

2001

## ALTERNATIVE EDUCATION: THE CRIMINALIZATION OF STUDENT BEHAVIOR

Augustina H. Reyes

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Education Law Commons](#)

### Recommended Citation

Augustina H. Reyes, *ALTERNATIVE EDUCATION: THE CRIMINALIZATION OF STUDENT BEHAVIOR*, 29 Fordham Urb. L.J. 539 (2001).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss2/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# ALTERNATIVE EDUCATION: THE CRIMINALIZATION OF STUDENT BEHAVIOR

## **Cover Page Footnote**

B.A., Dominican College; M.A., Harvard Graduate School of Education; Ed.D, University of Houston.  
Augustina Reyes is an associate professor of educational administration at the University of Houston. She is the director of the Sid W. Richardson Urban Principals Project.

# ALTERNATIVE EDUCATION: THE CRIMINALIZATION OF STUDENT BEHAVIOR

Augustina H. Reyes\*

## INTRODUCTION

In an article in the *New York University Law Review*, Harvard Law School professor Gerald Frug proposes that from its inception, public education has been more than just a commodity parents provide their children. Rather, public education has an important social function.<sup>1</sup> According to education philosopher John Dewey, public schools give their students "an opportunity to escape from the limitations of the social group in which [they were] born, and to come into living contact with a broader environment . . . different races, differing religions, and unlike customs."<sup>2</sup> Public education was intended to give students a broad perspective to prepare them for living in a complex, diverse society.

Frug only considers a school to be truly public if it is open to the heterogeneity of American life—if it enables students to encounter different groups of people in both curriculum and classroom.<sup>3</sup> This article will examine a relatively recent development in public education: alternative education programs (AEPs). Using Texas public schools as a case study, this article argues that AEPs defeat public education's goal of exposing students to a diverse student body. This is because AEPs segregate at-risk students—usually Latinos, African Americans, Native Americans, and poor Whites—from the rest of the student population.

This article deals with disciplinary AEPs, also known as DAEPs. Part I of the article will explore the legislative intent behind the Texas Education Code's DAEP provisions. Part II will describe the Code's DAEP provisions and how they have been supplemented by individual school district codes. Part III will describe how schools can boost their scores on accountability tests through

---

\* B.A., Dominican College; M.A., Harvard Graduate School of Education; Ed.D, University of Houston. Augustina Reyes is an associate professor of educational administration at the University of Houston. She is the director of the Sid W. Richardson Urban Principals Project.

1. Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 45-46 (1998).

2. Frug, *supra* note 1, at 46.

3. *Id.*

the use of DAEPs. Part IV will discuss the author's quantitative data on DAEPs, emphasizing the race, gender, and reading ability of students placed in DAEPs. Part V will give a qualitative description of a typical DAEP. The article will conclude by arguing that individual school districts have criminalized low student achievement by sending students with academic problems to DAEPs designed for student criminals.

This article relies on quantitative and qualitative data collected from 1996 to 2000.<sup>4</sup> The weaknesses of this article are as follows: (1) The DAEPs in this study were established relatively recently and only limited data is available; (2) because of legal implications (potential Office for Civil Rights investigations), schools do not readily make discipline data available; (3) case study data, in this case the only data available, cannot be generalized; and (4) qualitative descriptions also cannot be generalized.

## I. LEGISLATIVE HISTORY OF TEXAS DAEP LAWS

Alternative education has been in use in Texas for over twenty years. Its impetus came from an honest effort to remove serious juvenile offenders from the classroom during a juvenile crime wave in the 1980s.<sup>5</sup> Students awaiting trial for drug dealing or murder continued to sit in classrooms. Teachers were concerned for their safety and the safety of their students. The issue of seriously disruptive students was added to Texas' public policy agenda.

In June 1984, the Texas 68th Legislature, under pressure from H. Ross Perot,<sup>6</sup> passed massive school reform legislation, including laws establishing DAEPs.<sup>7</sup> Representative Alvin Granoff of Dallas spearheaded the DAEP legislation.<sup>8</sup> Granoff disliked the methods public schools used to punish students with severe discipline

---

4. See *infra* Tables II-VII.

5. STEVE H. MURDOCK ET AL., *THE TEXAS CHALLENGE: POPULATION CHANGE AND THE FUTURE OF TEXAS* 181 (1997) (discussing the rise in juvenile crime); Carol S. Stevenson et. al., *The Juvenile Court: Analysis and Recommendations*, *FUTURE OF CHILD.*, Winter, 1996, at 4, 7-8.

6. Robert Reinhold, *Texas Considers Taxes for Schools*, *N.Y. TIMES*, Apr. 22, 1984, at 17 (discussing tax reforms proposed by a panel headed by H. Ross Perot, to improve Texas public schools).

7. Act of 1984, ch. 889, 184 TEX. GEN. LAWS 2735 (amended and codified at TEX. EDUC. CODE, ANN. §§ 37.001-37.019).

8. W.W. Malinowski, *The Development, Implementation, and Implications of Alternative Education Programs in Texas* 101-04 (2001) (unpublished Ph.D. dissertation, University of Houston, Texas) (on file with the University of Houston, Urban Principals Center, Farish Hall 405).

problems.<sup>9</sup> He felt that the policy in place at most schools—expelling students for three days—gave delinquent students an unsupervised furlough to commit crimes.<sup>10</sup> Rather than expelling students to roam the streets, schools, according to Granoff, should place students in a supervised educational setting. A Florida study convinced Granoff that DAEPs would succeed in Texas: “We had some studies, like the one I mentioned out of Florida somewhere, where alternative programs had worked, where they gave them special attention and intensive, low teacher to pupil ratio classes. At least I saw enough to convince me that it would work . . . .”<sup>11</sup>

In 1984, the Texas legislature amended the Texas Education Code to require each school district to develop a DAEP for students found guilty of serious or persistent misbehavior.<sup>12</sup> The old punishments of expulsion and suspension were replaced with removal to a DAEP. The goal was to keep students in a supervised educational environment.

