

REPORT ON THE LEGAL NEEDS OF HARRIS COUNTY CHILDREN

A report by the American Bar Association Section of Litigation Children's
Rights Litigation Committee



SECTION OF LITIGATION
American Bar Association

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INTRODUCTION

*Many things can wait.
The child cannot.
Now is the time his bones are being formed,
His blood is being made,
His mind is being developed.
To him, we cannot say tomorrow.
His name is today.¹*

So it is with justice for children. Children cannot wait to have their essential needs for food, clothing, shelter, or medical care met. Children cannot wait to be free from physical, sexual or emotional abuse. Children cannot wait to obtain a safe, nurturing and permanent home in which to grow up. Children cannot wait to have their mental health, educational, or immigration needs met. Children cannot wait to have competent legal representation when they are charged with a crime. If, as a society, we truly believe that “children are our future,” we have failed to put our money where our mouths are when it comes to meeting children’s legal needs.

Indeed, the timely delivery of quality legal services to children in desperate need is desperately needed. Faced with dwindling financial resources, communities all over the United States are struggling with this dilemma. This Report is an appeal to the private bar to get involved and use its legal expertise on behalf of Houston’s children. The window of opportunity for making a difference in a child’s life is open only for a short period of time, but lawyers are uniquely situated to make the difference. It is the hope of the authors of this Report that the private bar will respond to this plea for help

¹ Gabriella Mistral was a Chilean poet, educator and diplomat, and in 1945 she became the first Latin American woman to receive the Nobel Prize in literature.

through *pro bono* work to supplement, not replace, existing legal services for Houston's most vulnerable children.

This Report is the work of the American Bar Association (ABA) Section of Litigation Children's Rights Litigation Committee (CRLC) in collaboration with the following law firms/corporations: Baker & McKenzie (Chicago and Houston), Fulbright & Jaworski (Houston), Greenberg Traurig (Denver and Washington, D.C.), Keith & Miller, Linebarger Goggan Blair & Sampson (El Paso), Locke Liddell & Sapp (Houston), Mounce, Green, Myers, Safi & Galatzan (El Paso), Shook, Hardy & Bacon (Houston), Susman Godfrey (Houston), and Vinson & Elkins (Houston).² The CRLC is the successor to the Task Force on Children, created in 1992 by the Council of the ABA's Section of Litigation at the request of former Chairs Louise LaMothe and Robert N. Sayler, to address the crisis in juvenile courts and in children's lives. The stated purposes of the Task Force were to inspire and assist lawyers to undertake the direct *pro bono* representation of children and to support and multiply the number, range, and quality of children's legal projects.

In 1998, the Children's Rights Litigation Committee was established, a standing committee of the Section of Litigation, to serve the needs of members of the Section of Litigation who were children's lawyers or litigators interested in children's legal issues. Additionally, the CRLC was to continue the work of the Task Force by recruiting Section of Litigation members to join the committee and take *pro bono* cases for children, increase legal representation for children and improve the quality of children's legal

² Law firms and volunteers will also be identified in the sections of the Report addressing the specific areas in which they participated.

representation, and provide technical assistance to individuals and groups desiring to start children's law programs.

In 2004, children have an urgent need for advocacy and representation in a wide array of situations.³ The CRLC has a Working Group of 10 children's law and litigation experts, who, through the generosity of the Section of Litigation, are able to travel nationwide both to increase the number of *pro bono* lawyers for children and the number of children's law programs nationwide to respond to children's legal needs. The Working Group responds to requests for technical assistance in the start up and expansion of child advocacy programs, assists with the training of *pro bono* lawyers, and focuses outreach to geographic areas where children's legal needs are the greatest.

Scott Atlas, Chair of the Section of Litigation during the 2002 – 2003 term and partner at Vinson & Elkins in Houston, chose Houston as the site of the 2003 Section of Litigation Annual Meeting. Aware that there is no children's law center in Houston, CRLC recognized this as an opportunity to possibly expand children's legal services in the Houston area. Accordingly, the CRLC and members of Houston law firms undertook an effort to identify whether there were unmet legal needs for children in Harris County, Texas, with a focus on three areas: child protection, delinquency, and school suspension/expulsion.

The vision of the project was to provide a baseline, credible analysis of children's urgent legal priorities that might serve as a springboard for the formation of a task force or other entity to create a follow-up plan addressing the unmet needs of Houston's

³ See ABA Steering Committee on the Unmet Legal Needs of Children, *America's Children Still at Risk, A Report of the Steering Committee on the Unmet Legal Needs of Children* (2001) (depicting unresolved legal issues facing America's children and recommending ways individual lawyers and the organized bar can address this crisis).

children. The ultimate goal of this Report is to provide a mechanism to meet the unmet legal needs of children in Harris County. It is CRLC's hope that in identifying the needs and proposing a variety of solutions, we can inspire members of the private bar to dedicate time and resources to address the urgent legal needs of Harris County children.

In conducting this needs assessment, CRLC did not attempt to assess the quality of representation that children are currently receiving as such an analysis is beyond the scope of this project. In addition, CRLC was unable to conduct an assessment of the quality or range of other services that are provided to children and families that appear in juvenile court. Again, such an analysis would require a much more extensive inquiry. This Report does note potential problems in both of these areas that are worthy of further examination, identifying specific systemic deficiencies that might lend themselves to seemingly available and attainable solutions.

The interviewers were impressed with the willingness of judges, lawyers, principals, probation personnel, and other system participants to take time to meet with us and give considered and candid responses to questions that were posed. Thus encouraged, the CRLC is confident that many of the current system actors will be willing partners in initiatives that develop from this Report.

The CRLC is indebted to the Houston law firms that generously donated the time and talent of many lawyers to assist with this survey. It is important to state, however, that the analysis and recommendations that are contained herein flow from the work completed by the law firm interviewers, but are solely the product of the CRLC Working Group.

Methodology

The project was divided into three phases: 1) collection of background information and data, including legal research, review of relevant reports and periodicals, and collection of statistical data; 2) observing court proceedings and conducting interviews with a variety of system stakeholders, including judges, lawyers who represent children, probation officers, school officials, and other court and school-related personnel;⁴ and 3) preparation of this Report and recommendations that detail the findings of all three project areas. Our findings and recommendations are detailed below.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

DELINQUENCY COURT

- 1) **Inadequate space in the Family Court undermines the administration of justice.** Immediate steps must be taken to remedy the shortage of interview rooms where attorneys can meet privately with their clients, rooms for court personnel, such as probation officers, to meet with minors to obtain and provide confidential information, and family waiting areas.
- 2) **Excessive caseloads and school referrals undermine the administration of justice.** School officials and the District Attorney should exercise greater discretion in deciding what school-based conduct should result in prosecution. An automatic deferred prosecution plan should be instituted for less serious cases.
- 3) **There is an unmet need for attorneys to file *Motions to Seal Court Records*.** The private bar should provide services to children who seek to have their juvenile court records sealed after successfully meeting required conditions. A *pro bono* program might be an excellent way to meet this need.
- 4) **There is an unmet need for mentors for children in delinquency court.** Establishment of a volunteer mentor program through local undergraduate institutions, law schools, other graduate schools and/or law firms would help to meet this need. Law firms should encourage lawyer and non-lawyer employees to volunteer as mentors.

⁴ Efforts were made to interview children and their parents, but we were unable to interview a meaningful sample and thus are unable to give them a voice in this Report. To the extent that any further inquiry is going to be undertaken relating to quality of counsel or outcomes, we believe it is critical to interview children and their parents.

- 5) **Children and their attorneys need better access to investigators, mental health experts, and mental health services.** The court should maintain a separate pool of funds that can be accessed *ex parte* by appointed attorneys for private investigators and mental health advocates. Judges, attorneys, and probation officers need to receive mental health-related trainings. One option for providing these trainings and improving access to private investigators and mental health advocates is that private law firms could fund or sponsor trainings and experts.
- 6) **The same attorney who represents a child in the detention hearing should represent the child throughout the delinquency proceedings.** The Court should reinstate its former policy of requiring the attorney appointed at the detention hearing to represent the minor until the conclusion of the case.
- 7) **There is an unmet need for attorney representation in justice of the peace courts and school expulsion cases.** A *pro bono* project should be established through local law schools and private law firms to represent minors in these kinds of cases.
- 8) **There are conflicting reports about how attorney appointments are being made.** A comprehensive review of the appointment process should be undertaken to ensure that the written appointment procedures, instituted pursuant to the Texas Fair Defense Act, are being followed.
- 9) **Attorneys need greater access to local and national delinquency trainings.** Law firms and other businesses should consider sponsoring local trainings or sponsoring appointed attorneys to attend trainings.
- 10) **There are conflicting reports on whether, and how, the Texas Fair Defense Act has affected the quality of appointed counsel.** There should be a review of how the Texas Fair Defense Act has affected the quality of counsel in order to consider necessary amendments to further improve representation.
- 11) **System participants need information about the efficacy of the various programs in which youth are placed as part of their disposition.** In order for defenders, prosecutors and judges to effectively advocate for and use alternative programs to incarceration, there needs to be an assessment of the efficacy of the various programs in which youth are placed as part of their disposition. Where the facts warrant, courts should consider continuing an attorney's appointment beyond disposition, which would enable attorneys to gain greater familiarity with the specifics of the programs, thereby benefiting the present clients, as well as future ones.

CHILD WELFARE

- 1) **Inadequate space in the family court undermines the administration of justice.** Immediate steps must be taken to remedy the shortage of interview rooms where attorneys can meet privately with their clients to exchange confidential and sensitive information. Child-friendly waiting rooms should be created.
- 2) **As a result of social workers being underpaid and having excessive caseloads, the needs of children in the child welfare system are not being met; turnover among social workers is alarmingly high.** There is a need for increased pay for, and training and supervision of, Texas Department of Family and Protective Services (DFPS) social workers. Social workers should be required to have a bachelor's or master's degree in social work.
- 3) **The lack of guidelines for attorney caseloads and case distribution calls into question whether children and their parents are receiving effective assistance of counsel.** Judges should enforce the statutory requirements of attorneys *ad litem* contained in the Texas Family Code and remove attorneys who do not perform those duties from the attorney appointment lists. Caseload requirements should be clearly established and enforced.
- 4) **Insufficient attorney pay limits quality of representation.** Lawyers should be paid an hourly rate for performing the required tasks outlined in the Texas Family Code, with no caps on their fees. The private bar and local law schools should consider establishing a *pro bono* program to supplement the representation of children and parents in child welfare and related cases.
- 5) **There is an unmet need for supervision of, and advocacy on behalf of, children in permanent custody of the state.** Attorneys and Court Appointed Special Advocate (CASA) volunteers should continue to remain on a case until the child is in a permanent placement or discharged from state custody. The private bar should consider creating a *pro bono* program to represent children in the permanent custody of the state. The court should consider appointing a special master to oversee permanent managing conservatorship matters.
- 6) **There is a lack of advocacy for needed services.** Social worker case loads must be reduced so that they have more time to devote to securing client services. Attorneys *ad litem* need training in evaluating and advocating for services.
- 7) **There is a lack of consistency in attorney training.** All child welfare judges should condition appointment on training in the areas recommended by the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*. The private bar should consider sponsoring local training programs for child welfare attorneys one or two times a year.

- 8) **There is a need for more CASA volunteers.** Law firms should encourage lawyer and non-lawyer employees to volunteer for the CASA program.
- 9) **There is a lack of services for parents, children, and young adults involved in the child welfare system.** An assessment of the availability of services for parents should be undertaken. Law firm lawyers and employees should volunteer to mentor youth transitioning out of foster care.

SCHOOL SUSPENSION AND EXPULSION PROCEEDINGS

- 1) **Students and parents are not guaranteed the opportunity to fully review and present material information prior to removal to a discipline program.** Because removal to a discipline program is disruptive to a student's educational progress, students and their parents should be given an opportunity to fully review documentary evidence, compel witness attendance, cross-examine witnesses and present evidence in an expulsion hearing.
- 2) **There is no formal procedure for review of a decision to suspend a student or remove a student to a discipline program.** A suspension or a decision to remove a student to a discipline program should be subject to review by the school board or a designee with the power to overturn the decision.
- 3) **There is no procedure for review of a decision to continue a student's placement in a discipline program.** A decision to continue a student's placement in a discipline program should be subject to review by the school board or a designee with the power to overturn the decision.
- 4) **There is no guarantee of uniformity in the interpretation and application of the Code of Student Conduct; this may result in inconsistent and disparate treatment of children in Houston Independent School District (HISD) schools.** School officials should be trained in the classification of offenses and designation of sanctions. A system of review should be instituted to allow for reclassification of an offense. There should be independent review of school disciplinary classifications and sanctions to ensure uniformity. School officials should also be trained in alternative methods of addressing negative student behavior.
- 5) **Few children are represented by attorneys during the school disciplinary process.** Students should have access to counsel when facing school expulsion. The private bar and local law schools should consider establishing a *pro bono* project to provide representation to students facing suspension or expulsion. Each hearing should be presided over by a truly objective decision-maker, trained to understand that they should not presume the student is guilty of an act or misconduct.

- 6) **There is an excessive amount of referrals from schools to delinquency court.** No school incident should require automatic referral to juvenile court. School officials should be given greater discretion (with guidelines) to decide whether to refer a case to juvenile court. School officials should also be required to be accountable when they do make a referral. The District Attorney should exercise restraint in making decisions about whether to prosecute school-based offenses.
- 7) **Decisions about whether to continue a child's expulsion is sometimes based on whether a discipline program has space for the student, as opposed to whether a child's expulsion period should be continued.** Return to school should not depend on the availability of space at an alternative education program. The school district should make space for any student whose actions do not merit continued expulsion.
- 8) **There needs to be an assessment of the quality of education for students placed in discipline programs or other alternative schools programs.** Unless discipline programs secure students the same quality of education they receive in a regular school setting, students should not be forced to attend such programs.
- 9) **A thorough examination of available data about expulsions and suspensions in HISD should be conducted by an outside entity to ensure that expulsion decisions are not related to a student's socio-economic status, race, or ethnicity, or a school's political contracts.** A full and fair discipline process requires blind decision-making that does not disproportionately affect a particular group or class of students. The private bar should form a task force to make such a process possible.

CHAPTER 1: DELINQUENCY COURT⁵

I. BACKGROUND OF HARRIS COUNTY DELINQUENCY COURT

Texas juvenile courts have exclusive jurisdiction over minors under the age of seventeen who are alleged to have engaged in delinquent conduct or conduct indicating need for supervision.⁶ A minor adjudicated in juvenile court may be subject to incarceration for up to forty (40) years.⁷ Until revisions were made to the Texas Family Code in 1995, the primary purpose of the juvenile court was to “provide for the care, the protection, and the wholesome moral, mental and physical development of children” coming within the court’s jurisdiction.⁸ In 1995, the Code was amended to reflect a change of philosophy, making the “protection of the public and safety” the paramount concern.⁹ Texas, like many other states, has moved away from the rehabilitative model of juvenile justice towards a more punitive approach.¹⁰ Many of the people interviewed for this Report, however, were hopeful that rehabilitation remains one of the primary goals of the juvenile court. This is a reasonable goal, as even the recent emphasis on punishment in the juvenile court has “left intact most of the procedures and facilities for the purpose of rehabilitating juveniles.”¹¹

⁵ Members of the Juvenile Justice Team who conducted research and interviews were: Cathryn Crawford (coordinator); Christopher Ahart, Wade Coriell, Gregg McHugh, Emily Pipkin, Daniel Sanborn, Anuj Shah, and Kallie Smythe from Vinson & Elkins; and Randy Crump, Boyd Hoekel, William Jensen, and Earl Spencer from Shook, Hardy & Bacon.

⁶ Tex. Fam. Code Ann. §§ 51.02, 51.04 (Vernon 2002 & Supp. 2004). A minor can be certified as an adult and transferred to adult court pursuant to Tex. Fam. Code Ann. section 54.02, in which case the juvenile court loses jurisdiction. This report will not address the needs of such minors.

⁷ Tex. Fam. Code Ann. § 54.04 (Vernon 2002 & Supp. 2004).

⁸ *Id.* § 51.01.

⁹ *Id.* § 51.01.

¹⁰ For discussions regarding the change in approach to juvenile justice in Texas and across the United States, see Justice Ed Kinkeade, *Appellate Juvenile Justice in Texas – It’s a Crime!* 51 BAYLOR L. REV. 17 (1999) and Judge Kent Ellis, *The Juvenile – Past and Present*, THE HOUSTON LAWYER, Nov.-Dec. 1995.

