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# THE CRIMINALIZATION OF STUDENT DISCIPLINE PROGRAMS AND ADOLESCENT BEHAVIOR

AUGUSTINA REYES\*

The new school conduct ethos has profoundly changed views about what was once deemed usual, if annoying, behavior by adolescents. No longer is the playground scrap or the kickball tussle deemed a rite of passage best settled by a teacher who orders the combatants to their corners, hears out the two sides, and demand apologies and a handshake.<sup>1</sup>

## INTRODUCTION

In 1995, Timothy Nevares, a tenth grader in the San Marcos Consolidated Independent School District, threw a rock at a passing car, injuring a passenger.<sup>2</sup> Although the incident did not occur at or near school, the Texas Criminal Procedure Code required that Timothy's school district be notified of student criminal activity.<sup>3</sup> By law, the police offense report created after

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<sup>1</sup> Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A1.

<sup>2</sup> See *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162, 1163 (W.D. Tex. 1996) (noting that Nevares "allegedly threw rocks at an automobile causing injury to a passenger").

<sup>3</sup> Article 15.27 of the Texas Code of Criminal Procedure established a new relationship with schools districts under the state zero tolerance policies. See TEX. CODE CRIM. PROC. art. 15.27 (2005). Chapter 37 and other state laws require regular meetings between school districts and law enforcement offices. See TEX. EDUC. CODE § 37.015 (2003). The principal of a school is required to report to the municipal police department any offenses committed by students. See *id.* The Texas Code of Criminal Procedure requires that schools districts be notified of student criminal activity. See TEX. CRIM. PROC. CODE ANN. art. 15.27 (2005). Chapter 37 of the Education Code requires that the district administrators regularly meet with juvenile officials to discuss juvenile crime within the school district. See TEX. EDUC. CODE § 37.010 (2003). The policy requires that the school district notify the "authorized officer of the juvenile court in the county." TEX. EDUC. CODE § 37.010(a) (2003). Under the Texas Education Code, this happens immediately after a due process hearing to transfer a student out of the regular classroom. See TEX. EDUC. CODE ANN. §§ 37.007(f), 37.009 (2003). It requires that any

an incident triggers school district action under the Texas zero tolerance policy, Chapter 37, Law and Order.<sup>4</sup> Section 37.006 mandates that any student who has engaged in conduct punishable as a felony “shall be removed from class and placed in an alternative education program.”<sup>5</sup> At the time of Timothy’s offense, section 37.006 of the Texas Education Code did not provide for notice to the student or a hearing prior to placement

student who engages in criminal mischief, even if the student is not expelled, be reported to the juvenile court. *See* TEX. EDUC. CODE. § 37.007(f). This report finds that forty-one states require that if the school removes a student from school for any criminal offenses outlined in the state zero tolerance policy, the district is required to report the incident to the juvenile authorities. THE ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 5 (2006), [http://www.civilrightsproject.harvard.edu/research/discipline/](http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspended.php#fullreport)

[opport\\_suspended.php#fullreport](http://www.civilrightsproject.harvard.edu/research/discipline/opport_suspended.php#fullreport) (last visited Oct. 27, 2006) [hereinafter OPPORTUNITIES SUSPENDED]. The coloration between schools and law enforcement was supported 1994 Gun Free Schools Act which conditioned federal aid to the schools upon the state’s adoption of policies to remove students who bring weapons to school for one year, and a policy to report these students to law enforcement authorities. *Id.* at 54 n.3. School discipline was no longer an issue of adolescent behavior; it became an issue of criminal record.

<sup>4</sup> The case of Timothy Narvares and the Texas Law and Order legislation was not unique to Texas: the stage for the Navares case was set during the 1990s when a number of school shootings became high profile news events, culminating with the April 1999 killings at Columbine High School. *See* Eric Blumenson & Eva Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65 (2003). News coverage and expert testimony predicted a wave of juvenile crime, even as the U.S. Department of Justice reported a 20% decrease in crime and a 30% decrease in juvenile crime during 1990-1999. *See Juvenile Justice and Delinquency Prevention Act of 2001*, 147 Cong. Rec. H5750-02 (2001). During this period U.S. Census data showed an increase of minority populations, particularly a growth bubble that represented minority youth. *See* Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Total by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, For the United States Regions, Divisions, and States* (U.S. Census Bureau Working Paper No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056.html> (last visited Oct. 27, 2006). Public testimony predicted a juvenile crime bomb with the coming of “40 million 10 year old and under . . . fatherless, godless and jobless” children. *See* Fox Butterfield, *Crime Continues to Decline, but Experts Warn of Coming ‘Storm’ of Juvenile Violence*, N.Y. TIMES, November 19, 1995, §1, at 18. School districts in Texas and across the U.S. developed “zero tolerance” policies that were codified in the state statutes of education and in criminal procedures. In 1995, the Seventy-Fourth Texas Legislature enacted the Safe Schools Act, requiring Texas school districts to establish Disciplinary Alternative Education Programs (DAEP) for students who commit criminal offenses. TEX. EDUC. CODE ANN. § 37.008 (Vernon 2003); *see also* Texas Education Agency, *2002 Comprehensive Annual Report on Texas Public Schools: A Report to the Texas Legislature* viii (2002), available at <http://www.tea.state.tx.us/research/pdfs/2002comp.pdf> (last visited Oct. 27, 2006) [hereinafter *Annual Report*].

<sup>5</sup> *See* TEX. EDUC. CODE ANN. § 37.006 (Vernon 2003). Section 37.006 states that a student “shall be removed from class and placed in a disciplinary alternative education program” if he “engages in conduct punishable as a felony” while “on or within 300 feet of school property, as measured from any point on the school’s real property boundary line, or while attending a school-sponsored or school-related activity on or off of school property.” *Id.*

in a disciplinary alternative education program, regardless of length of removal<sup>6</sup>

Timothy was removed from his high school and placed in the school district's disciplinary alternative high school program, otherwise known as "Rebound."<sup>7</sup> Rebound provided a basic education focusing on English, language arts, mathematics, science, history, and self-discipline.<sup>8</sup> The school was not required to provide any elective courses, even if such courses were specialized science or foreign language courses required for

<sup>6</sup> See TEX. EDUC. CODE ANN. §§ 37.006 (Vernon 2003). Section 37.006 provides procedures under the Texas zero tolerance policy under Subtitle G "Safe Schools," Chapter 37 "Discipline; Law and Order." *Id.* The Texas zero tolerance policy contains three major sections, a section for discretionary removals applicable to the school district student code of conduct, mandatory removals specified by Chapter 37, and penal provisions for Class A, Class B, and Class C misdemeanor offenses as specified by §§ 37.123, 37.152, 37.122, and 37.126. Students are removed from the regular classroom using a system that ranges from least severe removal to most severe using suspensions and expulsions. TEX. EDUC. CODE ANN. §§ 37.006 (Vernon 2003). Suspensions are usually removals from the regular classroom for a period not to exceed a total of ten days in an academic year. Expulsions are the most severe removals for a period that exceeds ten days and may be as long as an academic school year. An in-school suspension is the least severe removal of a student from the regular instructional classroom. While the student is removed from the regular classroom to an in-school-on-campus site, the student maintains a relationship with the teacher who provides daily instructional assignments for the student. The out-of-school suspension is more severe because the student's relationship with the teacher is severed. In addition the student is disengaged from the education site. While expulsion has the same severity as an out-of-school suspension, it is compounded by a longer period of time. Students who are suspended out-of-school or expelled are removed to a D.A.E.P. or a J.J.A.E.P. based on the offense. Some have contended that legally sound policies may not be developmentally sound policies for adolescents, as traditional approaches do not address a student's need to feel a sense of belonging at school. See generally Clea A. McNeely et al., *Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health*, 72 J. SCH. HEALTH, 138, 145 (2002).

<sup>7</sup> See Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 FORDHAM URB. L.J. 539, 540-41 (2001). In an effort to provide a separate supervised educational placement for dangerous and disruptive students rather than a three-day student expulsion, which some felt "gave delinquent students an unsupervised furlough to commit crimes," many states reported began using alternative education programs for discipline purposes. *Id.* at 541; see CAMILLA A. LEHR ET AL., ALTERNATIVE SCHOOLS: POLICY AND LEGISLATION ACROSS THE UNITED STATES: RESEARCH REPORT ONE 7 (2003), available at [http://ici.umn.edu/alternativeschools/publications/Legislative\\_Report.pdf](http://ici.umn.edu/alternativeschools/publications/Legislative_Report.pdf) (last visited Oct. 27, 2006).

<sup>8</sup> See TEX. EDUC. CODE ANN. § 37.008 (Vernon 2003). DAEPs require the removal of students from the regular classroom and isolates/segregates students in a facility that is on or off the regular campus. § 37.008(a)(2). Isolated students are provided with a basic core course curriculum of English language arts, mathematics, science, history, and self discipline; however, they are not required to provide a non-core course that may be required for promotion or graduation. § 37.008(a)(4). DAEP teachers are not required to have teaching certification until 2005-2006. *Id.* According to the Education Code, they may teach on a temporary or emergency certificate or permit. TEX. EDUC. CODE ANN. § 21.0031 (Vernon 2003). Teachers may also be assigned to teach a subject for which the teacher is not certified. *Id.* DAEPs are required to provide a certified bilingual teacher and a certified special education teacher. *Id.*

graduation. Additionally, the school failed to provide a library, books for loan, extracurricular activities, or certified teachers. In some cases teacher aides simply assigned workbooks in class and loosely supervised these expelled students in an independent-study type of arrangement. Rebound required drug counseling for all students, even when, like in Timothy's case, the student's discipline problems or incidents did not involve drugs.<sup>9</sup>

Nevares' parents conceded that Timothy deserved a reasonable punishment for his behavior, but brought suit arguing the Rebound program was not a proper high school program, in that it failed to present an "adequate" education, as required by Texas law.<sup>10</sup> The district court for the Western District of Texas ruled that such removal of students from "regular high school classes for placement in alternative education [constituted] a form of punishment [to a program that was] not comparable to that received at San Marcos High School."<sup>11</sup> Accordingly, the court reversed the school district transfer, determining that it violated Timothy's due process rights.<sup>12</sup> However, the Fifth Circuit reversed the district court, holding that no due process was necessary<sup>13</sup> and reasoning that alternatives such as Rebound were "mere transfer[s]" school districts could employ for disciplinary problems.<sup>14</sup>

<sup>9</sup> See TEX. EDUC. CODE ANN. § 37.008(k) (Vernon 2003). State policy requires that DAEPs provide a "program of educational and support services may be provided to a student and the student's parents when the offense involves drugs or alcohol." *Id.*

<sup>10</sup> Adequacy is a school finance standard that attempts to measure the quality of a state's education based on the sufficiency of funds allocated to students and to schools. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215-16 (Ky. 1989). The Texas finance system is based on a standard of adequacy. See *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991). The standard of "adequate" is based on the constitutional definition in the Kirby case. *Id.* The concept is reinforced by the Texas Public Education Academic Goals defining the "foundation of a well-balanced and appropriate education" as one that is made up of English, mathematics, science, and social studies. See TEX. EDUC. CODE ANN. § 4.002 (Vernon 2003).

<sup>11</sup> See *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 954 F. Supp. 1162, 1166 (W.D. Tex. 1996) (finding that the "punishment" of removal made the student's subsequent education deficient).

<sup>12</sup> See *id.* at 1167 (ruling that Nevares' due process rights had been violated).

<sup>13</sup> See *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, No. 96-50420, 1997 U.S. App. LEXIS 14955, at \*6 (5th Cir. Apr. 11, 1997) (stating "the United States Constitution has not been offended in the present dispute").

<sup>14</sup> See *Nevares*, 1997 U.S. App. LEXIS 14955, at \*4. Disciplinary Alternative Education Programs are considered another campus within the school district based on the campus number assigned by the Texas Education Agency. See TEXAS EDUCATION AGENCY, 2000-2001 ALTERNATIVE EDUCATION ACCOUNTABILITY MANUAL (April 2001), available at <http://www.tea.state.tx.us/perfreport>

What happened to Timothy Nevares is no longer an unusual occasion or extreme case, as a number of critics noted at the time of *Nevares*.<sup>15</sup> Rather, underachieving programs such as Rebound are now the norm for students considered “discipline problems,” “troublemakers,” or “criminals.”<sup>16</sup> Moreover, these programs are not merely alternatives in the same sense as charter schools, home schooling, and magnet schools. Rather, these programs have become criminalized, and the stealth employed by school districts and public authorities has allowed these alternative programs to flourish into a growth industry.<sup>17</sup> This situation resembles the convergence of large corporate interests, particularly the exponential increase in prisons and detention facilities throughout the nation and the burgeoning of accountability legislation.<sup>18</sup> Thus, it has been in the interests of builders of prisons and detention facilities to exploit children’s proclivities for defying authority and failing to conform to societal expectations. Simultaneously, this pattern appeals to educators, allowing them to remove troubled youth from school rolls, where, especially in states where financial resources and prestige factors determine the success of schools and school personnel, their

/account/2001/manual/manual.pdf (last visited Oct. 27, 2006). The court’s decision to label the removal of a student from the home campus to a DAEP (“a mere transfer”) opened the door to exempting DAEPs from state accountability. See *generally id.* While their scores are considered in the district average the DAEP campus does not receive an accountability rating. *Id.* at 8.

