what is expected of them.²⁸³ Additionally, there must be a faithful analysis of data collected by staff recording academic and behavioral progress.²⁸⁴ One example of a successful Tier 2 intervention, based on certain students’ need for more practice and feedback on their behavior, is the use of the more stringent “check-in, check-out” program, called the Behavior Education Program.²⁸⁵ This behavioral support model defines and teaches the universal behavior expectations; has a student check in with a positive adult on a regular basis; formalizes the consequences of misbehavior both at school and at home;

²⁸² *Id.* at 4.

²⁸³ *See id.*

²⁸⁴ *See, e.g., id.*

²⁸⁵ *See* DR. DEANNE A. CRONE ET AL., RESPONDING TO PROBLEM BEHAVIOR IN SCHOOLS: THE BEHAVIOR EDUCATION PROGRAM (2nd ed. 2010); *see also* Leanne S. Hawken & Susan S. Johnston, *Preventing Severe Problem Behavior in Young Children: The Behavior Education Program*, 4 J. EARLY & INTENSIVE BEHAV. INTERVENTION 599 (2007). “This secondary prevention program ... is a modified, check-in, check-out intervention.” This program is particularly adapted for use in middle and elementary schools and can be adapted for pre-school settings. *Id.*

and collects data for evaluation and adaptation of the intervention as the data shows what is necessary on an on-going basis.²⁸⁶ Studies show that this program functionally reduces problematic behavior, and for some students, it increases academic performance with a probable success rate of 60-75% of at-risk students.²⁸⁷ This and other programs provide a way to return the student's attention to the Tier 1 school-wide expectations, improve his social skills, and often improve academics.²⁸⁸ Students in Tier 2 should also have their academic proficiency assessed, because many times behavioral problems originate due to a student's inability to meet the academic success of his peers.²⁸⁹ Academic and behavior interventions may be required simultaneously.²⁹⁰ Before a student can be evaluated for the successfulness of such interventions, proper progress records toward academic and behavioral improvement, including evaluation of the fidelity of those implementing the intervention must be monitored.²⁹¹ As many as 5% to 15% of students will need certain targeted Tier 2 interventions, such as social skills training or daily behavior reports.²⁹²

²⁸⁶ Hawken, *supra* note 285, at 602.

²⁸⁷ See CRONE ET AL., *supra* note 285.

²⁸⁸ See *id.*; Sandomierski, *supra* note 273.

²⁸⁹ See Sandomierski, *supra* note 273.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² CRONE ET AL., *supra* note 285.

Core Elements of Tier II*

- “Universal screening
- “Progress monitoring for at risk students
- “System for increasing structure and predictability
- “System for increasing contingent adult feedback
- “System for linking academic and behavioral performance
- “System for increasing home/school communication
- “Collection and use of data for decision-making.”

*Available at: <http://pbis.org/research/default.aspx>

3. Tier 3.

Not responding to the broad-based interventions of Tier 1 or the targeted group interventions of Tier 2, are students that benefit from intensive, individualized behavior support and the use of functional behavioral assessment, at Tier 3.²⁹³ Tier 3 requires more intensive progress monitoring to identify students who will benefit from these additional intensive supports.²⁹⁴ The Individuals with Disabilities Education Act (IDEA), in 1997, called for functional behavioral assessment and positive behavior support for at-risk students.²⁹⁵ Schools

²⁹³ D. A. CRONE & R. H. HORNER, BUILDING THE CAPACITY TO IMPLEMENT FUNCTIONAL BEHAVIORAL ASSESSMENT IN SCHOOLS: A PRACTICAL GUIDE TO FUNCTION-BASED SUPPORT (2003). Functional behavioral assessment uses information from many sources to identify events that predict and maintain problem behavior. A behavior support plan is then designed based on this information which encourages alternative pro-social behaviors that serve the student the same as the problem behavior by changing the student’s environment to prevent problem behavior from occurring again. Robert H. Horner, *Functional Assessment: Contributions and Future Directions*, 27 J. APPLIED BEHAV. ANALYSIS 401 (1994).

²⁹⁴ See Sandomierski, *supra* note 273.

²⁹⁵ Deanne A. Crone et al., *A Demonstration of Training, Implementing, and Using Functional Behavioral Assessment in 10 Elementary and Middle School Settings*, 9 J. POSITIVE BEHAV. INTERVENTIONS 15 (2007), available at <http://pbi.sagepub.com/cgi/content/abstract/9/1/15>. See also Lori L. Newcomer & Timothy J. Lewis, *Functional Behavioral Assessment: An Investigation of Assessment Reliability and Effectiveness of*

must build the capacity to implement individualized behavior support to be effective in supporting children with more chronic or severe behavioral problems.²⁹⁶ As student's difficulties at Tier 3 are often persistent and intense, significant time and resources must be dedicated to them once these students are identified as needing more support.²⁹⁷ The use of the Prevent-Teach-Reinforce Model (PTR) is being tested to provide an alternative to what, before now, has been the usual behavioral interventions typical to a Tier 3 student. PTR is a five-step process being team-driven, not expert-driven. The goal of PTR is to individualize the behavior intervention plan at Tier 3 to gather data related to three categories: (1) antecedent variables (Prevent), those things that allow prediction of future misbehavior; (2) function and teach variables (Teach), how to best address the academic needs of the child in his current environment; and (3) consequence variables (Reinforce), defining goals that are pro-social and rewarding for positive behavior.²⁹⁸ Preliminary outcomes show that PTR significantly increases social skills and time engaged in academic work, and it produces significant decreases in problem behavior compared to the usual Tier 3 intervention techniques. Teachers found PTR highly effective in addressing problem behaviors and teaching new skills.²⁹⁹

Many interventions and programs have been developed and are being tested as PBIS is implemented.³⁰⁰ These

Function-Based Interventions, 12 J. EMOTIONAL & BEHAV. DISORDERS 168 (2004) (studying the use of description and experimental assessments to create hypotheses to effect a change in the function of problem behavior).

²⁹⁶ See Newcomer, *supra* note 272.

²⁹⁷ See Sandomierski, *supra* note 273.

²⁹⁸ Rose Iovannone et al., *Randomized controlled trial of the Prevent – Teach -- Reinforce (PTR) Tertiary Intervention for Students with Problem Behaviors: Preliminary Outcome*, 17 J. EMOTIONAL & BEHAV. DISORDERS 213, 213-15 (2009); Glen Dunlap et al., *Prevent-Teach-Reinforce: A Standardized Model of School-Based Behavioral Intervention*, 12 J. POSITIVE BEHAV. INTERVENTIONS 9 (2010).

²⁹⁹ See Dunlap, *supra* note 298.

³⁰⁰ See Jacqueline Yannacci & Jeanne C. Rivard, *Matrix of Children's Evidence-Based Interventions*, 2006 NASMHPD Research Institute, Inc.,

examples are only illustrative of the work being done.

D. Success and Implementation of PBIS in Texas

Core Elements of Tier III*

- “Functional Behavioral Assessment
- “Team-based comprehensive assessment
- “Linking of academic and behavior supports
- “Individualized intervention based on assessment information focusing on:
 - (a) Prevention of problem contexts,
 - (b) Instruction on functional equivalent skills, and instruction on desired performance skills,
 - (c) Strategies for placing problem behavior on extinction,
 - (d) Strategies for enhancing contingency reward of desired behavior, and
 - (e) Use of negative or safety consequences if needed.
- “Collection and use of data for decision-making.”

From the 2008-2009 school year until the 2010-2011 school year, the number of Texas school districts grew by 2% to a total of 1258 districts.³⁰¹ As of 2008, of a total of 9260 school campuses in Texas,³⁰² only sixty-one had implemented

Center for Mental Health Quality and Accountability,
http://www.nri-inc.org/reports_pubs/2006/EBPChildrensMatrix2006.pdf.
 (This matrix contains a list of ninety-two programs or interventions that have been tested and evaluated with varying degrees of effectiveness to provide a comprehensive review of programs, practices and core components known to be evaluated for positive outcomes for children and families).

³⁰¹ Texas Public School Districts and Charters, Alphabetic Index, OCT. 2010,
http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2011/not_tagged/school_district_index.pdf. The number of school districts in Texas grew in two years from a 2009 total of 1,235. *See also Number of Exemplary and Academically Unacceptable, Districts and Campuses Grows*, TEA NEWS RELEASE ONLINE (July 31, 2009) <http://www.tea.state.tx.us/index4.aspx?id=5280>.

³⁰² *Texas School Directory 2009-10*, TEXAS EDUCATION AGENCY 45

PBIS through the TEA's Regional Educational Service Centers.³⁰³ By 2010, the number of schools implementing PBIS as part of their behavioral management programs had grown to 800.³⁰⁴ A few anecdotal examples of the successes in Texas Public Schools illustrate how effective this program can be.

1. *Pleasanton*

In the 2004-2005 school year, Pleasanton I.S.D. implemented PBIS in its DAEP, ISS (in-school suspensions), and OSS (out-of-school suspension) programs at the Pleasanton Junior High.³⁰⁵ Although the demographics of children reported through PEIMS³⁰⁶ remained similar for the two school year periods (2003-2005),³⁰⁷ the total number of

(Feb. 2010),

http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2010/not_tagged/texas_school_directory_2009-10.pdf.

³⁰³ Lauren Rose, *House Public Education Committee HB 1340 – School-Wide Positive Behavioral Interventions and Support*, TEXANS CARE FOR CHILDREN (April 19, 2011),

[http://texanscareforchildren.org/Images/Interior/testimony/child%20mental%20wellbeing/hb%201340%20sw-](http://texanscareforchildren.org/Images/Interior/testimony/child%20mental%20wellbeing/hb%201340%20sw-pbis%20in%20house%20pub%20ed.pdf)

[pbis%20in%20house%20pub%20ed.pdf](http://texanscareforchildren.org/Images/Interior/testimony/child%20mental%20wellbeing/hb%201340%20sw-pbis%20in%20house%20pub%20ed.pdf) (citing Spaulding, *Implementation of School-wide PBS across the United States*, *supra* note 253) (The report on HB 1340 indicates that other schools in Texas were implementing PBIS without support from the Regional Service Centers, but the number of schools and their faithfulness to the best practices of PBIS was unknown).