The legislative history of alternative education in Texas reveals the deliberate creation of a discipline management service. The legislative intent was to remove students who exhibited criminal-type behavior from the classroom and place them in a supervised environment to continue their education. Some legislators supported this concept because it gave those students more individual attention by greatly reducing teacher-to-pupil ratios.

## II. CURRENT TEXAS DAEP LAWS

In 1995, the Texas legislature enacted detailed new legislation on DAEPs. The Texas Educational Code requires each school district to provide a DAEP for the purpose of removing dangerous students from their classrooms without interrupting their education.<sup>13</sup> Although the Code does not define the term “AEP,” the Texas Education Agency provides administrative rules for AEPs in an alternative education manual.<sup>14</sup> The manual defines DAEPs as serving students “at risk of dropping out of school.”<sup>15</sup>

---

9. *Id.*

10. *Id.*

11. *Id.*

12. Act of 1984, ch. 28, 184 TEX. GEN. LAWS 2735 (amended and codified at TEX. EDUC. CODE ANN. § 37.008).

13. TEX. EDUC. CODE ANN. § 37.008 (Vernon Supp. 2002).

14. TEX. EDUC. AGENCY, 2000-2001 ALTERNATIVE EDUCATION ACCOUNTABILITY MANUAL 6-9 (2000).

15. TEX. EDUC. AGENCY, TEX. ADMINISTRATORS' CODE Chapter 19 § 75.164 (1998).

The intent of the Texas DAEP legislation is evident in the kinds of conduct for which students must be placed in a DAEP. The Code mandates that schools place students in DAEPs for engaging in the following conduct:

- felonies
- assaults or terrorist threat
- using, providing, or possessing drugs
- using, providing, or possessing alcohol, glue, or aerosol chemicals
- public lewdness or indecent exposure<sup>16</sup>

Students must also be placed in DAEPs in the following cases:

- the student receives deferred prosecution for a felony
- a court or jury finds that the student engaged in a felony
- the school superintendent reasonably believes the student has committed murder, manslaughter, or criminally negligent homicide.<sup>17</sup>

If a student commits any of these acts, the Texas Education Code mandates that the student be placed in a DAEP. School administrators have no choice in the matter. The duration of the mandatory placements may be short-term (less than 80 days) or long-term (80 days or more).<sup>18</sup>

Students may also be placed in DAEPs when they are expelled for more serious criminal activities. Examples include weapons possession, arson, aggravated assault, murder, kidnapping, and acts of criminal mischief.<sup>19</sup> For such acts, students are expelled to either a regular DAEP or a juvenile justice AEP ("JJAEP").

The Texas Education Code also permits schools to place students in DAEPs at their own discretion. The Code mandates that each school district adopt its own student code of conduct.<sup>20</sup> The code of conduct must specify the conditions under which a student can be placed in a DAEP.<sup>21</sup> Discretionary placements in DAEPs may be short-term or long-term, usually at the discretion of the school administrator.

A good example of a school code of conduct is that of the Houston Independent School District. The Houston District has used its code to make its own rules for placing students in DAEPs. The

---

16. TEX. EDUC. CODE ANN. § 37.006(a) (Vernon Supp. 2002).

17. TEX. EDUC. CODE ANN. § 37.006(c) (Vernon Supp. 2002).

18. TEX. EDUC. AGENCY, 2000-2001 ALTERNATIVE EDUCATION ACCOUNTABILITY MANUAL (2000).

19. TEX. EDUC. CODE ANN. § 37.007(a)-(d) (Vernon Supp. 2002).

20. TEX. EDUC. CODE ANN. § 37.001(a) (Vernon Supp. 2002).

21. TEX. EDUC. CODE ANN. § 37.001(a)(2) (Vernon Supp. 2002).

District's code of conduct mirrors state law in requiring that students involved in criminal-type behavior be placed in DAEPs.<sup>22</sup> For example, after committing a Level IV infraction<sup>23</sup>—typically a felony—a student must be placed in a DAEP.<sup>24</sup> Felonies are unambiguously criminal-type acts for which the Texas legislature intended students to be placed in DAEPs.

The Houston Independent School's code of conduct also provides that students may be placed in a DAEP for engaging in Level III conduct, which includes the following acts:

- Misdemeanor criminal mischief (i.e. vandalism)
- Fighting
- Misdemeanor theft of property under \$750<sup>25</sup>

Once again, these are criminal-type acts, for which the Texas legislature intended students to be put in DAEPs.

In addition to the Level III and IV acts just described, the Houston Independent School District can also place students in DAEPs for much milder level I and II infractions. When one considers the slightness of Level I and Level II infractions, the intent of the law—to remove genuinely dangerous students from classrooms—is lost.