<sup>15</sup> See Jodi Berls and Scott S. Greenberger, *New Law Denies Students Due Process, Critics Say*, AUSTIN-AMERICAN STATESMEN (Texas), May 23, 1996, at A8 (discussing criticism of Texas Law at time of *Nevares* case).

<sup>16</sup> John J. Dilulio predicted the advent of tens of thousands of “severely morally impoverished juvenile super predators.” See John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23. According to Dilulio, the super-predators “fear neither the stigma of arrest nor the pain of imprisonment . . . [T]hey will do what comes ‘naturally’: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.” *Id.* Studies show that depictions of crime in the news are not reflective of either the rate of crime, the proportion of crime which is violent, the proportion of crime committed by people of color, or the proportion of crime committed by juveniles. See Lori Dorfman and Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, Building Blocks for Youth, April 2001.

<sup>17</sup> See Sharon Jayson, *Trouble Crowds Campus; With more students misbehaving, Austin’s alternative school is filling up fast*, AUSTIN-AMERICAN STATESMEN (Tex.), Oct. 2, 1996, at B1 (discussing unforeseen need for alternative schools for disciplinary problem students).

<sup>18</sup> See Joy M. Donham, *Third Strike or Merely a Foul Tip?: The Gross Disproportionality of Lockyer v. Andrade*, 38 AKRON L. REV. 369, 369–70 (2005) (noting recent large increase in prison populations in California).

likely-poor test performance will pull down averages.<sup>19</sup> Overly strict state zero-tolerance policies mandating disciplinary alternative education programs may be ineffective and often mean a transition from school to the prison pipeline.<sup>20</sup>

This development has been long in coming, but was never publicly debated or considered. Although it arrived obliquely on the cat's feet, it is clearly here to stay. Despite robust and longstanding debates, legislation, and litigation over such issues as school finance, vouchers, and desegregation, the public has never fully contemplated or acquiesced in this marriage of convenience that has led to the criminalization of school discipline programs and adolescent behavior.<sup>21</sup> Moreover it is not unexpected that the usual suspects would be involved in the process – African American and Latino boys, such as Timothy Nevares.<sup>22</sup> It is also not unexpected that this phenomenon would thrive in a nation with a longstanding history of educational underachievement in its large African American and Mexican American populations.<sup>23</sup> Though only one segment of a greater

<sup>19</sup> For information on how Texas deals with accountability scores with home schooled students or DAEP students, see Texas Educ. Agency Dep't of Accountability and Data Quality, *Accountability Manual* (2004), available at <http://www.tea.state.tx.us/perfreport/account/2004/manual> (last visited Oct. 27, 2006). Since all DAEP students are transferred into the DAEP, the DAEP does not have to report accountability ratings. See *id.* at 64.

<sup>20</sup> There are indications that removal from regular classrooms may cause students to drop out of school. OPPORTUNITIES SUSPENDED, *supra* note 3, at 11; JACQUELINE IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS 19 (1990). More than 30 percent of the sophomores who drop out of school had been suspended. High school dropouts are also more likely to be incarcerated, creating the school to prison pipeline. See *id.* Indeed, a student's removal from the regular classroom by suspension or expulsion should be the leading fear of true educators, as regular school attendance is critical to academic success. See Charles Achilles & P. S. Smith, *Stimulating the Academic Performance of Pupils*, THE PRINCIPAL AS LEADER 256 (Larry W. Hughes, ed., Macmillan College Publishing Company 1999); see also Michael A. Clump & Heather Bauer, & Alex Whiteleather, *To Attend or Not To Attend: Is that a Good Question?* J. INSTRUCTIONAL LEADERSHIP, Sept. 2003, at 224. Disciplinary actions, such as suspension, take their toll on the learning process, as students who do not attend school regularly eventually fail out. See *id.*

<sup>21</sup> See OPPORTUNITIES SUSPENDED, *supra* note 3, at v (explaining how principals and administrators have diverted from literal interpretations of Zero Tolerance policies and gravitated towards "highly creative interpretations of the ill-conceived laws and using them to suspend or expel children based on relatively minor, non-violent offenses").

<sup>22</sup> See OPPORTUNITIES SUSPENDED, *supra* note 3, at 7 (reporting that Zero Tolerance policies are more prevalent in predominately Black and Latino school districts, leading to racially disparate disciplinary actions on a national level).

<sup>23</sup> In 1999-2000, African Americans made up 17% of the United States K-12 enrollment and 35% of all expulsions in grades 7-12; Hispanics made up 16% of United States K-12 enrollment and 20% of all expulsions in grades 7-12; Whites were 61% of the K-12 enrollment and 15% of all the expulsions in grades 7-12. See National Center for

nation, a study of the Texas student discipline system will have national implications and variegated local lessons.<sup>24</sup>

Regrettably, these lessons have come mostly at the expense of minority children.<sup>25</sup> As examples of these issues have begun to surface, it is overdue for scholars and policymakers to look at the decade of developments since the Nevares case and ask whether this is a direction that the nation wishes to travel.<sup>26</sup> Any reasonable look at the phenomenon will answer this question in the negative. The purpose of this article is to study the policy and the practices of student discipline in Texas. As such, this article attempts to answer the question of why we as a society extend a criminal incarceration approach to K-12 public education discipline policy. Furthermore, this study examines Zero Tolerance policies and Disciplinary Alternative Education Programs (DAEP) using U.S. and Texas data.

### I. NEW AGE ALTERNATIVE EDUCATION

Alternative education is an educational model that offers, to members of the community at no extra cost, learning experiences alternative to those provided by conventional schools and

Education Statistics, U.S. Dep't of Education, *Publ'n No. 2003-008, Status and Trends in the Education of Hispanics* 38-39 (2003), available at <http://nces.ed.gov/pubs2003/2003008.pdf> (last visited Oct. 27, 2006) [hereinafter "NCES Statistics"].

<sup>24</sup> See Brooke Grona, Comment, *School Discipline: What Process is Due? What Process is Deserved?*, 27 AM. J. CRIM. L. 233, 235-38 (2000) (discussing the states' apprehensive adoption of zero tolerance legislation in the wake of federal failures, with Texas distinguishing itself by providing disciplinary alternative education programs).

<sup>25</sup> In 2000-2001 Texas expulsion data show that 97 percent were male. See NCES Statistics; see also Texas Education Agency, *Performance Assessment Report: Juvenile Justice Alternative Education Programs* (2004), available at <http://www.nicic.org/Misc/URLShell.aspx?SRC=Catalog&REF=http://nicic.org/Library/021106&ID=021106&TYPE=PDF&URL=http://www.tjpc.state.tx.us/publications/reports/RPTOTH200405.pdf> (last visited Oct. 27, 2006). Of the JJAEP enrollments, 81 percent were males. *Id.* African Americans comprised 14 percent of the state school enrollment, 21 percent of the DAEP placements, 19 percent of expulsions, 23 percent of the in-school suspensions, 26 percent of the JJAEP entrances, and 32 percent of the out-of-school suspensions. *Id.* Hispanics were 39 percent of the state school enrollment, 43 percent of the DAEP placements, 47 percent of expulsions, 42 percent of the in-school suspensions, 45 percent of the JJAEP entrances, and 43 percent of the out-of-school suspensions. *Id.* African American and Hispanic students have higher placement rates for the more severe violations of out-of-school suspensions, expulsions and JJAEP placements. *Id.*

<sup>26</sup> For an in-depth analysis of the practical aftermath of *Nevares*, see Audrey Knight, Note, *Redefining Punishment for Students: Nevares v. San Marcos I.S.D.*, 20 REV. LITIG. 777 (2001). The author's main argument is that involuntarily transferring students to an alternative school should be constitutionally recognized as a punishment, and thus, subjected to the same constitutional requirements as similar punishments. See *id.* at 807.



historically available by choice.<sup>27</sup> They can be innovative sites of choice and self-development, sites of heterogeneity, sites that offer the last chance for a student to graduate from high school, or mandatory disciplinary centers that segregate students along lines of race, class, ethnicity, and academic ability.<sup>28</sup> New Age disciplinary alternative schools are designed as behavioral management sites for students with discipline problems.<sup>29</sup> These schools do not represent the historical innovation found in traditional alternative education.<sup>30</sup> They are driven by the educational excellence paradigm and exist as remedial programs and disciplinary centers that separate out high achievers from those students “not able to function in the structure of a regular

<sup>27</sup> For a comprehensive study on this point, see Mary Anne Raywid, *Alternative Schools: The State of the Art*, EDUC. LEADERSHIP, Sept. 1994, at 26–31. Ms. Raywid defines alternative schools Type I, Type II, and Type III. *See id.* Type I (Innovative) alternative schools serve students of all types, with full student choice option. *Id.* The purpose of this school is to make education more responsive, engaging, challenging, fulfilling, and humane than it often is in conventional schools. *Id.* This model is based in the premise that for schools to be optimally effective, fundamental changes are needed in school organization, governance, curriculum, and instructional methods. *See id.* The general approach emphasizes innovation and interpersonal relationships. *Id.* Type II (Disciplinary) is a disciplinary school using a punitive instructional approach that is a compulsory placement and the last resort to expulsion. *Id.* The purpose of this school is to modify the behavior of students who present discipline problems. *Id.* This type of school is based on the premise that through placement in a discipline alternative center/school, the behavior of students at risk of suspension or expulsion may be modified enough to stay in school, and return to the regular classroom. *Id.* The curriculum and instructional methods are the same or comparable to the regular classroom, focusing on the state’s basic skill requirements. *Id.* Type III (Developmental) schools provide services for students with either academic or behavior problems, and the general approach is therapeutic. *Id.* The purpose of developmental schools is to provide extra help for students who are doing poorly in traditional schools. *Id.* It is believed that academic remediation and help with social or emotional development will enable the student to succeed when returned to the regular classroom. *Id.* The schools target students with either academic or behavior problems. *Id.* Students are placed on a voluntary or involuntary basis. *Id.* In some schools students are referred by teachers, but have the right to refuse to attend the school. *Id.*

<sup>28</sup> *See id.* at 26–31 (describing the many faces of alternative schools from the 1960s to present, recounting their role as “special needs” institutions and explaining how alternative schools “pioneered” public school reform with innovative policies).

<sup>29</sup> *See* FRANK BLAIR, EDUCATION COMMISSION OF THE STATES, ALTERNATIVE SCHOOLS FOR DISRUPTIVE STUDENTS (1999), available at <http://www.ecs.org/clearinghouse/15/05/1505.htm> (last visited Oct. 27, 2006) (containing the disciplinary parameters of all state statutes authorizing the use of alternative education for problematic students and stating whether students’ placement in alternative schools is voluntary or mandatory under those statutes).

<sup>30</sup> For an interesting study which demonstrates how the perception of alternative schools has changed in the past decade, and which supports the notion that the clientele and rationale for public alternative education has substantially changed since the 1960s. *See* TIMOTHY W. YOUNG, PUBLIC ALTERNATIVE EDUCATION: OPTIONS AND CHOICES FOR TODAY’S SCHOOLS (Teachers College Press 1990). At one time, most respondents in a national survey thought that “all kinds” of students went to alternative schools, yet, the majority of the country now believes that such schools are places for “disruptive” or “low-achieving” students. *Id.*

setting.”<sup>31</sup> Disciplinary alternative schools are sites that segregate at-risk students, who are most often poor white students, African American students, Native American students, and Latino students.<sup>32</sup> These sites often lack the vision to build cohesion, and instead create greater divisions in our society. These disciplinary alternative education programs (DAEPs) are the products of zero tolerance discipline systems.<sup>33</sup>

American schools have adopted an ideology and structure of equal but differentiated opportunities in their attempts to be all things to all students. Consequently, when students do not fit the mold, they drop out, are pushed out, or disengage.<sup>34</sup>

<sup>31</sup> See Raywid, *supra* note 27, at 26 (stating “[t]hey are driven by the educational excellence paradigm and exist as remedial programs and disciplinary centers that separate out high achievers from those students who cannot or will not succeed in a regular program”).

