



## **“Exclusionary” Discipline in Texas Schools: Legal Questions and Concerns<sup>1</sup>**

Exclusionary discipline refers to disciplinary placements that remove a student from his or her regular classroom assignment.

### **1. *Are school districts required to use exclusionary methods of student discipline?***

Yes, sometimes. Texas law permits and, in some cases, requires the use of exclusionary options. Since Senate Bill 1 recodified the Texas Education Code in 1995, Texas school districts have operated under Chapter 37. That chapter mandates that certain offenses result in a mandatory removal to a disciplinary alternative education program (DAEP) or a mandatory or permissive expulsion. See TASB’s [Chapter 37 Discipline Chart](#) for details.

School districts do not have unlimited authority to use exclusionary discipline, however, even when the consequences for a certain type of conduct are categorized as mandatory. A student cannot be expelled from a traditional public school or charter school for a reason not set forth in law. (Expulsion in large counties is to a county-operated JJAEP; in other counties expulsion sends students home.) All other removals from class (like DAEP or suspension) can be for any reason adopted by the school board in its local student code of conduct. Due process is required prior to an expulsion or out-of-school suspension, but courts have held that in-school suspension (ISS) and DAEP are just alternative placements, not deprivation of education, and therefore due process is not required for those removals. *E.g., Stephens v. Trinity Indep. Sch. Dist.*, 12-12-00094-CV, 2012 WL 5289346 (Tex. App.—Tyler Oct. 24, 2012, no pet.) (holding that transferring a student from regular classes to DAEP does not impact a protected property or liberty interest implicating due process concerns). State law requires notice and a conference for DAEP placements. Tex. Educ. Code §§ 37.009, .0012. State law also limits out-of-school suspension to three days, and students below third grade may not be suspended unless the student has engaged in serious misconduct (drugs, alcohol, weapons, or certain violent offenses). Tex. Educ. Code § 37.005.

### **2. *What concerns do lawmakers have regarding exclusionary discipline?***

**One concern is that the quality of instruction students receive in an ISS, DAEP, or JJAEP may be substandard.**

In both 2003 and 2007, the Legislature made reforms intended to improve the quality of instruction in DAEPs, including requiring certified teachers and requiring coursework to allow for grade advancement. TEA adopted related rules regarding DAEP instructional

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<sup>1</sup> An electronic version of this document is available on TASB School Law eSource at [tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/exclusionary\\_discipline.pdf](http://tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Students/documents/exclusionary_discipline.pdf).

settings. Anecdotally, quality has improved, but alternative settings rarely measure up to regular classroom instruction. In addition, many school districts do not provide transportation to alternative settings, which may adversely affect some students' attendance and allow the students to fall further behind academically.

**Advocates and lawmakers also have concerns regarding criminalization of school-related misconduct.**

Advocates for students, such as Texas Appleseed, and representatives of the Texas judiciary worked in both the 2013 and 2015 legislative sessions to eliminate potential Class C misdemeanor criminal penalties for low-level school-based misconduct, including disruption of class, disorderly conduct, and truancy. See Texas Appleseed, [\*Texas' School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools\*](#) (Dec. 2010).

**An ongoing concern is that student discipline may not be treating all students fairly.**

Following a groundbreaking, multiyear study of disciplinary records for a cohort of Texas public school students, concerns persist that school discipline has a disproportionate impact on students of certain races and abilities. Namely, African American students and students who qualify for special education due to emotional disturbance are overrepresented in discipline statistics. See The Council of State Governments Justice Center, [\*Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement\*](#) (July 2011).

This study and others like it have led to numerous investigations by the U.S. Department of Education's Office for Civil Rights, as well as national requirements for data collection as rigorous as the Texas data sources that made the Breaking Schools' Rules study possible. In 2018, the U.S. Government Accountability Office (GAO) issued a report finding that:

Black students, boys, and students with disabilities were disproportionately disciplined (e.g. suspensions and expulsions) in K-12 public schools, according to GAO's analysis of Department of Education . . . national civil rights data for school year 2013-14, the most recent available. These disparities were widespread and persisted regardless of the type of disciplinary action, level of school poverty, or type of public school attended. For example, Black students accounted for 15.5% of all public school students, but represented about 39 percent of students suspended from school—an overrepresentation of about 23 percentage points[.]

U.S. Gov't Accountability Office, [\*K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities\*](#), GAO-18-258 (Mar. 2018).

Districts are encouraged to study local data to determine if disproportionality issues emerge, and if so, to address potential causes.

**Finally, stakeholders are concerned that schools are overusing exclusionary options for all students.**

Since 1995, Texas has intentionally moved away from “zero tolerance” practices. Since 2009, state law has required school administrators to consider mitigating factors in determining disciplinary placements. Tex. Educ. Code § 37.001(a)(4). State law also requires targeted training for administrators involved in making disciplinary placements. Tex. Educ. Code 37.008. Since 2015, campuses have had to appoint a Campus Behavior Coordinator to oversee out-of-class placements. Tex. Educ. Code 37.0012. In 2017, the Texas Legislature enacted House Bill 674, prohibiting out-of-school suspension for students below grade three (with exceptions for drugs, alcohol, weapons, and violence, and authorizing adoption of a positive behavior program to provide these students with behavior management strategies, including restorative practices. Tex. Educ. Code §§ 37.005(c), .0013.

In addition, federal law considers the rate at which a school depends upon exclusionary discipline to be an indicator of the school’s climate. The Every Student Succeeds Act (ESSA) requires state-adopted accountability systems to allow for measurement and meaningful differentiation with regard to state-selected criteria, including school climate and safety. 20 U.S.C. § 6311. Under ESSA, school report cards must include measures of school quality, climate, and safety, including rates of in and out-of-school suspensions, expulsions, school-related arrests, referrals to law enforcement, chronic absenteeism (both excused and unexcused absences), and incidents of violence, including bullying and harassment. 20 U.S.C. § 6311(h)(1)(C)(viii)(I).