Level I infractions include acts<sup>26</sup> ranging from horseplay to copying other student's work.<sup>27</sup> Level I infractions call for immediate

22. FRANK KEMERER & JIM WALSH, *THE EDUCATOR'S GUIDE TO TEXAS SCHOOL LAW* 273 (1997).

23. Level IV Acts of Misconduct include the following:

- Engaging in a felony on a campus or school-related function
- Receiving deferred prosecution or a finding by a court or jury of delinquent conduct
- the principal's reasonable belief that the student has committed a felony

HOUSTON INDEPEN. SCHL. DIST., *THE CODE OF STUDENT CONDUCT* 9 (2000-01), available at <http://www.houstonisd.org>.

24. *Id.*

25. Other Level III infractions are gambling, truancy, smoking, profanity, and ethnic and racial slurs. HOUSTON INDEPEN. SCHL. DIST., *supra* note 23, at 6-7.

26. Level I acts of misconduct may include such behavior as:

- Violations of rules or procedures established by the teacher
- Cheating or copying the work of other students
- Refusal to participate in classroom activities
- Unexcused tardiness to class
- Failure to bring required classroom materials or assigned work to class
- General misbehavior, such as eating in class, horseplay, making excessive noise, or violating campus dress codes
- Failure to deliver or return written communications between home and school
- Disruptive or noncompliant behavior on a school bus
- Failure to protect individual computer account passwords from disclosure.

*Id.* at 6.

27. *Id.*

correction, but clearly do not constitute criminal-type behavior. If a student is cheating by copying other student's work, the student probably lacks the skill to complete the work independently. A lack of academic ability should not be treated as a criminal offense. Instead, Level I offenses call for better instruction, better behavior management, and better communication between parents and teachers.

Level II acts of misbehavior are slightly more severe than Level I violations, but still do not constitute criminal-type behaviors. Level II acts include inappropriate displays of affection, loitering in unauthorized areas, and disruptive behavior on a school bus.<sup>28</sup>

In addition, Level I, Level II, and some Level III acts may invite subjective bias on the part of school administrators. According to Jacqueline Irvine, professor of urban education at Emory University, disciplinary practices are often discriminatory because terms like "disorderly behavior" are highly subjective.<sup>29</sup> Irvine discusses, for example, how in African American culture, youth's "verbal sparring often turns into rough-and-tumble play" which may be "misinterpreted . . . as attacks."<sup>30</sup> A subjective interpretation of horsing around by an uninformed school administrator may land several African American students in a DAEP for 120 days.<sup>31</sup>

### III. How DAEPs Boost School Accountability Scores

The Texas Education Code provides for a statewide assessment program that "is knowledge-and skills-based to ensure school ac-

---

28. Level II infractions include the following behavior:

- Repeated violation of classroom rules or transportation under Level I
- Leaving the classroom or school grounds without permission
- Possession of matches or other flammable materials
- Inappropriate display of affection
- Any verbal abuse of others, including name-calling
- Posting or distributing unauthorized materials on school grounds
- Loitering in unauthorized areas
- Changing school records or documents or signing parent's name on school documents
- Participation in activities by groups such as gangs and cults
- Wearing dress or attire signifying gang affiliations
- Possession of beepers, cellular telephones, and electronic pagers
- Cafeteria disturbance
- Violation of a school's mandatory school-uniform policy

HOUSTON INDEP. SCHL. DIST., *supra* note 23, at 6-7.

29. JACQUELINE JORDAN IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS 17 (1990).

30. *Id.* at 27-28.

31. HOUSTON INDEP. SCHL. DIST., *supra* note 23, at 6-7.



countability for student achievement.”<sup>32</sup> According to the statute, all students, except special education and bilingual education students,<sup>33</sup> must be assessed in reading, writing, mathematics, social studies, and science.

DAEPs are not strictly subject to state accountability testing. The Texas Education Code permits the state commissioner of education to adopt his own rules and performance indicators for evaluating the performance of students in DAEPs.<sup>34</sup> The Commissioner has qualified long-term DAEPs as having alternative accountability. The test scores of students in long-term DAEPs are not attributed to their home schools. Instead, the long-term DAEPs are treated as separate schools within the district with their own separate test scores.<sup>35</sup>

In this study, alternative education is divided into two divisions: (1) short-term DAEPs—placements fewer than 90 days; and (2) long term DAEPs with placements over 90 days.<sup>36</sup> While the state law does not refer to short-term or long-term DAEPs, the distinction is made by the Texas Education Agency in its accountability procedures manual.<sup>37</sup> The program category is important because schools do not have to include test scores of students in long term DAEPs in the aggregate accountability scores that they must report to the state.<sup>38</sup>

---

32. TEX. EDUC. CODE ANN. § 39.022 (Vernon Supp. 2002).

33. TEX. EDUC. CODE ANN. § 39.023 (b) (Vernon Supp. 2002).

34. TEX. EDUC. CODE ANN. § 37.008(m) (Vernon Supp. 2002).

35. TEX. EDUC. AGENCY, ACCOUNTABILITY PROCEDURES FOR ALTERNATIVE EDUCATION MANUAL 3 (1997). The alternative school/program accountability rating system is based on two board-approved campus performance objectives. The ratings for alternative campuses are acceptable or need peer review. The school/program must use at least one of the following academic performance indicators: (1) an achievement test; (2) GED completion; (3) course completion; (4) credit completion; (5) promotion rate; or (6) graduation rate. The campus/program may also use the following non-academic performance indicators: (1) attendance; (2) dropout rate; (3) percent of recovered dropouts who remain in attendance; (4) percent of recovered dropouts who graduate; and (5) percent of recovered dropouts who complete GED. *Id.* at 15-17.