<sup>32</sup> In 2000–2001, low-income students made up approximately 50% of the state population, but approximately 60% of the DAEP enrollments, approximately 65% of the expulsions, approximately 70% of the out-of-school expulsions, and approximately 61 percent of the in-school suspensions. See Reyes, *supra* note 7, Table 2.6. At-risk students made up approximately 60 percent of the DAEP placements, approximately 70 percent of the expulsions, approximately 64 percent of the out-of-school suspensions, and approximately 61 percent of the in-school suspensions. *Id.*

<sup>33</sup> See TEX. EDUC. CODE ANN. § 37.006(a)–(b) (Vernon 2005). Mandatory removals to the DAEP must be made if the student commits certain violations on or within 300 feet from campus, while attending a school-sponsored or school-related activity on or off campus, or regardless of location. *Id.* The violations include a felony, an assault, a drug violation, an alcohol violation, a chemical violation, an act of indecent exposure, an act of retaliation against any district employee, and an assault or a terrorist threat. *Id.* Students must also be placed in DAEPs if they receive deferred prosecution for felony, or is convicted of a felony, or the superintendent believes the student committed murder, manslaughter, or criminally negligent homicide off-campus and while the student is not in school attendance. See TEX. EDUC. CODE ANN. §§ 37.006(a)(1)–(2), (c). The reasons to remove a student from the regular instructional classroom are serious crimes. *Id.* The state policy defines mandatory expulsion and removal from the regular instructional classroom. See TEX. EDUC. CODE ANN. § 37.007(a). Mandatory infractions include weapon possession (guns, knives, or clubs), aggravated assault, sexual assault, arson, murder, manslaughter, negligent homicide, indecency with a child, aggravated kidnapping, and felony charges. See TEX. EDUC. CODE ANN. §§ 37.007(a)(1)(A)–(D), (a)(2)(A)–(E). Mandatory expulsion is also required for causing bodily harm to a district employee or volunteer. See TEX. EDUC. CODE ANN. §§ 37.007(d). A student must also be expelled for one year if the student brings a firearm to school as defined in Guns Free School Act, 18 U.S.C. § 921 (1994). See TEX. EDUC. CODE ANN. § 37.007(b)(3), (e). In 2000–2001, 95% of all disciplinary actions in the state were for discretionary removals. See Summary of Chapter 37 Discipline Program Statistics for 3 Years through School Year 2000–2001, Texas Education Agency Division of Safe Schools. *Id.* There were approximately 25,000 drug related incidents, including Midol, asthma inhalers, and aspirin. *Id.* There were approximately 4,000 alcohol related incidents, including a Houston-area teen that refused to take a breathalyzer test at a football game. See Rachel Graves, *Backlash Growing over Zero Tolerance*, HOUSTON CHRON., Apr. 14, 2004, at 1A, 14A. The student refused to take the breathalyzer test, was charged, went to court, and was let off when the judge threw out the case. *Id.*

<sup>34</sup> See Gary Orfield, *DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS* (Harvard Education Press 2004) (discussing how a dangerously high percentage of

Historically, alternative schools had provided innovative school models as second chances to complete a high school degree.<sup>35</sup> Unlike the innovative alternative school models, DAEPs pose threats to a child's education when underachieving students who already have negative attitudes toward schools are removed from their regular instructional environment to inferior environments with teachers who are un-certified outside the areas of bilingual and special education.<sup>36</sup>

*a. Disciplinary Alternative Education Programs*

The literature defines three models of alternative education: an innovative model; a punitive model; and a developmental model.<sup>37</sup> The research shows that for students who do not fit the traditional school model, the innovative model has the most direct positive effect on achievement. However, Texas adopted a low-level punitive model for the DAEP.<sup>38</sup> As such, DAEPs consist of schools located off the home campus, intended for the purpose of removing dangerous students from their classrooms according to the policy without interrupting their education.<sup>39</sup>

DAEPs differ from the home campus and have a deleterious educational impact.<sup>40</sup> Teacher certification is questionable and no student testing is required.<sup>41</sup> DAEPs save money while removing

minority students disappear from the educational pipeline every year); *see also* PAUL E. BARTON, POLY INFO. CTR., EDUC. TESTING SERVICE, ONE-THIRD OF A NATION: RISING DROPOUT RATES AND DECLINING OPPORTUNITIES 3 (2005), available at <http://www.ets.org/research.pic> (last visited Oct. 27, 2006) (reporting that the high school completion rate has dropped approximately 7% in the past thirty years).

<sup>35</sup> *See* Raywid, *supra* note 27, at 26 (discussing how alternative schools first emerged in the 1960s as innovative departures from "the programmatic, organizational, and behavioral regularities" of public schools, and were able to partially evolve into institutions which provided a "last chance" for disruptive students).

<sup>36</sup> *See* TEX. EDUC. CODE ANN. § 37.008 (Vernon 2005).

<sup>37</sup> *See* YOUNG, *supra* note 30.

<sup>38</sup> *See generally*, Marcia Johnson, *Texas Revised Juvenile Justice and Education Codes: Not All Change Is Good*, 19 J. JUV. L. 1, 2-5 (1998) (discussing the punitive nature of Texas's Alternative Education Program).

<sup>39</sup> *See Annual Report, supra* note 4, at 45 (noting that students placed in a DAEP must continue to master basic subjects).

<sup>40</sup> *See* *Everett v. Marcuse*, 426 F. Supp. 397, 401 (E.D. Pa. 1977) (finding "lateral transfers as detrimental to the pupil's interests as a short term suspension").

<sup>41</sup> *See* Reyes, *supra*, note 7, at 544-45 (explaining how Texas does not require testing for special education students and how DAEPs are viewed as alternative programs which are not subjected to the statewide assessment program designed to ensure school accountability).

low-achieving students from home school rolls.<sup>42</sup> The system as a whole is under limited state supervision with regard to teacher performance, physical facilities, or school system manipulation.<sup>43</sup> DAEP students are exposed to an inferior curriculum and an inferior teaching staff.<sup>44</sup> They are only required to focus on a basic education excluding non-core course classes that may be needed for promotion from one grade level to another grade level or required for graduation.<sup>45</sup> Contrary to program descriptions, DAEP policy intentionally disrupts the student's education by removing the student from the regular classroom, breaking instructional relationships and engagement, and putting the student at-risk of missing instruction without any opportunities to make up the work.<sup>46</sup> Instructional segregation reduces a student's ability to pass a course and discourages the student from returning to school with indirect savings to the state school finance system.<sup>47</sup>

DAEP students are separated or segregated from non DAEP students. DAEP students are exposed to an instructional curriculum that, by policy, is legal, but inferior to the regular classroom curriculum.<sup>48</sup> Though teaches are certified bilingual or special education teachers, the instructional arrangements with bilingual and special education teachers may include a part-time

<sup>42</sup> See *id.* at 546 (noting that in a state where testing determines whether school performance is rated as exemplary or unacceptable removing underperforming students is a way to boost school's performance ratings possibly making the principal eligible for cash rewards).

<sup>43</sup> See Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 218–19 (1996) (noting that the Texas statute does not impose a duty upon school officials to investigate whether the alleged conduct actually occurred).

<sup>44</sup> See *id.* at 223 (explaining that Texas's alternative education programs are generally academically inferior to regular education because "students receive only limited classroom instruction.").

<sup>45</sup> See *id.* at 223–24 (noting how due to lack electives students returning to their regular schools may be behind in their work resulting in students not advancing to the next level).

<sup>46</sup> See *id.* at 224 (explaining that involuntary transfers which disrupt a child's education "result in a loss of educational benefits and opportunities").

<sup>47</sup> See IRVINE, *supra* note 20 (contending that the disproportionate use of severe disciplinary practices leads to black students' exclusion from classes, their perceptions of mistreatment, and increases feelings of alienation and rejection, which ultimately result in more misbehavior and/or leaving school).

<sup>48</sup> See Reyes, *supra* note 7, at 544–45 (discussing lack of testing for special education students and how DAEPs are viewed as alternative programs and therefore not subjected to statewide assessment programs designed to ensure school accountability); see also Tillman, *supra*, note 43, at 223 (noting the inferiority of curriculum at DAEPs).

teacher that is shared with another district or a teacher in a pull-out arrangement.<sup>49</sup>

### i. Educational Quality

There are no measures of the quality of education that DAEPs provide.<sup>50</sup> The original DAEP policy exempted DAEPs from accountability testing.<sup>51</sup> Recent revisions of the policy require DAEP accountability testing participation; however state accountability rules still exempt DAEPs from testing.<sup>52</sup> According to the rules, when a student transfers from one school in the district to another school, the student accountability scores are compared to a district average rather than any one campus.<sup>53</sup> Virtually all of the DAEP students are transfer students.<sup>54</sup> State budget reductions have reduced supervision of DAEP teacher performance, facilities, and general quality.<sup>55</sup> The state relies on self-reported data provided by DAEPs without any state site compliance requirements.<sup>56</sup>

DAEPs as defined by the state policy are for mandatory student removals.<sup>57</sup> Mandatory removals specify crimes for which

<sup>49</sup> Under the TEXAS EDUC. CODE ANN. § 21.0031 (Vernon 2005) teachers may teach on a temporary or emergency certificate or permit. Teachers may also be assigned to teach a subject for which the teacher is not certified. *Id.* DAEPs are required to provide a certified bilingual teacher and a certified special education teacher. *Id.*

<sup>50</sup> See generally, Reyes, *supra* note 7.

<sup>51</sup> See TEX. EDUC. CODE ANN. § 37.008 (Vernon 2000).

<sup>52</sup> The recent amendments to TEX. EDUC. CODE ANN. § 37.008 (Vernon 2005) require the commissioner to "adopt rules necessary to evaluate annually the performance of each districts disciplinary alternative education program[.]" *Id.*

<sup>53</sup> See Reyes, *supra* note 7, at 545 (stating the test scores of students in long-term DAEPs are "not attributed to their home schools," but instead the long-term DAEPs are "treated as separate schools within the district with their own separate test scores").

<sup>54</sup> See *id.*, at 546, 554 (discussing the rapid growth of DAEPs).

<sup>55</sup> See generally Augustina Reyes, *Criminalization of Student Discipline*, available at <http://www.civilrightsproject.harvard.edu/research/pipeline03/research03all.php> (last visited Oct. 27, 2006) (positing that Subtitle G, Safe Schools, Chapter 37, Discipline Law and Order is being used to justify student segregation).

<sup>56</sup> See Reyes, *supra* note 7, at 546 (explaining that mandatory placements are those required by the Texas Education Code, which leaves no discretion to the school district in placing the students).

<sup>57</sup> Mandatory removals to the DAEP must be made if the student commits certain violations on or within 300 feet from campus, while attending a school- sponsored or school-related activity on or off campus, or regardless of location. TEX. EDUC. CODE ANN. § 37.006(a)-(b) (Vernon 2003). The violations include a felony, an assault, a drug violation, an alcohol violation, a chemical violation, an act of indecent exposure, an act of retaliation against any district employee, and an assault or a terrorist threat. See *id.* Students must also be placed in DAEPs if they receive deferred prosecution for felony, or is convicted of a felony, or the superintendent believes the student committed murder, manslaughter, or criminally negligent homicide off-campus and while the student is not in school

a student must be removed from the classroom, including weapons possession, sexual assault, murder, felony drugs, and aggravated robbery.<sup>58</sup> Removal of dangerous students from the classroom maintains a safe school environment.<sup>59</sup> Thus, arguably, the DAEP mandatory student removal policy protects students and teachers.<sup>60</sup> The problem with DAEPs is the overzealous use of the mandatory removal policy that results in the classification of common healthcare products, such as nail file and Midol, as contraband.<sup>61</sup> DAEP data show that between 1998 and 2004, only roughly 18 percent of removals per year constituted mandatory removals.<sup>62</sup> The second problem is that

attendance. *See id.* at §§ 37.006(a)(1)–(2), (c). The reasons to remove a student from the regular instructional classroom are serious crimes. The state policy defines mandatory expulsion and removal from the regular instructional classroom. *See id.* at § 37.007(a). Mandatory infractions include weapon possession (guns, knives, or clubs), aggravated assault, sexual assault, arson, murder, manslaughter, negligent homicide, indecency with a child, aggravated kidnapping, and felony charges. *See id.* at §§ 37.007(a)(1)(A)–(D), (a)(2)(A)–(E). Mandatory expulsion is also required for causing bodily harm to a district employee or volunteer. *See id.* at §§ 37.007(b)(3), (d). A student must also be expelled for one year if the student brings a firearm to school as defined in Guns Free School Act, 18 U.S.C. § 921 (1994). *Id.* at § 37.007(d).

<sup>58</sup> *See Reyes, supra* note 7, at 553–54 (stating that the legislative intent of DAEPs was to place dangerous students in a school-supervised instructional center rather than release them on the streets, all in an effort to maintain safe schools for students).