¹¹ Ellis, *supra* note 10, at 32

The juvenile delinquency courts in Harris County are the busiest in the State of Texas. In 2002, there were 20,812 referrals to Harris County Juvenile Court.¹² In that same year, 401 Harris County juveniles were committed to the Texas Youth Commission (TYC).¹³ The TYC operates fifteen secured facilities (youth prisons), eight halfway house programs, and contracts with approximately thirty private and local government service providers. Approximately 80% of all youth committed to TYC are sent to secure facilities, where the average stay in 2002 was 22.7 months.¹⁴

Juvenile cases are heard in the district courts in the Harris County Family Courthouse. There are three juvenile district courts in Harris County in which delinquency and child protective services cases are heard; they are the:

- 1) 313th Juvenile District Court: Judge Pat Shelton and Associate Judge Bob Molder;
- 2) 314th Juvenile District Court: Judge John Phillips and Associate Judge Aneeta Jamal; and
- 3) 315th Juvenile District Court: Judge Kent Ellis and Associate Judge Sherry Van Pelt.¹⁵

The juvenile district courts and hearing rooms are located on the 4th floor of the Harris County Family Courthouse, 1115 Congress Street, Houston, Texas.¹⁶ In addition,

¹² Harris Cty. Juvenile Probation Dept., *Juvenile Probation – Not Just Another Job* 16 (Harris Cty. Juvenile Probation Dept. 2002 Annual Rep.). According to the Harris County Juvenile Probation Department, this figure represents a decrease from the two preceding years (there were 24,355 referrals in 2000 and 21,873 referrals in 2001), *supra*.

¹³ Tex. Youth Comm., *New Commitments by County for TYC Youth Fiscal Years 1998 – 2002*, at http://www.tyc.state.tx.us/research/county_commit.html. Harris County accounted for 16.4% of all new TYC commitments in 2002, *supra*. Like other Texas counties, Harris County has seen a reduction in the number of new TYC commitments over the past five years.

¹⁴ Tex. Youth Comm., *Juvenile Corrections System in Texas*, at <http://www.tyc.state.tx.us/about/overview.html>.

¹⁵ This information is based on the structure of the court in May 2003.

¹⁶ As discussed below, the physical facilities for juvenile court are woefully insufficient. Although there have been plans for the construction of a much needed new family courthouse, these plans have been delayed. Solutions to temporarily relieve the overcrowding of the 4th floor have been proposed, but not implemented. This is a serious problem that needs immediate resolution.

Associate Judge Beverly Malazzo presides over detention hearings held in the West Dallas Detention Center.

Under the Texas Family Code, all juveniles who appear in juvenile court are entitled to an attorney.¹⁷ As part of the Texas Fair Defense Act (TFDA),¹⁸ the Family Code was amended to require each county to adopt a plan that specifies the qualifications necessary for an attorney to receive an appointment to a juvenile case and that establishes appointment procedures.¹⁹ Following the passage of the TFDA, the juvenile board of Harris County issued such written appointment guidelines.²⁰ Recently amended in December 2003, these guidelines are referred to throughout the Report.

II. FACTUAL FINDINGS AND RECOMMENDATIONS

FINDING 1: NEED FOR ADEQUATE SPACE

The courtroom is packed. People are crammed on the pews in the gallery and are spilling out into the aisles. At the back of the courtroom, people stand craning their necks trying to get a view of what is happening in the front. The overflow of people extends into the hallway. Just before 9:00 a.m., a bailiff yells out for the people to close the door. Those that cannot squeeze into the barely remaining space in the courtroom gallery are pushed out into the crowded hallway, where someone periodically yells, "You need to move out of the hallway or I will move you." There is nowhere to go, so people either ignore the voice or shuffle around a bit as if they have some place to move.

Inside the courtroom, the bailiff calls out each minor-respondent's name, then bellows, "If you have an attorney and know who it is, and you don't see him here, go out into the hallway until the attorney arrives." The people begin filing out. The courtroom remains full, but there is now space on the pews. Occasionally a lawyer walks through the gallery calling out a name.

Attorneys and their clients meet in the hallway, huddled against the wall, trying to give at least the impression of privacy, while the masses of people walk by, going in and out of the courtrooms. One attorney crams into a phone booth with his client. There is no privacy. There is no quiet. There is no time.

¹⁷ Tex. Fam. Code Ann. § 51.10 (Vernon 2002 & Supp. 2004).

¹⁸ S.B. 7, 2001 Leg. 77th Sess. (Tex. 2001) (enacted).

¹⁹ Tex. Fam. Code Ann. § 51.102 (Vernon 2002 & Supp. 2004).

²⁰ FAIR DEFENSE ACT STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF COUNSEL FOR INDIGENT AND NON-INDIGENT JUVENILE RESPONDENTS (Harris County Juvenile Board, 2003).

It is in these hallways that attorneys often meet their clients for the first, and sometimes only, time.²¹ It is in these hallways that attorneys get information from their clients and their clients' parents regarding the alleged events, as well as the minor's background. It is in these hallways that attorneys are expected to explain to minors their legal rights. It is in these hallways that attorneys are expected to explain plea options and consequences to a minor. It is in these hallways that minors are expected to make the critical decision of whether to enter a stipulation admitting to an offense.²²

Unquestionably, it is nearly impossible for an attorney and a minor to have a meaningful or productive conversation in this setting. One attorney commented,

You are trying to have a conversation and there are tons of people around. The kid is uncomfortable. It is not conducive to them opening up to you. I am one of the few attorneys that actually have an office where we can meet. Even still, sometimes the kids are too poor to get to the office or they miss their appointments. It is rare that I get to meet them before court. And when you do meet them, the attorney-client privilege goes out the window.

Another attorney confirmed this, recounting a time when he was interviewing his client in the hallway before a hearing. Unbeknownst to the attorney, the Chief District Attorney was nearby and listening to the conversation. At the later hearing, over the defense attorney's objection, the District Attorney was called as a witness against the

²¹ Since the passage of the Texas Fair Defense Act and the resulting Harris County appointment guidelines, it is more common for attorneys to visit their clients in detention and to make initial contact before court. An attorney is required to call his client within 24 hours of receiving the appointment. It was reported, however, that when attorneys are appointed to a case in which the minor is not detained, the attorney is given only the name and phone number of the minor and his parents and the court date. Unless he reviews the court file within those 24 hours, the attorney is typically unaware of the allegations of the petition at the time of first contact, and so the first conversation he has with the client is not substantive. It is rare for an attorney to meet with his client face-to-face prior to the first court date. In most cases, the first opportunity the attorneys have to engage in a meaningful conversation with the minor is at the courthouse.

²² It was reported by a number of attorneys that it is not unusual to resolve the case at the first appearance. Although in theory attorneys get appointed prior to the initial appearance, the reality is that there continue to be in-court appointments. In addition, even when the appointments occur prior to court, the minors and attorneys' first meeting occurs in the courthouse. Thus, the only opportunity the minors have to talk to their attorneys before entering a plea of guilty is in the crowded, public hall.

minor and testified as to the conversation that the minor had with his attorney in the hallway.

Every person interviewed lamented the fact that there are no interview rooms in the family courthouse. Attorneys complain that there is no place in the family courthouse where they can talk to their clients in private.²³ Everyone agreed that the current structure is not conducive to meaningful attorney-client conversations.

Effective attorney-client communication is essential to effective representation.²⁴ The importance of having a place in which minors and their attorneys can have a private, uninterrupted conversation cannot be overstated. Effective communication with the client is critical to an attorney's ability to collect important information relating to the minor's innocence or guilt, as well as his or her level of culpability. Effective communication allows the attorney to collect information that is essential for the attorney to advocate for an appropriate disposition/sentence. Confidential, uninhibited communication between an attorney and his or her client helps the minor understand his or her rights and the consequences of waiving those rights. Because a juvenile

²³ This stands in stark contrast to the facilities in criminal court, where interview rooms are located throughout the courthouse.

²⁴ See, e.g., IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 3.3 "Confidentiality" (1979) ("[A]n attorney should not knowingly reveal a confidence or secret of a client or another, including the parent of a juvenile client."); Standard 3.5 "Duty to Keep Client Informed" ("The lawyer has a duty to keep the client informed of the developments in the case, and of the lawyer's efforts and progress with respect to all phases of representation."); Standard 5.1 "Advising the Client Concerning the Case" ("After counsel is fully informed on the facts and the law, he or she should with complete candor advise the client involved in juvenile court proceedings concerning all aspects of the case."); Standard 7.1 "Adjudication without Trial" ("The lawyer should keep the client advised of all developments during plea discussions with the prosecuting agency and should communicate to the client all proposals made by the prosecuting agency."); and Standard 9.3 "Counseling Prior to Disposition" ("The lawyer should explain to the client the nature of the dispositional hearing, the issues involved and the alternatives open to the court. The lawyer should also explain fully and candidly the nature, obligations and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan.").

adjudication may have consequences that extend well beyond a minor's 21st birthday,²⁵ ensuring that a minor is fully informed before he or she makes significant decisions in his or her case is critical.

The children who appear in court, whether as victims or perpetrators, are learning about law and justice and the workings of fundamental fairness in society. The lack of appropriate space for conducting juvenile court business affects what children who come into court are learning about democracy and the law. Insufficient facilities send a message that justice for children, and in fact, children themselves, are not valued in this society.

There are currently plans for the construction of a new family court building.²⁶ The projected date for the construction is ever changing and the latest target date to begin construction is 2005. Interviewees attribute the delay to the low priority of family court in the legal system. In the interim, the commissioners' court²⁷ agreed to allow the family court to expand its facilities into the 4th and 5th floors of the District Attorney's office, which is connected to the courthouse. No steps have yet been taken to implement this temporary plan.

²⁵ For example, a minor adjudicated for possession or sale of a controlled substance is barred from receiving federal financial aid and assistance for a certain time period. *See* 20 U.S.C.A. § 1091 (r) (1999). A minor adjudicated for a sex offense may be required to register as a sex offender. *See* Tex. Crim. Pro. Code Ann. § 62 .01, *et. seq.* (Vernon 2000) ("Sex Offender Registration Program"). A minor adjudicated in juvenile court can receive a determinate sentence of up to forty years. *See* Tex. Fam. Code Ann. § 54.04 (d)(3) (Vernon 2002).

²⁶ While the need for interview rooms is the most pressing, the court has additional space issues that need to be addressed. One judge commented, "The ABA was here twenty years ago and said that this is absurd, you need more courtrooms and space." According to the judge, since the ABA's visit in which it found the space lacking, the courtroom staff at juvenile court has increased from 18 to 52, but the facilities remain the same. In fact, the court personnel have had to reassign space to accommodate the additional staff. For example, the jury rooms are now used as hearing rooms, so as to enable associate judges to preside over cases. When minors exercise their right to a jury trial (which one judge reported happens about 20 times a year in his courtroom) the judges have great difficulty negotiating space for jury deliberations.

²⁷ The commissioners' court is the administrative body of county government. It is composed of the county judge (elected countywide) and four commissioners (elected by precinct). The court supervises the building and maintenance of county roads, bridges, parks, courthouses, jails, buildings and libraries.

RECOMMENDATIONS:

- 1) Adequate and appropriate space is critical to the administration of justice. A family court needs to include:
 - a. Interview rooms where attorneys can meet privately with their clients and their families;
 - b. Waiting rooms for families and witnesses;
 - c. Jury rooms; and
 - d. Appropriate space for court staff, including a probation office, where minors can meet with staff to provide confidential information and to discuss conditions of probations, provisions of services, etc.
- 2) As an interim measure, the commissioners' court, working in concert with system stakeholders, should immediately put a plan into place to identify existing space that can be temporarily used to meet the needs of the court participants.

FINDING 2: EXCESSIVE CASELOADS AND SCHOOL REFERRALS

“It is so hard to give good representation when the docket is so huge. There are so many people; there is a lot of pressure to get a case dealt with in one day. When we need to sit down to talk to the DA about a case, we can't because the DA is not accessible and there are too many other cases to deal with.” - Appointed Attorney

A visit to the 4th floor of the Harris County Family Courthouse makes it clear that the dockets in juvenile court are overloaded. As described above, the hallways are overflowing with people for the 9:00 a.m. call. Judges and/or associate judges hear cases late into the afternoon each day.

We did not attempt to assess caseloads of the appointed attorneys and thus will not draw conclusions about how excessive caseloads affect the quality of representation that minors receive in Harris County. More than one person commented that the excessive caseloads make it much more difficult, if not impossible, for the attorneys and the courts to give the kind of individualized attention to minors that is needed for truly

effective intervention.²⁸ Moreover, the sheer number of cases makes it difficult for attorneys and courts to ascertain which minors have a need for more intensive intervention efforts, as compared to those for whom one court referral is sufficient. The result of the excessive caseloads is that there is more of a tendency to approach cases according to the type of the alleged offense, rather than the individual needs of the alleged child offender. This can be especially problematic when addressing cases in which there are co-actors, which is common in juvenile cases. Because the courts are so busy, judges and even attorneys do not always take the time to assess the culpability of each co-actor and thus they are all treated the same, even though one person may have played a minor role in an offense as compared to the other juveniles involved.

Many attorneys believe the dockets are swollen with misdemeanor filings, such as cases involving marijuana or theft.²⁹ Interviewees blamed the District Attorney's office for the excessive docket, complaining that the District Attorney insists on prosecuting every case that comes to his attention. The overwhelming majority of the people interviewed attributed the docket overload to petitions that are filed from school referrals.³⁰ In addition, some attorneys complained that the District Attorney seeks the maximum penalty on any school referral case, without giving any thought as to whether that is appropriate in an individual case. Although some people criticized the schools for the apparent policy of referring every single case to court, most placed the blame on the District Attorney's office, stating that the District Attorney's office refuses to exercise

²⁸ One judge successfully lobbied for the addition of a fourth juvenile court in Harris County, which was included in a bill providing for the establishment of 15 new courts across the State of Texas. Although the legislature passed the bill, the governor vetoed it. There may be renewed efforts in the next legislative session to establish a fourth court.

²⁹ And in fact, they are correct. Of 20,812 court referrals in 2002, fewer than 20% (3,571) were for felonies. Harris Cty. Juvenile Probation Dept., *supra* note 12, at 16.

³⁰ In 2002, of the 20,812 referrals to juvenile court, over a quarter (5,591) were school referrals. *Id.* at 18.

meaningful discretion in assessing complaints and school referrals. The District Attorney's office, however, reported that it does in fact refuse to file on approximately 50% of the "no tolerance" referrals from schools.³¹

A variety of factors were cited as the cause of the increase in school referrals: the presence of police officers in schools; school administrators' fear of being held civilly liable for failure to adequately punish behavior; and unintended consequences of well-intentioned legislation.³² One interviewee even speculated that court referrals were a way to get rid of special education students. Regardless of the cause of the referrals, it is undeniable that school-related petitions contribute significantly to the overcrowded dockets. One judge estimated that school referrals account for 100-200 new petitions each month. Another judge observed, "A fight around the flagpole used to be handled at school; now it gets filed in court. Growing pains should not be dealt with in court. The kids miss school, the parents miss work, and they have to pay for parking. This has gone too far."³³

Schools need to maintain safety and discipline, however there is no need to refer minor infractions to court which will result in costly, time-consuming and adversarial litigation. Instead students can be sanctioned in a number of ways within the school

³¹ We were unable to check the accuracy of this figure.

³² For example, according to Judge Ellis, changes made to the Texas Family Code in 1995 require public schools to refer to juvenile court every juvenile that is expelled from school. Ellis, *supra* note 10, at 30-31. However, there is an argument to be made that an expulsion to a discipline program is not a true expulsion and therefore, should not require a court referral. There is also an argument to be made that there is an overuse of expulsions and referrals to discipline programs and that this is the reason for the increased use of court referrals.

³³ Interviewees gave a variety of examples of the types of school referrals that commonly result in the filing of a petition in delinquency court, including little kids getting into a "slap fight" on the playground; fighting in school; one student elbowing another in school; juvenile who has been suspended from school returning to school grounds while on suspension and getting charged with trespassing; a juvenile who brought prescription medication to school on two occasions being charged with distribution, and the prosecutor seeking the maximum; a girl throwing candy in school being charged with assault; and a girl crank calling charged with "False Alarm."

system for inappropriate behavior while saving the considerable resources of the court system for those cases that are actually criminal in nature.³⁴

The juvenile court judiciary is working towards reducing the number of school referral petitions. One proposal for an automatic deferred prosecution plan³⁵ calls for allowing less serious cases to be automatically deferred from prosecution to a term of “probation.” If a minor successfully completes a 3-6 month period of probation, then no charges are filed and the minor does not have an adjudication/conviction on his or her record. If the minor fails to complete probation, a petition would then be filed. If properly executed, this system makes sense: a minor is given the opportunity to demonstrate that he or she can follow rules and stay out of trouble, while avoiding the stigma of delinquency adjudication.³⁶ Moreover, the minor can begin his or her period of probation immediately, rather than having to wait for resolution of the case in court. This proposal has the potential to ensure that minors are held accountable for their conduct, while simultaneously freeing the courts and the attorneys for more serious cases. Surprisingly, it was reported that this proposal has met resistance from the District Attorney’s office.

³⁴ For a discussion of the maintenance of school safety without the use of court referrals, see *Opportunities Suspended: The Devastating Consequences of Zero-Tolerance and School Discipline* (Advancement Project, 2000), at <http://www.advancementproject.org>, and *Zero Tolerance* (William Ayers, Bernardine Dohrn and Rick Ayers, eds., The New Press, 2001).

³⁵ This plan would allow for a child charged with a minor infraction to form a contract with an agent of the school or court to admit responsibility for the behavior and agree to stay out of trouble for a certain period of time (3-6 months). If the minor stays out of trouble then the case is never filed with the court. If the minor does get into trouble then the case does go into court, but his or her earlier admission of responsibility cannot be used against him or her.