³⁰⁴ Email from Amie Young, State Coordinator for the Texas Behavior Support Initiative (January 7, 2010) (on file with author).

³⁰⁵ Email Interview with Linda M. Hall, Public Relations Officer, Pleasanton Independent School District (July 20, 2011) (on file with author).

³⁰⁶ See TEXAS EDUCATION AGENCY (TEA), <http://ritter.tea.state.tx.us/peims/>. PEIMS stands for the Public Education Information Management System and is the TEA's statewide education database.

³⁰⁷ Hall, *supra* note 305. From the 2003-2004 year to the 2004-2005 school year, total number of students at this campus went from 500 to 521. The number of African American students rose from .2% to .38%, the number of Hispanic students from 63.4% to 65.83%, the number of White students declined from 36% to 33.4%, and the number of Asian students declined from 1.4% to .38%. The number of economically disadvantaged

discipline referrals to the office fell from 3,076 referrals in 2003-2004 to 1,341 referrals in 2004-2005, a 56.4% reduction.³⁰⁸ Pleasanton I.S.D. saw three expulsions and Juvenile Justice Alternative Education referrals in 2003-2004 and that number dropped to zero for the 2004-2005 year.³⁰⁹ During that same time, physical restraints decreased from three incidents, down to one incident.³¹⁰ Referrals to the DAEP were down 25.5% in placements and 24% in the total number of students.³¹¹

These statistics indicate significantly fewer classroom incidents occurring as a direct result of the Tier 1 strategies being implemented. To effectuate this, the staff used different, more effective methods to control discipline. Altogether, PBIS resulted in fewer students being referred to the office and a substantial reduction in the number of students being removed from their home campuses and placed in DAEP. The figures for ISS and OSS were basically static between the two school years.³¹² This would indicate the district had not implemented effective Tier 2 or Tier 3 strategies during that year, but that the Tier 1 implementation was a success.

students decreased from 60% to 62.2%; disabled students remained virtually the same from 22.8% to 22.0%; and dropout percentages remained at zero for both years. *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* In 2003-2004, there were ninety-eight placements in DAEP for seventy-five students, and in 2004-2005, that decreased to seventy-three placements for fifty-seven students.

³¹² *Id.* From 2003-2004 to 2004-2005 the in-school full day suspensions went from 1414 days (208 students) to 1445 days (200 students) and the out-of-school full suspensions from 246 days (eighty-seven students) to 253 days (eighty-five students). The partial day in-school suspensions dropped by 32% from 162 days (102 students) to 110 days (eighty-two students), and the partial day out-of-school suspensions almost doubled from 131 days (eighty-seven students) to 261 days (eighty-six students). Once again a conclusion can be drawn that the staff was not fully implementing Tier 2 and Tier 3 interventions during the first year, hence the erratic statistics.

2. *Austin*

Once the educators in the Austin, Texas school district realized they could not assume students knew good manners, they implemented programs in elementary schools that taught students expected social skills through PBIS. The achievement test scores were the highest ever, suspensions declined, attendance improved, and disciplinary referrals to the principal's office were significantly reduced.³¹³

3. *Education Region of Texas*

In 2004-2005, a Texas Regional Education Service Center, based out of an urban city, began implementing PBIS in the urban city and nearby rural schools served by the service center.³¹⁴ Over the next four years, a total of thirty-six campuses (twenty-three rural schools and thirteen urban)—elementary, middle, junior and high schools—began to implement PBIS.³¹⁵ An evaluation study looked at four measures of disciplinary outcomes based on the percent of the student population which had (1) a disciplinary action in the school year; (2) two or more disciplinary actions during the school year; (3) the number of disciplinary actions per 100 students; and (4) the number of days removed from class per 100 students.³¹⁶ Virtually all cohorts saw improvement the first year

³¹³ Raven L. Hill, *Austin School District Focuses on Good Behavior*, AUSTIN AMERICAN-STATESMAN, Aug. 4, 2007.

³¹⁴ Eugene W. Wang, *A Texas Regional Education Service Center: Positive Behavior Support (PBS) Project Evaluation* (2008). (Texas is divided into twenty regions each with their own service center to serve the schools in their region. The Region the subject of this evaluation serves twenty counties around the urban center, fifty-seven public schools and four charter and private schools).

³¹⁵ *See id.* The first year (2004-05) seven schools were trained and implemented PBS. The second year (2005-06) eight rural schools and nine urban campuses were added. The third year (2006-07) seven rural schools and four additional urban schools came on board. In the fourth year (2007-08) one additional school was added and the urban school district expanded district-wide, but the expansion was not part of the Regional PBIS program. *Id.*

³¹⁶ *Id.*

of PBIS implementation, on all four measures of disciplinary outcomes – sometimes the improvements were dramatic.³¹⁷ However, this was not sustainable with all cohorts and outcome measures, especially in the secondary schools.³¹⁸

The data clearly indicates all cohorts in the elementary schools were effective in all four measures and three secondary schools showed some improvement. Five schools are worthy of comment. (1) At least one rural elementary cohort saw a 65.9% reduction in disciplinary referrals over three years, a 64.3% reduction in multiple referrals, and a 64.5% reduction in the disciplinary referrals per 100 students.³¹⁹ (2) Another rural elementary cohort had a 61.2% reduction in the days removed from class per 100 students.³²⁰ (3) A third cohort in the rural secondary schools, which began implementation in the third year, had improvements in all four areas for its two years.³²¹ (4) The first cohort in the urban secondary schools, which began implementation the second year also improved over three years.³²² (5) The urban secondary school second cohort which began implementation the third year saw its biggest reductions the first year.³²³

Three schools dropped out of the program—two of those were secondary schools—and virtually all secondary cohorts had difficulty sustaining the program.³²⁴ This may be a function of the commitment of the coaches, staff, or admin-

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* (Rural secondary (third cohort): 18.4% reduction in single referrals, 14.9% reduction in multiple referrals, 33.4% reduction in referrals per 100 students, and 44% reduction in days removed per 100 students).

³²² *Id.* (Urban secondary (first cohort): 9.2% reduction in single referrals, 17.5% reduction in multiple referrals, 41.1% reduction in referrals per 100 students, and 27.8% reduction in days removed per 100 students).

³²³ *Id.* (Urban secondary (second cohort, first year): 15.5% reduction in single referrals, 15.9% reduction in multiple referrals, 18.7% reduction in referrals per 100 students, and 19% reduction in days removed per 100 students).

³²⁴ *Id.*

istration; a function of adolescence resistance; or some other cause which is not discussed. The implementation, however, was dramatic in the elementary schools and for a program such as PBIS to be a long term success, the children must be conditioned from early childhood to adapt their behavior to the program's expectations.³²⁵ The evaluator acknowledged there are unique challenges to implementing PBIS in secondary schools.³²⁶

E. Juvenile Justice: PBIS and Alternatives

A growing body of research indicates that PBIS is a preferential substitute for more time-honored ways of dealing with bad behavior and discipline in the juvenile justice setting.³²⁷ The science shows some approaches are just more effective.³²⁸

³²⁵ See George Sugai & Robert Horner, *The Evolution of Discipline Practices: School-Wide Positive Behavior Supports*, 24 CHILD & FAM. BEHAV. THERAPY 23 (2002) (stating those that have developed and worked on PBIS stress it must be implemented school-wide, in every campus, from the adolescent to the youngest child).

³²⁶ *Id.*

³²⁷ C. Michael Nelson et. al., *Positive Behavior Support in the Juvenile Justice System*, PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Ore.), May 2008, available at http://www.pbis.org/pbis_newsletter/volume_4/issue3.aspx.

³²⁸ U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATE: 1994-1996: PROGRAM REPORT (Oct. 1997), available at <https://www.ncjrs.gov/pdffiles/reform.pdf>. Take note of the rise of juvenile boot camps during the late 1980's and early 1990's. Evaluations in the mid-1990's, however, showed the efficacy was questionable. Programs suffered from high attrition rates, absenteeism, and recidivism. Children who seemed to do well while at the boot camp often failed upon return home. See *id.* One effective technique in the juvenile correctional setting is the implementation of Performance-based Standards (PbS). This is not PBIS, but it is "a nationally-recognized improvement program developed by the Council of Juvenile Correctional Administrators (CJCA)...dedicated exclusively to improving the conditions, services and overall operations of juvenile facilities and programs" with technical assistance. COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, PERFORMANCE-BASED STANDARDS: SAFETY AND ACCOUNTABILITY FOR JUVENILE CORRECTIONS AND DETENTION FACILITIES, (2011), available at

I. Missouri Division of Youth Services

The storied successes by the Division of Youth Services (DYS) in the State of Missouri are an example of a non-PBIS juvenile justice application that is very effective in assessment, care, treatment, and education of the children in its care.³²⁹ Known as the “Missouri Model,” there is no barbed wire, no more than ten children and two adults live in cottage-style homes, no pepper spray, and the emphasis is on “rehabilitation in small groups, constant therapeutic interventions and minimal force.”³³⁰ Almost 90% of the children released from DYS successfully completed the program or aftercare, or joined the military or Job Corps.³³¹ The recidivism rate at one

http://cjca.net/cjcaresources/93/PbS_InfoPacket.pdf. PbS uses a form of positive rewards system and evidence based measures. In March, 2008, Richard Nedelkoff, TYC Conservator, announced PbS had been implemented in the Texas Youth Commission, along with a fully implemented PBIS in the TYC school system. The program provides data collection, performance reports, outcome measure analysis, and facility improvement plans all toward meeting national standards in all aspects of the TYC facility operations. *See* Message from TYC Conservator Richard Nedelkoff, TEXAS YOUTH COMMISSION, (Mar. 14, 2008), *available at* http://www.tyc.state.tx.us/archive/reform/rn_conservator_3-14-08.html (last visited August 12, 2011).