<sup>59</sup> While mandatory expulsions are clearly defined in the code to be objective, there are cases where the definition of zero tolerance seems out of control, such as cases in which a butter knife is defined as a weapon under the Texas Education Code. *See* TEX. EDUC. CODE ANN. § 37.007(a)(1). Schools have attempted to crack down on violence and danger since the Columbine school shootings, but as a result have increased the number of offenses for which children can be sent to discipline schools, suspended, expelled, ticketed, or arrested. *See* Rachel Graves, *Backlash Growing Over Zero Tolerance*, HOUSTON CHRON., April 18, 2004, at A1.

<sup>60</sup> *See Reyes, supra* note 7, at 546 (stating that from 1996 to 2000, mandatory removals decreased from 21,700 to 19,100); *see also* Annette Fuentes, *Discipline and Punish: Zero Tolerance Policies Have Created a 'lockdown environment' in Schools*, THE NATION, December 15, 2003 (showing that of the 1.7 million disciplinary actions, 95% were for discretionary reasons in 2000).

<sup>61</sup> *See Reyes, Criminalization, supra* note 55, at 2 (positing whether *Subtitle G, Safe Schools, Chapter 37, Discipline Law and Order* stated purpose of isolating students who commit crimes is really an elaborate system to justify student segregation); *see also* Graves, *supra* note 59, at A1 (quoting Houston Federation of Teachers' spokeswoman as saying zero-tolerance policies allow teachers to teach and make schools safer).

<sup>62</sup> *See Reyes, Criminalization, supra* note 55, at 18. In 1999-2000, African Americans made up 17% of the U.S. K-12 enrollment and 35% of all expulsions in grades 7-12; Hispanics made up 16% of U.S. K-12 student enrollment and 20% of all student expulsions in grades 7-12; and Whites were 61% of the K-12 enrollment and 15% of all the expulsions in grades 7-12. *See* NATIONAL CENTER FOR EDUCATION STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF HISPANICS (2003), <http://nces.ed.gov/pubs2003/2003008.pdf>. When K-6 data are included, the percentages go even higher. *Id.* In Texas, discipline decisions made by teachers and school administrators lead to the removal and educational disruption of a disproportionately high rate of at-risk, low-income, minority, and male students. *See Reyes, supra* note 55, at 49-50. In 2000-2001, Texas expulsion data show that 97% were male. *Id.* Of the JJAEP enrollments, 81% were males. *Id.* African

some DAEP policies and administrative rules have created a gray zone that allows schools to get rid of "hard to educate" students who are also low-test performers under the guise school safety.<sup>63</sup>

ii. Underlying Statistics

DAEP enrollments are disproportionately African American, Hispanic, low-income, at-risk, and male students.<sup>64</sup> DAEP enrollment from 1998 to 2004 shows that student enrollments increased from 70,728 to 103,696.<sup>65</sup> During the same period, statewide Hispanic student enrollment increased from 39 percent to 41 percent.<sup>66</sup> In the DAEP they increased from 41 percent to 47 percent.<sup>67</sup> African Americans remained 14 percent of the state student enrollment and increased from 21 percent to 24 percent in the DAEP.<sup>68</sup> The state enrollment for Whites decreased from 42 percent to 37 percent.<sup>69</sup> DAEP enrollments for Whites decreased from 37 percent to 29 percent.<sup>70</sup> DAEP data show that DAEPs remove low-income and low-achieving students from the

American and Hispanic students have higher placement rates for the more severe violations of out-of-school suspensions, expulsions and JJAEP placements. *See id.* African Americans were 14% of the state school enrollment, 21% of the DAEP placements, 19% of expulsions, 23% of the in-school suspensions, 26% of the JJAEP entrances, and 32% of the out-of-school suspensions. *Id.* Hispanics were 39% of the state school enrollment, 43% of the DAEP placements, 47% of expulsions, 42% of the in-school suspensions, 45% of the JJAEP entrances, and 43% of the out-of-school suspensions. *Id.* This data is not unique to Texas. *Id.* For a review of Michigan zero tolerance policies see Ruth Zweifler and Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191 (2002). In 2000-2001, low income students made up approximately 50% of the state population, but approximately 60% of the DAEP enrollments, approximately 65% of the expulsions, approximately 70% of the out-of-school expulsions, and approximately 61 % of the in-school suspensions. *See Reyes, supra* note 55, at 50. At-risk students made up approximately 60 % of the DAEP placements, approximately 70% of the expulsions, approximately 64% of the out-of-school suspensions, and approximately 61% of the in-school suspensions. NATIONAL CENTER FOR EDUCATION STATISTICS, STATUS AND TRENDS IN THE EDUCATION OF HISPANICS (2003), <http://nces.ed.gov/pubs2003/2003008.pdf> (last visited Oct. 27, 2006).

<sup>63</sup> *See Reyes, Criminalization, supra* note 55, at 48; *see also* STATE LEVEL DATA: THREE YEAR PEIMS 425 RECORD (2005), <http://www.tea.state.tx.us/safe/PEIM425sum05.xls> (last visited Oct. 27, 2006).

<sup>64</sup> This raises concerns about the intent and practice of Texas student discipline policy in particular, and U.S. zero tolerance student discipline policies in general. *See id.*

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

home-school rolls.<sup>71</sup> Low-income students increased from approximately 69 percent to approximately 65 percent.<sup>72</sup> At risk enrollments for the same period increased from approximately 61 percent to approximately 77 percent of all DAEP enrollments.<sup>73</sup> Males made up approximately 74 percent of the enrollment.<sup>74</sup> Proportionately Hispanics, African Americans, low-income, and at-risk students are over represented in the DAEP.<sup>75</sup> White students are unrepresented.<sup>76</sup> Mandatory enrollments increased from 15 percent in 1998-1999 to 22 percent in 2003-2004.<sup>77</sup> Mandatory enrollment shows that an increase in the use of DAEPs for the intended purpose; however, 82 percent of the DAEP enrollments were for non-mandatory reasons.<sup>78</sup> DAEPs have become convenient centers for student removal regardless of discipline, social, academic, or psychological issues.<sup>79</sup>

#### *b. Juvenile Justice Alternative Education Programs*

In 1995, Texas Senate Bill I mandated that all counties with a population of 125,000 or more operate a Juvenile Justice Alternative Education Program (JJAEP) under the jurisdiction of the county juvenile board.<sup>80</sup> JJAEPs were exclusively mandated

<sup>71</sup> See Reyes, *supra* note 7, at 555 (explaining DAEP's test scores are attributed to alternative schools and, thus, home schools benefit by removing low-scoring students from their averages).

<sup>72</sup> See AUGUSTINA REYES, DISCIPLINE, ACHIEVEMENT, AND RACE 12 (2006) [hereinafter DISCIPLINE] (showing 60% of DAEP students were in low-income bracket in 1998-99 school year, whereas in 2003-04 low-income students grew to 66%).

<sup>73</sup> See *id.* (demonstrating in 1998-99 academic year at-risk students constituted 63% of all students, and in 2003-2004 77% of DAEP students were classified at-risk).

<sup>74</sup> See *id.* (asserting in most represented years approximately 74% of all DAEP pupils were male, however, percentages for certain years are not disclosed).

<sup>75</sup> See Reyes, *supra* note 7, at 555 (fortifying assertion that minority students are over-represented in DAEP by stating that while during 1996-1997 academic year only 37% of population was Hispanic 41% of removals were Hispanic, similarly while 14% of population was African American 22% of removals were African American).

<sup>76</sup> See *id.* at 548, n.57 (declaring while Whites constituted 43% of population in 1999-2000 academic year, Whites only comprised 35% of DAEP removals).

<sup>77</sup> See DISCIPLINE, *supra* note 72, at 12 (showing mandatory enrollments increased from 14% to 23%).

<sup>78</sup> See *id.* (showing, depending on scholastic year, between 77% and 86% of pupils were in DAEP for reasons other than mandatory placement).

<sup>79</sup> See STATE LEVEL DATA, THREE YEAR PEIMS 425 RECORD (2005), <http://www.tea.state.tx.us/safe/PEIM425sum05.xls> (last visited Oct. 27, 2006) (demonstrating DAEP pupils are racially diverse, and may be categorized as special education, economically disadvantaged, and/or at-risk students).

<sup>80</sup> See Anastasia Cisneros-Lunsford, *A Second Chance Expelled Students Continue to Learn in Disciplined, Encouraging Program*, SAN ANTONIO EXPRESS NEWS, Sept. 30, 1997,



in urban areas for youth who are on probation or deferred prosecution.<sup>81</sup> JJAEPs are operated by the county juvenile board and are reserved for the most dangerous students.<sup>82</sup> While a judge may place a student in the JJAEP, the largest number of JJAEP referrals comes from DAEPs and other school district referrals for the discretionary violation of "serious and persistent misbehavior."<sup>83</sup> In 2000-01, there were 6,832 entrances into the JJAEP, of which 52 percent (or 3,537) of the adolescent entrances were for persistent misbehavior in the DAEP.<sup>84</sup> Essentially, fifty-two percent of the JJAEP students committed no crime, but they were put in the same facility as students who committed murder, felony drug offenses, weapons offenses, and other serious crimes.<sup>85</sup>

What the JJAEP does with the 1,593 students who committed serious crimes is the mandated purpose of zero tolerance policy; however in practice, the JJAEP as a facility can only operate financially by contracting with school districts to place persistent misbehavior students, exposing persistent misbehavior students to real criminals and creating new entrances into the school to jail pipeline.<sup>86</sup> Persistent misbehavior students may have committed a school discipline code of conduct infraction over five

at B4 (discussing JJAEP came into existence pursuant to bill passed by Texas Legislature in 1995).

<sup>81</sup> See Reyes, *supra* note 7, at 542 (enumerating reasons for which students might be placed in DAEP, including that they received deferred prosecution for felonious conduct).

<sup>82</sup> See JUVENILE JUSTICE ALTERNATIVE EDUC. PROGRAM (2005), <http://www.lubbockisd.org/JJAEP/pages/homepage.htm> (last visited Oct. 27, 2006) (stating some JJAEP students have committed felonies); see also JUVENILE JUSTICE ALTERNATIVE EDUC. PROGRAM (2005), <http://www.lubbockisd.org/JJAEP/pages/school.htm> (last visited Oct. 27, 2006) (explaining JJAEP staff includes drill instructors and juvenile probation officers).

<sup>83</sup> See Reyes, *supra* note 7, at 541-42 (defining "serious and persistent" as including such criminal conduct as assaults, terrorist threats, possessing, providing, or using aerosol chemicals, alcohol, drugs, or glue, public lewdness, indecent exposure, felonies, and reasonable belief that student has committed murder, manslaughter, or criminally negligent homicide); see also JUVENILE JUSTICE ALTERNATIVE EDUC. PROGRAM (2005), <http://www.lubbockisd.org/JJAEP/pages/homepage.htm> (last visited Oct. 27, 2006) (stating some students are placed in JJAEP pursuant to court orders).

<sup>84</sup> See DISCIPLINE, *supra* note 72, at 14 (providing in academic year beginning 2001 52% of JJAEP pupils were transferred to JJAEP due to persistent misbehavior); see also Augustina H. Reyes, Criminalization of Student Discipline, Address at School to Prison Pipeline Conference at Harvard University, at 24 (May 17, 2003) [hereinafter "School to Prison Pipeline"] (stating there were 6,832 students in JJAEP).

<sup>85</sup> See School to Prison Pipeline, *supra* note 84, at 25 (discussing non-criminal JJAEP pupils are mixed with murderers).

<sup>86</sup> See JUVENILE JUSTICE ALTERNATIVE EDUC. PROGRAMS, PERFORMANCE ASSESSMENT REPORT 13 (2002) (displaying how many students have committed each offense).

times.<sup>87</sup> The student is removed from the home campus and placed in a DAEP.<sup>88</sup> If the persistent misbehavior continues, the student is placed into a JJAEP.<sup>89</sup> While the student behavior may have a connection to student academic understanding, literacy, or serious psychological problems, no student evaluations are conducted and no academic records are reviewed unless the parent aggressively requests such a review.<sup>90</sup>

## II. THE CRIMINALIZATION OF ADOLESCENT BEHAVIOR

As in many other states, Chapter 37 of the Texas Safe Schools law created a major shift in the state's student discipline policy.<sup>91</sup> Since school attendance is a mandatory requirement, schools have always been agents of the socialization process for youth.<sup>92</sup> Schools have functioned to impart knowledge and skills to children but also to transmit the values and behavior patterns of the culture.<sup>93</sup> Student discipline was treated as policy for student behavioral management, with responsibility resting with the local district and based on theory of and research in student

<sup>87</sup> See School to Prison Pipeline, *supra* note 84, at 24–25 (defining “serious and persistent misbehavior” as violating rules which are not grave enough to warrant expulsion upon first transgression, however, when violated two or more times may be serious enough).