36. The Texas Education Agency's Accountability manual has been rewritten twice since the DAEP legislation was passed in 1995. The first manual, published in 1997, indicated that a long term DAEP placement was for 90 days or more. TEX. EDUC. AGENCY, ACCOUNTABILITY PROCEDURES FOR ALTERNATIVE EDUCATION MANUAL 7 (1997). The second manual, published in 2000, changed the definition of "long-term" to 85 days or more. TEX. EDUC. AGENCY, 2000-2001 ALTERNATIVE EDUCATION ACCOUNTABILITY MANUAL 6 (2000).

37. TEX. EDUC. AGENCY, ACCOUNTABILITY PROCEDURES FOR ALTERNATIVE EDUCATION MANUAL FOR TEXAS PUBLIC SCHOOLS AND SCHOOL DISTRICTS 7 (1997).

38. *Id.*

In a state where high stakes testing can determine whether school performance is rated as exemplary or academically unacceptable, removing potentially low-scoring students from campus accountability data may be seen by some administrators as an opportunity to boost their school's performance ratings.<sup>39</sup> In some cases accountability data determines if a principal will lose his job.<sup>40</sup> If the school's performance is ranked in the "top or second quartile," the principal may be eligible for cash rewards.<sup>41</sup>

#### **IV. QUANTITATIVE FINDINGS**

##### **A. Rapid Growth of DAEPs**

The data showed that in 1996–97, there were 99,381 student removals from Texas schools or approximately 3% of the state's total student enrollment.<sup>42</sup> In October 1996, the state registered 374 AEPs serving 35,590 students in long-term placements.<sup>43</sup> Total removals to DAEPs increased from around 99,400 in 1996 to almost 123,000 in 2000.

##### **B. Mandatory Versus Discretionary Removals**

The majority of students in this study were placed in DAEPs as either mandatory or discretionary placements. Mandatory placements are those required by the Texas Education Code, which leaves no discretion to the school district in placing the students. These placements, as discussed previously, are intended for students who display unambiguously criminal-type behavior. Discretionary placements, in contrast, are defined by local schools in their student codes of conduct.<sup>44</sup> From 1996 to 2000, mandatory removals decreased from about 21,700 to 19,100. Discretionary removals,

---

39. TEX. EDUC. CODE ANN. § 39.072(a) (Vernon Supp. 2002).

40. "(a) The commissioner shall design an objective system to evaluate principals that: (1) is based on types of information available as of January 1, 1995, through the Public Education Information Management System ("PEIMS") and the state's Public School accountability system." TEX. EDUC. CODE ANN. § 21.357(a) (Vernon Supp. 2002).

41. TEX. EDUC. CODE ANN. § 21.357(b)(1) (Vernon Supp. 2002) (stating that the principal can also receive cash rewards if the principal is ranked in the second quartile).

42. TEX. EDUC. AGENCY, CHAPTER 37 SAFE SCHOOLS SURVEY (1996).

43. TEX. EDUC. AGENCY, CHAPTER 37 SAFE SCHOOLS SURVEY (1996).

44. TEX. EDUC. CODE ANN. § 37.001 (Vernon 2000).

in contrast, increased from 73,300 to almost 104,000.<sup>45</sup> Between 1996 and 2000, 64% of the total removals were discretionary.<sup>46</sup>

The power of local school districts to remove students at their discretion is often incongruent with the legislative intent behind DAEP removals. An analysis of the Houston School District Code of Conduct indicates that a student who consistently forgets homework, refuses to participate in class, or copies the work of another student may end up in the same DAEP as an accused murderer or dope dealer. Using their discretion, the school districts have categorized academic difficulties as criminal activities.

Data from an unpublished report on an urban JJAEP designed for hard core delinquent students showed that 36% of students in the sample were placed in DAEPs for mandatory reasons—for committing a felony or serious offense. The remaining 64% were placed in DAEPs for discretionary reasons—persistent discipline problems.<sup>47</sup> Persistent discipline problems were general discipline problems as defined by each school in its code of conduct.<sup>48</sup> They ranged from being disrespectful to horse play to inappropriate language.

### C. Race and Gender

Only limited data on DAEPs has become available since the Texas Education Code was amended in 1995. There are, however, unpublished reports and other preliminary data. The preliminary data includes unpublished school discipline referral data analyses from several schools. An analysis of case study data on elementary discipline referrals revealed that over 80% of the referrals came from inexperienced teachers who lacked the skills to manage diverse student bodies.<sup>49</sup> For example, one school showed that 75% of the discipline referrals were for African American males on a campus with a less than 20% African American male student population.<sup>50</sup> Over two dozen of the referrals reported in one year

---

45. TEX. EDUC. AGENCY, EXECUTIVE SUMMARY OF CHAPTER 37 DISCIPLINE PROGRAM STATISTICS 172 (2000); *see infra* Table IV.

46. *Id.*

47. Augustina H. Reyes, Urban Juvenile Justice Alternative Education Program (Spring 1998) (unpublished raw data on teacher discipline referrals, on file with the University of Houston, Urban Principals Center, Farish Hall 405).

48. TEX. EDUC. CODE ANN. § 37.001 (Vernon Supp. 2002).

49. Augustina H. Reyes, Teacher Discipline Referrals (1997) (unpublished raw data on teacher discipline referrals, on file with the University of Houston, Urban Principals Center, Farish Hall 405).

50. *Id.*

were for a single first grade African American male student who received no discipline referrals the following year under a different teacher. In another case, over 80% of the teachers reported having no training in interpreting the cultural norms of students in a school with a student population that was over 70% minority.<sup>51</sup> The data show that initial student discipline infractions often occur because of the incompatibility between a given teacher's background and the diversity of the student population.