The South Dakota Department of Corrections implemented PbS at four sites as part of the CJCA beginning in April, 2001, and now operates five campuses using PbS in what they call their Star Academies. In 1995, they began collecting and analyzing data to improve their conditions and services; and by 2004, The South Dakota Office for Juvenile Justice and Delinquency Prevention was one of five recipients of the 2004 Innovations in American Government Award. South Dakota’s early lead in improving juvenile corrections has been a national success story. *See* SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, PERFORMANCE BASED STANDARDS [PBS] REPORT (January 2009), *available at* <http://doc.sd.gov/juvenile/documents/2008PbSpublicReport.pdf>.

³²⁹ *See Division of Youth Services*, MISSOURI DEPARTMENT OF SOCIAL SERVICES, <http://www.dss.mo.gov/dys/>.

³³⁰ Solomon Moore, *Missouri System Treats Juvenile Offenders With Lighter Hand*, N.Y. TIMES, March 26, 2009, *available at* <http://www.nytimes.com/2009/03/27/us/27juvenile.html> (last visited Aug. 12, 2011).

³³¹ MO. DEP’T. OF SOCIAL SERVICES, DIVISION OF YOUTH SERVICES ANNUAL REPORT FISCAL YEAR 17 (2010) *available at*

year after program completion was 16% and at three years was 34%.³³² During 2008-2009, 38% of seventeen year olds in DYS received a high school diploma or GED prior to discharge: a school completion rate more than three times the national average.³³³

2. *Jefferson Parish Louisiana*

Jefferson Parish, Louisiana saw some successes brought about by the good work of those at the Southern Poverty Law Center.³³⁴ As part of the settlement of a class action administrative due process complaint, the Louisiana Department of Education agreed to implement PBIS in every school throughout the Jefferson Parish School System, among other improvements.³³⁵ As a result, a Corrective Action Plan was implemented in early 2006.³³⁶ By 2009, there was a 35% reduction in the children referred to the juvenile justice system, the number of students suspended for more than ten days decreased from 235 to thirteen, and the district provided additional educational services to children more than two years

<http://www.dss.mo.gov/re/pdf/dys/dysfy10.pdf> (last visited July 24, 2011).

³³² *Id.* at 18-19.

³³³ *Id.* at iv.

³³⁴ Southern Poverty Law Center, *School-to-Prison Pipeline*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/what-we-do/children-at-risk/school-to-prison-pipeline> (last visited Dec. 3, 2011). In its efforts to keep children from the school to prison pipeline, in 2007, the Southern Poverty Law Center announced the launching of its School to Prison Reform Project based in New Orleans. *See* Southern Law Poverty Center, *SPLC Launches 'School to Prison Reform Project' to Help At-Risk Children Get Special Education Services, Avoid Incarceration* (Sep. 11, 2007), <http://www.splcenter.org/get-informed/news/splc-launches-school-to-prison-reform-project-to-help-at-risk-children-get-special>.

³³⁵ *See* Mediated Settlement Agreement, *In Re G.D. v. La. Dep't of Educ.*, Log 45-H-41 (Aug. 2005), *available at* http://www.splcenter.org/sites/default/files/Jefferson_Parish_Agreement.pdf.

³³⁶ *See* D. Joe Olmi, *Jefferson Parish Public School System, Corrective Action Plan*, SOUTHERN POVERTY LAW CENTER (February 27, 2006), *available at* http://www.splcenter.org/sites/default/files/Jefferson_Parish_Corrective_Action_Plan.pdf.

behind.³³⁷

3. *Iowa Juvenile Home*

The Iowa Juvenile Home serves adolescent children in need of assistance who are in the care of the state and delinquent females.³³⁸ These students fall into staggering statistical categories: they are more than two grades behind; 70% are in special education programs; 72% have substance abuse problems by age fifteen; 58% were on probation for seven months prior to admission to the Iowa Juvenile Home; 66% failed in foster care; 68% were not attending school; 92% self-report abuse; and 58% come from a mental health setting.³³⁹ This home “serves as the safety net for the most troubled/troubling youth in the State of Iowa,”³⁴⁰—the top 1% of students with high-risk behaviors in Iowa.³⁴¹ Simply put, the traditional correctional approaches to disciplinary problems were not effective in this institutional setting.³⁴²

For the four years immediately preceding the imple-

³³⁷ *See id.*

³³⁸ *See Toledo Iowa Juvenile Home/Girls State Training School*, IOWA DEPARTMENT OF HUMAN SERVICES, <http://dhs.iowa.gov/Consumers/Facilities/Toledo.html> (last visited Dec. 3, 2011).

³³⁹ Craig Rosen, *Implementing School-Wide PBS in an Institutional Setting* [hereinafter Rosen PP], (2006), available at <http://www.neglected-delinquent.org/nd/resources/spotlight/spotlight200601b.asp#note2> (follow “Implementing PBS at IJH” hyperlink) (last visited Aug. 12, 2011); *see also* Craig Rosen, *Positive Behavior Supports & The Iowa Juvenile Home: A Philosophy for Education and Treatment*, (2004), available at <http://www.neglected-delinquent.org/nd/events/2004may/Presentations/ORCrosen.ppt>. This is an earlier version of the Rosen PP which has earlier additional information about the implementation of PBS in the Iowa Juvenile Home. *Id.*

³⁴⁰ *See* Rosen PP, *supra* note 339.

³⁴¹ Anju Sidana, *PBIS in Juvenile Justice Settings*, NAT’L EVALUATION & TECHNICAL ASSISTANCE CTR. (Feb. 2006), <http://www.neglected-delinquent.org/nd/resources/spotlight/spotlight200601b.asp>.

³⁴² *See id.*

mentation of PBIS in 2003-04, there were 11.41 daily behavioral removals from the home on an average day.³⁴³ After the initial implementation of PBIS, the average rate of disciplinary removals was reduced 50%,³⁴⁴ to 5.47 removals per day.³⁴⁵ The use of restraints and seclusion as a disciplinary alternative was on the increase prior to the implementation of PBIS,³⁴⁶ but over the first fifteen months of PBIS, there was a 73% reduction in its use.³⁴⁷ In 2005, disciplinary rates rose due to an increase in referrals of children with mental disabilities, however, the evidenced-based PBIS program provided the tools needed to restructure strategies and environments to decrease the numbers and rates of referrals.³⁴⁸

4. *Illinois Youth Center*

Another dramatic example of how PBIS has worked in the juvenile justice institutional environment is at the Illinois Youth Center-Harrisburg (IYC) boys' prison.³⁴⁹ This school houses 400 males, ages thirteen to twenty-one, who have been adjudicated ("convicted" of violating the law), who, on the average, read a little above sixth grade level.³⁵⁰ There was initial concern that PBIS would not work, but practice showed the implementation did not differ from regular public

³⁴³ Rosen PP, *supra* note 339.

³⁴⁴ Sidana, *supra* note 341.

³⁴⁵ Rosen PP, *supra* note 339.

³⁴⁶ *Id.*

³⁴⁷ Sidana, *supra* note 341. In the first year, the reduction in restraints alone saved fifteen hours per month of staff time. *See* Rosen PP, *supra* note 339.

³⁴⁸ *See* Sidana, *supra* note 341. (At the end of the article is a link to seven PowerPoint slides (charts) which explain how the school identified the rise in misbehavior and the sources of the problem which led them to restructure their clinic and classrooms to provide appropriate interventions and supports for positive behavior).

³⁴⁹ *See generally id.*

³⁵⁰ Melva Clarida, *Positive Behavior Interventions and Supports at the Illinois Youth Center-Harrisburg*, NDTAC WEBSITE (Dec. 2005), http://www.neglected-delinquent.org/nd/docs/PBIS_Doc7_IYC_full%20article.pdf.

school.³⁵¹ “PBIS showed that punishment, exclusion, and counseling do not work to correct bad behavior.”³⁵² The results were dramatic. There were thirty-two fights in IYC the month prior to implementation of PBIS, and afterwards there were no fights in the facility for three years.³⁵³ During the same quarter for the two years following implementation, from the baseline of the month before and month following implementation, minor infractions dropped from almost 650 to about 140 during year one and near seventy in year two.³⁵⁴ Major infractions dropped from a baseline of approximately 225 to about 125 in year one, and close to sixty-five in year two.³⁵⁵ Even with a turnover of population of up to 15% per month, through proper orientation, new students quickly adapt.³⁵⁶ “We know that it can work in a juvenile correctional setting.”³⁵⁷

5. *Other States*

Several other states have implemented PBIS at various levels throughout their school systems. For example, in 2000, the South Dakota legislature passed an administrative rule indicating support for PBIS for special education students, and in 2005, their Department of Education developed a plan for the implementation of PBIS throughout their schools.³⁵⁸ As of September 2010, of the 152 school districts in South Dakota, thirteen districts were part of the statewide initiative.³⁵⁹ Since

³⁵¹ See generally Sidana, *supra* note 341.

³⁵² Clarida, *supra* note 350 (quoting an interview with Melva Clarida, IYC Principal).

³⁵³ Sidana, *supra* note 341.

³⁵⁴ Clarida, *supra* note 350.

³⁵⁵ *Id.*

³⁵⁶ *See Id.*

³⁵⁷ *Id.*

³⁵⁸ See generally S.D. DEP’T OF EDUC., POSITIVE BEHAVIOR INTERVENTIONS AND SUPPORTS (PBIS) IN SOUTH DAKOTA (AKA RESPONSE TO INTERVENTION FOR BEHAVIOR (2006, revised Mar. 2011), available at

http://doe.sd.gov/oess/documents/SPED_PBI_stateplan.pdf.