³⁶ In supporting this proposal, we, like many of the individuals we interviewed, do not think that it is appropriate or desirable to have every school infraction result in a referral to the court system or even the probation department. We encourage school officials to reexamine their policies governing court referrals.

RECOMMENDATIONS:

- 3) School officials should develop a range of school-based sanctions and an array of restorative justice policies, and leave only the most serious cases for court referrals.
- 4) The District Attorney should refuse to file a petition for a minor, non-violent school referral.
- 5) An automatic deferred prosecution program should be instituted for the less serious cases that do come into court, allowing minors to accept responsibility for their acts while avoiding the stigma of a delinquency conviction, and thereby freeing up the limited court and attorney resources for more serious cases.

FINDING 3: NEED FOR MOTIONS TO SEAL RECORDS

“I always get excited when I see a Motion to Seal Records because that means that the kid did good and two years have passed. A lot of times, kids do not know that they can get a lawyer to do this for them.” – Juvenile Court Judge

The Texas Family Code allows a minor to file a petition to seal his or her records after meeting certain conditions.³⁷ The import of sealing juvenile records cannot be overstated. Once a minor successfully completes the conditions of his or her juvenile probation or sentence, he or she should no longer have the stigma of an adjudication. One of the primary reasons there is a separate court for juveniles is because the system seeks to give them a second chance at successful citizenship and does not want them to have to live under the weight of an act they committed as children.

Everyone interviewed agreed that the majority of juveniles that are eligible to have their records sealed do not exercise this legal right. In addition to not being aware

³⁷ Tex. Fam. Code Ann. § 58.003 (Vernon 2002). In the case of deferred prosecution, the minor may apply to have the records sealed immediately after successfully completing his or her period of supervision. Tex. Fam. Code Ann. § 58.003 (d). If the minor has been convicted of a misdemeanor, he or she may apply to have the record sealed two years after any official action was taken in his or her case, and in the case of a felony, after he or she turns twenty-one years old, so long as the minor had not been convicted/adjudicated of another offense. Tex. Fam. Code Ann. § 58.003 (a)-(c).

of these rights, parents and minors may find that such a filing is prohibitively expensive. Although one judge said that he would award fees to an attorney who filed a motion on behalf of an indigent child, he also reported that he has never made an appointment for an attorney to undertake this task, nor has he ever been asked to do so. Attorneys reported that they do file these motions for fee-paying clients. Attorneys charge \$1,000- \$5,000 to file a petition to seal the records. Judges stated that they would enthusiastically support a *pro bono* project geared at sealing minors' records.

RECOMMENDATION:

- 6) The private bar should establish a *pro bono* record sealing project. Representing a client on a Motion to Seal Records is an ideal *pro bono* case because it involves discrete and relatively simple issues and there is an attainable end date for a case. Judges and probation would cooperate and the benefit to former child offenders would be significant. This is clearly an unmet legal need that can be remedied by the private bar.

FINDING 4: NEED FOR MENTORS

“A lot of kids in this court need a lot of help. They should be held accountable, but they also need a lot of help. A big majority of our dockets are poor people and people with a lot of social problems. A lot of these kids have not had responsible role models.” - Juvenile Court Judge

When one judge first ascended to the bench, there was a volunteer corps called “Victory Volunteers,” which was a mentorship program for juveniles in delinquency court. The program is apparently now defunct. Although some child advocates have been successful in recruiting mentors for juveniles in the child protective services side of the court, there is a significant shortage of volunteers on the delinquency side of the court. Judges and attorneys uniformly agreed that there is a real need for volunteers to

serve as mentors to minors that get involved in the delinquency court. This is undoubtedly due to the lack of a structured program for volunteers.

The probation department previously had a program designed especially for girls who have special needs and would benefit from positive female role models. According to one judge, “for some reason that is not understandable” people were not in favor of the program and it was eliminated. Currently, girls are sent to private placements that do not necessarily address their special needs.

RECOMMENDATIONS:

- 7) A volunteer mentor program should be established through local undergraduate institutions, law schools, graduate schools, and/or law firms.³⁸ This would present an ideal volunteer opportunity for local citizens. Such a program should be highly structured and would require funding for training, matching volunteers with juveniles and providing support. Collaboration with the court and the probation department would be crucial.
- 8) Law firms could encourage lawyer and non-lawyer employees to volunteer as mentors.

FINDING 5: RESOURCE DEFICIENCIES: MENTAL HEALTH EXPERTS AND INVESTIGATORS

“We see a lot of mental health challenges where the rules of probation need to be adapted for the individual kid. That is currently not being done. The probation officers are just not trained to recognize and address mental health needs. A mental health advocate would be a great resource to help determine both culpability issues, as well as appropriate dispositions. It would really help to know what the source of the problem is and whether the type of program that is being recommended would actually help the kid. For example, the DA may offer anger management to a kid that assaulted a family member. A mental health advocate could help assess whether these group anger management classes would be helpful or if the kid is destined to fail in them. Maybe what the kid needs is one-on-one counseling. It would really help to have someone who can help determine whether this kid should even be taking this plea.” – Juvenile Attorney

³⁸ Big Brothers Big Sisters is an example of a successful mentor program that is managed well. See <http://www.bbbs.org> for more information.

Investigators and Experts Generally

It was reported that attorneys rarely request the appointment of experts or investigators, reserving such requests for “high profile cases.” Almost every attorney interviewed stated that they thought there were some cases that would benefit from an independent investigator or expert. Many attorneys were receptive to the idea of having a full-time investigator available to the defense upon request and indicated that they would use an investigator more frequently if they did not have to go through the court to secure the services. Going through the court puts attorneys at risk of being perceived by the court as accessing too many resources and may result in premature disclosure of trial strategy.

Mental Health Experts

There were inconsistent responses regarding the adequacy of mental health evaluations, experts and resources for children with mental health problems. One attorney opined that “probation usually weeds out the MHMRA³⁹ cases. They will say, ‘this kid needs an evaluation’.” Another attorney opined that judges and attorneys do not have the means to address mental health or special education issues and that there is no effective system in place to provide more than a superficial diagnosis and examination of a juvenile’s mental health and special education needs.⁴⁰ One attorney surmised that many attorneys fail to identify special education and mental health needs of their clients or “they have the attitude that there is not much they can do about it and judges go along with that attitude because this is not mental health court.”

³⁹ Mental Health and Mental Retardation Authority of Harris County.

⁴⁰ The Clinic Evaluation and Services Initiative located in Cook County, Illinois is an example of a program that is successfully addressing these needs by designing and implementing comprehensive reforms of the mental health and clinical services system within the juvenile court. For more information see <http://www.law.northwestern.edu/depts/clinic/cfjc/programs/cesi.htm>.

Probation is not necessarily equipped to identify and address the mental health and special education needs of minors. In addition, defense attorneys stated that they are not able to have candid conversations with probation because the probation officer does not have the same duty of confidentiality to the client as the attorney. Therefore, they are hesitant to give probation information that clearly would be helpful in assessing the appropriateness of programs or the need for more comprehensive assessment. One attorney stated, “Probation cannot help you understand and address the mental health issues of a particular client because they already have a different role.”

One judge stated that he did not think there were many prosecutions of juveniles with mental health or even special education needs. He conceded, however, that the only way he would be aware that a minor had such needs is if he was informed of it; he is dependent upon the attorney and/or probation department to alert him. A few attorneys opined that there are a number of minors in the system that have mental health and special education needs, but they do not get proper attention because the attorneys do not realize that their clients have these problems. This is supported by national data and opinion papers that suggest that child mental health victims are frequently ignored in juvenile courts around the nation.⁴¹

Many attorneys agreed that they would benefit from having an independent mental health specialist with whom they could consult about their clients. It was reported that MHMRA assigns a person to criminal court to assist defense attorneys in understanding mental health issues of specific clients. Additionally, there is a pilot project in criminal court in which pre-trial services “flag” mental health cases. These

⁴¹ See Bruce Kamradt, *Funding Mental Health Services for Youth in the Juvenile Justice System: Challenges and Opportunities* (National Center for Mental Health and Juvenile Justice, 2002), available at <http://www.ncmhjj.com>.

cases are assigned to one of three attorneys, one of whom has an extensive background in mental health work. A staff member from MHMRA monitors the case. There is no similar staff person or pilot project in juvenile court.⁴²

RECOMMENDATIONS:

- 9) The Court should maintain a separate pool of funds for experts and investigators that is administered by a judge or court administrator who is not presiding over the case for which the funds are sought. *Ex parte* requests for funds should be permitted in order to preserve a minor’s confidentiality, attorney work product, and a minor’s right to effective assistance of counsel.
- 10) Mental health training programs for judges, attorneys, probation officers and other stakeholders should become routine. The American Bar Association Juvenile Justice Center, with support of the John D. and Catherine T. MacArthur Foundation, has established juvenile court training curricula on mental health and developmental issues relating to children and offers these trainings at little or no cost.⁴³ These trainings would be an excellent resource for increasing awareness of these issues.
- 11) The private bar could provide financial support of full-time investigators who are available to appointed attorneys without having to make a request through the judge presiding over the case.
- 12) The private bar could provide financial support of a mental health advocate to serve in a two-year fellowship. The mental health advocate should be available to appointed attorneys without requiring the request to be made through the judge presiding over the case. If the attorney did not seek to use the material in court, it would remain confidential in compliance with state mental health confidentiality laws.

⁴² When asked if this is because probation fulfilled such a role, one attorney answered no, because probation officers “already have a defined role and that is definitely not it.”

⁴³ For more information on these trainings see MacArthur Curriculum, at <http://www.abanet.org/crimjust/juvjus/macarthur.html>.

FINDING 6: A CHANGE IN POLICY REGARDING THE APPOINTMENT OF ONE ATTORNEY FOR THE LIFE OF THE CASE

After the passage of the TFDA, a rule was instituted in Harris County requiring that the attorney who was initially appointed to the case follow the case to its conclusion.⁴⁴ Under this rule, rather than having one attorney represent the minor at the detention hearing and another represent the minor at the subsequent court proceedings, the same attorney represented the minor at all stages of the proceedings. This practice comports with ABA standards.⁴⁵ All but one of the attorneys interviewed found that this practice enhanced their representation because it allowed them to get more complete information from the minor and his or her family, allowed for more contact, and consequently, led to the development of a more effective and productive attorney-client relationship. Largely in response to the administrative difficulty of having numerous attorneys in the detention hearings in one day and the difficulty in scheduling review hearings, the juvenile board⁴⁶ recently decided to revert back to a detention hearing duty attorney: a single attorney will be appointed for all detention hearings held on a given day, but will not remain on the case. The consensus among interviewees was that this

⁴⁴ FAIR DEFENSE ACT STANDARDS AND PROCEDURES FOR THE APPOINTMENT OF COUNSEL FOR INDIGENT AND NON-INDIGENT JUVENILE RESPONDENTS 8.5.3 (2002).

⁴⁵ See IJA-ABA JUVENILE JUSTICE STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard 2.4 (b) "Duration of representation and withdrawal of counsel" (1979) ("Lawyers initially retained or appointed should continue their representation through all stages of the proceeding, unless geographical or other compelling factors make continued participation impracticable."). The Texas Family Code does not require that the same attorney represent the minor at all stages of the proceedings, but it does appear to require uninterrupted representation and requires an attorney to remain on the case until substitute counsel is appointed if the juvenile has been detained. See Tex. Fam. Code Ann. § 51.101 (Vernon 2002) ("If an attorney is appointed at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.").

⁴⁶ Every county in Texas has a juvenile board. In Harris County the board consists of the county judge, the juvenile court judges, two district court judges and a justice of the peace in Harris County. The juvenile board establishes general personnel policy for the employees of the probation department and the county institutions under the jurisdiction of the board. Tex. Hum. Res. Code Ann. §152.1071(a) and (c) (Vernon 2002).

change was dictated more by the detention center's inability to accommodate each defendant's attorney rather than an interest in improving the quality of representation.

Although one attorney stated that he asks his clients to call him while on probation, especially if they are concerned about something, the norm appears to be that attorneys lose all contact with their clients after disposition.⁴⁷ Attorneys are not compensated for post-sentencing services and consequently do not follow up with their clients.

Although some interviewees said that the attorneys are contacted when a minor violates probation, members of the probation department stated that they do not contact the attorney if his or her former client violates the conditions of probation. In addition, attorneys' appointments do not extend to representation in collateral proceedings, such as school expulsion or custody hearings. Many people agreed that expanding representation to collateral proceedings would be beneficial to the minor.⁴⁸

Attorneys reported that they are not automatically reassigned to represent minors who appear in court on a subsequent charge. While such reassignment might be difficult in some cases, the value of having the same attorney represent a minor on multiple or subsequent charges is apparent: the attorney would already have important information about the minor and his or her family; the attorney would have already begun to develop

⁴⁷ Very few of the attorneys interviewed handle juvenile appeals. One attorney opined that the low number of juvenile appeals can be attributed to the combination of two factors: 1) very low caps placed on attorney compensation for appeals, and 2) the new requirement that one needs to be board certified to handle such appeals.

⁴⁸ It is necessary to point out that this may require attorneys to become familiar with an entirely new set of rules and regulations, as representation in school or other proceedings involves different procedures, personnel, etc. However, addressing all of the minor's legal and school needs often leads to sustained positive results. One program in Seattle Washington, Team Child, has enjoyed great success in taking this holistic approach to legal representation. To find out more about this program, visit their website *at* <http://www.teamchild.org>

a trusting relationship with the minor; and the attorney would have a better understanding of the minor's needs and the challenges presented by certain dispositions.

RECOMMENDATIONS:

- 13) While we are cognizant of the administrative concerns that led to the decision to revert back to a detention hearing duty attorney, we strongly encourage the juvenile board to reinstate the procedure requiring attorney appointment for the life of the case.
- 14) The court should institute a policy requiring the probation department and/or the clerk to notify the minor's previously appointed attorney if there is an alleged probation violation.
- 15) Attorney appointments should be made to include comprehensive legal representation for the child. Attorneys should be encouraged to represent minors in collateral proceedings. Attorneys should be compensated for that representation.

FINDING 7: NEED FOR REPRESENTATION IN JUSTICE OF THE PEACE COURTS AND IN SCHOOL EXPULSION CASES

One judge thought that *pro bono* attorneys would be a welcome sight in justice of the peace and truancy courts, as well as in school expulsion hearings. Justice of the peace courts, which have significantly overloaded dockets, handle class C assaults, thefts, etc, and allow for six-person jury trials. These types of cases often involve discrete issues that, if adequately handled, lend themselves to speedy resolutions. Establishing a *pro bono* project in these venues may be a good way to get attorneys interested in what happens in the juvenile court and enable them to become familiar with juvenile issues on a graduated scale. It would also benefit the population of under-served, at-risk youth.

RECOMMENDATION:

- 16) Establish a *pro bono* project through local law schools and private firms to handle cases in justice of the peace and truancy courts, as well as in school expulsion hearings.⁴⁹

III. IMPACT OF TEXAS FAIR DEFENSE ACT

While the primary goal of this Report was not to assess the effects of the Texas Fair Defense Act (TFDA),⁵⁰ we believe that the Report would not be complete without some comment on the impact of the TFDA on the delinquency court in Harris County. While reactions to the passage of the TFDA varied tremendously, everyone interviewed agreed that the legislation has affected the Harris County juvenile justice system in one way or another.

Appointments

Some interviewees claim that the TFDA had a positive impact on representation because a greater number of attorneys are being appointed to cases rather than a small cadre of “favorites.” They also note that attorney compensation is better under the TFDA. Others claim that the new guidelines and increased fees imposed as a result of the TFDA have attracted unqualified attorneys from the criminal courts who, while technically qualified, do not have the requisite base of knowledge or understanding of the philosophy of the juvenile court to effectively represent minors. They complain that not only does this result in less effective representation, but it is unfair to the people who worked hard for juvenile certification before the TFDA because they are not getting as many cases, making it difficult for them to “stay in the game.” Still others claim that the

⁴⁹ For further discussion of the need for *pro bono* attorneys in expulsion hearings, see *infra* Chapter 3: School Suspension and Expulsion Proceedings, Finding 5.

⁵⁰ Tex. Code of Crim. Pro. Ann. Art. 1.051 (Vernon 2002).

TFDA has not changed anything at all, other than cause a marginal increase in attorney compensation.

One judge complained that, administratively, the appointment process is a “nightmare,” in large part because it is computer driven. Some attorneys that have been accepting appointments for years are not computer savvy and may miss out on appointments. There have been computer glitches, although, by all accounts, not recently. The judge has heard complaints from attorneys who say that they have been available for months and yet have not received appointments. Another judge stated that he has his doubts about the assignment procedure because he continues to “see the same faces in court,” while other attorneys complain to him that “their names are not coming up on the wheel.”

A few comments regarding the appointment process caused us some concern. For example, prior to the passage of the TFDA, it was reported that some Texas judges required campaign contributions in exchange for appointments.⁵¹ It was also reported that in courtrooms across the state there were a small group of attorneys who received the majority of court appointments. As recently as 2002, the *Houston Press* reported that this was still the case in at least one courtroom.⁵² While it was consistently reported that the number of attorneys receiving appointments in Harris County has expanded, some interviewees reported that favoritism continues to play a role in the appointment process,

⁵¹See, e.g., Butcher, Allan K., Moore, Michael K, *Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas* (received by the State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters; Committee Approval 9/8/00; received by State Bar 9/22/00); and Texas Appleseed Fair Defense Project, *Selling Justice Short: Juvenile Indigent Defense In Texas*, Juvenile Chapter (October 2000). At least one attorney reported that he has shifted his gift giving from the judges to the court coordinators, explaining “Christmas time, I even give gifts to each coordinator, because I had to jump into the game.”