This study does not assume that DAEP placements break down along racial lines, although it cautions that the potential is there for such division. Research on student discipline generally shows that minority students receive a disparate amount of punishment for student misbehavior.<sup>52</sup> When minority and non-minority students engage in an identical discipline infraction, minority students receive harsher punishments by school officials.<sup>53</sup> From 1996 to 1997, the state data showed that while 46% of Texas' student population was White, only 28% of DAEP removals were White. While 37% of student enrollment was Hispanic, 41% of the removals were Hispanic.<sup>54</sup> While 14% of the state enrollment was African American, 21% of the removals were African American.<sup>55</sup> The race of the student was not identified in 9% of the removals.<sup>56</sup> Similar figures were reported for 1999 to 2000.<sup>57</sup>

It should be noted that there were some problems with the data. Schools in Texas were funded on an official per pupil count taken the last week in October. Since school administrators want to maximize their funding, they will often tolerate misbehavior until October 30. Once the student counts are calculated for funding, they are more likely to remove students from their campus. Consequently, October numbers will reflect the lowest removal count for the school year; therefore, the state data reported may be deflated.

---

51. *Id.*

52. E.g., Brenda L. Townsend, *Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions* 66 EXCEPTIONAL CHILD 381 (2000).

53. Michael Heise, Presentation at the 2001 American Association of Law Schools Conference in San Francisco (Jan. 6, 2001).

54. *Id.*

55. *Id.*

56. *Id.*

57. From 1999 to 2000, White students constituted 43% of the student population and 35% of the DAEP removals. Hispanics were 40% of the state public school population and 42% of the DAEP population. African Americans were 14% of the state school population and 23% of the DAEP removals. TEX. EDUC. AGENCY, EXECUTIVE SUMMARY OF CHAPTER 37 DISCIPLINE PROGRAM STATISTICS 1997-2001 172 (2001).

April and May data for a small rural school district showed that 12% of the district's 1622 students were placed in the district's DAEP.<sup>58</sup> While the district had an enrollment of 45% White, 26% Hispanic, and 28% African American, the DAEP had an enrollment of 17% White, 25% Hispanic, and 43% African American.<sup>59</sup> A suburban district had an enrollment of 64% White, 19% Hispanic, and 9% African American.<sup>60</sup> The district's DAEP's enrollment was 42% white, 34% Hispanic, and 13% African American.<sup>61</sup> Based on the October count, the suburban DAEP enrolled 90 students; by May, however, enrollment was up to 475.<sup>62</sup> In sum, even by conservative counts, Hispanic and African American students are over represented in the state and local district removal data.<sup>63</sup>

Data were also analyzed for students placed in DAEPs for eighty-five days or more. While these data are a subset of total state removals, they also represent new data for students labeled as "at risk" and placed in DAEPs such as dropout prevention programs, charter schools, and other arrangements that qualify as an alternative program arrangement under the state's alternative accountability system. From 1996 to 1997 there were 35,590 students enrolled in AEPs for more than eighty-five days, of which 9% were enrolled in elementary school programs, 15% in middle school programs, and 76% in high school programs.<sup>64</sup> The data showed an over-representation of Hispanics and African Americans with the greatest over-representation at the middle school level.

For each ethnic group, males tended to be over-represented at every level. For example, in the elementary school, there was a 63% to 53% male and a 37% to 47% female representation.<sup>65</sup> In the middle school level, there was a 68-70% male representation and a 30-32% female representation.<sup>66</sup> In the high school level, the gender gap narrowed to 55% to 57% male representation and a 45% to 43% female representation.<sup>67</sup> Hispanic females tended to

---

58. Augustina H. Reyes, *End Of The School Year Student Placements In Alternative Education Centers* (1998) (unpublished raw data on end of the school year student placements in alternative education centers for small and rural districts, on file with the University of Houston, Urban Principals Center, Farish Hall 405).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. TEX. EDUC. AGENCY, CHAPTER 37 SAFE SCHOOLS SURVEY (1996).

65. *Id.*

66. *Id.*

67. *Id.*

outnumber every other ethnic female group at every level. In the elementary level there was a 47% Hispanic female representation compared to 37% White females and 40% African American females.<sup>68</sup> In the eleventh and twelfth grade, Hispanic females had a proportionately higher representation in AEPs than Hispanic males.<sup>69</sup> It was also higher than males and females for any other group.<sup>70</sup>

#### D. Reading Ability

Data from an unpublished report for an urban county JJAEP showed that achievement level for discretionary student placements was very low. For example, in a sample of thirty-three students, 76% were reading below grade level.<sup>71</sup> Another unpublished report of an urban county JJAEP showed that 58% were below grade level.<sup>72</sup> The unpublished data from the urban JJAEP showed that from a sample of fifty-two students, 64% were tracked into a criminal facility, not because they were a physical threat to anyone but because they could not read or were bored with traditional instruction. This pattern is both a retreat from the promise of equal educational opportunity and a criminalization of low student achievement.

#### V. QUALITATIVE FINDINGS

Findings for this study were supported by the qualitative data gathered from a in depth interview with a DAEP principal. The interview posed the following question: What are the administrative challenges in the operation of alternative schools?