³⁵⁹ See, e.g., MICKY J. WIENK & COLBY CHRISTENSEN, Part A – 2009-

2006, it has been the policy of the State Board of Education and the Michigan State Board of Education that PBIS be implemented in every school district in Michigan.³⁶⁰ Virtually all states have some form of PBIS available to their school districts.³⁶¹ Just some of the states that are implementing PBIS include Nebraska,³⁶² Oregon and Washington,³⁶³ Arkansas,³⁶⁴ Maryland,³⁶⁵ Florida,³⁶⁶ Arizona,³⁶⁷ Kansas,³⁶⁸ North Carolina,³⁶⁹ Mountain Plains States,³⁷⁰ Vermont,³⁷¹ New

2010 PBIS REPORT, (Sept. 2010), *available at* http://doe.sd.gov/oess/documents/PBIS_annualreport.pdf.

³⁶⁰ *See, e.g.,* MICH. DEP'T. OF EDUC., SCHOOL-WIDE POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS IMPLEMENTATION GUIDE 2010 vii (2010), *available at* http://www.michigan.gov/documents/mde/SchoolwidePBS_264634_7.pdf.

³⁶¹ *See generally* Heather Peshak George & Stephanie A. Martinez, *How to Get PBS in Your School*, PBIS NEWSL. (OSEP Technical Assistance Ctr. on Positive Behavioral Interventions & Supports, Eugene, Ore.), Mar. 2007, *available at* http://www.pbis.org/pbis_newsletter/volume_4/issue1.aspx.

³⁶² *See generally* NEBRASKA POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORT (NPBIS), <http://www.npbis.org/> (last visited Aug. 12, 2011).

³⁶³ *See generally* NORTHWEST POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS NETWORK, INC. (NW PBIS NETWORK), *available at* http://www.pbisnetwork.org/?page_id=126 (last visited Aug. 12, 2011).

³⁶⁴ *See, e.g.,* PROJECT ACHIEVE: BUILDING STRONG SCHOOLS TO STRENGTHEN STUDENT OUTCOMES, *available at* <http://www.projectachieve.info/outcomes1/implementation-in-arkansas.html> (last visited Aug. 12, 2011).

³⁶⁵ *See, e.g.,* PBIS MARYLAND, <http://www.pbismaryland.org/> (last visited Aug. 12, 2011).

³⁶⁶ *See generally*, FLORIDA'S POSITIVE BEHAVIOR SUPPORT PROJECT, *available at* http://flpbs.fmhi.usf.edu/aboutus_projectmission.asp last visited Aug. 12, 2011).

³⁶⁷ *See generally* PBISAZ: POSITIVE BEHAVIOR INTERVENTIONS AND SUPPORTS, *available at* <http://www.pbisaz.org/basics> (last visited Aug. 12, 2011).

³⁶⁸ *See generally* KANSAS INSTITUTE FOR POSITIVE BEHAVIOR SUPPORT, *available at* http://www.kipbs.org/new_kipbs/index.html (last visited Aug. 12, 2011).

³⁶⁹ *See generally* UNC CHARLOTTE, BEHAVIOR AND READING IMPROVEMENT CENTER, *available at* <http://coedpages.uncc.edu/bric/mission.htm> (last visited Aug. 12, 2011).

³⁷⁰ *See generally* Mountain Plains Regional Resource Center, REGIONAL

York,³⁷² and New Hampshire,³⁷³ as PBIS has become a national behavioral modification phenomenon.³⁷⁴

X. Texas Youth Commission and School Discipline

In 2007, the Texas Youth Commission came under heavy criticism when complaints of abuse to children committed to the care of TYC surfaced and the Texas Rangers, the investigative division of the Texas Department of Public Safety,³⁷⁵ substantiated charges of molestation of inmates.³⁷⁶ In March 2007, the Governor placed TYC in conservatorship in answer to these complaints,³⁷⁷ and by the end of 2007, he had

RESOURCE CENTER PROGRAM, *available at* <http://www.rrcprogram.org/mprrc> (last visited Aug. 12, 2011) (RRC serves Arizona; the Bureau of Indian Education serves Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming).

³⁷¹ See generally VERMONT FAMILY NETWORK, *available at* <http://www.vermontfamilynetwork.org/i-need-help-with/special-education/positive-behavior-supports/> (last visited Aug. 12, 2011).

³⁷² See generally NEW YORK STATE FAMILY SUPPORT IN POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, *available at* <http://fifsinnyspbis.tripod.com/> (last visited Aug. 12, 2011).

³⁷³ See generally NEW HAMPSHIRE CENTER FOR EFFECTIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS, *available at* <http://www.nhcebis.seresc.net/> (last visited Aug. 12, 2011).

³⁷⁴ See the PBIS WEBSITE, *available at* http://www.pbis.org/links/pbis_network/default.aspx (showing a complete list of states and contact information).

³⁷⁵ Emily Ramshaw, *Hundreds May Be Freed from TYC*, THE DALLAS MORNING NEWS, Mar. 24, 2007, *available at* <http://old.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/032407dntextyc.3ba24d1.html> (noting claims made by Will Harrell, Executive Director of the American Civil Liberties Union of Texas and Jay Kimbrough, appointed by Governor Rick Perry as special master to investigate allegations of sexual and physical abuse at TYC).

³⁷⁶ Doug J. Swanson, *Sex Abuse Reported at Youth Jail*, THE DALLAS MORNING NEWS, February 18, 2007.

³⁷⁷ See TEXAS YOUTH COMMISSION, *Appendix A: Detailed CoNEXTions© Treatment Program Implementation Plan*, Texas Youth Commission Reform Plan (July 23, 2008), *available at* http://www.tyc.state.tx.us/reform/reform_plan/appxA_coNEXTions.html and *Attachment 1: Detailed CoNEXTions© Implementation Plan* (August

appointed a series of three conservators to investigate wrongdoing and redefine TYC's goals and role in the community.³⁷⁸ In December 2007, TYC unveiled its new treatment program, dubbed CoNEXTions©.³⁷⁹

Also during 2007, the Office of the Independent Ombudsman was created for the Texas Youth Commission "for the purpose of investigating, evaluating, and securing the rights of the children committed to the commissionFalse"³⁸⁰ Among other duties, the Office completed an extensive four-month evaluation of the education programs within TYC.³⁸¹ As to the impact of disciplinary policies, serious concerns were raised:

Disciplinary policies and security placements nega-

6, 2008, available at http://www.tyc.state.tx.us/programs/coNEXTions/at-1_coNEXTions.html (including detailed statements of scope, deliverables, and deadlines, such as focusing on academics, vocational and workforce development and pro-social leisure time training, as directly effects this article was a commitment to the development of an Integrated Behavior Management System that would include and/or complement the implementation of PBIS in the TYC school system).

³⁷⁸ Emily Ramshaw & Doug Swanson, *Gov. Rick Perry Names New TYC Conservator*, THE DALLAS MORNING NEWS, Dec. 19, 2007.

³⁷⁹ Press Release, Tex. Youth Comm'n, TYC Unveils CoNEXTions© Treatment Program (Dec. 7, 2007), available at http://www.tyc.state.tx.us/archive/Press/120707_tyc_treatment_program.html.

³⁸⁰ 64 TEX. HUM. RES. CODE § 64.002 (West 2007), commonly known as S. Res. 103, 2007 Leg., 80th Reg. Sess. (Tex. 2007), effective June 8, 2007; see also

<http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=SB103>. Other duties of the Office of the Independent Ombudsman for the Texas Youth Commission are to investigate complaints of the actions of TYC, inspect facilities, review procedures, provide assistance to children and their parents, review court orders, make appropriate referrals, supervise children's advocates and made reports to the Governor and others of its activities. *Id.*, § 64.101, et seq.

³⁸¹ Michael P. Krezmien, *A Review of Education Programs for Students in the Texas Youth Commission State Schools, Office of the Independent Ombudsman for the Texas Youth Commission 5* (July 2008) available at http://www.tyc.state.tx.us/ombudsman/rept_education/education_report.pdf.

tively impact educational opportunities and the quality of education, special education, and related services. Students were regularly denied educational access and entitlements, and the educational programming in security settings was inadequate. Disciplinary policies have a disproportionate negative impact on minority students and students with disabilities.³⁸²

To contrast efforts currently being made, the report showed there was no “[s]chool-based behavioral programming” in the TYC schools and that most teachers saw “maintaining control in the classroom” as the “primary responsibility of the teachers.”³⁸³ One of the most troubling findings was the system-wide new CoNEXTions© program designed to address these needs was apparently poorly implemented and provided no educational component—meaning children put into the program no longer had to do school work.³⁸⁴ The report found the inconsistent application of the punitive approach to discipline, which is “known to be ineffective for students with emotional and behavioral disorders,” with no positive reinforcement for good behavior.³⁸⁵ In its recommendations were decreased punitive measures, the use of evidence-based monitors of behavior and the development of policies, and procedures and practices to respond to disciplinary concerns.³⁸⁶ Of particular interest to the recommendations of this Article is a section on “universal behavioral supports” discussing “new and innovative practices,” such as

³⁸² *Id.* at 6.

³⁸³ *Id.* at 23.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 23-24. The report of the Independent Ombudsman showed that 40.4% of the children in TYC suffered from some type of disability (intellectual disability (0.7%), emotional disturbance (17.4%), learning disability (17.1%), other health impairments (4.8%) and other disabilities (0.3%)). This is contrasted to the students in Texas public schools (ages six through twenty-one) whose total percentage of student population with some type of disability is 9.76% (intellectual disability (0.68%), emotional disturbance (0.92%), learning disability (6.1%), other health impairments (1.38%) and intellectual disability (0.68%)). *Id.* at 13-14.

³⁸⁶ *Id.* at 80.

PBIS, in dealing with children with behavioral problems.³⁸⁷

By July, 2008, TYC began to acknowledge the need for developing programs, such as PBIS, to improve classroom management along with better classification and assessment systems.³⁸⁸ Stating treatment to be the “fundamental philosophy behind the juvenile justice system in Texas,”³⁸⁹ TYC listed PBIS as one of the twelve “major evidence-based tools, techniques and therapies”³⁹⁰ to accomplish its rehabilitative goals. TYC’s prior approach to discipline, being punitive in nature without positive reinforcement, has “been associated with increased aggression, truancy, and dropout rates.”³⁹¹ The Office of the Independent Ombudsman for the Texas Youth Commission lobbied for legislation to implement PBIS within the TYC system in a briefing paper prepared for the 2009

³⁸⁷ See generally *id.* at 59-60.