<sup>88</sup> See Reyes, *Criminalization*, *supra* note 55, at 12 (explaining that alternative education placements include the DAEP's, which are schools usually off of the home campus intended for the purpose of removing dangerous students from their classroom without interrupting the student's education).

<sup>89</sup> See *id.* at 13 (noting that the largest number of JJAEP referrals come from DAEP's and other school district referrals for serious and persistent misbehavior).

<sup>90</sup> See *id.* at 24.

<sup>91</sup> See Marcia Johnson, *Texas Revised Juvenile Justice and Education Codes: Not All Change is Good*, 19 J. JUV. L. 1, 16 (1998) (discussing the differences in the revised Texas Education Code, including the increased emphases on parental participation and alternative education programs, as well as stiffer penalties for violating provisions of the code).

<sup>92</sup> See DAVID B. TYACK, *THE ONE BEST SYSTEM*, 16 (1974) (explaining the history of rural education and noting that school provided opportunity for social contact and became an extended family); see also Sharon L. Nichols and Thomas L. Good, *Inadequate Interest and Resources for Youth's Socialization*, available at [www.tercord.org](http://www.tercord.org) (last visited Oct. 27, 2006) (discussing the need for educators to address problems of socialization among American teenagers).

<sup>93</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (stating that education is the principal instrument in awakening the child to cultural values as well as helping the child adjust normally to his environment); see also Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 108 (1996) (explaining the difficulties modern schools face in addressing substantive value issues due to the diversity in ideas and student populations in contrast to nineteenth century schools which reflected more of a value consensus).

behavior.<sup>94</sup> Texas districts relied on a five-step student behavioral management plan that included teacher correction of behavior in the classroom, parent conferencing, counseling referrals, with suspension and expulsion reserved for the most severe disciplinary infractions.<sup>95</sup> Developmentally, adolescence is a transitional period between childhood and adult life. It is like a bridge between childhood and adulthood over which individuals must pass before they take their places as mature, responsible adults and is a period of biological, cognitive, psychosexual, and social changes.<sup>96</sup> It is a socialization period in which a child's behavior is gradually shaped by adult guidance and adult socialization. It is the period of development for emotions and self, including aspects of self-concept, self esteem, gender, and identity. It is a period that produces "annoying behavior" by adolescents: "The society in which adolescents grow up has an important influence on their development, relationships, adjustments, and problems. The expectations of the society mold their personalities, influence their roles, and guide their futures."<sup>97</sup> School discipline policies constitute a set of behavioral expectations that will mold the future of Texas youth.

The new Chapter 37, Discipline Law and Order policy signaled a shift to a public school discipline policy based on a criminalization model.<sup>98</sup> The term "Law and Order" has a dramatic racial impact, suggesting widespread purposeful and institutional racism.<sup>99</sup> We as a society have extended a criminal incarceration approach to K-12 education. This policy

<sup>94</sup> See ANITA WOOLFOLK HOY & WAYNE KOLTER HOY, *INSTRUCTIONAL LEADERSHIP: A LEARNING-CENTERED GUIDE*, 206-10 (2003) (discussing classroom management as an instructional technique for productive classrooms and managing student discipline and behavior); see also H. JEROME FREIBERG & AMY DRISCOLL, *UNIVERSAL TEACHING STRATEGIES* 144-47 (2000) (discussing classroom management strategies that enhance self-discipline).

<sup>95</sup> See Ellen Williams, *Annual Survey of Texas Law: Education*, 49 S.M.U. L. REV. 901, 933-34 (1996) (stating that prior law had "suffocating amounts of due process and second guessing" and that the teacher's decision to remove a discipline problem could be overridden by multiple authorities).

<sup>96</sup> See F. PHILIP RICE, *THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE*, 13 (8th ed. 1996) (providing a background for the study of adolescents); see also ADRIA STEINBERG, *ADOLESCENTS AND SCHOOLS, IMPROVING THE FIT* (1993) (discussing adolescent physical and psychological developmental transitions).

<sup>97</sup> See RICE, *supra* note 96.

<sup>98</sup> See Johnson, *supra* note 91, at 17 (noting one of the effects of the revised codes is that more children will be subject to the juvenile justice system).

<sup>99</sup> See generally IAN HANEY LOPEZ, *RACISM ON TRIAL; THE CHICANO FIGHT FOR JUSTICE* (2003) (discussing the widespread racism that exists in law enforcement).

criminalizes common school disruptions as Class B and Class C misdemeanors or other disruptions as identified by the local district code of student conduct, and require that a student be defended in front of a municipal or a county court.<sup>100</sup> More obviously, Texas school discipline policy is framed in language that has criminalized what was “once deemed usual, if annoying, behavior by adolescents.”<sup>101</sup> When 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.

*a. Using the Language of Criminality to Frame Student Discipline Policy*

The Discipline Law and Order policy within Chapter 37 was developed for the purpose of clearly defining student behavioral expectations of Texas youth.<sup>102</sup> The policy was developed to remove serious juvenile offenders from classrooms in Texas.<sup>103</sup> Serious offenders were defined by the mandatory removal policy as students who commit serious crimes; however, common classroom disruptions and local district student code of conduct infractions were framed in the same language of mandatory criminal behavior.<sup>104</sup> Chapter 37 is intricately interlocked with the state Penal Code, the Family Code, the Government Code, the Human Resource Code for the Texas Juvenile Commission, the Alcoholic Beverage Code, the Criminal Procedures Code, and the Health and Safety Code.<sup>105</sup> Other interlocking clauses are

<sup>100</sup> See Johnson, *supra* note 91, at 17 (noting the expulsion from an alternative education program may require the child to be referred to juvenile court).

<sup>101</sup> See Dirk Johnson, *Schools' New Watchword: Zero Tolerance*, N.Y. TIMES, Dec. 1, 1999, at A1.

<sup>102</sup> See Reyes, *Criminalization*, *supra* note 55, at 11 (explaining that students are removed based on elaborate state and local discipline policies, rules, regulations and procedures and thereby implying expectations are clearly defined).

<sup>103</sup> See *id.* (explaining that Subtitle G, Safe Schools, Chapter 37 Law and Order attempts to provide alternative setting for disruptive students).

<sup>104</sup> See TEX. EDUC. CODE ANN. § 37.007 (Vernon 2005) (listing first the behavior that requires mandatory expulsion and then the behavior for which a student may be expelled).

<sup>105</sup> See *id.* (referencing the Texas Penal Code, Health and Safety Code, Alcoholic Beverage Code, and Code of Criminal Procedure).

embedded in federal policy, including 18 U.S.C. § 921 (the 1994 Guns Free Schools Act).<sup>106</sup>

TABLE I: SCHOOL REMOVALS<sup>107</sup>

Kind of Alternative Placement	Grade Level	Mandatory Removal to DAEP	Discretionary Removal to DAEP
In-school suspension: teachers send work to an isolation unit located on the campus for a short-term placement. This is not a serious offense but it requires isolation. The student offenses are outlined in the student handbook.	In-school suspension units are used in the elementary, middle, and high school.	On or 300 feet from campus, or while attending a school-sponsored or school-related activity on or off campus: <ul style="list-style-type: none"> <li>• a felony;</li> <li>• an assault or a terrorist threat (Penal Code 22.01(a){1})</li> <li>• a drug violation (felony drugs);</li> <li>• an alcohol violation;</li> <li>• glue or aerosol chemicals violation;</li> <li>• lewdness or indecent exposure, or</li> <li>• Retaliation against any school employee.</li> </ul>	Conduct occurring off campus and while the student is not in attendance at a school-sponsored or school-related activity if: Superintendent belief that student has engaged in felony Title 5, Penal Code; Presence threatens safety of students and teachers, and detrimental to educational process.
Off-campus alternative education program(AEP)for	District wide off-campus alternative schools for: 1. Elementary Schools -	Conduct occurring off campus and while the student is not in attendance at a school-sponsored or school-	

<sup>106</sup> 18 U.S.C. § 921(2006) (providing definitions for statute); 18 U.S.C. § 922 (2006) (describing unlawful acts).

<sup>107</sup> Discipline Law and Order, TEX. EDUC. CODE. ANN. Chap. 37 (Vernon 2005).

discipline purposes.	least common;	related activity if:
Placements outlined in Chapter 37, including persistent misbehavior, engages in a felony, or commits a serious offense at a school-sponsored activity on or off campus (TEC, 37.002, 37.006, 37.007, & 37.008).	2. Middle Schools; 3. High Schools; 4.*Re-assignment Elementary School;(5 Da.) 5.Re-assignment Middle School; and 6. Re-assignment High School Off-campus alternative education placements: 1. Boot Camp; 2. District-wide DAEP; 3. Jail 4. Private School; 5. Charter School; and 6. Home School	• Deferred prosecution (Family Code 53.03;
Off campus and out-of-district placements for discretionary placement (serious and persistent mis-conduct) and mandatory placement for committing a felony.	1. Juvenile Justice AEP; 2. Collaborative DAEPs; 3. Psychiatric Hospital	
State Youth Commission	State Youth Commission	

The Texas student behavior policy is very similar to the zero tolerance discipline policy used by other states.<sup>108</sup> In response to a threat on the loss of federal funds, Texas policy followed the format of the 1994 Gun Free Schools Act.<sup>109</sup> Subtitle G of Chapter 37, Discipline Law and Order, was created to outline student discipline policy in Texas.<sup>110</sup> The Texas K-12 student discipline policy was framed using a law enforcement model of

<sup>108</sup> See TEX. CODE CRIM. PROC. ANN. § 15.27 (Vernon 2005) (mandating notification to schools); Zweifler & De Beers, *supra* note 23, at 194-95 (discussing Michigan zero tolerance policy).

<sup>109</sup> See TEX. CODE CRIM. PROC. ANN. § 15.27 (Vernon 2005) (describing Texas policy); see also Harvard University Advancement & Civil Rights Project, *supra* note 20 (indicating that removing students from classrooms will cause many to drop out of school).

<sup>110</sup> See TEX. EDUC. CODE ANN. § 37.001(Vernon 2005) (outlining student course of conduct).

crime prevention in anticipation of, rather than in response to, criminal conduct.<sup>111</sup> The media reported juvenile and school crime with the face of students of color, reporting the growing numbers of low-income students who are primarily minority.<sup>112</sup> In response to the fear of growing new minority student populations, state student discipline policy changed from school discipline to “Law and Order,” language that signals that the new public school student population is suspect to criminal activity and public schools must be prepared to fight the anticipated crime wave that will hit the schools as the number of students of color grows in the public school system.<sup>113</sup> Ten years after the implementation of zero tolerance policies, public crime waves have not materialized.<sup>114</sup> On the contrary, only five percent of the 1.7 million discipline actions in 2000-2001 were for serious criminal activity mandatory removals.<sup>115</sup>

In anticipation of a crime wave that would spill into the streets of society, school discipline policy was tightly coordinated with the offices of state juvenile justice officials, including juvenile judges, and other state policy makers.<sup>116</sup> The Law and Order student discipline policy broke with the historical traditions in the way public schools dealt with student discipline.<sup>117</sup> The intent of this new relationship between the criminal justice system and schools was to provide information on student criminal activity.<sup>118</sup> The “zero tolerance” policies give absolute

<sup>111</sup> See RICHARD VALENCIA & DANIEL SOLORZANO, CONTEMPORARY DEFICIT THINKING IN THE EVOLUTION OF DEFICIT THINKING IN EDUCATIONAL THOUGHT AND PRACTICE, 154, 199, 250 (Richard Valencia ed., 1997). In a speech made at the University of Texas by President Clinton, the President stated, “Violence for White people too often comes with a Black face.” *Id.* It was noted that 70 percent of the violent crimes against Whites was committed by other Whites. *Id.* Valencia asserts that crime has been inflamed by media sensationalism that associates crime and race, which mobilizes the public to seek vengeance, not justice. *Id.*

<sup>112</sup> See generally, Butterfield, *supra* note 4 (stating that wave of crime expected due to juvenile violence).

<sup>113</sup> See generally Blumenson & Nilsen, *supra* note 4 (exploring the consequences of zero tolerance policies).

<sup>114</sup> See generally OPPORTUNITIES SUSPENDED, *supra* note 3 (discussing that there is little evidence that Zero Tolerance policies minimize violence in schools).

<sup>115</sup> See SUMMARY OF CHAPTER 37 DISCIPLINE PROGRAM STATISTICS (1998-2001) (detailing numbers of student infractions).

<sup>116</sup> See TEX. CODE CRIM. PROC. ANN. § 15.27 (Vernon 2005) (outlining notification to schools in situations such as arrests of students).

<sup>117</sup> See Zweifler & De Beers, *supra* note 23, at 195-97 (discussing history of zero tolerance).