The interviewed principal had administered alternative school programs for over twenty-one years and was the principal for one of the best programs in the state.<sup>73</sup> She started as a teacher and counselor in an innovative alternative magnet school. She has

---

68. *Id.*

69. TEX. EDUCATION AGENCY, CHAPTER 37 SAFE SCHOOLS SURVEY (1996).

70. *Id.*

71. Augustina H. Reyes, Urban Juvenile Justice Alternative Education Program (1998) (unpublished raw data on teacher discipline referrals, on file with the University of Houston, Urban Principals Center, Farish Hall 405).

72. Augustina H. Reyes, Urban Juvenile Justice Alternative Education Program (1998) (unpublished raw data on teacher discipline referrals, on file with the University of Houston, Urban Principals Center, Farish Hall 405).

73. Interview with Terry Rizzo, Principal, suburban DAEP, in Houston, Texas (March 13, 1998).

spent the last fifteen years developing a suburban middle school DAEP.

According to the principal, the challenges of administering a successful DAEP for disruptive students include maintaining a low student-to-teacher ratio; identifying student risk factors at an early stage; maintaining district-wide support of the programs; emphasizing parental involvement; developing and maintaining very strict behavior requirements; and developing and using curriculum based on real life learning.<sup>74</sup>

Students placed at the suburban DAEP are admitted after a mandatory parent/student half-day orientation. The orientation provides an overview of the reasons why students are placed in the DAEP, focusing on the poor decisions students make and the role of low self-esteem.<sup>75</sup> Students are informed of the punitive aspects of the placement including separation from their friends and limited freedom, and lock-up conditions. They are also informed of the positive program aspects, including a psychologist, chemical dependency counselors, adolescent problem-solving classes, and social skills class.<sup>76</sup> Students are provided with general information about the school including transportation, food service, clinic procedures, absences/tardies, dress code, and campus discipline rules.<sup>77</sup> During the orientation, a student diagnostic profile is developed, focusing on student behavior, learning styles, self-esteem, and aptitude in reading, math, and other subjects.<sup>78</sup>

In addressing the needs of students, the interviewee categorized her students as ranging from very bright, wealthy, troubled students to academically challenged students who needed a real-world, hands-on education.<sup>79</sup> The principal noted that the difference between the teacher parking lot and the student parking lot is that all the sports cars were in the student parking lot.<sup>80</sup> In the following excerpt, the principal describes the challenges of administering a DAEP:

The students who come here need smaller classes and more active, highly participatory instructional strategies.<sup>81</sup> The home

---

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Telephone Interview with Terry Rizzo, Principal, suburban DAEP in Houston, Texas (Mar. 13, 1998).

80. *Id.*

81. *Id.*

schools need to provide more meaningful, concrete, real world experiences for these students.<sup>82</sup> Our best students are the felons and the drug kids.<sup>83</sup> The drug kids are often the ones who are selling their medications.<sup>84</sup> It is the unruly student who is the persistent behavioral problem. They cannot comply with school rules.<sup>85</sup> They are so unruly that they have not been paying attention and need active hands-on learning in order to understand learning concepts.<sup>86</sup>

Students have to be shown the real world need for knowledge. For example, my students always ask, "When will I use math to calculate area or volume information?" Teachers have to be able to show them that when you're renting an apartment or carpeting a room, you need to know how to calculate the area. With the area you can determine which is the best or more efficient buy.<sup>87</sup> These students cannot survive academically in the regular classroom.<sup>88</sup> They need to be taught a concept two or three times using two or three different techniques. For example, Bill, one of my teachers, filled a classroom with boxes to teach the concept of volume. In teaching history, Bill teaches the 1950s by having a 1950s party, dressing in 1950s clothes, and eating 1950s food.<sup>89</sup>

Among the challenges faced by DAEPs are constantly changing student enrollments that directly affect per pupil funding. State law drives student enrollments in DAEPs. Each time the state law identifies a new student offense, the number of qualified students increases. There are more enrollments and more staffing, funding, and facility needs.<sup>90</sup> For example, in 1995, state law mandated that all students who committed an off-campus felony had to be placed in a DAEP immediately.<sup>91</sup> Previously, students who committed an off-campus felony were returned to the regular classrooms. Another state discipline mandate gave classroom teachers the option to remove unruly students or persistently misbehaving students from class. This mandate has almost doubled the number of candi-

---

82. *Id.*

83. *Id.*

84. Telephone Interview with Terry Rizzo, Principal, suburban DAEP in Houston, Texas (Mar. 13, 1998).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*



dates for alternative education placements.<sup>92</sup> In the following excerpt, the interviewee describes the relationship between state law and DAEP enrollment:

When I started in these programs, I was the only staff for thirty-eight students and operated in one classroom. Today I have 475 students, a staff of twenty-nine, consisting of twenty-seven professionals and two educational aides, a portable facility, and a separate campus.

State law drives the enrollment in alternative education programs.<sup>93</sup> If state law on student discipline changes, enrollment changes. Recent changes have increased the number of students in alternative education programs [the option for teachers to remove students with persistent misbehavior problems].<sup>94</sup>

Identifying and hiring the best teachers is a major challenge in administering an AEP. Teachers have to be highly competent, multi-disciplinary, and multi-certified. They need high self-esteem, positive attitude, flexibility, and the skills of a social worker. They must be non-judgmental and accepting of at-risk students, compassionate, caring, patient and tolerant, and able to maintain confidentiality.