³⁸⁸ See generally RICHARD NEDELKOFF, OVERVIEW OF TYC REGIONALIZATION PLANNING FOR THE CURRENT BIENNIUM AND BEYOND 2 (2008), available at

<http://www.tyc.state.tx.us/reform/regionalization/regionalization.pdf>. A goal was set for integrating these criteria in the CoNEXTions© program manual by August 31, 2008, with the new classification and assessment system in place by October 1, 2008. *Id.* at 44.

³⁸⁹ See CoNEXTions© Treatment Program Overview, TEXAS YOUTH COMMISSION 1 (2008), available at

<http://www.tyc.state.tx.us/programs/coNEXTions/coNEXTions.pdf>.

³⁹⁰ *Id.* at 3. Soon the treatment program overview was complemented with an implementation schedule and greater specificity as to the role of PBIS. See Overview of CoNEXTions© Treatment Program & Implementation Schedule, Texas Youth Commission 12 (August 5, 2008), available at <http://www.tyc.state.tx.us/programs/coNEXTions/coNEXTions.pdf>. Re-stated as a major tool and technique for the implementation of the treatment program goals, the integration of PBIS in the TYC school system with the developing Behavior Management System was enumerated within the scope and philosophical approach toward rehabilitation of the CoNEXTions© program. *Id.*

³⁹¹ OFFICE OF THE INDEPENDENT OMBUDSMAN FOR THE TEXAS YOUTH COMMISSION, SB 1362: POSITIVE BEHAVIOR SUPPORTS AND IMPROVED BEHAVIOR, at 3 available at

http://www.tyc.state.tx.us/ombudsman/rpt_SB1362_PositiveBehaviorSupports.pdf (briefing paper prepared for the Honorable Senator Florence Shapiro, Chairwoman of the Texas Senate Committee on Education, in support of SB 1362).

Legislative session,³⁹² highlighting the successes of PBIS in the Illinois and Iowa juvenile correctional facilities and the impact PBIS has made in the public schools. This paper argued that PBIS will allow teachers and staff to do their jobs while ensuring students improve their behavior, ultimately benefiting the communities to which the students are ultimately returned.³⁹³

In response to these reports and initiatives, the following year saw legislation introduced addressing the need for reading improvement, recidivism reduction, and improvement in behavior in TYC.³⁹⁴ TYC was charged to adopt system-wide positive behavior supports (PBS) incorporating “current behavioral research” applied systematically on an individual basis, with training for teachers and staff and assessments of effectiveness according to set criteria.³⁹⁵

³⁹² *See id.* at 2. A second briefing paper was part of that effort, it was also prepared for Senator Shapiro, in support of SB 1362 that addressed the second prong of the proposed legislation, making the case for providing TYC guidelines for implementing a reading plan that included changes in teaching strategies, materials, instruction time, assessments, and teacher training. *See* Office of the INDEP. OMBUDSMAN FOR THE TEX. YOUTH COMMISSION, SB 1362: READING PLAN AND REDUCED RECIDIVISM (2009), available at

http://www.tyc.state.tx.us/ombudsman/rpt_SB1362_ReadingProgramComponent.pdf.

³⁹³ *See generally id.* at 10.

³⁹⁴ *See generally* S.B. 1362, 2009 Leg., 81st Reg. Sess. (Tex. 2009). This was filed March 4, 2009. The House version, substantially similar as it applies to the issues raised in the Article was H.B. 3689, 2009 Leg., 81st Reg. Sess. (Tex. 2009). The House version was sent to a conference committee and the report was adopted by the Senate and House May 31, 2009, and after being signed in both the House and Senate was signed by the Governor June 19, 2009. *See* TEXAS LEGISLATURE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=HB3689>. SB 1362 was reported out of Committee and sent to Calendars where it died. *See* TEXAS LEGISLATURE, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=81R&Bill=SB1362> (last visited Aug. 12, 2011).

³⁹⁵ *See* TEX. EDUC. CODE ANN. §106(c) (West 2009). The criteria set out in §106(c)(3) includes “(A) documentation of school-related disciplinary referrals, disaggregated by the type, location, and time of infraction and by

The TYC Executive Commissioner and the Superintendent of Education issued the TYC Education Plan.³⁹⁶ The Plan outlined TYC's (1) accelerated educational programs, (2) improved special education initiatives, (3) advances in transition services for the children's reentry to the community, (4) expectations for extensive education assessment and placement upon first arrival, and (5) planned professional development for teachers in Response to Intervention (RtI) and PBIS.³⁹⁷ All TYC operated schools are now mandated to implement PBIS with a youth's participation as a positive step toward earning privileges and release on parole.³⁹⁸ A success-

subgroups designated under commission rule; (B) documentation of school-related disciplinary actions, including time-out, placement in security, and use of restraints and other aversive control measures, disaggregated by subgroups designated under commission rule; (C) validated measurement of systemic positive behavioral support interventions; and (D) the number of minutes students are out of the regular classroom because of disciplinary reasons." *Id.*

³⁹⁶ See generally TYC EDUCATION PLAN, *supra* note 263.

³⁹⁷ *Id.* Because of the dictates of this statute, TYC created a change to their General Administrative Policy Manual to become effective September 1, 2010, to implement such participation and reporting requirements of the reading improvement program and the PBIS system. TEX. YOUTH COMM'N, GENERAL ADMINISTRATIVE POLICY MANUAL § 91.55(c)(5) (2011), *available at* <http://austin.tyc.state.tx.us/CfInternet/gap/91/gap9155.html>. The reading program provisions are beyond the scope of this paper, and only the change in policy in implementation of PBIS is discussed. *Id.* This provision redefines the limitations on the removal of a child from her school to only disciplinary reasons which are "a violation of the rules of conduct or a subsequent failure to participate in positive behavioral interventions." *Id.* The use of the word "subsequent" should not go without comment indicating that children in these programs should be given more than one opportunity to participate in PBIS prior to being removed from their school. This hesitation to remove children from their schools is one element lacking in the implementation of DAEP programs in local public schools – a key change argued by this article. The continued use of language such as "Rules of Conduct" justifying removal continues to be an issue for me as such rules generally will allow for subjective interpretation and the use of less than serious violations of school rules as the reason to remove a child from class. If there are no DAEP's to use, then the schools will be forced to deal with their own behavioral issues. See generally *id.*

³⁹⁸ See TEX. YOUTH COMM'N, GENERAL ADMINISTRATIVE POLICY

ful “participation” in the mandated PBIS system is defined by TYC with a six month look-back provision and certain specific objective criteria for evaluating the child’s participation.³⁹⁹ Interestingly, a successful “participation” is also defined in subjective terms allowing for flexibility in meeting a child’s specific needs.⁴⁰⁰ Consistent with the basic principles of a

MANUAL § 91.55(d)(1) (2011), *available at* <http://austin.tyc.state.tx.us/CfInternet/gap/91/gap9155.html>. This section includes the overall general operation guidelines toward implementation of a PBIS system in each TYC operated school. *Id.* It is this implementation that is currently underway, and outcomes are not yet available for the TYC school system. However, some limited antidotal results are available and will be the subject of the second paper in this series as complete implementation and evaluation is obtained. Important to the effectiveness of PBIS are the evidence-based decisions on addressing misbehavior and rule violations. TEX. EDUC. CODE ANN. § 30.106 (2011). Written and verbal explanations of a child’s requirements and expected level of participation must all be consistent with the child’s individual educational plan or committee recommendations for those with limited or affected conditions. TEX. YOUTH COMM’N, GENERAL ADMINISTRATIVE POLICY MANUAL § 91.55(d) (2011), *available at* <http://austin.tyc.state.tx.us/CfInternet/gap/91/gap9155.html>. Additional due process rights are given to the child and his parent or guardian who will actively participate in the determination of the child’s participation in the required program. TEX. YOUTH COMM’N, GENERAL ADMINISTRATIVE POLICY MANUAL § 91.50-.71 (2011), *available at* <http://austin.tyc.state.tx.us/Cfinternet/gap/index.html#due>. Also, a specific staff member from outside the school participates in this evaluation presumably to add another level of fairness to the process. TEX. YOUTH COMM’N, GENERAL ADMINISTRATIVE POLICY MANUAL § 91.55(d) (2011), *available at* <http://austin.tyc.state.tx.us/CfInternet/gap/91/gap9155.html>. It is apparent the design and implementation of PBIS within the TYC schools is strictly following the generally accepted standards for an effective PBIS program with particular attention to the child’s individual educational needs. *See generally id.*

³⁹⁹ *Id.* at (f). Participation in the PBIS system is defined in this section. Subparagraph one includes specific objective criteria for successful participation that include, during the most recent six-month period, (A) the child has had no more than three days of removal from school for disciplinary reasons and/or three written refusals to attend class as required, or (B) missed no more than 10% of “instructional minutes” because of such removals or refusals and showed “a pattern” of staying in class longer, presumably during the applicable six-month period. *Id.*

⁴⁰⁰ *Id.* Subparagraph two defines, subjectively, a successful participation.

properly created evidence-based PBIS system, an evaluation process is provided to test the effectiveness of the implementation of PBIS within the TYC school system.⁴⁰¹

By summer 2009, CoNEXTions© was well established and hints of the fledgling use of PBIS occur in literature.⁴⁰² In conjunction with the legislative mandate implementing PBIS in TYC,⁴⁰³ the hiring of a new TYC Superintendent of Schools in 2009, and the leadership of the new TYC Executive Commissioner, TYC finally produced a seventy page document on CoNEXTions© entitled *The Texas Youth Commission Rehabilitative Strategy Implementation Manual*.⁴⁰⁴ The manual once again confirms PBIS as one of

As one of the major tenets of PBIS is the use of evidence to make decisions in adjusting a child's behavioral environments, this subjective outlet is a bit suspect. All that is required here is the child responding to PBIS showing the child has the "behavioral skills necessary" to "transition" to future placements, whether academic, vocational, or training or "appropriate transition supports" exist to promote this transition. It seems as if this is written intentionally vague to either reward a child with release who is showing progress or to provide a mechanism for pushing a child out of TYC when circumstances may require it. *See id.*

⁴⁰¹ *See id.* at (g)(2) ("(A) The evaluation of outcomes shall be 'disaggregated' by type, location, and time of infraction, whether the student is classified as general education, special education or English as a second language students, and by ethnicity."). Further, statistics are to be kept as to the disciplinary actions taken, whether time-out, security, restraints, or other 'aversive' measures, and 'disaggregated' by general education, special education or English as a second language students, and by ethnicity. *Id.* at (g)(2)(B). As the implementation of PBIS is completed within TYC, it is hoped those statistics will become the primary topic in a later paper in this series. Cooperation of TYC in the dissemination of these statistics has been promised." *See generally id.*

⁴⁰² CoNEXTIONS©, TYC BROCHURE (Texas Youth Commission, Austin, TX), (June 3, 2009), available at http://www.tyc.state.tx.us/programs/conexions_bro/conexions_bro.pdf. "Teachers, with the assistance of juvenile correctional officers, use classroom management skills that provide an environment favorable to learning for all youth.").