⁵² See Tim Fleck, *Old Ways Die Hard: A State Law Can’t Break up a Juvenile Courtroom Gang*, HOUSTON PRESS, 6/20/02.

the perception being that a handful of attorneys continue to receive the majority of appointments.⁵³ In fact, one attorney reported that he works about 200 days a year, during which time he receives approximately 300-400 appointments. Some interviewees acknowledged that favoritism continues to guide appointments, but suggested that this is simply a consequence of judges seeking out the best and most qualified attorney for the case.

The juvenile board recently decided to modify the guidelines for the appointment of attorneys that it put into place after the passage of the TFDA to include a requirement that attorneys taking appointments obtain continuing legal education credits that are specific to juvenile cases. The hope is that newcomers to the juvenile court (who are typically adult criminal defense attorneys) will become better educated on the differences between adult and juvenile cases. This new requirement makes the need for access to juvenile-focused trainings even greater.

RECOMMENDATIONS:

- 17) There should be an independent audit of the appointment practices in Harris County to ensure that the written procedures are being followed and that favoritism or bias does not factor into the appointment process.
- 18) Law firms could create a program for sponsorship of public interest attorneys to attend local and national juvenile delinquency training seminars and conferences.⁵⁴

⁵³ After June 1, 2003, attorneys that have been denied inclusion on the appointment list will no longer be allowed to appeal that decision. One attorney expressed concern that this would enable judges to manipulate the appointment process.

⁵⁴ One of the issues that defenders should receive training on is immigration and its impact on sentences for defendants.

Fees

Though every attorney interviewed reported benefiting from the increased fees, many feel that they are still inadequately compensated. Most stated that they do not submit bills for out-of-court work, despite the provisions allowing them to do so. One attorney stated that “most of the cases are cut and dry. I am appointed, told when the kid is going to be in court. I call his parents. There is no need for him to come into the office or meet before court.” He stated that he does not request out-of-court fees because “the judges don’t like to sign off on them and I want to stay on the [appointment] list.”

It was reported that the fee structure is a disincentive to taking cases to trial because attorneys are almost guaranteed to exceed the caps in preparing a case for trial. One attorney reported that maybe one in two hundred cases go to trial “because there is no money in it. Going to trial doesn’t make financial sense because they probably exceed the fee caps on these cases.” Another attorney reported that he had not had a trial in three years. One attorney noted, “The fee structure creates an incentive for defense attorneys to churn and burn cases.”

One judge reported an increase in requests for payment for out-of-court fees for interviews and investigations, while many attorneys stated that they still do not typically submit fee requests for time spent out of court. The reasons for this are varied – some said that out-of-court fee requests are simply not worth it, while others believed that if they began requesting compensation for out-of-court fees, they would lose favor with the judges and receive fewer appointments. One attorney stated that she is only compensated for out-of-court fees on cases that are set for trial.

Fees are capped by case, creating a disincentive to give any one client “too much time.” An attorney needs court approval to exceed the cap. It is uncommon for attorneys to submit petitions for fees in excess of the cap. It was reported that if you stay within the cap, judges never reduce the fee award. Almost every interviewee agreed that, although there has been an increase in the amount of fees that they receive, appointed attorneys are still not adequately compensated, especially when they are assigned cases (such as felonies) that require more time and attention. Because fees are capped by the case, attorneys are required to take as many cases as they can, reducing the amount of time they can dedicate to individual clients. Although the county will reimburse investigation expenses, no attorneys reported incurring these costs. One attorney explained that hiring an investigator was almost never justified given that “case outcomes are generally clear from the outset.” Also, attorneys are not compensated for post-sentencing services.

Amount of Time on Cases

The amount of time attorneys reported spending on their cases varied. Defense attorneys reported spending little time on the majority of their cases; one attorney estimated that she generally spends 30-45 minutes on each case, while another claimed to interview his clients, preferably at home, well before trial; another attorney stated that she generally only visits with a child and his or her family immediately before trial because district attorney and probation reports are not available until then; another attorney makes himself available to his clients before trial but does not seek them out; no attorneys reported tending to their clients after sentencing.

RECOMMENDATION:

19) There should be a review of how the TFDA has affected the quality of counsel in order to consider necessary amendments to further improve representation. The system of compensation for attorneys, though recently amended, should be re-examined to explore ways to encourage higher quality practice by appointed attorneys.

IV. OTHER ISSUES WORTHY OF REVIEW

A. DETENTION HEARINGS

In 2002, 6,215 children were admitted to detention centers in Harris County.⁵⁵ We were only able to observe one day of detention hearings and were concerned with what we saw. Three minors who appeared on unrelated charges had joint detention hearings – presumably because none of them had parents attending the proceedings. One attorney stated that he is usually given five minutes to meet with the client and prepare for the detention hearing. Perhaps it was for this reason that we saw communications between minors and their attorneys taking place in open court, in the presence of others. It was not clear that the minors or their parents fully understood the proceedings. A recent probation report also made reference to detention hearings being held by teleconference, which raises a number of concerns.⁵⁶ It may be beneficial to conduct further review of the detention process, particularly in light of the fact that there were over 6,000 minors admitted to juvenile detention centers in Harris County in 2002.⁵⁷

⁵⁵ Harris Cty. Juvenile Probation Dept., *supra* note 12, at 14. This is a very high number that is cause for concern. For information on effective alternatives to detention, see The Annie E. Casey Detention Alternatives Initiative, at <http://www.aecf.org/initiatives/jdai>.

⁵⁶ Harris Cty. Juvenile Probation Dept., *supra* note 12, at 14.

⁵⁷ *Id.* at 14, 17.

B. EVALUATION OF PROGRAMS AVAILABLE FOR DELINQUENT YOUTH

Although everyone, including the prosecutors, agrees that one of the goals of the juvenile court continues to be rehabilitation,⁵⁸ no one could speak to the success of the programs to which children are sent as a condition of their court sentences. While there appear to be a lot of programs available to minors, there does not appear to be a mechanism for assessing the effectiveness of these programs. One member of the probation department commented, “There are tons of programs, but I can’t speak too much to the effectiveness. You just never know – there are so many programs, it is hard to know.” One attorney stated that she has her doubts about the efficacy of the rehabilitation programs, but because she only sees a client after sentencing if he gets in trouble again, she has no basis on which to evaluate the programs. Attorneys are not asked to provide, nor are they compensated for, providing post-sentencing services.

RECOMMENDATION:

20) In order for defenders, prosecutors and judges to effectively advocate for and use alternative programs to incarceration, there needs to be an assessment of the effectiveness of the various programs in which youth are placed as part of their disposition. Where warranted by the facts of a case, courts should consider continuing an attorney’s appointment beyond disposition, which would enable attorneys to gain greater familiarity with the specifics of the programs, thereby benefiting the present clients, as well as future ones.

⁵⁸ This view may actually cause attorneys to forgo advocacy due to their belief that the only way to get a minor “help” is by getting them to enter a guilty plea. According to one interviewee, “usually lawyers get kids the treatment they need by having them plead guilty. The outcome is not related to innocence or guilt, though.”

C. SPECIAL CONCERN RELATING TO SEVENTEEN TO TWENTY-ONE YEAR-OLD INDIVIDUALS

A few people were concerned with the overlap in adult and juvenile jurisdiction, which includes ages from 17-21. It was reported that often a young adult who is still serving juvenile probation will be charged with an adult offense and the attorney will enter a plea on his or her behalf, unaware that he or she is on parole from the TYC. As a result, what seemed like a good deal ends up sending the child back to a secure facility. In addition, even if a young adult is exonerated in the adult system, he or she may have his or her probation revoked because of the lower standard that applies to revocations (preponderance of the evidence as opposed to reasonable doubt), but juveniles and some attorneys fail to comprehend this.

V. CONCLUSION

Many of the unmet needs of youth in delinquency court could be met with support from the private bar. As outlined in the recommendations above, the private bar can give financial support, institute or participate in *pro bono* programs, and assist in staffing mentorship programs. The system participants in the delinquency court uniformly welcomed assistance from the private bar. It is our hope that the private bar will respond to this call for assistance and lend its support to the improvement of justice for all Harris County youth in the delinquency system.

CHAPTER 2: CHILD WELFARE⁵⁹

I. BACKGROUND OF HARRIS COUNTY DEPENDENCY COURT

"In every child who is born under no matter what circumstances and of no matter what parents, the potentiality of the human race is born again, and in him, too, once more, and each of us, our terrific responsibility toward human life: toward the utmost idea of goodness, of the horror of terrorism, and of God." James Agee, Let us Now Praise Famous Men.

In the year 2000, the state of Texas had a rate of child fatalities alarmingly higher than every other state at 177 deaths from abuse and/or neglect (3.0 deaths per 100,000 as compared to the second highest, Ohio at 2.0 deaths per 100,000).⁶⁰ In 2002 the number of child fatalities as a result of abuse or neglect in the state of Texas increased to 203, with 49 of these fatalities occurring in Harris County, Texas; of those, 5 were in foster care at the time of their deaths.⁶¹ By contrast, over a similar time period, only 4 states had more fatalities than Harris County (Florida, Illinois, New York and Ohio).⁶²

There were 6,415 confirmed child victims of abuse and/or neglect in Harris County in 2002, and the Texas Department of Family and Protective Services (DFPS)⁶³ completed 16,429 investigations of child abuse and neglect.⁶⁴ In 2002, DFPS was legally

⁵⁹ Members of the Child Welfare Team who conducted research and interviews were: Frank Cervone (coordinator); Catherine Krebs; and Elysia Franty, Tammie Fergusson, Neil Verma, and Josh Westerman from Locke Liddell & Sapp.

⁶⁰ U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment 2000* Table 5-2 (U.S. Government Printing Office, 2002). In FY 1998, 176 children died from abuse and neglect (36% of these children had been involved with the Department of Family and Protective Services). Texas Department of Family and Protective Services, *Child Abuse and Neglect Related Deaths in Texas and the Nation i*, available at http://www.tdprs.state.tx.us/Child_Protection/pdf/chldstdy.pdf.

⁶¹ Texas Department of Protective and Regulatory Services, *2002 Data Book* 145, available at http://www.tdprs.state.tx.us/About_PRS/PRS_Data_Books_and_Annual_Reports/2002data/DatabookFY02.pdf. As of the publishing of this report, 2003 statistics were not available.

⁶² In the year 2000 Florida had 65 fatalities, Illinois 61, New York 79, and Ohio 58. U.S. Department of Health and Human Services, *supra* note 60, at Table 5-2.

⁶³ Prior to February 1, 2004 the Texas Department of Family and Protective Services was known as the Texas Department of Protective and Regulatory Services.

⁶⁴ Texas Department of Protective and Regulatory Services, *supra* note 61, at 135.

responsible for 5,413 Harris County children, with 5,255 children in substitute care and 4,151 of these in foster care.⁶⁵

Most child welfare cases enter the system when child abuse or neglect is reported to DFPS. DFPS investigates the report of abuse or neglect to assess whether the child who is the subject of the report is in immediate danger. If the danger is immediate then DFPS may file a petition in court to take custody of the child. In every child welfare suit in Harris County there is a request for termination of parental rights.⁶⁶

Texas dependency courts, referred to as family courts, have jurisdiction over family law matters, including child welfare, custody, support and reciprocal support, dependency, and neglect.⁶⁷ The Harris County family courts are located in the Harris County Family Law Center, a building located adjacent to the Harris County Justice Center, the “old” Harris County civil courthouse, and the “new” Harris County civil courthouse annex. The facility is outdated and not set up to efficiently handle the traffic arising from an increasing volume of family law cases. These courts also hear juvenile justice cases.⁶⁸

Besides DFPS, which is generally the petitioner, the other parties involved in child welfare cases include the children who are the subjects of the cases, their parents, attorneys for each party and in some cases Court Appointed Special Advocate (CASA)

⁶⁵ *Id.* at 149.

⁶⁶ This is not statutory, but is a general policy that has been implemented so that Texas is in compliance with federal time line requirements for closing a case within 12 months of the filing of the petition. The state can amend the petition at a later date if termination is no longer the goal. The various grounds for involuntary termination of the parent-child relationship are abandonment, child endangerment, failure to support the child, conviction for violation of certain Penal Code sections, inability to care for child, etc.

⁶⁷ Tex. Gov't. Code Ann. §24.601 (Vernon 2004).

⁶⁸ For a breakdown of the courts and the judges see *supra* Chapter 1: Delinquency Court, Background of Harris County Delinquency Court.

volunteers. The county attorney represents DFPS in court.⁶⁹

The court is required to appoint an attorney *ad litem*⁷⁰ for a child for whom a governmental entity is seeking termination of the parent-child relationship or for whom an agency is seeking to be named conservator. An attorney *ad litem* must be appointed for the parent in a suit to terminate the parent-child relationship where the parent opposing termination is indigent, where the father is unknown or cannot be located, or where the parent is served with citation by publication.⁷¹ Attorneys *ad litem* are appointed by the family law courts and selected from a list of approved attorneys *ad litem*. The local administrative district judge compiles the list of approved attorneys. Attorneys *ad litem* are paid from the general funds of the county⁷² and earn fees of \$125 per hour for in court time and \$30-\$50 per hour (with a \$500 cap) for “out-of-court” time.⁷³ Attorneys *ad litem* are required by statute to investigate the facts of the case; obtain and review copies of all of the child's relevant medical, psychological, and school records; and become familiar with the American Bar Association's *Standards of Practice*

⁶⁹ Tex. Fam. Code Ann. §264.009 (Vernon 2002) (County attorneys represent Harris County in various civil matters).

⁷⁰ Tex. Fam. Code Ann. §107.012 (Vernon 2002). *See also* Tex. Fam. Code Ann. §107.001(2) (Vernon 2002) (defines an "attorney *ad litem*" as an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation).

⁷¹ Tex. Fam. Code Ann. §107.013 (Vernon 2002). *See also* Tex. Fam. Code Ann. §107.001(2) (Vernon 2002) (defines an "attorney *ad litem*" as an attorney who provides legal services to a person, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation).

⁷² Tex. Fam. Code Ann. §107.015(c) (Vernon 2002).

⁷³ According to the Harris County payment voucher, attorneys *ad litem* receive a minimum of \$75 and a maximum of \$150 for in court, non-trial appearances, and a minimum of \$100 and maximum of \$300 for trial appearances. Out-of-court time is paid at a rate of \$30 to \$50 with a maximum of \$500 total (this generally works out to be 10 hours paid at \$50 per hour). In comparison, the delinquency rates are now the same as rates for adult criminal representation and are dependent upon the severity of the charge. Out-of-court hourly fees range from \$50 per hour (\$500 max) for 3rd degree felonies and lesser cases to \$100 per hour (\$2000 max) for first degree felonies. In-court hours for non-trial time range from 3rd degree felony offenses at \$150 a day, with a maximum of \$750, to 1st degree felony offenses at \$250 a day, with a maximum of \$1250. Trial rates are \$300 a day for 3rd degree offenses and \$400 a day for 1st or 2nd degree offenses. Juvenile attorneys stated that judges can apply their own caps for payment.

*for Lawyers Who Represent Children in Abuse and Neglect Cases.*⁷⁴ Attorneys *ad litem* who are appointed to represent children are also required to interview the child if the child is four years of age or older; interview individuals with significant knowledge of the child's history and condition, including the child's foster parents; and interview all parties to the suit.⁷⁵

CASA volunteers also play an important role in the child welfare system. The Texas Family Code sections 264.601-613 allow the attorney general to contract for services with CASA programs. In Harris County, the CASA program provides advocacy services to abused and neglected children, and seeks to obtain permanent placements for children. CASAs perform home visits, attend service planning meetings, and identify services and other resources. Often working in concert with the child's court appointed lawyer, CASAs are volunteers who function as guardians *ad litem*, acting at all times in the child's best interest. It should be noted that while the Harris County CASA program is said to be the largest in the nation, less than half of Harris County children in out-of-home care, and none of the youth in the permanent custody of the state, have CASA volunteers assigned to them.

II. FACTUAL FINDINGS AND RECOMMENDATIONS

FINDING 1: NEED FOR INTERVIEW ROOMS IN THE JUVENILE COURT

This Report suggests that space in the juvenile court is an urgent concern that needs to be addressed immediately.⁷⁶ The juvenile court has three courtrooms which

⁷⁴ Tex. Fam. Code Ann. §107.003 (Vernon 2002).

⁷⁵ Tex. Fam. Code Ann. §107.003 (Vernon 2002). The state bar or individual judges could theoretically sanction a lawyer for not complying with these statutory mandates, however we could find no information on whether or how often this happens. One interviewee noted that she had never seen sanctions imposed on an attorney who had not complied with these statutory mandates.