You have to like the challenge and your students. You have to be an unconventional teacher.<sup>95</sup> Teachers have to be able to teach from the lowest level to the highest level, from the sixth grade to the twelfth grade.<sup>96</sup> Teaching in this school requires that teachers infuse their teaching with enthusiasm.<sup>97</sup> If a teacher is happy, students are more likely to participate.<sup>98</sup> Teachers also need to be familiar with a lot of programs, like Boys Town.<sup>99</sup>

### CONCLUSION

DAEPs are experiencing explosive growth. In view of the need to maintain safe schools for students, this article fully supports the legislative intent of the Texas Education Code with respect to

---

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Telephone Interview with Terry Rizzo, principal, suburban AEP in Houston, Texas (Mar. 13, 1998).

99. Boys Town has a "long history of offering help, hope and healing to abused, abandoned, neglected, handicapped or otherwise troubled children." Boys Town materials, at <http://www.boystown.org/aboutus/intdex.htm>.

DAEPs.<sup>100</sup> Students who present a danger to themselves and others should be put in DAEPs. The Texas Education Code clearly lists the offenses that qualify students for mandatory placement into a DAEP.<sup>101</sup> The legislative intent was to place dangerous students in a school-supervised instructional center rather than releasing them on to the streets.<sup>102</sup> Yet between 1996 and 2000, only 36% of all removals were for mandatory placements based on criminal-type behavior.

This study did not find a legislative intent for school districts to transfer students who exhibit academic related behavioral problems into DAEPs using discretionary policy. Yet, 64% of all removals from 1996 and 2000 were such discretionary placements.<sup>103</sup> The Texas Education Code requires that schools districts “adopt a student code of conduct for the district . . . specify[ing] the circumstances . . . under which a student may be removed from a classroom, campus, or alternative education program.” This legislation does not call for the criminalization of academically related behavioral infractions.<sup>104</sup> If a student does not turn in homework because the student cannot read, the student may be placed in an DAEP with drug users, accused murderers, or other felons. Is this the best facility for an illiterate student? As the DAEP principal said: “Students need small classes and more active, highly participatory instructional strategies.” The home schools need to provide more meaningful, concrete, real world experiences for these students.<sup>105</sup> Finally, the achievement data from the JJAEP placements showed that seventy-five percent of the students placed using the discretionary policy were reading below grade level.<sup>106</sup>

The accountability manual for long-term alternative schools clearly states that DAEPs are held to a lower standard than regular schools, suggesting they are inadequate.<sup>107</sup> For example, only 30% of the students need to score 70% or more on the math and reading subtest.<sup>108</sup> On the state-learning index, in contrast, 85% percent of the students must demonstrate an increase—defined as any

---

100. TEX. EDUC. CODE ANN. §§ 37.005-37.007, 37.011 (Vernon 1996 & Supp. 2002).

101. *Id.*

102. *Id.*

103. *Id.*

104. TEX. EDUC. CODE ANN. §§ 37.005-37.007, 37.011 (Vernon 1996 & Supp. 2001).

105. Interview with Terry Rizzo, principal, suburban AEP (Mar. 13, 1998) in 2000.

106. *Id.*

107. TEX. EDUC. AGENCY, ALTERNATIVE EDUCATION ACCOUNTABILITY SYSTEM MANUAL (2000).

108. *Id.* at 14.

score above zero.<sup>109</sup> The alternative school accountability system requires that the test scores of long-term DAEP students be attributed to the alternative school rather than the home school. For a time, this option gave home campuses the opportunity to remove low-scoring students from their averages. The policy, however, was revised in 2000.<sup>110</sup>

The data also showed that minority students and students with reading and other learning problems were over-represented in DAEPs, including students that were simply unchallenged by the regular curriculum.<sup>111</sup> These students were removed from the regular classroom at a school's discretion and put in DAEPs. Even by conservative PEIMS data, there was evidence of an over representation of minority students in alternative programs. PEIMS data are conservative because they are taken in October as official counts for campus funding. Most principals will tolerate disruptions until October 30. After the official count, they will start the discretionary removal process. DAEP enrollments increase over the school year, probably peaking in February. From 1996 to 1997, 37% of the state population was Hispanic and 14% was African American. Meanwhile 41% of the removals were Hispanic and 22% were African American.<sup>112</sup> From 1999 to 2000, the over-representation of minorities in DAEPs increased to 23% African American and 41% for Hispanics.<sup>113</sup> The case study data for selected rural and suburban districts reconfirmed that trend. Are minority and low-income students proportionately more unruly than white and middle class students? It is more likely that the mismatch between the structure of the educational system and minority and low-income students creates behavioral clashes.<sup>114</sup>

The data from this study indicate that state juvenile laws and state discipline laws have merged to criminalize low student achievement. The data show that the new criminalization of school discipline has disproportionately targeted minority students and students who read below grade level or who may have other instructionally related problems. While no one questions the need to provide punitive alternative or segregated educational sites for

---

109. *Id.*

110. *Id.* at 11.

111. *See infra* Table II.

112. *Id.*

113. *Id.*

114. M.M. Kennedy et al., POVERTY, ACHIEVEMENT, AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES (1986) (Interim report from the National Assessment of Chapter I.).

juveniles who have committed felonies, the treatment of poor achievement as a criminal offense will cause lifelong harm to the students who can least afford it. By isolating students with low achievement and persistent misbehavior, rather than trying to improve the culture, the climate, and instructional programs of the regular campus, has public education given up on the promise of equal educational opportunity for all?