⁴⁰³ *See generally* H.R. 3689, Leg. 81st Sess. (Tex. 2009), amending TEX. CODE CRIM. PROC. ANN. §4 (West 2009).

⁴⁰⁴ *The Texas Youth Commission Rehabilitative Strategy Implementation Manual* TYC. FISCAL REPORT (Texas Youth Commission and Texas Juve-

the now thirteen major tools and techniques of the CoNEXTions© treatment program.⁴⁰⁵

House Bill (HB) 3689 was the first legislative mandate

nile Commission, Austin, TX), [hereinafter TYC STRATEGY MANUAL] (October 19, 2009), available at http://www.tyc.state.tx.us/about/TJPC_TYC_Coordinated_Strategic_Plan_FY2010.pdf. (Copy on file with author). As an aside, November 20, 2009, the Boards of the Texas Juvenile Probation Commission (JPC) and the Texas Youth Commission approved their *Coordinated Strategic Plan for FY 2010 (Plan)*. Perhaps foreshadowing the combination of these two agencies into one, The Texas Juvenile Justice Commission, by the 82nd Legislature, this document sets out broad considerations “for planning: data sharing, development of validated risk assessment instruments, strategies to determine program effectiveness, aftercare, identification of cost effective programs, and protocols to demonstrate costs of treatment.” *Id.* at 1. Showing TYC’s insight into using evidence-based programs, on page 14 of the *Plan* is the only reference to PBIS (therein referred to as PBS) within the plan. Now that the two agencies are combined, the initiative of TYC to use PBIS within their behavior management program will find its way into juvenile probation. This is significant because JPC in most counties are responsible for the Juvenile Justice Alternate Education Programs (JJAEP) and have direct involvement in the school district’s Disciplinary Alternate Education Programs (DAEP). Should the recommendations of this article, to eliminate DAEP programs, be successful, the lessons learned by TYC, and others, within juvenile justice on the benefits to PBIS and the reduction of the criminalization of children will certainly benefit those children finding themselves in this alternate school environment. *See id.*

⁴⁰⁵ *See id.* at 3. The five basic rules in CoNEXTions© are (1) Be in the right place at the right time, (2) Follow directions, (3) Participate in activities, (4) Respect others, and (5) Accept consequences. *Id.* Certainly these rules would translate easily to the public school setting. The sincere attempt of TYC to implement PBIS is shown in this document where the specific behavioral interventions are enumerated as are the program activities and expectations, an explanation of how a child’s performance is measured, and the definitions and consequences of rule violations. *Id.* at 16-28. Further, in the General Administrative Policy Manual, GAP.95.1 adopted September 1, 2009, sets out “the basic principles on which the Texas Youth Commission (TYC) will operate its behavior management system reiterating the basic plan set out in the TYC GAP.91.55. *See* TEX. YOUTH COMM’N, GENERAL ADMINISTRATIVE POLICY MANUAL § 91.55 (2011), available at <http://austin.tyc.state.tx.us/CfInternet/gap/91/gap9155.html>.

for PBIS to be implemented in a school system.⁴⁰⁶ As is customary in any evidence-based program, periodic evaluation by analysis of outcome measures meant TYC was to report to the legislature on the effectiveness of the reading plan and the implementation of the positive behavior supports by December 1, 2010.⁴⁰⁷ The report dated December 1, 2010, outlines the efforts to implement PBIS in the TYC educational system.⁴⁰⁸ Although experts were employed early in 2010, the process began in earnest in June, 2010.⁴⁰⁹ The local PBIS leadership teams led training, solicited input, designed local lesson plans, created rules posters, reviewed data to track disciplinary incidents, and coordinated with the statewide leadership team and consultants.⁴¹⁰ Because of the change from more traditional ways of viewing discipline, there was significant reduction in referrals to Security, and school attendance is the highest it has been in ten years.⁴¹¹

By January, 2011, PBIS had been implemented at all educational facilities within TYC.⁴¹² In her 2010 Annual Review of Agency Treatment Effectiveness, dated December 31,

⁴⁰⁶ *Mandated Legislative Report*, IMPLEMENTATION STATUS REPORT OF POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS (PBIS) SYSTEM IN TEXAS YOUTH COMMISSION, Dec. 1, 2010, at 2 (copy on file with author).

⁴⁰⁷ *Id.* § 30.106(f). A final report on the effectiveness of PBIS is due December 2, 2012. *Id.* § 30.106(g). Both subsections (f) and (g) expire January 1, 2013. *Id.* § 30.106(h).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 2-4.

⁴¹⁰ *Id.* at 4.

⁴¹¹ *Id.* at 5. Interestingly, one of the primary facets of HB 3689 was the requirement that student's successfully participate in PBIS to achieve parole. TYC implemented GAP.91.55 to override this provision of the law. Consultants found the requirement "aversive . . . to the philosophy of PBIS systems as implemented nationally." *Id.* Consequently, these eligibility for parole requirements were modified defining "successful participation" to time in class and the student developing "behavioral skills" required in any academic or vocational environment. *Id.*

⁴¹² CHERYLN K. TOWNSEND, EXEC. DIRECTOR TYC, EXECUTIVE DIRECTOR'S REPORT TO THE TEX. YOUTH COMM'N. BOARD (2011) *available at* <http://www.tyc.state.tx.us/about/tycminutes.html>; *see also infra* notes 198-204 and accompanying text.

2010, the Executive Director of TYC reported contracts with PBIS national experts and Texas State University to help TYC de-emphasize “the use of security and isolation as a behavioral intervention” as TYC implements PBIS.⁴¹³ As CoN-EXTions© was implemented, including the new behavioral management program with a fully integrated PBIS, the results for the year supported “positive movement” in the development of these programs.⁴¹⁴ In the public relations war, Texas has been the recent recipient of positive opinion in its efforts to reform its juvenile justice system.⁴¹⁵ TYC’s five year strategic plan set out broad, ambitious goals.⁴¹⁶

For many TYC youth, their inability to control their behavior and engage in the classroom was a significant factor leading to their criminal behavior. As part of its education improvements, TYC is implementing the Positive Behavioral Interventions and Support (PBIS) program, a long-term multi-dimensional support system that teaches youth how to successfully manage their behavior both in and out of the classroom. PBIS will be a significant part of TYC’s education efforts. The agency is also developing a more robust curriculum that supports re-entry of youth back into the public school system (accelerating credits to over-

⁴¹³ Cheryl K. Townsend, TEXAS YOUTH COMMISSION 2010 ANN. REV. OF AGENCY TREATMENT EFFECTIVENESS, at 16, *available at* http://www.tyc.state.tx.us/about/Annual_Treatment_Effectiveness_Review2010.pdf.

⁴¹⁴ *See generally id.* at 47.

⁴¹⁵ *See generally Texas’s Progress on Juvenile Justice*, N.Y. TIMES, July 10, 2011, at SR11, *available at* <http://www.nytimes.com/2011/07/10/opinion/sunday/10sun3.html>.

⁴¹⁶ *See generally* TEX. YOUTH COMM’N. STRATEGIC PLAN 2011-2015 2-4 (2010), *available at* http://www.tyc.state.tx.us/about/TYC_Strategic_Plan_2011_to_2015.pdf. TYC contracted with Quan-Qual Outcomes to survey the “organizational outcomes” and “to analyze data and provide models to improve education goals and procedures.” *Id.* at 33.

come learning deficiencies and improve reading skills).⁴¹⁷

XI. Conclusion

Disciplinary Alternate Education Programs have been called the “expanding black hole” of the Texas education system.⁴¹⁸ The bias against the children who find themselves in alternate education must change. The public holds negative opinions of these children and looks at them as merely having “behavior problems.”⁴¹⁹ These students may be “disconnected” or “turned off” by the public school education system—or indeed, many institutions of society seen as main stream—but they are not by nature “disruptive, deviant, and dysfunctional” or a “detriment to the traditional school.”⁴²⁰ When so many children are dumped into DAEP’s every year—resulting in millions of citizens over time without the basic tools of a high school education—one must ask, is it the children that are the problem, or is it the adults? Professional educators know that the basic needs of children include more than food, clothing, and shelter. Children require “a safe environment, acceptance by others, and a feeling of being cared about, needed and loved.”⁴²¹ When students are removed from their home schools, labeled as discipline problems, treated like criminals, and pushed out of the public schools by a system which favors the protection of the status quo, is it no wonder they dropout?

None of these issues are new; they are all within the knowledge of policy makers in Austin. The Texas Senate Committee on Criminal Justice prepared an *Interim Report* in

⁴¹⁷ *Id.* at 8-9.