⁷⁶ See *supra* Chapter 1: Delinquency Court at Finding 1 for analysis and recommendations.

alternate between child welfare and juvenile justice matters every other day. These courtrooms share a hallway that is overcrowded every day. There is a need for private interview rooms in child welfare cases due to the sensitivity of the issues of child abuse and neglect.

FINDING 2: SOCIAL WORKER TURNOVER AND SALARY

[DFPS] employees are overloaded and underpaid with too many cases to supervise. The [DFPS] in Harris County had a 52% turnover rate last year, with the average turnover for new employees being less than 1 year. The state offers good benefits, but the workers get frustrated because they do not have time to do their jobs properly. - CASA Volunteer and Former DFPS Social Worker

According to interviewees, DFPS features a workforce of caseworkers and supervisors who are inexperienced, frustrated and overworked. The statistic that was most frequently quoted by those interviewed is that DFPS loses fifty-two percent of new social workers within the first year of their employment.⁷⁷ In one interviewee's opinion, DFPS workers are leaving because of low pay and heavy caseloads as “high as 60-70 cases [families] per worker.”⁷⁸ Another interviewee agrees, opining that DFPS employees are “overloaded and underpaid,” with average caseloads estimated to be between 60 and 80 cases. In contrast, the Child Welfare League of America recommends that social workers handle 17 ongoing cases at one time.⁷⁹ One interviewee stated that benefits provided by the state were “good,” but two others believe that workers are

⁷⁷ The Human Resources Department of DFPS confirmed that the turnover rate for new social workers is approximately 50% within the first year of employment. This statistic is consistent with Child Welfare League of America findings which indicate that turnover in child welfare agencies frequently exceeds 50%. Child Welfare League of America, *Child Welfare Workforce*, RESEARCH ROUNDUP, September 2002, at 1., available at <http://www.cwla.org/programs/r2p/rrnews0209.pdf>. Harris County social services had an overall turnover rate of 30% in 2001. Texas Department of Protective and Regulatory Services, *Texas Statewide Assessment*, Section V, at 189.

⁷⁸ According to the DFPS 2002 *Data Book* for FY 2002, the average monthly caseload per worker was 26.8 cases. This number did not include the caseload for intake workers. Texas Department of Protective and Regulatory Services, *supra* note 61, at 40.

⁷⁹ STANDARDS OF EXCELLENCE FOR SERVICES TO ABUSED OR NEGLECTED CHILDREN AND THEIR FAMILIES (Child Welfare League of America, Revised 1999), available at <http://www.cwla.org/newsevents/news030304cwlacasead.htm>.

generally underpaid for the job they are asked to perform. According to the DFPS website, incoming social workers will be paid \$28,908-\$32,616 a year.⁸⁰ This salary is generally consistent with the national average starting at \$29,412 for those with a master's degree in social work (social workers in Texas are not required to have a degree in social work), and \$26,453 for those with any undergraduate degree,⁸¹ but falls well below the Child Welfare League's recommended base salary of \$40,000 for child welfare caseworkers.⁸² Two of the most lauded supports provided by DFPS are laptops and cell phones that are given to each worker to enable remote work, including working from home. This technology increases flexibility and efficiency. Nevertheless, interviewees almost unanimously agreed that social workers have too many cases to do their job well.

Another element adding to the pathogenesis of social worker burnout, according to one interviewee, is that workers suffer "frustration due to the inability to effectively complete their duties." Heavy caseloads and limited resources combine to prevent caseworkers from giving each child and family adequate attention. The position of a DFPS social worker was widely described as "stressful." One interviewee believes that the poor work environment generally motivates everyone to leave and that "only the worst people stay" because they are not able to find alternative employment. According to another interviewee, the average DFPS supervisor has three years tenure, which in his opinion means they do not have enough experience to be supervising cases.⁸³ State social

⁸⁰ This salary range was listed in DFPS job openings for child welfare specialists on 1/1/04. See <http://www.tdprs.state.tx.us/>.

⁸¹ Child Welfare League of America, *Calls for Increased Federal Investment in Children's Services and Case Workers* (March 4, 2003), available at <http://www.cwla.org/newsevents/news030304cwla.htm>.

⁸² Child Welfare League of America, *Who's Looking Out for Children? Building a Strong National Child Welfare System Fifteen Essential Steps*, available at <http://www.cwla.org/newsevents/news030304cwla15steps.htm>.

⁸³ We could not find statistics on the average experience of a DFPS supervisor.

workers are not required to have an academic degree in social work⁸⁴ even though several studies have found that a degree in social work positively correlates with performance and can increase retention rates for workers.⁸⁵

Most interviewees believe that the basis of the problems with DFPS is inadequate funding, stating that the best way to improve the situation is to find more funding to allow for increased hiring and pay.⁸⁶ It was clear to interviewees that additional workers would reduce the burden on the average worker and an increase in pay would make the job more appealing. More social workers would also mean that children under the care of DFPS would be safer because they could be supervised more adequately.

The state of Texas developed an action plan in 1999 to address the high rate of child fatalities as a result of abuse or neglect.⁸⁷ Some of the elements of the plan included hiring additional caseworkers, incentives to reduce worker turnover, social worker training, and additional supervisory staff.⁸⁸ Despite the recognition of these needed changes, it appears from our interviews that these are still problems, and indeed, child fatalities in Texas have continued to rise since the development of the plan.⁸⁹ High caseloads and frequent turnover necessarily erode any improvements a system might achieve through training and reform. We saw no reference to quality assurance or critical

⁸⁴ The DFPS website does not list a social work degree as a minimum requirement for employment. See job openings at <http://www.tdprs.state.tx.us/jobs/C06C06.htm>. DFPS does not keep track of the education level of its employees. Texas Department of Family and Protective Services, *Report on the Initial Five-Year Child and Family Services Plan Data*, Objective 2.3, available at http://www.tdprs.state.tx.us/About_PRS/State_Plan/sec10a.asp.

⁸⁵ Child Welfare League of America, *supra* note 77, at 3-4.

⁸⁶ In 1998, Texas increased funding for DFPS to hire 380 additional employees (these positions were filled by FY 2000), yet interviewees continued to see inadequate staffing as a pressing issue. The Texas Department of Protective and Regulatory Services, *Strategic Plan 2003-2007* 67, available at http://www.tdprs.state.tx.us/About_PRS/PRS_Data_Books_and_Annual_Reports/strategicplan/STRATPLN0307.pdf.

⁸⁷ Texas Department of Family and Protective Services, *supra* note 60.

⁸⁸ *Id.* at iii-iv.

⁸⁹ See *supra* Chapter 2: Child Welfare, Background of Harris County Dependency Court.

review to measure the positive or negative effects of improvement initiatives. State leaders need to be lobbied on the issue of increasing the number of state social workers, raising their compensation and requiring an appropriate educational background. While child deaths are only one measure of the quality of a child welfare system, the Harris County data are troubling. These changes in the workforce capacity could perhaps lower the high number of child fatalities in Harris County, while improving the overall performance and morale of the agency.

RECOMMENDATIONS:

- 1) The state should increase funding for the hiring of additional social workers, and provide for increased compensation to DFPS workers.
- 2) DFPS ought to implement a requirement that social workers have a bachelor's or master's degree in social work.
- 3) DFPS should provide ongoing worker and supervisor training and increase funding for training.
- 4) DFPS should develop a quality assurance program to improve practice, identify shortcomings and deficits, and upgrade workforce capacity.
- 5) DFPS should implement a rating system for workers that relates reviews and work performance to compensation rates.

FINDING 3: LACK OF GUIDELINES FOR ATTORNEY CASELOADS AND CASE DISTRIBUTION

Each judge in the dependency court has his or her own method for the distribution of cases. Caseloads are not published and there is no cap on the number of cases that an attorney can be assigned at one time. Interviewees reported that there are “more attorneys than cases.” Many of the attorneys, however, have handled as many as 50 cases at a time.

Judges do not deny that they sometimes hand-select appointed attorneys. One judge stated that it is his practice to “appoint the better lawyers.” Another judge stated that he “likes appointing the good, experienced lawyers.” The impression of some non-judges, however, was that attorneys were appointed based on a “good old boys” network or the “campaign contributors list.”

Even if the selection criterion is limited to the skill of the attorney as perceived subjectively by the judges, it is clear that such selections are made without regard for the individual attorney’s caseload. One judge admitted that he did not keep track of this statistic, and we could identify no official record of attorney caseloads. It is easy to imagine that the systems currently employed by the judges could result in the assignment of a case to an overloaded attorney, when a competent attorney with a much lighter caseload may be available. Additionally, the current selection criteria may give the impression (even if it is incorrect) that cases are distributed unfairly.

Some attorneys *ad litem* who were interviewed stated that their high caseloads prevented them from effectively completing necessary tasks such as meeting with their child clients and attending permanency plan team meetings.⁹⁰ Not only is meeting with a child client mandated by statute,⁹¹ it is essential to a lawyer’s ability to represent that child in court.⁹² Since children are not always brought to court for dependency cases, it is incumbent upon lawyers to visit their child clients to interview them before going into court. High caseloads or lack of compensation (see Finding 4) may prevent a lawyer from completing this crucial task.

⁹⁰ A permanency plan team meeting is convened by DFPS to work with the professionals involved in the case to determine the appropriate permanency goal for the child.

⁹¹ Tex. Fam. Code Ann. §107.003 (Vernon 2002)

⁹² ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, C-1 (1996).

Some interviewees feared that attorney performance was affected by the “friendly” dynamic between lawyers and judges that carries over to the courtroom, resulting in the rubberstamping of motions and the erosion of zealous advocacy. If attorneys are dependent upon judges for their livelihoods, then lawyers may yield to a judge’s desire to resolve cases quickly, rather than advocating vigorously for their clients. On this point one person interviewed acknowledged that it is a “very small Bar,” but stated that “all attorneys are friends, but they fight the fight.”

RECOMMENDATIONS:

- 6) The guidelines for attorney representation found in the Texas Family Code (or to be developed by the Harris County Court) should dictate how many cases lawyers should have and how much they should be paid (*See Finding 4*).
- 7) The guidelines currently in place in the Texas Family Code should be adhered to more closely.
 - a) Lawyers need to be trained on their responsibilities as attorneys *ad litem* in conformity with ABA Standards. Law firms could assist by hosting these trainings and sponsoring national experts to train local practitioners.
 - b) Lawyers should be paid an hourly rate for the required tasks found in Texas Family Code section 107.003 (*See Finding 4*).
 - c) Judges should inquire on the record as to whether appointed attorneys *ad litem* are adhering to statutory requirements. Judges should have the authority to remove attorneys from the appointment list who repeatedly fail to adhere to the statutory requirements.
 - d) The court should contact the National Council of Juvenile and Family Court Judges (NCJFCJ), Child Victims Act Model Courts Initiative to ask

for assistance in improving practice and conforming to national standards.⁹³

- 8) With regard to case distribution, it appears that the child welfare system may have the same problems of favoritism and inadequate distribution of case appointments that existed in the juvenile justice system prior to the implementation of the Texas Fair Defense Act.⁹⁴ It may be necessary to reassess the appointment process to eliminate any appearance of impropriety.

FINDING 4: INSUFFICIENT ATTORNEY PAY LIMITS REPRESENTATION

Lawyers cannot afford to do everything that they need to in order to effectively represent a client in an abuse and neglect case. - Attorney ad litem

Attorneys *ad litem* for children are paid for only 10 hours of out-of-court time per case.⁹⁵ According to the majority of those interviewed, more out-of-court time is required to visit the child client, interview the parties involved (including the CASA volunteer, if there is one), evaluate necessary services for a client, and prepare for court.⁹⁶ Harris County also places specific limits on attorney compensation for trials (a maximum of \$2,500), expert testimony (a maximum of \$800), investigation (a maximum of \$600) and appeals (a maximum of \$2,500).⁹⁷ If attorneys are not compensated for the time they spend conducting their own investigation of the facts, then many may choose to simply accept the state's version of events. This in turn leads to fewer trials, fewer controversies at trial, and possibly, fewer appeals.

⁹³ The NCJFCJ's nationally recognized Child Victims Act Model Courts Initiative is engaged in efforts to improve juvenile and family court practices in child abuse and neglect cases nationwide and can offer courts technical assistance and resources to improve their practices. *See* National Council of Juvenile and Family Court Judges, *Child Victims Act Model Courts Initiative*, at <http://www.pppncjfcj.org/html/childvic.html>.

⁹⁴ Texas Appleseed Fair Defense Project, *supra* note 51, at 15.

⁹⁵ Harris County payment voucher caps payment for out-of-court time at \$500 (lawyers are generally paid the maximum of \$50 per hour).

⁹⁶ Note that these activities are required under Tex. Fam. Code Ann. §107.003 (Vernon 2002) and the *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, C-1, C-2, and C-4 (1996).

⁹⁷ *See* Harris County appointed attorney payment voucher.

In addition to the paramount benefits to the child, effective lawyers can save the State of Texas substantial long term foster care payments by securing permanent placements for their clients in a timely manner. Lawyers need to be free to do what is important for a case (and indeed what they are statutorily mandated to do) and should be paid for their time, otherwise they are placed in the unfair position of having to fail in their professional obligations or to provide services without pay (which is probably what some attorneys end up doing). Legal representation can be critical to a child's future, and this representation should be valued and compensated appropriately so that lawyers can adequately represent their child clients.

RECOMMENDATIONS:

- 9) Lawyers should be paid a reasonable hourly rate for the required tasks found in Texas Family Code section 107.003, with no cap on the amount of fees that can be awarded for time spent on a case. The private bar needs to take an active role in lobbying the governmental body in charge of setting the limits discussed above. Additionally, judges and the county board responsible for paying attorneys *ad litem* should be educated on the need to reimburse attorneys for actual time spent on a case.
- 10) A *pro bono* program could supplement the work of the professional corps of children's lawyers. Protocols might be developed to determine which cases could be referred to *pro bono* lawyers. Examples of matters that *pro bono* lawyers could handle include appeals, collateral matters such as special education or other entitlements, filing amicus briefs and acting as co-counsel on complex cases. *Pro bono* lawyers for children should be well-trained and provided with mentorship.

FINDING 5: NEED FOR SUPERVISION/ADVOCACY FOR CHILDREN IN PERMANENT CUSTODY OF THE STATE.

These are the kids that are truly lost in the system without a voice. -Attorney ad litem

Every child welfare case in Harris County is filed as a termination case. DFPS has reportedly adopted this practice in an effort to meet the twelve-month deadline for case disposition imposed by federal law. Many parents reach the end of twelve months still attempting to satisfy the court orders that must be fulfilled before the court will consider reunification. In cases involving older children, DFPS is hesitant to seek termination of parental rights because of the difficulties of finding an adoptive placement for them. In both types of cases courts may choose to grant DFPS permanent managing conservatorship of the children.⁹⁸

Several things happen once permanent managing conservatorship is granted to the state. Since this is considered a final disposition of a child welfare case, the attorney *ad litem* representing the child and the CASA volunteer both withdraw and the child welfare part of the case is technically closed. This leaves the child with no advocate.

Currently, the Texas Family Code allows for notice of the placement review after the final order to “the child's attorney *ad litem* and volunteer advocate, if the appointments were not dismissed in the final order.”⁹⁹ In other words, under state law attorney representation is a possibility after a final order. However, one judge reported that when he kept attorneys *ad litem* on these cases, he was criticized for the expense of paying the lawyers.

⁹⁸ Permanent managing conservatorship grants DFPS permanent custody of a child until she or he reaches age 18.

⁹⁹ Tex. Fam. Code Ann. §263.501(d)(5) (Vernon 2002).

Entities responsible for disbursing county funds need to be educated about the importance of advocates for children under permanent conservatorship of the state. Advocacy issues continue for children in the permanent conservatorship of the state. An independent advocate should monitor and have the capacity to challenge the provision of services. A child's entitlements such as education, family visitation, safety and transitional supports also need attention.

Under the current system, the only oversight of children in the permanent conservatorship of the state is by a judge who reviews the status of the case every six months. Though DFPS caseworkers are required to monitor the progress of these children, their overwhelming caseloads makes this impossible in most cases. Judges have inadequate time and resources to review the great number of Harris County children in the permanent conservatorship of the state.¹⁰⁰ Already overburdened with the active cases on their dockets, judges are unable to effectively monitor the progress of these children in the system or to assure that the needs of these children are being met. Children in the permanent conservatorship of the state often get lost in the system with no representative to advocate for the services the children may need or to monitor their progress in finding a permanent placement or achieving reunification.

RECOMMENDATIONS:

- 11) Texas Family Code section 263.501(d)(5) should be clarified to require lawyers to represent their child clients until they are placed in a permanent placement or are discharged from state custody.
- 12) CASA volunteers should remain on a case until the child is in a permanent placement or is discharged from state custody. The time commitment to a

¹⁰⁰ In FY 2002, 239 children in Harris County who were not freed for adoption were placed in the permanent custody of the state. Texas Department of Family and Protective Services, *supra* note 61, at 159.

permanent conservatorship case would not be as great for the CASA volunteer. The role of the CASA representative would be to maintain contact with the child and ensure that the system is meeting the child's needs. Because of the decreased time commitment, CASA may be able to attract additional volunteers to assist with the permanent conservatorship cases.