**3. *How are school districts working to reduce disciplinary referrals?***

**Schools have long had special practices for special populations.**

In accordance with state and federal laws regarding special education, schools have an obligation to discharge discipline differently to students who qualify for special education. One of the ways schools discharge this duty is through the adoption of Positive Behavioral Intervention and Supports (PBIS), which is an evidence-based approach to setting clear expectations for behavior, reinforcing good behavior, and proactively minimizing the conditions in which students are most likely to exhibit inappropriate behavior. For more information, see the U.S. Department of Education’s [Technical Assistance Center on Positive Behavioral Interventions and Supports](#) and the Region 4 Education Service Center’s [Texas Behavior Support](#) website.

This approach has strong support from the federal Department of Education and advocates who encourage schools to adopt these practices schoolwide, and not just for special populations.

**Many districts and individual campuses are adopting approaches intended to focus on the prevention of misbehavior.**

In addition to the option to extend PBIS practices schoolwide, schools are considering and customizing programs intended to teach students greater self-awareness, empathy, and conflict resolution skills with a goal of reducing the need for student discipline. TASB does not promote or endorse any one approach. We believe that these programs are more meaningful to the school community if they are home grown. TASB does offer a template for local Student Codes of Conduct through its Policy Service. The template leaves a place to incorporate local preventative measures into the code. Options in use in Texas include:

- **Social and Emotional Learning (SEL):** SEL is a curriculum woven into other classroom instruction that teaches students core social skills. Austin ISD has a system-wide program for SEL. For more information, see the [Collaborative for Academic, Social, and Emotional Learning](#) website and the [Austin ISD SEL](#) website.
- **Mindfulness practices:** The concept of *mindfulness* generally refers to a state of mind that is achieved by focusing, without judgment, on the present moment. Across the nation, schools are increasingly adopting programs that use meditation, yoga, breathing exercises, or other activities intended to promote mindfulness in order to help students manage anger and develop peaceful conflict resolution skills. Researchers have also suggested that mindfulness practices may improve students' focus and concentration. For an in-depth discussion of these issues, see Lauren Cassini Davis, [When Mindfulness Meets the Classroom](#), *The Atlantic* (Aug. 31, 2015).
- **Restorative practices:** Inspired by interventions with proven success in juvenile justice settings, many schools are adopting restorative practices designed to teach conflict resolution by allowing students to deepen their understanding of the effect their behavior has on others. This movement is gaining national momentum, as described in the following articles: Emily Richmond, [When Restorative Justice Works](#), *The Atlantic* (Dec. 29, 2015); "Restorative Discipline" (Apr. 2016), Eric Randall, [Restorative Discipline](#), National School Boards Association (Apr. 10, 2016).

**4. Who are the leading resources on restorative practices in Texas?**

Many school officials and policy makers are working to spread the word about restorative discipline practices. See Merri Rosenberg, [Restorative Discipline: How Schools Are Changing Culture, Conversation Around Discipline](#), *Texas School Business*, at p. 14-16 (May 2016). The following list highlights just a few of these individuals.

- **TEA Director of Restorative Discipline, Dr. Gaye Lang**

Since 2015, TEA has partnered with the University of Texas Institute for Restorative Justice to promote restorative discipline practices and training across the state. See TEA's [Restorative Discipline](#) website for more information.

- **School attorney, Jim Walsh**

Jim Walsh, a founding attorney of the school law firm, Walsh, Gallegos, Treviño, Kyle, and Russo, LLC, has used his considerable influence as a leading school attorney to encourage school officials to consider adopting restorative practices. See Jim Walsh, [High Time for a Paradigm Shift](#), *Texas School Business*, at p. 7 (Mar. 2014); Jim Walsh, [Restorative Discipline: Why you should Look Into This](#), Walsh Gallegos (2016). Mr. Walsh also serves on the board of the nonprofit Restorative Matters.

- **School administrator, Kevin Curtis**

Mr. Curtis, the founder and CEO of National Educators for Restorative Practices, gained personal experience with restorative methods as an assistant principal at Ed White Middle School. He is now doing training for other administrators through the regional service centers. See the [National Educators for Restorative Practices](#) online for more information.

## **5. *Where are Texas educators on these issues?***

While many educators see the benefits of incorporating behavioral supports, instruction on social skills, and restorative practices into their campus communities, these efforts have their detractors: board members who say this approach weakens the disciplinary climate and condones student misbehavior, teachers who perceive these efforts as an overlay to already overloaded curricular requirements, administrators who rely on hardline rules to ensure decisions are swift, consistent, and impersonal, and many (parents included) who wonder if attempts to reduce exclusionary discipline will make classes unruly and impair teachers' ability to provide high quality instruction to the students who are not struggling with these issues.

These concerns speak to the need for local control. Texas is a diverse state with diverse interests. Parents, educators, and legislators all share the goals of safe schools with high standards for conduct and classrooms where teachers can focus on academic instruction. Experience shows that when teachers, parents and even students feel included in designing local approaches that enhance the school climate, restorative practices can be transformative. But a top-down, one-size-fits all approach will likely not achieve the same benefits.

For now, TASB will continue to encourage our membership to explore and nurture home-grown approaches to improving the school climate and reducing the need for exclusionary discipline.

For more information on this and other school law topics,  
visit TASB School Law eSource online at [schollawesource.tasb.org](http://schollawesource.tasb.org).

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