⁴¹⁸ Marc Levin, *Policy Brief: Disciplinary Alternative Education Programs: What Is and What Should Be*, TEXAS PUBLIC POLICY FOUNDATION (Dec. 2005), <http://www.texaspolicy.com/pdf/2005-12-DAEPs-pb.pdf>.

⁴¹⁹ See Jay McGee, *Reflections of an Alternative School Administrator*, 82 THE PHI DELTA KAPPAN, 589 (2001).

⁴²⁰ *Id.* at 588-91.

⁴²¹ See *id.* at 591.

December 2010, as ordered in the *Interim Charges* of the Lieutenant Governor of the State of Texas to the Committee in anticipation of the 82nd Regular Legislative Session, in 2011.⁴²² Interim Charge Nine was to “[c]onsider the impact that secondary education school disciplinary laws and policies have on the juvenile justice system and the adult prison system [and r]ecommend changes, if needed, to current law.”⁴²³ The Committee heard testimony from a wide variety of activists, educators, and other experts in the field.⁴²⁴ Eleven recommendations to the committee were made in the report, but neither recommendation seven, to “[r]equire school district(s) to implement some form of evidence based programs that are proven to reduce truancy, crime, and drug offenses” nor recommendation nine, requiring more training for teachers and administrators in discipline techniques and intervention options, made it into law.⁴²⁵

During the recently completed legislative session, HB 1340 was introduced addressing these recommendations by attempting to create a state leadership team to provide assistance from assessment to evaluation, from coordination with other state agencies to funding, and to develop a framework and infrastructure for a statewide plan to enable school districts to implement PBIS.⁴²⁶ The bill’s sponsor touted the measure as giving teachers and administrators more time to teach when appropriate behavior becomes the norm in the classroom.⁴²⁷ The bill fell short when it did not mandate im-

⁴²² See generally S. CRIM. JUST. COMM., INTERIM REPORT TO THE 82ND LEGISLATURE (Tex. 2010), available at <http://www.senate.state.tx.us/75r/senate/commit/c590/c590.InterimReport81.pdf>.

⁴²³ *Id.* at 81.

⁴²⁴ *Id.* at 82-95.

⁴²⁵ *Id.* at 95. See generally H.R. 1340, 2010 Leg., 82nd Sess. (Tex. 2011), available at

<http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB01340I.pdf#navpanes=0>.

⁴²⁶ *Id.*

⁴²⁷ Armando Walle, Texas House of Representatives, Support Request for HB 1340, Positive Behavioral Interventions and Supports (PBIS) (copy on

plementation of PBIS and failed political truthfulness, and consequently credulity, when the author claimed PBIS costs would be minimal, if none at all.⁴²⁸ Although the bill was left pending in committee and never made it to a vote,⁴²⁹ the author should be commended for taking the first step toward implementation of PBIS statewide. Should the recommendations of this Article be adopted—for the elimination of Disciplinary Alternate Education Programs throughout the state—a state mandated implementation of PBIS will provide school districts with the tools to manage behavioral problems at the student's home campus. Certainly some of the cost can be offset by the elimination of the DAEP's. But, the cost will be returned many times over with the resulting productivity that comes with a better educated population. In today's time of budget shortfalls and economic downturn, it will be difficult politically for the Legislature to require school districts to meet a mandated implementation of PBIS. If the districts on a leap of faith will hire the appropriate professionals to assess, develop, train, implement, and manage the PBIS program—and evaluate its progress—the cost will be returned.

But whenever one loses hope, the Texas Legislature

file with author).

⁴²⁸ *Id.* The Legislative Budget Board (LBB), in its Fiscal Note to Honorable Rob Eissler, Chair, House Committee on Public Education on HB 1340, indicated that the passage of this bill would not have significantly fiscal implications. See JOHN S. O'BRIEN, DIRECTOR, LEGISLATIVE BUDGET BOARD, FISCAL NOTE, LEG. 82ND SESS (Tex. 2011), available at <http://www.capitol.state.tx.us/tlodocs/82R/fiscalnotes/pdf/HB01340I.pdf>. The report acknowledged that it is only possible if the leadership team could consist of those who are available through other agencies. *Id.* It incorrectly assumed, however, that there would be no changes to school district reporting or state data collection. In reality, the whole premise of PBIS is data collection and an evidenced based approach to addressing disciplinary and behavioral problems in the schools. No estimate was made as to the funding that would be necessary for a school district to participate. *Id.* The report acknowledged the possibility of administrative costs to districts to implement PBIS and to report the results. *Id.*

⁴²⁹ See Texas Legislature Online, H.B. 1340, available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=HB1340> (last visited Aug. 13, 2011).

will surprise. Passed in the 82nd Legislative Session was SB 501 that amended the Texas Human Resources Code by establishing the Interagency Council for Addressing Disproportionality.⁴³⁰ The Council is to examine the disproportionate involvement of racial or ethnic minority children in juvenile justice, child welfare, and mental health systems—including the delivery of educational services—to make recommendations, and to assist in the “elimination of health and health access disparities among racial, multicultural, disadvantaged, ethnic, and regional populations.”⁴³¹ By December 1, 2012, the Council shall file a report of its findings and recommendations for corrective action.⁴³² So, all is not lost. There are those in leadership in Texas that are trying to understand the effect of the disparate treatment of children based upon their racial background, ethnic origins, and socioeconomic status. But, then again, the same legislature seems to turn a blind eye when it decides to turn up the heat on local districts and students by instituting a new generation of high-stakes accountability tests.

A. *Seeing “Staars”*⁴³³

The future of high-stakes testing in Texas begins anew with the 2011-2012 school year. In response to legislative mandates in 2007 and 2009, the class that is entering the ninth grade for the 2011 school year will be subject to new testing requirements.⁴³⁴ Ask yourself if you could answer the following questions:

#1, “You should know the characteristics and behavior of waves. Analyze the characteristics of waves, including ve-

⁴³⁰ S. 501, 2011 Leg., 82nd Sess. (Tex. 2011), *available at* <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00501F.pdf#navpanes=0>.

⁴³¹ TEX. HUM. RES. CODE ANN. § 2.001 (West 2011).

⁴³² TEX. HUM. RES. CODE ANN. § 2.005 (West 2011).

⁴³³ Staar stands for State of Texas Assessments of Academic Readiness. Press Release, Tex. Educ. Agency, STAAR to replace TAKS (Jan. 26, 2010), <http://www.tea.state.tx.us/index4.aspx?id=7874>.

⁴³⁴ *See id.*

locity, frequency, amplitude, and wavelength, and be able to calculate using the relationship between wavespeed, frequency, and wavelength.”⁴³⁵

#2, “Compare characteristics and behaviors of transverse waves, including electromagnetic waves and the electromagnetic spectrum, and characteristics and behaviors of longitudinal waves, including sound waves.”⁴³⁶

#3, “Describe how the macroscopic properties of a thermodynamic system such as temperature, specific heat, and pressure are related to the molecular level of matter, including kinetic or potential energy of atoms.”⁴³⁷

Replacing the current Texas Assessment of Knowledge and Skills (TAKS) test will be the State of Texas Assessments of Academic Readiness (STAAR) test.⁴³⁸ Twelve core subjects will now be tested in high school at the end of the course, along with new assessments in grades three through eight to begin in the fall of 2011.⁴³⁹ “The new tests

⁴³⁵ This question is formulated from a nine page publication entitled STAAR, the State of Texas Assessments of Academic Readiness, Physics Assessment, Eligible Texas Essential Knowledge and Skills, published by the Texas Education Agency, Student Assessment Division (Fall 2010), under Reporting Category 4: Waves and Quantum Phenomena, p. 5, available at

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CEEQFjAA&url=http%3A%2F%2Fwww.tea.state.tx.us%2FWorkArea%2Flinkit.aspx%3FLinkIdIdentifier%3Did%26ItemID%3D2147488326%26libID%3D2147488325&ei=UyvETqWeBcLptgfIyriqDQ&usg=AFQjCNFZzu3AQCvvWdT0twdyVkj9nug82w>.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 4.

⁴³⁸ *See id.*

⁴³⁹ *See House Bill 3 Transition Plan*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/student.assessment/hb3plan/> (follow “Chapter 1” hyperlink at Section I). *The Transition Plan for House Bill 3* contains the process to develop and implement House Bill 3 (81st Texas Legislature, 2009), as required by Section 68 of the bill. *Id.* The transition plan covers development of the new STAAR program, “new performance ratings for Texas public schools; federal requirements for assessment and accountability; accreditation, sanctions and interventions; and financial ac-

will be significantly more rigorous than previous tests and will measure growth.”⁴⁴⁰ Under the new 2010-2011 Graduation Credit Requirements, there will still be three tracks to graduation, two twenty-six credit paths, the Recommended High School Program, and the Distinguished Achievement Program (DAP), and a twenty-two credit option called the Minimum High School Program.⁴⁴¹ As an example of the new rigor, the Texas Education Agency has published assessment requirements in each of the twelve core areas.⁴⁴² The questions in the previous paragraph are from the Physics Assessment publication, which sets out four reporting categories, or minimum essential knowledge requirements, to pass the Physics end of class exam.⁴⁴³ So, as an example of the new more rigorous test, knowledge of physics will be required to gradu-

countability.” *Id.* (All chapters of the Transition Plan can be accessed at this site).

⁴⁴⁰ STAAR to Replace TAKS, *supra* note 433. See also *House Bill 3 Transition Plan*, *supra* note 439 (follow “Chapter 2” hyperlink at Section I) (On this page are the general characteristics that will contribute to “Rigor”).

⁴⁴¹ 2010-2011 GRADUATION CREDIT REQUIREMENTS, *available at* <http://www.tea.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147489482&libID=2147489481>; see also *House Bill 3 Transition Plan*, *supra* note 439 (follow Chapter 7” hyperlink at Section I).