13) Harris County may want to create a new judgeship or appoint a special master to handle all the permanent managing conservatorship (PMC) matters. This could increase the oversight role of the judge assigned to PMC cases and relieve the dockets of the other courts by removing all of their PMC cases. Because such a docket would only include PMC matters, the judge would be educated on the PMC process and thus be better equipped to effectively meet the needs of these children. Furthermore, relieving other Harris County juvenile judges of their PMC cases would enable them to dedicate more attention to the other child welfare cases on their dockets.

14) Harris County leadership, the court and bar should develop the capacity to provide legal representation of all children in PMC. The bar should consider creating a *pro bono* program for attorneys to represent children in the permanent conservatorship of the state.¹⁰¹

FINDING 6: LACK OF ADVOCACY FOR SERVICES WITHIN THE COURTROOM

Mental and physical needs of children are the caseworker's responsibility. - Attorney ad litem

The Harris County judges that were interviewed felt satisfied that attorneys *ad litem* were adequately requesting services for their child clients. Our team, however, did not observe any advocacy for services during the courtroom observation component of

¹⁰¹ Children's Law Center of Minnesota launched such a *pro bono* project, State Wards: The Forgotten Children Project, in 1999. In this project, *pro bono* attorneys ensure that children in the permanent custody of the state are receiving services, graduate from high school and have an independent living plan to help them successfully transition out of foster care. For more information, visit the Children's Law Center of Minnesota's website, at <http://www.clcmn.org>, or contact Gail Chang Bohr at gcbahr@clcmn.org.

this study. Many of the interviewees believe that attorneys *ad litem* and DFPS workers bear the responsibility for ensuring that the children's mental and physical needs are being met. However, the reality appears to be that if the children's needs are monitored, it is done by the CASA representative or the foster parent. DFPS workers are too burdened by their caseloads to supervise the children with this amount of detail, and although some attorneys are able to take the time to advocate for services, many are not. Some attorneys do not even take the time to meet the children they represent, much less attend to their particular mental and physical needs. The result of these deficiencies is a gap in expectations and in services: children in the Harris County child welfare system have mental and physical needs that are being overlooked and there is little apparent concern that the gaps need to be filled. We are left to consider two possible outcomes: either all needs of all children are being satisfied through the administrative process, or opportunities to advocate for needed services are being lost to the detriment of the children.

RECOMMENDATIONS:

- 15) Caseworker pay needs to be increased and their caseloads need to be decreased (See Finding 2). If the caseloads of DFPS workers were decreased, then the workers would have more time to dedicate to securing services for the children to whom they are assigned.
- 16) Attorneys *ad litem* representing children in Harris County need to be trained to evaluate the need for services and to provide advocacy for these services. The system needs to put an emphasis on service advocacy through training and communicating the expectation that it is part of the attorney *ad litem*'s responsibilities. Emphasizing the importance of service advocacy, and recognizing that service advocacy is an essential part of effective representation of a child, should be incorporated into any child welfare training for attorneys *ad*

litem.¹⁰² Local law firms could sponsor these training programs for both judges and attorneys. The inclusion of judges in the training could create an expectation that the attorneys appearing in their courts will advocate for services for the children to whom they are assigned. The American Bar Association Section of Litigation is available to assist with such trainings.¹⁰³

FINDING 7: LACK OF CONSISTENCY IN LAWYER TRAINING

Harris County has a video training course and accompanying materials for attorneys *ad litem*, but it is unclear whether all attorneys *ad litem* are required to watch the video prior to being appointed to child welfare cases. Some interviewees reported that Judge Ellis and Magistrate Van Pelt of the 315th Juvenile District Court require all attorneys practicing in their court to watch the video training course and study the accompanying materials, and that the other two courts do not. One court employee reported that officially all three courts require the training, but there are “no checks or balances” to ensure that attorneys have viewed the video training prior to accepting appointments. The training materials cover topics such as:

- *Ad Litem* Nuts & Bolts: Appointments, Practice, Responsibilities and Liability
- Case Investigation & Preparation
- Identification and Use of Family Law Resources
- Representing the Child/Understanding Child Development and the Impact of Abuse
- Handling Child Abuse Cases and Understanding the Child Protection System

¹⁰² See ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Part IX, Standards for the Child’s Attorney, C-4. “Request Services” (1996) (stating the child’s attorney should seek appropriate services (by court order if necessary) to access entitlements, to protect the child’s interests and to implement a service plan).

¹⁰³ The American Bar Association Section of Litigation Children’s Rights Litigation Committee has experts available to assist with trainings. Additionally, the Committee co-sponsors with the National Institute of Trial Advocacy (NITA), *Training the Lawyer to Represent the Whole Child*, a six-day intensive program that teaches lawyers how to provide effective advocacy to children, including service advocacy. This training was held in Philadelphia in 2002, and in New York City in 2004, and can be replicated anywhere in the country. For more information see <http://www.nita.org>. Additionally, the *Rocky Mountain Child Advocacy Training Institute*, is held every spring in Denver for children’s lawyers from around the country. For more information, read about the training at http://www.rockymountainchildrenslawcenter.org/news_institute.html.

- Interacting With and Representing Children

However, because the training is not live, there is no opportunity for lawyers to ask questions. Additionally, there is no central application process to ensure that every attorney has even viewed the video training, so one must assume that some untrained lawyers are being appointed by the court.¹⁰⁴

RECOMMENDATIONS:

- 17) Every Harris County court handling child welfare cases should require all attorneys to complete a training course on the representation of abused and neglected children and their parents. Completion of this training course should be a prerequisite to receiving appointments of child welfare cases.¹⁰⁵
- 18) Training programs should be developed to ensure that a competent and qualified bar is available for the representation of children and parents. Private firms in Harris County could assist in the planning and presentation of live training programs several times throughout the year. The ABA Section of Litigation could assist in the development of course curricula and procedures for the periodic update of the curricula so that the attorneys consistently receive training on the latest practices and procedures in the child welfare system.

¹⁰⁴ Attorneys who want to accept delinquency appointments are required to complete a standard application, however lawyers who want to accept child welfare cases simply introduce themselves to the individual judges and ask to be put onto the appointment list. It was reported that judges may inquire about an attorney's prior experience or training before putting them on the appointment list, however there are no guidelines for the judges in determining whether to place an attorney on the appointment list, nor do there appear to be any official requirements for the lawyers.

¹⁰⁵ In July 2003, amendments were made to the Child Abuse Prevention and Treatment Act (CAPTA) that include a requirement for CAPTA state grant eligibility that a state either have a law requiring all court-appointed attorneys to have appropriate training, or the state governor must certify that no lawyer is appointed in any case without having prior appropriate training. 42 U.S.C. § 5106a(b)(2)(A)(xiii), *as amended by* Pub. L. No. 108-36, § 114(b)(1)(B)(vii). *See* Tex. Fam. Code Ann. §107(2) (Vernon 2002) (requires that attorneys *ad litem* receive training in child advocacy or have the experience equivalent to such training). *See also* ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, at Part II, Enhancing the Judicial Role in Child Representation, I-2. "Content of Lawyer Training" (1996) (recommending that the appropriate state administrative office of the trial, family, or juvenile courts should provide educational programs, live or on tape, on the role of the child's attorney and providing a list of essential topics such a training should address).

19) At a minimum, the attorney *ad litem* training should cover the following topics recommended by the ABA *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*:¹⁰⁶

- Information about relevant federal and state laws and agency regulations;
- Information about relevant court decisions and court rules;
- Overview of the court process and key personnel in child related litigation;
- Description of applicable guidelines and standards for representation;
- Child development, needs, and abilities;
- Information on the multidisciplinary input required in child-related cases, including information on local experts who can provide consultation and testimony on the reasonableness and appropriateness of efforts made to safely maintain the child in his or her home;
- Information concerning family dynamics and dysfunction including substance abuse, and the use of kinship care;
- Information on accessible child welfare, family preservation, medical, educational, and mental health resources for child clients and their families, including placement, evaluation/diagnostic, and treatment services; the structure of agencies providing such services as well as provision and constraints related to agency payment for services;
- Provision of written material (e.g., representation manuals, checklists, sample forms), including listing of useful material available from other sources; and
- Cultural competency.

20) Child welfare attorneys should be required to obtain annual continuing legal education credits specific to juvenile cases in order to continue to receive case appointments.¹⁰⁷

FINDING 8: EXPANSION OF CASA REPRESENTATION

Our goal is to service at least 1,550 of the 4,000 children in out-of-home placement in Harris County this year. - CASA Coordinator

We need more help from groups like CASA because the [DFPS] workers are overworked and underpaid. - Juvenile Court Judge

¹⁰⁶ ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Part II, Enhancing the Judicial Role in Child Representation, I-2. Content of Lawyer Training (1996).

¹⁰⁷ The juvenile board recently decided to modify the guidelines that it previously put in place after the passage of the Texas Fair Defense Act to include a requirement that delinquency attorneys taking appointments obtain continuing legal education credits that are specific to juvenile cases.

All interviewees agreed that having a CASA volunteer involved in a case is beneficial and improves the quality of representation for children in the custody of the state, as well as for the parents involved in the child welfare system. CASA volunteers help children and parents gain access to services because CASA volunteers are often the participants with the greatest amount of contact with the families. There are approximately 4,000 children in out-of-home placement in Harris County this year, however, and CASA has the resources to serve only about 1,550. The Harris County CASA program is among the largest in the nation with a staff of 46 people supervising 500 volunteers who completed over 47,000 hours of work last year. Still, the program is not able to service even half of the children in the state's custody. As previously noted, none of the hundreds of youths living in the permanent custody of the state are represented either by lawyers or CASAs. There is a critical need to increase the number of CASA volunteers or CASA-like programs in Harris County.

RECOMMENDATIONS:

- 21) Law firms should encourage non-lawyer employees to volunteer as CASAs and allow them to perform this public service, even when it requires work during regular business hours.
- 22) Private firms should be encouraged to give their lawyers billable hour credit for time spent on *pro bono* activities including volunteering as a CASA representative. This would make it possible for many more attorneys in the community to serve in this capacity.
- 23) The private bar could assist in fundraising activities to benefit the CASA program. Increasing CASA funding will make it easier for CASA to expand its program in the future and serve more children in Harris County. One option could be the creation of a permanent endowment (or other commitment) by a law firm that is supported annually.

- 24) Law firms should promote lawyer and firm participation in the CASA Board of Directors and other leadership activities at the local CASA program.
- 25) Harris County and court leadership should engage the CASA program in a planning effort to meet the need of youths in PMC for effective representation.

FINDING 9: LACK OF SERVICES FOR PARENTS AND/OR CHILDREN IN CHILD WELFARE CASES

a) Services for Parents

It is hard for parents to actually get the services they need because there is no central location to receive the services ordered by the court. - Juvenile Court Judge

In many instances, it is extremely difficult for parents to comply with the orders of the court because services are difficult to obtain. Most of the parents involved in the child welfare system are indigent. Many of the services parents are expected to obtain are only offered at locations scattered throughout Harris County. Presumably, many parents do not have their own transportation. Furthermore, even if the parents are able to get to the location where the services are offered, the service agencies are often over-booked and thus unable to provide the services within the time frame ordered by the court. This unavailability of services makes it impossible for many parents to comply with court orders and can result in a delay of reunification of the family and, in some instances, prevent reunification entirely.¹⁰⁸

RECOMMENDATIONS:

- 26) Training programs should be developed to address service advocacy for parents and children in dependency cases. Parents' attorneys, CASA volunteers, and DFPS workers should be required to attend this training and should be encouraged to bring any problems in obtaining services to the court's attention.

¹⁰⁸ For a discussion of the difficulty of securing services for the treatment of parents' substance abuse problems due to funding, see Texas Department of Family and Protective Services, *supra* note 86, at 66.

- 27) All participants in the system should be encouraged to assist parents and children in contacting the service agencies and in making transportation arrangements to and from the service locations. This is an area where CASA representatives can make a difference.
- 28) Harris County and court leadership should thoroughly research and assess the availability of the services to which parents are referred or compelled. Shortages and delays should be identified and remedied.
- 29) Lobbying for greater funding for state service agencies would assist in increasing the number of service agencies and thus the availability of services to parents and children. A centralized service center housing all agencies offering court-ordered services would increase accessibility to parents relying on public transportation. A coordinated network of community-based services should be developed to ensure that all regions are served.

b) Services for Young Adults

Preparation for Adult Living (PAL) is available, but there is just not enough support for children once they turn eighteen. -Attorney ad litem

Children in the state's custody are usually automatically released from state custody at age eighteen. If a child has special needs and is categorized at a higher level of care, he or she can remain in the custody of the state until age twenty-one. The program Preparation for Adult Living (PAL) is designed to help these children make the transition to adulthood. However, the interviewees felt that the PAL program was not very successful in providing adequate services to teenagers making the transition to adulthood. PAL provides caseworkers and financial assistance to teenagers for rent and household needs through funds from the federal Chafee Foster Care Independence Act, but does not provide assistance in locating housing or finding employment.

Consequently, many children feel abandoned by the system upon reaching the age of majority.

RECOMMENDATIONS:

- 30) Attorneys *ad litem* should advocate for appropriate services to their clients who will be transitioning out of foster care to ensure that they will leave foster care with, among other things, housing, Medicaid, a job or an educational plan.¹⁰⁹
- 31) Law firm lawyers and employees should volunteer to become mentors to youth who have or will be transitioning from foster care. DFPS is currently re-establishing its PAL mentorship program for current or former foster youth ages 14-21 who are dealing with issues of transitioning into adulthood.¹¹⁰ Lawyers would be especially welcome to mentor youth ages 18-21 as many of these young adults have legal issues which need to be resolved.
- 32) The DFPS PAL program holds life-skills training courses for youth who have graduated from care, and they could use volunteers to assist with teaching classes. Additionally, local bar associations could work with PAL employees to develop training/information courses offered to teenagers in state custody to train them for independent living. Members of the local bar could volunteer to develop training curricula and to aid in the actual teaching of the young adults. Areas where young adults could use training would include: establishing a budget, applying for public benefits, financial planning for higher education, housing rights, etc. The New York City based Youth Advocacy Center, a program that trains teenagers in foster care to advocate for themselves and prepare for adulthood, could be used as a model.¹¹¹

¹⁰⁹ Retaining attorneys *ad litem* for children in the permanent custody of the state (*see supra* Finding 5) will be helpful here, as will training for attorneys *ad litem* on service advocacy (*see supra* Finding 6).

¹¹⁰ This mentorship program was re-established in January, 2004, after a year hiatus. Robin Slusher is the mentor staff contact at DFPS and she can be reached at 713-940-5171. This program will offer training and certification for volunteer mentors.

¹¹¹ To learn more about the Youth Advocacy Center, visit its website at <http://www.youthadvocacycenter.org>.

33) A consumer satisfaction evaluation mechanism should be established to assess the success and capacity of the PAL program and other transitional services for older youth.

III. CONCLUSION

The Harris County child welfare system is in great need. While some of these needs must be met by existing system actors such as judges and agency administrators, the private bar can assist in improving the quality of representation and services that minors and their parents receive. The private bar can establish *pro bono* programs, encourage lawyer and non-lawyer employees to serve as CASA volunteers or mentors, provide financial and other support for training and increasing resources, and call on politicians and officials to remedy some of the shortcomings outlined above. Such support from the private bar can significantly assist in improving the child welfare system and meeting the unmet legal needs of children and families in Harris County.

CHAPTER 3: SCHOOL SUSPENSION AND EXPULSION PROCEEDINGS¹¹²

I. BACKGROUND OF HOUSTON INDEPENDENT SCHOOL DISTRICT

The Houston Independent School District (HISD) is comprised of 13 school districts with 211,197 students. There are 174 elementary schools, 34 middle schools, and 30 high schools. The ethnic and racial make-up of these schools is 53% Hispanic, 34% Black, 11% White, and less than 4% Asian or Native American. Approximately 73% of these students receive free or reduced-cost lunches.

The Texas legislature recently evaluated and amended the law of school discipline in Texas. In 1995, the Texas legislature revised Chapter 37 of the Texas Education Code (Chapter 37) to mandate that the juvenile justice system and the public school system work together to help make schools safer. Chapter 37 now requires each school district to provide an alternative education program for students who receive discipline. In 1999, the Governor appointed a Task Force on School Violence Prevention led by the Attorney General and comprised of 22 members around the state, including teachers, state senators, school superintendents, parents, and law enforcement officers.

HISD spends approximately 11% percent of its budget on security and monitoring services. The school district has a 178 person armed police force that has the power to arrest, called the Houston Independent School District Police Department, which is separate from the Houston Police Department. Though every middle and high school is required to have at least one school district police officer on duty at all times, most have

¹¹² Members of the School Suspension and Expulsion Team who conducted research and interviews were: Angela Vigil (coordinator); Lori Hood and Liquita Lewis Thompson from Baker & McKenzie; Sonya Garza, Susan Logsdon, and Jon Rice from Fulbright & Jaworski; Bruce A. Koehler from Mounce, Green, Myers, Safi & Galatzan; Carolyn Courville, Erica Harris, Eric Mayer, and Bill Merrill from Susman Godfrey; Edward Hernandez and Carmen Perez from Linebarger Goggan Blair & Sampson; Catherine Krebs and Barbara Stalder.

three. The HISD Code of Conduct suggests that principals are charged with determining when the police should be notified.