<sup>118</sup> See TEX. CODE CRIM. PROC. ANN. § 15.27 (Vernon 2005) (outlining notification procedures).

power to juvenile authorities in collaboration with school officials.<sup>119</sup> The new collaboration requires that if a student commits an illegal offense off school grounds, juvenile authorities are to report back to the school districts, which must then remove the student from school; such action led to the removal of Timothy Navares.<sup>120</sup>

School district collaboration with local law enforcement goes beyond reporting student crime.<sup>121</sup> In Toledo, Ohio, a student was handcuffed, put in a police car, and delivered to the county detention center for a dress code violation.<sup>122</sup> In Texas school districts, the police can be called to arrest a student “when a student uses food inappropriately, moons, possesses or uses a skateboard, scooter or in-line skates, pulls a chair out from under someone, or engages in inappropriate public display of affection.”<sup>123</sup> The police are the first line of forming adolescent behavior.<sup>124</sup> When students are arrested, they enter the school-to-jail pipeline. Many find themselves in juvenile, county, or municipal court where they must defend their innocence and face a criminal record. Schools influence an adolescent’s socialization process. By sending adolescents to county detention centers and juvenile, county, or municipal courts for behavior issues like dress code violations and food fights, schools are criminalizing irksome juvenile behavior and prepping students for the school to prison pipeline.

Chapter 37 elaborately intertwines criminal law with student discipline policy.<sup>125</sup> Overzealous interpretations of the policy may lead to the arrest and removal of students for misclassification of

<sup>119</sup> See generally, Blumenson & Nilsen, *supra* note 4 (describing elements of zero tolerance policies).

<sup>120</sup> See TEX. CODE CRIM. PROC. ANN. § 15.27 (Vernon 2005) (describing proper procedure).

<sup>121</sup> See Sara Rimer, *Unruly Students Facing Arrest, Not Detention*, N.Y. TIMES, Jan. 4, 2004, at A1 (giving examples of student arrests).

<sup>122</sup> See *id.* at A1 (describing incident where student refused to conform to dress code).

<sup>123</sup> See Donham, *supra* note 18.

<sup>124</sup> See Rimer, *supra* note 121 (showing that city police officer handcuffed student, put her in police car and drove her to detention center).

<sup>125</sup> See Patty Blackburn Tillman, Note, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 217–18 (1996) (noting Chapter 37 was created by Texas legislature to strike a balance between educating all youth and meting out stiff penalties for violent and disruptive students).



drugs and weapons.<sup>126</sup> While Class B and Class C misdemeanors seemingly represent objective policy, in practice the majority are “classroom disruptions,” “fighting,” and uniform violations.<sup>127</sup> When left to the discretion of the school, fighting offenses can become subjective offenses.<sup>128</sup> Subjective or discretionary decisions reflect a teacher or administrator’s personal judgment, which may be colored by the pressures to meet state accountability ratings, shrinking budgets that reduce support staff for teachers, cultural conflict, or the lack of teacher development and preparation for classroom management.<sup>129</sup> When a shove or physical contact among minority youth is subjected to discretion, the interpretation of what may be horsing around may be reported as a Class C misdemeanor fighting.<sup>130</sup> Discretionary or subjective discipline decisions can easily work against minority groups.<sup>131</sup> As the data from this study shows, minority students tend to be disciplined at a higher rate and for more severe violations than non-minority students, particularly when reasons for removal are subject to teacher or administrator interpretations.<sup>132</sup>

<sup>126</sup> See Graves, *supra* note 33, at 1 (stating that suspensions for taking butter knives and nail files to school have become commonplace).

<sup>127</sup> Seizing control of a building or a portion of that building to interfere with authorized class activities is also a disruptive activity. See TEX. EDUC. CODE ANN. § 37.123(a)(b) (Vernon 2005). Class C Misdemeanors are classroom disruption activities that intentionally disrupt classes or other school activities, including loud noises, enticing or attempting to entice a student to skip class or school, entering a classroom without the permission of a teacher or principal, or acts of misconduct like loud or profane language. See TEX. EDUC. CODE ANN. § 37.124 (Vernon 2005). Disruption of transportation is also a Class C Misdemeanor. See TEX. EDUC. CODE ANN. § 37.126 (Vernon 2005). In practice, Class B and Class C Misdemeanors include student ticketing for coming to school without a uniform or falling asleep in class. *Id.*

<sup>128</sup> See Tillman, *supra* note 125, at 219 (explaining “the duration of the student’s assignment to an alternative education program, like the determination that a student engaged in violent or disruptive conduct, is solely within the school district’s discretion”).

<sup>129</sup> See Reyes, *supra* note 7, at 547 (noting analysis of case study data showed that over 80% of elementary discipline referrals came from inexperienced teachers “who lacked the skills to manage diverse student bodies); Mary M. Osher et al., *Deconstructing the Pipeline: Using Efficacy, Effectiveness, and Cost-Benefit Data to Reduce Minority Youth Incarceration*, in NEW DIRECTIONS FOR YOUTH DEV., at 91–120 (2003) (discussing the affects of racial bias in subjective placements of students of color in South Carolina).

<sup>130</sup> Disruption of conduct of classes or other school activities is a Class C misdemeanor. See TEX. EDUC. CODE ANN. § 37.124 (Vernon 2005). An unpublished report on an urban JJAEP revealed 64% of the students were placed in DAEPs for discretionary reasons, including “horsing around.” See Reyes, *supra* note 7, at 547.

<sup>131</sup> See Graves, *supra* note 33, at 1 (noting statistics show a disproportionate number of poor, disabled, and minority students are being taken out of the classroom in Texas as a whole).

<sup>132</sup> See Reyes, *Criminalization*, *supra* note 55, at 10 (stating that research shows that minority students tend to be disciplined at a higher level than non-minority students).

The language of criminality used to frame the Texas Zero Tolerance policy progressed to criminalizing student school socialization behavior historically framed in student developmental stages.<sup>133</sup> Though teachers and administrators are entrusted with the ability to interpret student behavior, zero tolerance removes school discipline from the hands of school personnel who have historically mediated student disputes.<sup>134</sup> While historian David Tyack contends that early school masters had to be able to fight off the school bully, George Will asserts that civilized life depends on informal rules and measures or the social wink that prevents mundane conflicts from becoming legal extravaganzas or opportunities for moral exhibitions.<sup>135</sup> Teachers should not be expected to fight off the school bully, but neither should student behavior be judged using criminal norms.

*b. Race as a Policy Factor*

*i. The Theory*

For weal or for woe, the destiny of the colored race in this country is wrapped up with our own; they are to remain in our midst, and here spend their years and here bury their fathers and finally repose themselves. We may regret it. It may not be entirely compatible with our taste that they should live in our midst. We cannot help it. Our forefathers introduced them, and their destiny is to continue among us; and the practical question which now presents itself to us is as to the best mode of getting along with them.<sup>136</sup>

Racial beliefs in America are embedded in national identity using complex and disguised methods.<sup>137</sup> According to Ernest

<sup>133</sup> See Raywid, *supra* note 27, at 27 (discussing how developmental alternative schools work on stimulating social and emotional growth).

<sup>134</sup> See Tillman, *supra* note 125, at 218 (explaining that school districts are compelled under Texas law to place students in alternative education programs when they commit violent or disruptive offenses).

<sup>135</sup> See George F. Will, *When Laws Replace Common Sense*, WASH. POST, Dec. 24, 2000, at B7 (positing that privacy and civilized life depend on unwritten social codes); TYACK, *supra* note 92, at 19 (noting a story about a rural schoolmaster fighting an unruly student).

<sup>136</sup> See II ENCYCLOPEDIA OF AMERICAN CONSTITUTION 761 (Bell, D., 1992).

<sup>137</sup> See Ernest R. House, *Race and Policy*, 7 EDUC. POL'Y ANALYSIS ARCHIVES (1999), available at <http://epaa.asu.edu/epaa/v7n16.html> (last visited Oct. 28, 2006) (stating

House, Richard Delgado, and Derrick Bell, racial beliefs attribute certain character traits to African American and other minorities that lead to education policies, which are justified as being fair and democratic.<sup>138</sup> Haney Lopez depicts racism as common sense asserting that:

Racial beliefs and practices harm segments of our population. Yet few of us see society's current state as unnatural or unjust. Most deny that race or other structural forces limit the life changes of individuals and groups. We do not believe that our attitudes or actions are based on racial considerations. Instead, race has become common sense: accepted but barely noticed; present, though not important; an established fact that we lack the responsibility, let alone the power, to change. The color line has come to seem a fiction, so little do we apprehend its daily mayhem . . . But race and racism continue to distort almost every social encounter and wrap almost every facet of our social structure . . . Common sense racism expresses the idea that racial discrimination is standard and accepted, even among those who consciously intend not to discriminate . . . racism is routine.<sup>139</sup>

Racial beliefs are more often infused in the curriculum, organization, finance, and administration of schools through deeply rooted culture and traditions. However, in zero tolerance regimes they are found in formal, seemingly objective policy.<sup>140</sup>

The theoretical models of institutional racism may be grounded in purposeful action or the denial of the relevance of individual behavior.<sup>141</sup> For example, the widespread use of race-neutral practices that impose harmful effects on minority communities irrespective of the attitudes of individual decision

"racism is deeply embedded within the national identity itself, built into the American character by history and experience").

<sup>138</sup> See *id.* (discussing how presumed character traits of African Americans which mark them as inferior lead to policies such as exclusion, differentiated curricula and treatment, etc.); see also RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION 13-20 (1994) (discussing negative ethnic imagery and its effects); Derrick Bell, Jr., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

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

<sup>140</sup> The Texas legislature's reason for implementing zero tolerance policy referred only to stemming growing violence in schools. See Tillman, *supra* note 125, at 217-18.

<sup>141</sup> See Lopez, *supra* note 99, at 7 ("We treat people according to their place in the racial hierarchies created by society and, by doing so, perpetuate those hierarchies.").

makers reflects a model of institutional racism grounded on the denial of the relevance of individual behavior.<sup>142</sup> Lopez, in his analysis of how the Los Angeles law enforcement community used the language of criminality to depict Latinos, discusses how statistical crime-prevention approaches figured prominently in the chief's philosophy regarding deployment in minority communities.<sup>143</sup> If one uses objective, rational data, race-based differentiated policies are viewed as being fair and democratic.<sup>144</sup> The following is a quote by the LAPD policy chief rationalizing the use of statistical policing and crime-prevention models:

Every department worth its salt deploys field forces on the basis of crime experience. Deployment is often heaviest in so-called minority sections of the city. The reason is statistical – it is a fact that certain racial groups, at the present time, commit a disproportionate share of the total crime. Let me make one point clear in that regard – a competent police administrator is fully aware of the multiple conditions which create this problem. There is no inherent physical or mental weakness in any racial stock which tends it toward crime. But, and this is a ‘but’ which must be borne constantly in mind—police field deployment is not a social agency activity. In deploying to suppress crime, we are not interested in why a certain group tends toward crime, we are interested in maintaining order.”<sup>145</sup>

The use of objective crime statistics confirmed a criminal propensity among minorities and attributed criminality as a group characteristic in the same way that today's policies deny many children of color access to educational programs for reasons that are neutral on their face; however, like zero tolerance policies, they present devastating consequences to students and their families.<sup>146</sup>

<sup>142</sup> See Lopez, *supra* note 99, at 7 (explaining that racism plays a large part in constructing the society we currently live in).

<sup>143</sup> See Lopez, *supra* note 99, at 139 (discussing how a 1972 study compared arrest statistics and major crime rates for the regions surrounding Los Angeles).

<sup>144</sup> See Lopez, *supra* note 99, at 136 (“Crime statistics tied to race seemingly confirmed a criminal propensity among minorities generally”).

<sup>145</sup> See, Lopez, *supra* note 99, at 135.

<sup>146</sup> See Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 1 (2002).

## ii. The Facts

Is race a factor that makes minority students suspect in the Texas zero tolerance policy? There are three factors that indicate that in race does appear to be a factor: the funding of DAEPs, the location of JJAEPs, and the statistical history of student discipline referrals in Texas.<sup>147</sup> DAEP funding policy reaffirms at-risk students as a target.<sup>148</sup> Compensatory and Accelerated Education defines a student at-risk of dropping out of school and eligible for compensatory education funding as “a student who has been placed in a program in accordance with §37.006” of the Discipline code.<sup>149</sup> State policy permits school districts to use eighteen percent or more of all state compensatory education funds for DAEPs.<sup>150</sup> Districts may waive the eighteen percent cap on DAEPs and increase DAEP State Compensatory Education (SCE) funds by using an annual petition from the Board and District Site-Based Management Committee.<sup>151</sup> The purpose of SCE funding is to reduce student disparities in achievement and school completion.<sup>152</sup> SCE programs must be supplemental to regular education and targeted for students who are low performing and students who are at risk of dropping out of schools.<sup>153</sup> There are no data that show that DAEPs reduce disparities in achievement or disparities in school completion.<sup>154</sup> On the contrary, there are data that show that students who are

<sup>147</sup> See Reyes, *Criminalization*, *supra* note 55, at 1 (“The proliferation of the use of disciplinary alternative education programs (DAEP) in Texas and the disproportionate enrollment of [minorities] . . . raised concerns about the intent and practice of DAEP policy.”).