⁴⁴² See *State of Texas Assessments of Academic Readiness (STAAR™) Resources*, TEX. EDUC. AGENCY, <http://www.tea.state.tx.us/student.assessment/staar/> (last visited Nov. 24, 2011). This site includes links to grades three through eight Assessed Curriculum and Blueprints in reading, math, writing, science, and social studies. Also, are the End of Class (EOC) Assessed Curriculum and Blueprints for the twelve core courses, English I, II, III, Algebra I, Geometry, Algebra II, Biology, Chemistry, Physics, World Geography, World History, and U.S. History. Many other STAAR resources links are available including the Spanish Assessment criteria. *Id.*

⁴⁴³ See generally TEX. EDUC. AGENCY: STUDENT ASSESSMENT DIV., STATE OF TEXAS ASSESSMENTS OF ACADEMIC READINESS (STAAR): PHYSICS ASSESSMENT: ELIGIBLE TEXAS ESSENTIAL KNOWLEDGE AND SKILLS [hereinafter STAAR Physics] 6-7 (2010), *available at* <http://www.tea.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147488326&libID=2147488325>.

ate high school in Texas, even in the Minimum Program.⁴⁴⁴

Under the current assessment program, only 66% of Texas public schools, 52% of charter schools, and 50% of school districts made “adequate yearly progress” (AYP) during 2010-2011.⁴⁴⁵ This means, under the old, less rigorous testing requirements, 34% of Texas public schools, 48% of charter schools, and 50% of school districts failed in reading, mathematics, attendance, and/or graduation.⁴⁴⁶ Now the testing requirements are more rigorous including questions such as “define and explain Coulomb’s constant.”⁴⁴⁷ If we have a dropout crisis under the old testing program, soon it will be a dropout Apocalypse.

Some believe the new testing system is designed to fail as the next step toward the privatization of education.⁴⁴⁸

⁴⁴⁴ See generally *House Bill 3 Transition Plan*, *supra* note 439. Although in the Executive Summary to the HB 3 Transition Plan, on page *vi* it says, “Modified assessments are not being developed for Algebra II, chemistry, or physics as these courses are not required on the Minimum High School Program (MHSP),” under Chapter 7 of HB 3 Transition Plan, on p. I-90, it very plainly shows for the Minimum HSP a minimum of two science credits of biology and “Integrated Physics and Chemistry” are required. *Id.* This implies a combining of the two courses together in what will be a simpler curriculum, but physics and chemistry none the less. See generally *id.* (follow “Executive Summary” hyperlink).

⁴⁴⁵ *Sixty-Six Percent of Texas Schools Meet AYP* (Adequate Yearly Progress), TEX. EDUC. AGENCY NEWS RELEASES ONLINE (August 4, 2011), available at

http://www.tea.state.tx.us/news_release.aspx?id=2147502010.

⁴⁴⁶ See DIV. OF PERFORMANCE REPORTING, DEP’T OF ASSESSMENT, ACCOUNTABILITY, AND DATA QUALITY, 1 TEXAS EDUCATION AGENCY 2011 PRELIMINARY AYP STATE SUMMARY TABLE, (2001), available at <http://ritter.tea.state.tx.us/ayp/2011/summaries11.pdf>.

⁴⁴⁷ See *STAAR Physics*, *supra* note 443; see generally *STAAR Physics Reference Materials*, <http://www.tea.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147496783&libID=2147496780> (the TEA website contains links to resources for all reference materials in each of the twelve core subject areas tested).

⁴⁴⁸ 2011 “Adequate Yearly Progress” Ratings: Failure by Design, Texas AFT (AMERICAN FEDERATION OF TEACHERS) LEGISLATIVE HOTLINE (Aug. 4, 2011), available at <http://texasaftblog.com/hotline/?p=1131>; see

Under federal law, all states are to have a 100% passing rate on state academic assessment achievement tests by the end of the 2013-2014 school year.⁴⁴⁹ This may now be attainable in Texas as the schools have more students repeating grades or taking remedial classes to learn about Coulomb's constant or transverse waves. Texas will certainly graduate fewer students as more students become academic liabilities and are pushed out. More children will become frustrated, disengage and give up on good behavior, while getting further behind and dropping out. This testing change does not address the racial effects of the current testing system. It only amplifies them.⁴⁵⁰

also AFT Member Helps Expose Corporate-Led Campaign Against Public Ed., TEXAS AFT LEGISLATIVE HOTLINE (Aug. 5, 2011), <http://texasaftblog.com/hotline/?p=1133>. Members of Texas AFT complain that the American Legislative Exchange Council (ALEC) has a stated legislative priority of privatizing public education. *Id.* ALEC's website says their Mission in Education is to "promote excellence in the nation's educational system by advocating education reform policies that promote parental choice and school accountability, consistent with Jeffersonian principles of free markets and federalism." *See* AM. LEGIS. EXCH. COUNCIL (ALEC), *available at*

http://www.alec.org/Content/ContentFolders/Education/EducationModelLegislation/EducationPrinciples/ALEC_Education_Princ.htm (last visited Aug. 15, 2011). They do believe that "(t)he ability of the private sector to provide, whether independently or in partnership with the public sector, educational goods and services is beneficial to meeting the individual learning needs of students and ensuring a quality education system in America." *Id.*

⁴⁴⁹ 20 U.S.C. § 6312(c)(1)(M) (2006) "[W]hether all of the schools [within the local education agency] are making the progress necessary to ensure that *all* students will meet the State's proficiency level of achievement on the State academic assessments" by the end of the 2013-2014 school year. *Id.* (emphasis added).

⁴⁵⁰ As this article is being edited, Secretary of Education Arne Duncan "announced that he will unilaterally override the centerpiece requirement of the No Child Left Behind school accountability law, that 100 percent of students be proficient in math and reading by 2014," by giving waivers to states that have their own accountability programs and are making progress toward better schools. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011. The question arises whether the executive branch by fiat can override legislation deemed to be counterproductive? Certainly a battle in the future will occur between the Executive and Legislative branches on the implementation of the expectations of No Child

Even though racism based on biology has been rejected by modern society, our cultural racism, even if unintended, must be acknowledged. In today's society, surely Anglos do not consciously believe that African American and Hispanic "cultural products, values, methods, and structures" are inferior to their own⁴⁵¹ – or certainly they dare not admit it out loud. As a society we have crossed that Rubicon. But "the cultural consequences of race-based discrimination and inferiority/superiority assumptions"⁴⁵² can't be denied from the multitude of statistical examples given above. We must not fail to acknowledge that "the intersection of race and culture" is the reason for these "race effects."⁴⁵³ In understanding that racism is a contributing factor we can craft public policy that addresses in a frank way the necessity to correct the problem and positively mitigate the future "race effects" of our bias.⁴⁵⁴

The first step is to address the issue of how we approach discipline in the public schools. The existence of DAEPs is too big a temptation to the public school administrator who finds himself having to "game the system"⁴⁵⁵ to satisfy accountability requirements, especially now with resources being reduced.⁴⁵⁶ Additionally it is not in a child's

Left Behind if Congress does not change the requirements of the act. The requirements of the Texas STAAR test will none the less go into effect soon.

⁴⁵¹ James M. Jones, *Cultural Racism: The Intersection of Race and Culture in Intergroup Conflict*, in *CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT* 466 (Debra A. Prentice, Dale T. Miller eds., Russell Sage Foundation 1999).

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ See generally Victor Goode, *Cultural Racism in Public Education: A Legal Tactic for Black Texans*, 33 *HOW. L.J.* 321 (1990) (arguing that the Thirteenth and Fourteenth Amendments to the U.S. Constitution can be used as a tool by people of color to force school districts in Texas to move beyond their "racist conduct.").

⁴⁵⁵ Heilig 2008, *supra* note 182, at 77.

⁴⁵⁶ Jim Vertuno & Chris Tomlinson, *Texas Legislature Oks \$4 Billion in Education Cuts*, ASSOCIATED PRESS, June 28, 2011, available at <http://www.kvue.com/news/124705329.html>. During the 2011-2013 biennium, the Texas Legislature will cut \$4 billion from public school financ-

best interests to be “excluded from school based solely upon inappropriate social behavior.”⁴⁵⁷

The Legislature should force the districts to hire the necessary professionals to provide the training and expertise to create a statewide implementation of PBIS. PBIS has been shown to work in the public schools, in juvenile justice settings, and with adult prison populations.⁴⁵⁸ If it will work there, it will work throughout the state. Eliminate the DAEP’s as they now exist and reunite all children with their home schools. Give the local districts no other option but to deal with their children and train all the teachers and staff on a campus who contact students, “how to reinforce positive behavior and how to teach, model and reinforce standards of behavior expected at school. . .to improve school climate, reduce disciplinary referrals and boost academic performance.”⁴⁵⁹ We must stop telling these children they belong in alternate education, especially disciplinary alternate education. “I do not believe that schools or programs that seek to serve the variety of youths and families in today’s society should be separated out as ‘alternatives.’ Ensuring that all individuals have the opportunity to become successful is not an alternative – it is a necessity.”⁴⁶⁰

ing, changing distribution formulas to reduce money flowing to school districts from the state and authorized school districts to furlough teachers if necessary. *Id.*; see also Stephen Ceasar & Teresa Watanabe, *Education Takes a Beating Nationwide*, L.A. TIMES, July 31, 2011 (Texas cuts pre-kindergarten programs for 100,000 at-risk children).

⁴⁵⁷ Andrea M. Cohn, *Information for Educators: What is Positive Behavioral Support?* NAT’L ASS’N OF SCH. PSYCHOLOGISTS RES., http://www.nasponline.org/resources/factsheets/pbs_fs.aspx (last visited Nov. 24, 2011). (Dr. Cohn is now a psychologist in Houston, Texas).

⁴⁵⁸ See *supra* Part VIII.

⁴⁵⁹ Deborah Fowler, *How to Break Racial Disparities-Discipline Cycle*, THE DALLAS MORNING NEWS, Mar. 17, 2011.

⁴⁶⁰ McGee, *supra* note 419, at 591.