Based on the findings of this study, several recommendations are in order. Schools sending students to alternative schools for discretionary placements should conduct a climate and culture analysis. Discretionary placement should require a student achievement evaluation similar to a special education admission, review, and dismissal committee meeting. It should be established that the student requires an DAEP placement. Schools making discretionary student placements should be encouraged to use compensatory funds to reduce class size, to train teachers in effective discipline techniques, and to provide training in cross-cultural relationships for teachers and administrators. Students identified as persistent misbehavior problems should be funded at a level that makes it possible for the affected campus to provide the intensive academic services students need without isolation or in an innovative well-funded home-campus-based alternative program.

As minority and low-income student populations continue to increase, the number of students in punitive DAEPs will also increase. Policymakers must be willing to properly fund long-term instructionally innovative alternative schools or other instructionally appropriate programs for students who have learning problems before they enter the middle school. Finally, universities must restructure their training programs to incorporate the needs of new student populations. Equal educational opportunity is possible but only if policies, institutions, and professional behavior change.

**TABLE I**

**Levels of Alternative Education Placements for Discipline  
Based on State Education Code**

Level (Discipline)/ Length of placement	Kind of Alternative Placement	Grade Level
Level I and Level II: Short-term placements for discipline infractions occurring one to ten times	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.
Level III, IV: Short-term to long-term placements, fewer than 85 days and 85 days or more.	Off-campus alternative education program (AEP) for discipline purposes. 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 (TEXAS EDU. CODE ANN. §§ 37.001 37.002, 37.006, 37.007, 37.008).	District wide off-campus alternative schools for: 1. Elementary Schools (least common) 2. Middle Schools 3. High Schools 4. *Re-assignment Elementary School(5 Da.) 5. Re- assignment Middle School 6. Re-assignment High School Off-campus alternative education placements: a. Boot Camp b. District-wide AEP c. Jail d. Private School e. Charter School f. Home School
Level V: Short-term placements, less than 85 days, or long-term placements, 85 days or more.	Off campus and out-of-district placements for discretionary placement (serious and persistent misconduct) and mandatory placement for committing a felony.	1. Juvenile Justice AEP 2. Collaborative AEPs 3. Psychiatric Hospital

**TABLE II**

**Statewide Data for Student Removals to DAEPs In Accordance  
with Sections 37.001, 37.006, and 37.007 By Ethnicity\***

Ethnicity	State %	DAEP 1996	State %	DAEP 1997-98	State %	DAEP 1998-99	State %	DAEP 1999-00
African American	14%	21.8%	14%	18%	14%	20%	14%	23%
Asian	2.7%	0.7%	3%	.7%	3%	1%	3%	<1%
Hispanic	38.7%	40%	38%	39%	38%	41%	4-%	41%
White	34%	27.8%	44%	34%	44%	37%	43%	35%
Unknown		9.2%	NA	8%	NA	NA	NA	NA
		99,381	3891877	87,560	3945367	94,205	3991783	122,931

\*Texas Education Agency, Public Education Information Management System Data, 1996-2000, October official counts

**TABLE III**

**Statewide Data for Student Removals to DAEPs in Accordance  
with Sections 37.001, 37.006, and 37.007**

Type of Removal	1996	1997-98	1998-99	1999-2000
Total students removed	70,958	64,897	70,728	85,849
*Total Removals to DAEP	99,381	87,560	94,205	122,931
Total Students Expelled	6,210 (9%)	13,497 (21%)	18,066 (26%)	9,010 (10%)
**Total Expulsions		16,281	23,044	9,750

\*These data include students with more than one removal.

\*\*These data include students with more than one removal.

**TABLE IV**

**Total DAEP Removals According to Section 37.006 (Mandatory  
Removals) and Section 37.001 (Discretionary Removals)**

Type of Removal	1996-97	1997-98	1998-99	1999-2000	Average
Mandatory DAEP Removals Section 37.006	21,689 (22%)	51,372 (59%)	12,992 (14%)	19,098 (16%)	36%
Discretionary DAEP Removals Section 37.001	73,302* (74%)	36,188 (41%)	81,213 (59%)	103,833 (84%)	64%
Total DAEP Removals Sections 37.001 & 37.006	99,381 (100%)	87,560 (100%)	94,205 (100%)	122,931 (100%)	100%

\*4,290 Unknown Removals

**TABLE V****Total Expulsions**

Type of Removal	1996-97	1997-98	1998-99	1999-2000	1996-2000
Mandatory Expulsions Section 37.007	2,055 (33%)	782 (5%)	967 (4%)	1,013 (10%)	64%
Discretionary Expulsions Section 37.001	4,036 (64%)	15,436 (95%)	22,077 (96%)	8,737 (90%)	36%
Total Expulsions	6,210 (100%)	16,281 (100%)	23,044 (100%)	9,750 (100%)	

**TABLE VI****Expulsions by Ethnicity\***

Ethnicity	State Enrollment	AEP Placement 1997-98	State Enrollment	AEP Placement 1998-99	State Enrollment	AEP Placement 1999-2000
African American	14%	19%	14%	20%	14%	17%
Asian	3%	1%	3%	1%	3%	1%
Hispanic	38%	35%	38%	39%	40%	46%
White	45%	35%	44%	40%	43%	36%
		16,218		23,044		9,750

\*These data represent official October counts and may be deflated.

**TABLE VII**

**Achievement Sample of Placements in Juvenile Justice  
Alternative Education Placement**

*Sample N=52*

Kind of Infraction	Reading Achievement Below Grade Level	Reading Achievement On Grade Level	Reading Achievement Above Grade Level
Mandatory Placement (n=19)	58%	5%	37%
Discretionary Placement (n=33)	76%	3%	21%