<sup>148</sup> See *id.*

<sup>149</sup> See Subchapter C, Compensatory Education Programs, TEX. EDUC. CODE ANN. § 29.081(d)(6) (Vernon 2003).

<sup>150</sup> See TEX. EDUC. CODE ANN. § 42.152 (Vernon 2003).

<sup>151</sup> See *id.*

<sup>152</sup> See GARY ORFIELD, *DROPOUTS IN AMERICA: CONFRONTING THE GRADUATION RATE CRISIS 1* (Harvard Education Press, Mass. 2004) (citing that a U.S. Census Bureau report which detailed the discrepancy between the earning salaries of Latino’s who graduated high school from those that did not).

<sup>153</sup> See *id.* at 2 (noting “[m]ore and more of our future workers are from racial and ethnic groups whose young people are having severe difficulty finishing high school.”).

<sup>154</sup> See *id.* at 4 (explaining that the rate of high school drop outs is misleading because most states merely report annual enrollments rather than following individual students).

removed from the regular classroom and suspended are more likely to dropout out school.<sup>155</sup>

The purpose of compensatory education is to provide educational opportunities to decrease the learning gap for economically disadvantaged students.<sup>156</sup> The Texas DAEP system, intended to narrow the achievement gap for economically disadvantaged students, is funded using compensatory education funds earmarked to help students learn how to read, do math, do science, and other academic activities.<sup>157</sup> In Texas as in most states, compensatory education students are more likely to be minority, poor, and from urban areas.<sup>158</sup> Compensatory education is based on a theory of concentrations of poverty.<sup>159</sup> Nationally, approximately 38 percent of the K-12 student enrollment is categorized as low-income based on participation in the free and reduced priced lunch; however the national official poverty rate for children under the age of 18 is 16.7 percent.<sup>160</sup> In Texas, 51.9 percent of the K-12 student enrollment or 1.8 million students are categorized as low-income.<sup>161</sup> As on the national level, minority students are more likely to be low income.<sup>162</sup> In 2003, National Center for Educational Statistics (NCES) reported that national poverty figures for fourth grade consisted

<sup>155</sup> See *id.* at 9 (explaining that “[t]he crisis deserves a comprehensive strategy . . . that includes . . . high school reform . . . support services and collaboration with criminal justice systems, families, health care, and other systems addressing the whole range of problems that are concentrated in these schools.”).

<sup>156</sup> See *id.* (stating that “[m]any of these students need sustained contact with adult mentors who can give them support and help them connect to mainstream society.”).

<sup>157</sup> See Reyes, *Criminalization*, *supra* note 55, at 1 (citing how Texas state policy has undertaken an initiative to advance statewide education among minorities).

<sup>158</sup> See *id.* (explaining how Texas study showed that state policy targeted urban, low-income, minority students in hopes of furthering their education).

<sup>159</sup> See WILBERT VAN DER KLAUW, *BREAKING THE LINK BETWEEN POVERTY AND LOW STUDENT ACHIEVEMENT: AN EVALUATION OF TITLE I 3-4* (2005), available at <http://www.unc.edu/~vanderkl/brlink.pdf> (last visited Oct. 28, 2006) (noting that compensatory education evolved during the ‘war on poverty’).

<sup>160</sup> See National Center for Education Statistics, *Tables and Figures*, available at <http://nces.ed.gov/quicktables/Detail.asp?Key=1104> (last visited Feb. 25, 2006) (charting percentage of students eligible for school lunch program); U.S. Census Bureau, *Poverty: 2003 Highlights* (Aug. 26, 2004), available at <http://www.census.gov/hhes/poverty/poverty03/pov03hi.html> (last visited Oct. 28, 2006) (highlighting poverty rates).

<sup>161</sup> See Texas Education Agency, *Academic Excellence Indicator System § II*, at 1 (2002-03), available at <http://www.tea.state.tx.us/perfreport/aeis/2003/state.html> (last visited Oct. 26, 2006) (charting student information).

<sup>162</sup> See National Center for Education Statistics, *Concentration of Enrollment by Race/Ethnicity and Poverty § I*, at 40 (2004), available at [http://nces.ed.gov/programs/coe/2004/pdf/05\\_2004.pdf](http://nces.ed.gov/programs/coe/2004/pdf/05_2004.pdf) (last visited Oct. 26, 2006) (noting white students are more likely to be in schools with smaller levels of low income students).

of 23 percent of all non-minority students, 70% of all African American students, and 71 percent of all Hispanic students were eligible for free and reduced priced lunch.<sup>163</sup> African American and Hispanic students are more likely to be low income.<sup>164</sup> By designating state compensatory education funding for DAEPs, there was a presumption that the students would be low-income African American or Hispanic.<sup>165</sup> By using state compensatory education funds a decision was made to use funding for disciplinary programs to isolate students rather than improving student achievement.<sup>166</sup>

When state compensatory education money is used to fund DAEPs, academic programs intended to improve achievement for low-income students are short-changed.<sup>167</sup> Programs intended to reduce student dropouts and to reduce the achievement gap for poor and at-risk students are not funded.<sup>168</sup> State compensatory education funds are intended for accelerated education programs to increase student performance on state tests, summer school, tutorial services, basic skills development for high school, after-school, summer intensive math programs, and summer intensive science programs.<sup>169</sup> DAEPs take money away from academic programs for low-income and at-risk students who need additional support to compensate for benefits denied by limited family resources.<sup>170</sup>

The second factor that indicated that race played a role in the Texas Zero Tolerance policy was the mandate that mid-sized and

<sup>163</sup> See *id.* (reflecting larger percent of minority students from low-income family).

<sup>164</sup> See *id.* (noting those minorities were more likely in high poverty schools).

<sup>165</sup> See generally Intercultural Development Research Association, *Disciplinary Alternative Education Programs in Texas: What is Known, What is Needed*, available at <http://www.idra.org/Research/alted.htm> (last visited Oct. 26, 2006) (noting low-income students were more likely sent to DAEP).

<sup>166</sup> See *id.* (proposing districts should have the option of creating DAEPs that do not isolate students).

<sup>167</sup> See *id.* (examining how DAEPs become warehouses for substandard educational opportunities).

<sup>168</sup> See Education Resource Service, *What Can Schools Do to Reduce the Achievement Gap?*, <http://www.ers.org/otsp/otsp3.htm> (last visited Oct. 26, 2006) (recommending how to narrow achievement gap).

<sup>169</sup> See Texas Education Agency, History of Texas State Compensatory Education (1975-1994) (2004), available at <http://www.tea.state.tx.us/school.finance/audit/resguide12/comped/comped-01.html> (last visited Oct. 26, 2006) (noting what each targeted program must involve).

<sup>170</sup> See generally INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, THE NATIONAL PICTURE 19 (1999), available at <http://www.idra.org/Research/alted.pdf> (last visited Oct. 26, 2006) (noting funding can be used in other ways).

urban counties have JJAEPs.<sup>171</sup> In 1995, Senate Bill I mandated that all counties with a population of 125,000 or more operate a Juvenile Justice Alternative Education Programs under the jurisdiction of the county juvenile board.<sup>172</sup> While the TEC Chapter 37 discipline mandate was intended for all Texas public school students, it targets urban areas with large minority and low-income populations.<sup>173</sup> There are 264 counties in Texas and only 26 counties are required to have JJAEPs.<sup>174</sup> The 26 most populated counties in Texas have largely minority populations, like Harris County (Houston) with a population made up of 18 percent African American, 33 percent Hispanic, and 41 percent non-minority students.<sup>175</sup> Its largest school district, the Houston Independent School District, is 90 percent minority and 90 percent low income.<sup>176</sup> According to the National Center for Educational Statistics (2001–2002), 63 percent of large and mid-sized districts nationally are predominately minority.<sup>177</sup> According to the U. S. Census, of all the people living in poverty in the U. S., ten percent were non-minority, 24 percent were African American, ten percent were Asian, and 23 percent were Hispanic.<sup>178</sup> There is a greater probability that African

<sup>171</sup> See generally House Research Organization, *Making the Grade: Alternative Education and Safe Schools*, available at <http://www.capitol.state.tx.us/hrofr/focus/alted.pdf> (last visited Oct. 28, 2006) [hereinafter *Making the Grade*] (explaining that counties have some flexibility in arranging JJAEPs).

<sup>172</sup> See TEX. EDUC. CODE ANN. § 37.011 (Vernon 1996) (noting a county with population less than 125,000 may set up JJAEP).

<sup>173</sup> See TEX. EDUC. CODE ANN. § 37.001 (Vernon 1996) (mandating that all schools create student discipline codes).

<sup>174</sup> See *Making the Grade*, *supra* note 171 (noting only twenty-two counties are required to have JJAEPs).

<sup>175</sup> See U.S. Census Bureau, *Maps in American Factfinder*, available at [http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?\\_pageId=gn7\\_maps](http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=gn7_maps) (last visited Oct. 28, 2006) (charting demographic highlights of Harris County).

<sup>176</sup> See Houston Independent School District AEIS Report 2003-2004, available at <http://www.tea.state.tx.us/cgi/sas/broker> (last visited Oct. 28, 2006) (demonstrating that African Americans make up 29.8% of the district, while 58.1% of the population is Hispanic).

<sup>177</sup> See National Center for Education Statistics, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States 2000-2001*, available at [http://nces.ed.gov/pubs2002/100\\_largest/table\\_08\\_2.asp](http://nces.ed.gov/pubs2002/100_largest/table_08_2.asp) (last visited Oct. 28, 2006) (highlighting the large number of minority students in the 100 largest school districts in the United States, often comprising nearly 90% of the population).

<sup>178</sup> See U.S. Census Bureau, *Poverty: 2004 Highlights*, available at <http://www.census.gov/hhes/www/poverty/poverty04/pov04hi.html> (last visited Oct. 28, 2006) (discussing how the poverty rates for African Americans and Hispanics remained unchanged in 2004, while the rates rose for non-Hispanic Whites and decreased for Asians).



Americans and Hispanics are going to be low income and living in large urban areas than the probability that non-minority students are going to be low income and living in urban areas.<sup>179</sup> Thus, mandating urban JJAEPs virtually guarantees they will be predominately minority. The 2000–2001 data for JJAEP enrollments show that almost 75 percent are minority students with 80 percent male.<sup>180</sup>

The third factor that makes race a consideration in the Texas Zero Tolerance policy is linked to racial bias. Texas data identified the over-representation of minority students in all student removal and placement categories.<sup>181</sup> “One factor related to the non achievement of black students is the disproportionate use of severe disciplinary practices, which leads to black students’ exclusion from classes, their perceptions of mistreatment, and feelings of alienation and rejection, which result ultimately in more misbehavior and/or leaving school.”<sup>182</sup> According to Jacqueline Irvine, African American students are two to five times as likely to be suspended at a younger age and more likely to receive lengthier repeated suspensions.<sup>183</sup> African Americans make up 17 percent of the U.S. K-12 enrollment but 35 percent of the seventh to twelfth grade suspension/expulsion rate.<sup>184</sup> Hispanics also comprise 17 percent of the K-12 enrollment and 20 percent of the seventh to twelfth grade

<sup>179</sup> See National Center for Education Statistics, *NCES Publication No. 2003-008*, available at <http://nces.ed.gov/pubs2003/hispanics/Section1.asp> (last visited Oct. 28, 2006) (noting how in 2000, Hispanic students lived in large cities or their outskirts 65% of the time, and were more than four times likely live in large cities as compared with white kids).

<sup>180</sup> See Texas Juvenile Probation Commission, *Annual Report (2000-2001)*, available at <http://www.tjpc.state.tx.us/publications/reports/RPTOTH200103.pdf> (last visited Oct. 28, 2006) (noting that the proportion of female offenders has increased in the last decade by more than 5%).

<sup>181</sup> See FLORENCE LINELE CLARK, *ZERO-TOLERANCE DISCIPLINE: THE EFFECT OF TEACHER DISCRETIONARY REMOVAL OF URBAN MINORITY STUDENTS*, available at <http://www.lib.utexas.edu/etd/d/2002/clarkfl026/clarkfl026.pdf> (last visited Oct. 28, 2006) (discussing how “discriminatory treatment of minority students in school discipline is not an isolate phenomena, but rather part of a complex inequity that appears to be associated with both special education overrepresentation and school dropout.”).