During the 2000-2001 school year, HISD expelled 261 children.¹¹³ In 2001-2002, the number of expulsions increased to 296,¹¹⁴ and HISD reportedly had 82,602 disciplinary incidents, ranging from “disruptive behavior” to “conduct punishable as a felony.”¹¹⁵ We were unable to obtain statistics on the number of children who were suspended, placed in discipline programs, or disciplined by sanctions other than expulsion during that time period. In calendar year 2002, HISD referred 5,591 incidents to the Harris County juvenile court, which represented over one-quarter of all referrals to delinquency court for that year.¹¹⁶

II. THE HISD DISCIPLINARY CODE

“Zero Tolerance/Pursuit of Criminal Charges”

“The HISD Board of Education, in accordance with its major system priorities, believes the school environment should be safe for all students and free of disruptions that interfere with the education process. In response to this belief, the board has developed a policy of zero tolerance. This policy shall apply to elementary, middle, and high school students.”

“All students who unlawfully possess a firearm, illegal knife as defined by state law, explosive, or any other dangerous object or weapon on school district property, on school buses, and/or in attendance at district-related activities shall be recommended for expulsion. The Board of Education further declares that the Code of Student Conduct will be strictly applied.”

¹¹³ These statistics came from the HISD Department of Research and Accountability.

¹¹⁴ *Id.* We are concerned about the accuracy of this statistic, as HISD has recently been criticized for its record-keeping practices. HISD was publicly criticized for its failure to adequately define and report drop-outs. This public criticism, originally published in the *El Paso Times* in July 2003, criticized the district for describing students, who turned out to be drop-outs, as “transfers” from the district. This was particularly important as HISD had been receiving positive recognition nationally for its low drop-out rates. While there are certainly shared issues between school discipline policies and practices, and drop-out policies and practices, this evaluation is focused solely on school discipline. Therefore, the text contains no content as to the issues and possible recommendations that would correlate to HISD’s policies of identifying, preventing and reporting drop-outs.

¹¹⁵ *Id.*

¹¹⁶ Harris Cty. Juvenile Probation Dept., *supra* note 12, at 18.

“In every case where students in elementary, middle, or high school engage in conduct that contains the elements of an offense in violation of the Penal Code or the Education Code, the school district will pursue arrest, charges, and removal to a discipline program, juvenile detention facility, or county jail.”¹¹⁷

A. Classifications of Conduct and Sanctions¹¹⁸

The HISD Code of Student Conduct (Code) contains a multi-level disciplinary scheme, assigning progressively severe punishments as the severity of the offense increases. The Code sets forth five levels of student misconduct with commensurate disciplinary options. While it appears that the scheme was intended to comply with federal guidelines, the HISD system punishes and excludes children from school much more vigorously than federal law requires.¹¹⁹ In addition, although the Code on its face sets forth standards for identification of levels of sanctions, there are no guidelines for educators to use when assessing and assigning levels of classification to a student’s conduct, which may result in disparate treatment of children in HISD schools. There are, similarly, no guidelines for determining the appropriate punishment. Moreover, the Code does not provide for training of HISD principals or school administrators in the identification, assignment and/or designation of punishment for any offenses. Interviewees confirmed that they have received no training on these issues.

1. Level I – Violation of Classroom Rules¹²⁰

In HISD’s multi-level disciplinary scheme, Level I offenses are those that occur in the classroom and can be corrected by the teacher. Examples include violations of rules

¹¹⁷ CODE OF STUDENT CONDUCT, Student Misconduct, Levels of Offenses (Houston Independent School District, 2002-2003).

¹¹⁸ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

¹¹⁹ See Gun-Free School Act, 20 U.S.C.A. §8921 (1994).

¹²⁰ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

or procedures established by the teacher; cheating; refusal to participate in classroom activities; unexcused tardiness; failure to bring required supplies, completed homework or communications between school and home; participating in horseplay; violating the dress code; and any other behavior that disrupts the classroom or interrupts the operation of class. Teachers may discipline students for Level I violations in a number of ways, including oral correction, contact with parents, detention, and removal of privileges.

2. Level II – Administrative Intervention¹²¹

Level II offenses are more serious in nature than Level I offenses. They include leaving the classroom or school grounds without permission; possessing flammable material; inappropriate displays of affection; verbal abuse; wearing attire signifying gang affiliations; possession of beepers, cellular telephones, or pagers; and accessing or sending inappropriate material via the school's computers. Level II offenses also include continuance of Level I misconduct. For Level II offenses, the administrator may discipline the student with behavior contracts, corporal punishment,¹²² removal from class¹²³ or from school transportation, and exclusion from extracurricular activities.

3. Level III – Suspension and/or Optional Removal to a Disciplinary Alternative Education Program (Discipline Program)¹²⁴

Level III offenses are defined as actions that seriously disrupt the educational process in the classroom, in the school, and/or at school-related activities. In addition to

¹²¹ *Id.*

¹²² Corporal punishment is defined as "spanking or paddling . . . to a maximum of three 'pops.'" *Id.* The HISD should reconsider its policy of allowing teachers to physically punish students. ABA standards prohibit the use of corporal punishment in institutional settings. No form of corporal punishment should be permitted in a public school setting. *See IJA-ABA JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO CORRECTIONS PROHIBITION ON THE ADMINISTRATION OF CORPORAL PUNISHMENT, Standard 4.8 "Limitations on the Use of Physical Force by Personnel" (1979).*

¹²³ The Code of Student Conduct details a specific procedure for a teacher to remove a student from class.

¹²⁴ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

continuance of Level I or Level II misconduct, Level III offenses include fighting; gambling; theft under \$750; truancy; possession of live ammunition or knives 3-5 inches in length; possessing or using tobacco products or prescription drugs; sexual or racial harassment; hazing; possession of fireworks or laser pens; misdemeanor criminal mischief; and certain computer-related offenses. In addition to the punishments available for lower level offenses, a student may have to make restitution or restore property, lose computer privileges, attend in-school suspension, have out-of-school suspension for up to three school days per occurrence,¹²⁵ or receive a referral to a discipline alternative education program (discipline program).¹²⁶

4. Level IV – Required Placement in a Discipline Program¹²⁷

Level IV offenses include behavior that would constitute a criminal offense, such as engaging in felonious conduct; assaulting individuals; making terroristic threats; selling controlled substances; engaging in public lewdness; burglarizing an HISD facility; defacing school property; possessing firearms or ammunition; and participating in illegal organizations. Students committing Level IV offenses are referred to a discipline program for a length of time determined by an administrator.

5. Level V – Expulsion for Serious Offenses¹²⁸

Level V offenses are defined as serious misbehavior and/or illegal acts that threaten to impair the educational efficiency of the school and/or that most seriously disrupt the orderly educational process in the classroom and/or the school. Level V

¹²⁵ Throughout this report the term “suspension” will mean an out-of-school suspension for a period of no more than 10 days unless the text specifically states that a suspension is “in-school”.

¹²⁶ A discipline program is a school-based program run by HISD that serves as an alternative to regular HISD classes. Placement in a discipline program is not considered an expulsion.

¹²⁷ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

¹²⁸ *Id.*

offenses include continued serious misbehavior, or persistent misbehavior as listed under state law while a student is placed in a discipline program. This not only includes misconduct that occurs on school property, but also includes misconduct that occurs away from school property at a school-sponsored or school-related activity. Level V offenses are punishable by expulsion. HISD defines expulsion as removal of a student from a regular school program for more than three consecutive school days but not longer than one calendar year. Students who are expelled are not barred from school completely, rather they are expelled to attend the Harris County Juvenile Justice Alternative Education Program, where they can complete their classes.¹²⁹

B. Procedures and Guidelines for Determining Sanctions¹³⁰

1. Level I and Level II Offenses

The procedures for determining disciplinary sanctions vary depending on the offense level and the type of punishment available. According to the Code, a staff member may correct a student on the spot for Level I offenses. The staff member is thereafter supposed to discuss the behavior with a parent, administrator, or support personnel, and maintain a record of the discipline.

For offenses at or above Level II, the staff member must refer the student to an administrator, typically the principal, by completing a discipline form or one-page report. The school is to give the student's parent written notification within 24 hours. After

¹²⁹ The Juvenile Justice Alternative Education Program is run by a private entity that contracts with HISD to educate students expelled from HISD. Placement in this program is considered an expulsion from HISD. A student can be placed in this program as a result of a school discipline proceeding or a juvenile court judge's order.

¹³⁰ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

conferring with the teacher and the student, the administrator determines the student's discipline.

2. Level III and Level IV Offenses

At Level III and Level IV (as with Level II offenses), after the staff member refers the student to an administrator, the administrator will confer with the student and the parent. At this conference, the student is given an opportunity to explain the incident, after which the administrator determines whether to suspend the student or to send him or her to a discipline program.¹³¹ The school then provides the parent and the teacher with written notice of the offense and the action taken. For a Level IV offense, the school administrator may also notify the HISD police department.

a. Suspensions and Due Process

If an administrator decides to suspend a student, the school typically does not hold a formal hearing or otherwise afford a student due process. As indicated above, students facing suspensions are usually only afforded a meeting with the parents and an administrator, at which time the administrator determines the appropriate sanction. This decision is final and may not be appealed within the HISD system.

Generally little or no fact-finding occurs before or during the suspension meeting. Two principals confirmed that at their schools, administrators do not typically hold formalized hearings at the suspension level, nor do they permit students or parents to call witnesses. Instead, the assistant principal simply accepts the complainant-adult's version of what allegedly occurred.

¹³¹ According to state law, students under the age of 6 cannot be placed in a discipline program.

Another principal similarly reported that his fact-finding is based on the factual determinations of the police and the findings of the assistant principal. If the parent requests that the officer or teacher attend the suspension meeting, the principal tries to accommodate that request. The school does not keep a transcript of the suspension meeting. Rather, the school simply notes the date, the charge, and the final outcome.

On the other hand, a principal, of what he described as an “affluent school,” reported that generally fact-finding does occur in his school. The assistant principal collects information from the officer, teachers, and other students, and then gives the parent his recommended decision regarding the outcome. The parent may choose to appeal the assistant principal's decision to the principal. The principal then makes the final determination, which is not appealable within the HISD system.

HISD avoids the issue of providing the due process that is necessary when imposing long-term suspensions by simply choosing not to assign long-term suspensions. Given the vast and conflicting assortment of legal interpretations as to what period of suspension triggers the right to due process,¹³² HISD imposes only relatively short-term suspensions (up to three days), refers the student to a discipline program, or imposes a myriad of lesser classroom and administrative sanctions.

b. Discipline Program

If a school decides to refer a student to a discipline program, the school will provide the parent with a letter explaining the reasons for the removal and advising the parent of the length of time the student will attend the discipline program. In contrast to

¹³² In *Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975), the Court analyzed a large and diverse group of lower court cases, and reached the conclusion that “the lower courts have been less uniform, however, on the question whether removal from school for some shorter period may ever be so trivial a deprivation as to require no process, and, if so, how short the removal must be to qualify.”

the finality of a school's decision to suspend a student, a parent or student may appeal a school's decision to place a student in a discipline program to the district superintendent or his designee. The appeal must be made within five days of the parent's or student's receipt of the decision placing the student in a discipline program. The student may be placed in a discipline program pending the appeal.

During the appeal hearing, the superintendent will advise the student of the alleged misconduct and the evidence against the student. The student or parent may then make a ten minute presentation. The superintendent has complete discretion as to whether other witnesses or documentary evidence may be presented. After the hearing, the superintendent will issue a written decision. This decision is final and may not be appealed within the HISD system.¹³³

A student's progress while at a discipline program is formally reviewed by the school board's designee at the end of the placement period or at 120-day intervals, whichever occurs first. In addition to the board's designee, representatives from HISD, the discipline program, and the student's referring campus or home school, as well as parents may participate in the review. The board's designee must make reasonable efforts to invite the student's parent to the review and may thereafter, hold the meeting in his or her absence. At the formal review, the student or the student's parent can present arguments in favor of the student's return to the regular school campus.

After assessing the student's progress, the administrators in attendance at the review may decide that the student: (1) remain in the discipline program; (2) be removed from the discipline program and placed in a non-disciplinary alternative education

¹³³ The fact that there is no appeal of this, or any other decision, within the HISD system does not, of course, prevent a student or student's family from filing a due process claim in state or federal court.

program that may be able to more appropriately address the student's needs; or (3) be returned to the sending campus or the campus to which the student is presently zoned. Within three business days from the date of the determination, the committee must provide a written decision to the parent. The committee's decision is final and may not be appealed within the HISD system.

2. Level V Offenses - Expulsion and Due Process¹³⁴

For Level V offenses, a student may be subject to expulsion. Federal case law and HISD policy require a formal hearing that comports with due process prior to expelling any student. The expulsion process begins with an administrator contacting the HISD police to investigate the school infraction or illegal act and thereafter conferring with the student. If the police arrest the student, the school must notify the student's parents within one hour. The school must thereafter give the student and parent written notification of the reasons for the proposed expulsion. Although any expulsion must include an official police or law-enforcement investigation, the administrator does not have to await the results of the investigation before proceeding to an expulsion hearing.

An expulsion hearing is to be held within seven days of the date of the offense. A student may only be suspended for up to three days while awaiting the hearing. If the hearing is not held within the three-day suspension period, the student must be placed in a discipline program while awaiting the hearing. The parent, however, could choose to waive the hearing.

An impartial school administrator, principal or his or her designee must conduct the hearing to consider expulsion.¹³⁵ Although no case has yet been found challenging

¹³⁴ All information in this section came from the Code of Student Conduct, Student Misconduct, Levels of Offenses.

this specific provision of the Code of Student Conduct, the authority given to principals to sit as impartial hearing officers in situations where they have proposed the expulsion is ripe for litigation.

The hearing officer must conduct a full hearing. The student has the right to representation by counsel and can call witnesses. Students do not however appear to have the right to compel witnesses to attend the hearing or the right to cross-examine witnesses. If the administrator decides to expel a student, that expulsion may not last for a period longer than a full academic year. One principal who was interviewed reported that most expulsions typically last 180 school days — the maximum allowed time. The decision to expel a student is appealable to the next higher administrative level in the school system. As such, expulsion hearings are generally recorded on audiotape so as to maintain a record of the hearings and the evidence introduced during them.

One principal reported that she presides over suspension and expulsion hearings and makes the final decisions. She has a script for the hearings that “explains the rules” that are “put out by HISD.” This principal reported that she knows the Code and permits students to bring witnesses, but they cannot compel these witnesses to testify. Students may also bring attorneys, although they often do not. Another principal reported that only about 10% of students bring attorneys to their hearings. The school is not represented by counsel in a hearing conducted by the principal. The school always brings its own witnesses. The school also provides parents with copies of audiotapes of the

¹³⁵ CODE OF STUDENT CONDUCT, Procedures for Expulsion and the Appeal of Expulsion (Houston Independent School District, 2002-2003). The first paragraph of this section states that a “school official” conducts the hearing. Paragraph (b), which applies when a principal or his designee or the assistant school principal proposes the expulsion, states that the principal (if he can be impartial), or his impartial designee will conduct the hearing.

hearing. It can take from a day to a week to get the decision to the parents. While awaiting the decision, the student is kept in school.

Another administrator suggested that the expulsion hearing procedure is anachronistic and no longer invokes a due process right because the students are not being expelled from the public school system completely. He reasoned that because the students are expelled to the Juvenile Justice Alternative Education Program and will complete their classes and can graduate, they are not being denied the educational rights that require due process. This is also an issue that has not been tested in the courts.

III. FACTUAL FINDINGS AND RECOMMENDATIONS

HISD has a system of school discipline that is strictly enforced and favors removal from a regular school program, imposition of punitive sanctions, and referral to the juvenile justice system. As a result, a large percentage of students are subjected to disciplinary measures each year, referrals to the juvenile court are skyrocketing and complaints are on the rise from parents and advocates for children about the quality of alternative education programs. This Report makes specific recommendations to address these concerns. The goal of each recommendation is to make the HISD and juvenile justice systems better serve the interests of Houston students while simultaneously addressing the public's concern for preserving school safety.¹³⁶

¹³⁶ Efforts were made in this assessment to be as thorough as possible in learning about the HISD discipline system. However, many system actors were unavailable for interviews. For this reason, some conclusions of this report rely on information from only a few system interviewees supplemented by critique and reflection by national experts in the field of education law and school discipline. The authors of the report hope these conclusions will engender a healthy debate about these issues of public concern and encourage those with differing opinions to share them in response to this document.