<sup>182</sup> See IRVINE, *supra* note 20, at 16.

<sup>183</sup> See *id.* at 16–17 (citing one study that showed blacks comprising 54% of the enrollment in one school district, but 67% of the suspensions).

<sup>184</sup> See *id.* at 17 (discussing another study from Kentucky showing how black students comprise 12% of school enrollment, but account for 31% of school suspensions).

suspension/ expulsion rate.<sup>185</sup> Texas data for disciplinary removals affirms the disproportional removals of African Americans, Hispanics, special education, low-income, and at-risk students.<sup>186</sup> While discriminatory discipline practices cause school failure, including low achievement and school dropouts, they also create a record of disproportional removals that may create proof of disproportionate impact and create an inference of discriminatory intent and challenge to zero tolerance policies using the Office of Civil Rights complaint process.<sup>187</sup> Removing students from the regular instructional class 2.1 to 3.2 times in one school year can cause that student to lose content sequencing, important instructional content, important instructional relationships, and lead to school failure.

According to the U.S. Department of Justice in 1999, nationally, one out of 15 students was suspended.<sup>188</sup> African American and Hispanic students were more likely to be suspended or expelled from school for more severe violations than were non-minority students.<sup>189</sup> Non-minority students make up over 50 percent of the K-12 population and 15 percent of the seventh twelfth grade expulsion/suspension rate. Higher rates of suspension also correlate with higher school dropout and juvenile crime rates.<sup>190</sup>

<sup>185</sup> See *id.* (highlighting how white teachers view black students as “aggressive, un-industrious, hostile, and rebellious,” thus partially accounting for the higher suspension rate).

<sup>186</sup> See DISCIPLINARY ALTERNATIVE EDUCATION PROGRAMS IN TEXAS, <http://www.idra.org/Research/alted.htm> (last visited Oct. 28, 2006) (demonstrating how the vast majority of students pulled out of the classroom were minorities, with Hispanics and African Americans comprising over 60%).

<sup>187</sup> See Zweifler, *supra* note 62; see also Adrian Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Children of Color*, 14 CORNELL J. L. & PUB. POL’Y 327 (discussing the use of the OCR complaint process, state constitutions, and state laws to challenge the impact of zero tolerance policies on students of color).

<sup>188</sup> See Justice Policy Institute Policy Brief, *Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions*, available at <http://www.justicepolicy.org/downloads/sss.pdf> (last visited Oct. 28, 2006) (noting how suspension rates over the last twenty-three years has doubled to more than 6.8% of students, while student victimization has remained relatively steady).

<sup>189</sup> See *id.* (noting how African Americans are approximately 2.6 times more likely to be suspended from school as compared with whites).

<sup>190</sup> See IRVINE, *supra* note 20. A study examining ten elementary schools, five junior high schools, and four high schools in the Southeastern United States in 1983-1984 showed the following results: “Although black students composed 54% of the enrollment, they represented 67% of the students suspended at all levels of schooling. *Id.* The educational implications are dramatic. *Id.* Black males in one district during one academic year missed 159 days of school, in comparison with sixty-two days for white males, thirty-two days for black females, and four days for white females.” *Id.*

The 2000–2001 Texas student discipline data reports an over representation of Hispanics and African Americans in all student categories with a greater over-representation in the more severe discipline categories like expulsion, out-of-school suspension, and JJAEP entrances.<sup>191</sup> While African Americans made up 14 percent of the state enrollment, they made up 21 percent of the DAEP enrollments, 30 percent of the first grade DAEP placements, 19 percent of the expulsions, 32 percent of the out-of-school suspensions, 23 percent of the in-school suspensions, and 26 percent of the JJAEP entrances.<sup>192</sup> Hispanics make up 39 percent of the state student enrollment, 43 percent of the DAEP placements, 47 percent of the expulsions, 43 percent of the out-of-school suspensions, 42 percent of the in-school suspensions, and 45 percent of the JJAEP entrances.<sup>193</sup> Non-minorities were under represented in every category, particularly the more severe discipline categories like expulsion, out-of-school suspension and JJAEP entrances. Non-minorities make up 44 percent of the state enrollment, 34 percent of the DAEP placements, 33 percent of the expulsions, 24 percent of out-of-school suspensions, 34 percent of in-school suspensions, and 28 percent of JJAEP.<sup>194</sup>

Low income students made up approximately 50 percent of the state population, but made up 50 percent to 60 percent of the DAEP enrollments, 49 percent to 65 percent of the expulsions, 60 percent to 70 percent of the out-of-school expulsions, and 54 percent to 61 percent of the in-school suspensions.<sup>195</sup> At-risk students made up 50 percent to 60 percent of the DAEP placements, 54 percent to 70 percent of the expulsions, 55 percent to 64 percent of the out-of-school suspensions, and 54 percent to 61 percent of the in-school suspensions.<sup>196</sup>

<sup>191</sup> See *Texas Juvenile Probation Commission Annual Report (2000-2001)*, available at <http://www.tjpc.state.tx.us/publications/reports/RPTOTH200103.pdf> (last visited Oct. 28, 2006) (noting that Hispanic and African American juveniles made up the vast majority of referrals, combining for more than 62% of the Texas referrals).

<sup>192</sup> See Texas Education Agency, *PEIMS Safe Schools Data (2002)*, available at <http://www.tea.state.tx.us/safe/chapter37.html> (last visited Oct. 28, 2006).

<sup>193</sup> See *id.*

<sup>194</sup> See Texas Education Agency, *State Level Three Year PEIMS 425 Record Data (2002-2005)*, available at <http://www.tea.state.tx.us/safe/chapter37.html> (last visited Oct. 28, 2006) [hereinafter *PEIMS Data*].

<sup>195</sup> See *PEIMS Data*, *supra* note 194.

<sup>196</sup> See *PEIMS Data*, *supra* note 194.

Hispanics and African Americans were not only over-represented in every discipline category but they were also more severely disciplined based on their disproportionate over representation in expulsions, out-of-school suspensions, and JJAEP entrances. African Americans made up 14 percent of the state student enrollment, but they made up 32 percent of the more severe out-of-school suspensions while non-minorities made up 44 percent of the state population and 24 percent of the out-of-school suspensions.<sup>197</sup> In the most severe category of entrances into the JJAEP, African Americans made up 26 percent of the entrances while non-minorities made up 28 percent.<sup>198</sup>

The data for Class A, Class B, and Class C misdemeanors may or may not be represented in the state PEIMS discipline data reported in this study.<sup>199</sup> In the cases of student ticketing by municipal, state, or county peace officers if the student is given a ticket but not removed from the regular classroom by suspension or expulsion, no data are reported to the state.<sup>200</sup> Since student ticketing is considered the business of the city, state, or county, student tickets are reported to the appropriate judicial system, rather than the state education agency.<sup>201</sup>

## CONCLUSIONS

Why would we as a society extend a criminal incarceration approach to the K-12 education? Yet the data from this study show that this is happening on a massive scale with minority, low-income, and low-achieving students as targets. In practice, Subtitle G, Safe Schools, Chapter 37, Discipline Law and Order has transformed an adolescent behavioral process into a criminal system that intended or not, disproportionately isolates African American and Hispanic males. The “Discipline Law and Order”

<sup>197</sup> See *PEIMS Data*, *supra* note 194.

<sup>198</sup> See *PEIMS Data*, *supra* note 194.

<sup>199</sup> See Texas Education Agency, *PEIMS: Public Education Information Management System*, available at <http://www.tea.state.tx.us/peims> (last visited Oct. 28, 2006) [hereinafter *PEIMS*] (noting that major categories of data collected include organization data, budget data, financial data, staff data, student demographic, student attendance and discipline data).

<sup>200</sup> See *PEIMS Data*, *supra* note 194 (depicting suspensions and expulsions as categories that are included in PEIMS data reporting).

<sup>201</sup> See *PEIMS*, *supra* note 199 (explaining that PEIMS encompasses all data requested and received by TEA about public education).

title of the state school discipline policy has a dramatic racial impact, suggesting widespread purposeful and institutional racism. Low-income, low-achieving, and minority students are isolated in inferior DAEP schools that, until 2005, were neither required to use certified teachers nor subject to accountability testing; despite the fact that the DEAPs used state funds to operate. DAEP schools operate virtually free of state supervision with regard to education impact, teacher performance, or other system controls.

Whether or not the intent of zero tolerance is to deny an education to many of the state's citizens, the data on the practice in the use of zero tolerance policies shows that those who are punished are poor, low-achieving, minority, and male adolescents. The Timothy Nevarez case symbolizes this result in Texas. The final punishment for their adolescent deeds is to deny them an education. The correlations between poor attendance, exclusions from school, and dropping out of school are only exacerbated by zero tolerance policies.<sup>202</sup> While there are concerns with zero tolerance policies, there is more of a concern about the moral behavior of adults who are "demonizing children" and abandoning their responsibility in developing behavioral expectations.<sup>203</sup>

The Texas system was designed to increase school safety by removing students who committed mandatory criminal violations and who posed a danger to teachers and other students.<sup>204</sup> In practice, it quickly became a system of discretionary removal of minority adolescents from the regular classroom.<sup>205</sup> Data from this study indicate that zero tolerance is not working at reducing

<sup>202</sup> See OPPORTUNITIES SUSPENDED, *supra* note 3 (describing how many students view suspension as an enabling mechanism for dropping out of school because repeated suspensions for minor infractions occur under zero tolerance policies); see also Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999) (stating that "school suspension was found to be a moderate to strong predictor of a student's dropping out of school").

<sup>203</sup> See Sharon Nichols & Thomas Good, *Inadequate Interest and Resources for Youth's Socialization*, TEACHERS COLLEGE RECORD, Jun. 28, 2004, available at <http://www.tcrecord.org> (last visited Oct. 28, 2006) (emphasizing that adults in society are failing in their responsibilities to educate and guide today's youth).

<sup>204</sup> See TEX. EDUC. CODE ANN. §37.001 (Vernon 2003) (asserting that purpose of code of conduct is to explain circumstances in which teacher is justified in removing student from classroom).

<sup>205</sup> See PEIMS Data, *supra* note 194 (revealing large numbers of African Americans and Hispanics who were subject to removals, suspensions, and expulsions).

misbehavior.<sup>206</sup> From 1998 to 2004, the number of discipline actions increased from 1,563,960 to 2,363,617 disciplinary actions.<sup>207</sup> While the number of students decreased for the same period, the recidivism rate per pupil increased from 2.1 removals per student to 3.2 removals.<sup>208</sup> The flaw in an elaborate system built for mandatory criminal-like student removals is that there are fewer than ten percent mandatory removals a year.<sup>209</sup> Rather the system has been used to criminalize adolescent behavior. After ten years of zero tolerance discipline policies in Texas and the United States, there is a need to reexamine student discipline policy and either re-assert that indeed the practice reflects the intent or to create a policy that truly develops school to work pipeline. Although this study features Texas, other case studies will likely reveal similar racial results and over-reactions.<sup>210</sup> After a decade of zero tolerance and racialized discretion, the entire approach of creating criminals in schoolyards needs a fresh approach.

TABLE 2: DISCIPLINARY ALTERNATIVE EDUCATION PROGRAMS (DAEP) FOR 1998-2004: PERCENTAGES

Year	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004
State Population Percentage	2.4	3.1	3.0	3.2	3.3	3.2
Mandatory Placements	14	16	15	19	20	23
Males	74	ND	74	ND	73	ND
Special Education Students	25	25	25	25	24	23

<sup>206</sup> See Skiba & Peterson, *supra* note 202, at 376 (discussing how not only is there almost no data suggesting that zero tolerance policies reduce school violence, but that some data indicates zero tolerance policies actually encourage students to continue to misbehave because of desire to drop out).

<sup>207</sup> See *PEIMS Data*, *supra* note 194.

<sup>208</sup> See *PEIMS Data*, *supra* note 194.

<sup>209</sup> See *PEIMS Data*, *supra* note 194.

<sup>210</sup> See Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. POVERTY L. & POL'Y 553, 564-68 (2004) (analyzing ineffectiveness of zero tolerance policies and predicting that they will continue to detrimentally affect communities by

Special Education Placements	28	26	25	25	25	25
African Americans	21	23	21	22	22	23
Hispanics	41	41	43	44	46	46
Whites	37	35	34	33	31	29
At-Risk Placements	53	55	55	60	63	69
At-Risk Missing	10	7	10	9	9	9
Low-Income	51	51	55	53	56	57
<u>Low-Income Missing</u>	<u>9</u>	<u>7</u>	<u>10</u>	<u>9</u>	<u>9</u>	<u>9</u>

State PEIMS (1998-2004), Texas Education Agency Division of Safe Schools.

failing to provide alternative education locales for those students who are removed from schools).