FINDING 1: NO GUARANTEED OPPORTUNITY FOR STUDENTS OR PARENTS TO REVIEW AND PRESENT MATERIAL INFORMATION PRIOR TO REMOVAL TO A DISCIPLINE PROGRAM

FINDING 2: NO FORMAL REVIEW OF STUDENT SUSPENSIONS OR REMOVALS TO A DISCIPLINE PROGRAM

FINDING 3: NO FORMAL REVIEW OF A DECISION TO CONTINUE A STUDENT'S PLACEMENT IN A DISCIPLINE PROGRAM

RECOMMENDATIONS:

- 1) Students and their parents should be given the opportunity to fully review and present evidence prior to the removal to a discipline program. Removal to a discipline program is disruptive to the student's educational process. The school official making the decision should have the benefit of all relevant information and arguments in making a decision to assign a child to a discipline program. As such, a student and his or her parent should be given a reasonable opportunity to defend the student's right to stay in the regular educational setting. A student should be afforded the right to review documentary evidence, the right to compel the attendance of witnesses, the right to cross-examine witnesses, and the right to present evidence. Generally, a student who is punished as a result of a proceeding that is inherently unfair will not learn from the sanction, nor will he or she necessarily improve his or her behavior when he or she returns to the school setting.
- 2) A suspension or a decision to remove a student to a discipline program should be subject to review. Because removal of a student to a discipline program will have a significant effect on the student's education, the decision to remove a student to a discipline program should be reviewable by the school board or a designee with the power to overturn the decision.
- 3) A decision to continue a student's placement in a discipline program should be subject to review. Because the failure to return a student to a regular educational setting will have a significant effect on the student's education, the decision of a board designee to continue placement in a discipline program or to remove the

student to a non-disciplinary alternative educational setting should be reviewable by the school board or a designee with the power to overturn the decision.

FINDING 4: NO GUARANTEE OF UNIFORMITY IN THE INTERPRETATION OF THE DISCIPLINARY CODE

School administrators who were interviewed believe the Code of Student Conduct is “excellent” because it “lays the law out clearly” and “shows parents the infraction and the punishment.” They also lauded the guidelines because they do not vary by school. One administrator argued that if a principal reads the Code exactly as it is written, there is no need for interpretation.

Though most of the actors interviewed suggested that there was no opportunity for exercising discretion in classifying behaviors and sanctions, the HISD Code appears to contain numerous provisions requiring the exercise of discretion. In fact, the Code provides that district staff members are required to use their judgment to determine the most effective way to correct student misconduct. At Level I, a staff member has sole discretion to render discipline. At Level III, an administrator can choose between suspension and a discipline program. The administrator has discretion regarding the length of time that a student is removed to a discipline program. Even at Level V, the administrator has the “option” of expulsion for certain offenses, although one administrator reported that he does not expel students for “discretionary offenses” anymore because HISD has to pay for the alternative educational placement for those students. That is, the state or county pays for students who are subject to “mandatory” expulsions to the Juvenile Justice Alternative Education Program. Still, an administrator maintains discretion as to the length of the expulsion even when it is an expulsion to the Juvenile Justice Alternative Education Program.

One principal reported that his school operates as a “true zero tolerance school,” meaning that when a child faces expulsion, no consideration is given to the child’s grades or the number of times he or she is alleged to have engaged in the offensive conduct. Another administrator commented that zero tolerance policies result from HISD and the state legislature imposing a strict disciplinary regime because of school shootings, the prevalence of drugs, and other serious problems. Because of this, they have “gun-free schools,” which can result in an honor student being expelled if he or she brings a replica of a gun to school.

One interviewee complained that a good student who has committed only one minor infraction can receive an extremely serious sanction based solely on the classification of the offense. For example, the child may be placed in a low quality educational program or subject to a lengthy period of placement in a discipline program. One interviewee thought that state law may not be flexible enough to address this situation. On the other hand, one of the administrators stated that an honor student should realize that if he or she brings a gun replica to school and starts waving it around, he or she puts others in danger. The administrator pointed out that because the Code is so clear, honor students are clearly on notice that they could be expelled for such an act.

While the guidelines might be read the same within a school, there is evidence to indicate that they are not interpreted the same way by every administrator. The actions resulting in suspension or expulsion are determined by the level of student misconduct as set out in the Code. However, someone has to use judgment to classify the behavior. The Code was written by attorneys and relies on legal terms of art to classify offenses.

For example, an administrator might have varying views on what the term “aggravated” means, especially when applying it to a given set of facts.

In fact, the most overlooked use of discretion is the flexibility to determine how to classify the offense. A physical action can be labeled as different things by different observers. For example, “horseplay” is a Level I offense, “bullying” is a Level II offense, “fighting” is a Level 3 offense, and “assault” can be a Level IV or Level V offense. The descriptions of these actions in the Code are so general that a child pushing another child could be categorized as any of the offenses listed above and as a result the child could be subjected to any form of discipline, from a verbal reprimand to expulsion.

RECOMMENDATIONS:

- 4) School officials must be trained in classification of offenses and sanctions. In order to guarantee uniformity in the application of the disciplinary Code, any school official or educator assigned the responsibility of administering school discipline should be trained in the identification and investigation of offenses and should receive training on the classification of the offense and the designation of sanctions. School officials should also be trained in alternative methods of addressing negative student behavior.
- 5) Any removal from the regular school setting should be permitted only following a proceeding before an objective decision-maker who was not involved in the investigation of the incident or disciplining of the student.
- 6) A system of review should be instituted to allow for an offense to be downgraded if it is determined that an offense was incorrectly or unreasonably classified. This review should be conducted prior to the imposition of sanctions.
- 7) HISD should be required to report each of the classifications of offenses to a centralized authority outside of HISD, which could then perform a yearly review of district-wide reports and sanctions to encourage consistency.

- 8) HISD should continue to review and redraft its Code to correct vague descriptions of offenses.

FINDING 5: FEW CHILDREN ARE REPRESENTED BY ATTORNEYS DURING THE DISCIPLINARY PROCESS

While the HISD Code of Student Conduct is silent on whether a student or parent can bring an attorney with them to a meeting considering a three-day suspension or expulsion, where the expulsion was not proposed by the principal or his or her staff,¹³⁷ the right to appear with an attorney has specifically been provided for in hearings in which the principal or his or her staff has proposed expulsion.¹³⁸ Students are allowed to have lawyers, parents, and/or community advocates present at those hearings.

Though disciplinary rules apply equally to all students, except as provided under board policy and federal case law related to disabled students, it seems that special education students generally have more access to legal advocates. The Houston Volunteer Lawyers Program, a project of the Houston Bar Association, receives calls from the public that are screened by a staff attorney. If the caller qualifies for assistance financially and substantively, she or he is referred to a volunteer lawyer who handles the case on a *pro bono* basis. The Volunteer Lawyer Program has not received any calls regarding school suspensions or expulsion. Lonestar Legal Aid and Advocacy, Inc., the local legal services offices, only handle suspension or expulsion cases when a child has special needs.

One interviewee who has represented children with special education needs believes that most children who are being expelled have unidentified special education

¹³⁷ CODE OF STUDENT CONDUCT, Levels of Student Misconduct and Disciplinary Options, and Procedures for Expulsion and the Appeal of Expulsion (Houston Independent School District, 2002-2003). See various sections discussing disciplinary procedures at different levels.

¹³⁸ *Id.* at Procedures for Expulsion and the Appeal of Expulsion, Para. (c).

needs. Consequently, if a student does not have a lawyer, his or her parents may not raise this important issue during the expulsion process. She recounted that she represented a student who had been charged with assault. The client had been referred for a special education evaluation the year before but was not receiving services. Because the attorney raised the issue (and sent the school a copy of the appropriate regulations regarding special education), the expulsion was avoided.

One administrator said that occasionally students bring attorneys to these removal proceedings, but they do not seem to have any real effect. Generally, these attorneys do not know school law well and, more importantly, they cannot make the principal change his or her mind one way or the other.¹³⁹ Most administrators and attorneys interviewed did not believe there was a need for lawyers to represent children affected by zero tolerance, except in rare circumstances. One example given by an administrator is a child who has “the deck... stacked” against him or her due to a history of poor conduct, but who is actually innocent of this particular offense. The administrator emphasized this was an exception, and that in most cases the zero tolerance program works.

Another administrator said that the presence of an attorney does not improve the process or help the student. Although he stated an attorney's presence can make it more difficult for the administrator, he has never heard of an administrator changing his or her mind as the result of an attorney attending one of these proceedings. HISD typically does not send an attorney to these hearings. The only time HISD attorneys get involved is in

¹³⁹ The comments from principals seemed to indicate that there is a problem with the quality of counsel when they are present.

discipline hearings for special education students.¹⁴⁰ Another interviewee suggested that school discipline is not an area that justifies a huge amount of money for lawyers to represent children and families affected by zero tolerance policies.

According to one attorney, the school districts seem to have the hearing process “down to a science.” He thinks the process is fair and works well. As far as he knows, HISD does not have a lawyer present at the hearings unless the student has counsel or the case is unusually difficult. He said HISD is so comfortable with the process that they may not have a lawyer present even if the student has one, if the case is not particularly difficult. Another attorney commented that she felt that there was not much an attorney could do at an expulsion hearing, since there is no discretion in these cases. One child advocate disagreed, however, and commented that there was a need for lawyers to represent children in suspension or expulsion hearings, even when there are no special education needs.

One attorney interviewee has represented five to six students in suspension cases at the administrative hearing level of HISD. HISD was represented by counsel in about half of her cases. Two of her cases were referrals to alternative placement. The rest were suspensions or other punishments. Her success rate is about 25-30%. She believes that the guidelines for suspension or expulsion are so vague that administrators read too much into them. As an example, she noted that one of her clients was expelled for bringing a toy gun to school. The administrators considered the toy to be a weapon. The interviewee felt that HISD administrators are terrified of being perceived as being “soft

¹⁴⁰ The Code is silent with regard to counsel appearing on behalf of the school in expulsion hearings. As all Board of Education meetings are attended by district counsel, however, it is assumed that final appellate hearings before the Board of Education are attended by the Board’s counsel.

on crime” and thus have an incentive to apply the Code very strictly, in what the attorney believes is an unreasonable manner. She recommended training principals and/or superintendents on fairness and positive community relations in dealing with misconduct.

This attorney also expressed concern that, while the defender of the child has no subpoena authority, the school district can require their witnesses/employees to attend. She commented that the district will have their own attorneys present if they know she is coming. Although she is not aware of whether a record of the original proceeding is made by the district, she has been allowed to tape record the proceedings herself. None of her cases has gone beyond the hearing level because her clients just cannot afford further litigation at her \$125.00 an hour fee. She usually receives a decision immediately, and the usual suspension is for ten days although some of the suspensions are in-school suspensions. This advocate suggests that the system needs an outsider to make recommendations because most of the time the administrators have already made up their minds.

There was consensus among those interviewed that most parents do not challenge proceedings for suspension or expulsion. Parents who do challenge the school’s position, however, generally have the financial ability to do so. One administrator said that generally the only people who can afford to bring attorneys are those from the “middle” and “upper” economic class. Parents without money, and likely without education, are left on their own to try to persuade the principal or school district to change a student’s discipline, the length of the placement, or to change the venue of the placement.

One principal of an “affluent” high school recalls that out of 26 disciplinary hearings, only three of the parents hired attorneys. This principal did not believe having

an attorney affected the outcome because he felt he had no discretion under the Code. Regardless of the outcome of such cases, affluent parents can opt to place their child in private school rather than accept or lodge a challenge to the discipline. Private schools are not an option for an indigent family, and other HISD schools cannot admit them once expelled.¹⁴¹ Nor do the poor generally have the means to move to another district.

RECOMMENDATIONS:

- 9) Given the severity of the possible sanctions for a student subject to expulsion, students should have access to an advocate to appear on their behalf at disciplinary proceedings. Socioeconomic status should never be a reason that a student is denied a fair process.
- 10) The private bar and local law schools should consider establishing a *pro bono* project to provide representation to students facing suspension or expulsion. Having *pro bono* counsel available to indigent children and families facing school discipline proceedings would at least give students and families the opportunity to exercise the rights they have to counsel under the Code.
- 11) A public education campaign should inform parents about access to representation and counsel in the HISD school discipline matters to determine if they would take advantage of the free legal services provided. Experience in other cities around the nation suggests that parents do not call on legal aid for assistance because they do not know that such assistance is available and/or because they are led to believe by the school that legal assistance would not change the outcome of the proceedings.
- 12) The decision-makers in these proceedings should never be the advocates for, or against, the expulsion of the individual student who is the subject of the proceeding. Each hearing should be presided over by a truly objective decision-

¹⁴¹ HISD’s policy states that the district “will honor expulsion orders from other school districts and shall not admit a student expelled from another district until the student completes the period of expulsion.” CODE OF STUDENT CONDUCT, Procedures for Expulsion and the Appeal of Expulsion (Houston Independent School District, 2002-2003).

maker, trained to understand that he or she should not presume the student is guilty of an act of misconduct.

FINDING 6: EXCESSIVE AMOUNT OF REFERRALS FROM SCHOOLS TO DELINQUENCY COURT.

Within two business days after a student’s expulsion hearing, a principal is required to send the parent and school administration a copy of the order placing the student in a discipline program or expelling the student. Information required by section 52.04 of the Texas Family Code, including a copy of the police report, must be included with the order. School administration must then forward the information to the authorized officer of the juvenile court. Several interviewees in the juvenile court stated that the court system is overloaded with these school-based referrals.¹⁴² Many interviewees complained that these referrals were for relatively minor behaviors that are better suited for resolution within the school.¹⁴³

Many interviewees expressed a concern that trivial offenses were being criminalized by the system. This, they posited, led to unnecessary school exclusion and referral to the juvenile justice system because the HISD Code provisions do not allow the flexibility necessary to reasonably match the culpability of a student’s actions with the appropriate level of punishment. Interviewees also expressed concern that, while many parents expressed support for zero tolerance in principle, they would reject the system and its application if their child became involved in it.

¹⁴² This belief is well-founded. In 2002, there were 5,591 school-based referrals to juvenile court, which constituted over one quarter of all delinquency court referrals. Harris Cty. Juvenile Probation Dept., *supra* note 12, at 16. For purposes of this report, a “school-based referral” is a juvenile court case that was initiated by a school official or a case where the incident took place on school grounds or at or near a school-related event.

¹⁴³ See *supra* Chapter 1: Delinquency Court, Finding 2, and accompanying text.

The administrators, principals, and teachers who were interviewed were quite confused about who has the discretion to determine where the school discipline system and the juvenile justice system should meet. Few interviewees understood the integral relationship between the school disciplinary system and the juvenile court. This is a fundamental issue that must be addressed if the school disciplinary process is to function properly.

One attorney suggested that, while the school police are notified when her clients get in trouble, in only one case did a child get a citation by the police. Nevertheless, she believes HISD and the juvenile justice system have a great deal of interaction. “They work hand-in-hand.” She is not aware of the courts securing any witnesses for HISD. She also assumes HISD notifies appointed attorneys¹⁴⁴ about the time and place for hearings, but they do not have time to attend the hearings. Interviews with actors in the juvenile justice system, however, revealed that appointed attorneys are not informed of these hearings, nor are they compensated for attending these hearings.

One principal noted that almost anything in Level IV or Level V of the Code of Student Conduct, including offenses such as weapons, assault, intentional destruction of property, and possession of drugs or alcohol, requires notification of the police. Other than this notification, and occasional calls from prosecutors or probation officers, the principal believed there is little contact between schools and the juvenile justice system. He was aware that appointed attorneys in the juvenile justice system are not notified of school administrative hearings.

¹⁴⁴ Interviewees often referred to “public defenders.” However, because delinquency attorneys are appointed by the court and are not “public defenders,” they will be referred to as appointed attorneys.

One HISD attorney commented that school discipline policies and the juvenile justice system are better coordinated than they used to be. He attributed this to the efforts of Judge Eric Andell, a former juvenile court judge who is now the U.S. Deputy Undersecretary of Education under Rod Paige, the former HISD superintendent. As an example, a student who pleads guilty in juvenile court is now informed that this will require a suspension under the HISD Code and Chapter 37. This lawyer did concede that the coordination of the two systems may still need improvement.

RECOMMENDATIONS:

- 13) Referral to the juvenile justice system should never be done as a punishment, but rather should be done when the activities of a student truly rise to the level of a crime. While the determination of what is criminal and what is not ultimately falls within the purview of the prosecutor and police, training of school administrators will help avoid unnecessary and improper notification of the authorities.
- 14) School officials should develop a range of school-based sanctions and make court referrals only in the most serious cases.
- 15) No school incident should require automatic referral to the juvenile justice system. An individual school official should be required to sign a criminal complaint or, in some way, be held accountable for the referral to law enforcement.
- 16) Prosecutors should exercise restraint in making decisions on whether to prosecute school-based offenses, and should not bring charges when the conduct would not otherwise merit a referral to the juvenile justice system.
- 17) Police should exercise their discretion to not arrest a student when investigation shows no criminal act was committed.
- 18) When a student is punished within one of the two systems, the other system should be fully apprised of the type, condition, and length of the first sanction in

order to design an action by the second system which enhances the rehabilitative nature of the sanction and helps restore the student to full and capable citizenship in school and the community.

- 19) Special care must be taken to ensure a minor has counsel in school proceedings because the evidence in the school proceeding can most likely be used against a student in the juvenile justice proceeding. Because the stakes are so high for the students, the system needs to be evaluated carefully to determine the efficacy of providing children access to counsel early in this process.

FINDING 7: LENGTH OF EXPULSION DETERMINED BY PROCEDURAL RULES OR SPACE AVAILABLE IN AN ALTERNATIVE PROGRAM, NOT THE GRAVITY OF THE INCIDENT

Students expelled from HISD are entitled to receive educational services but are not entitled to participate in any regular or extracurricular district programs during the period of the expulsion. HISD has the option of either referring the student to the Harris County Juvenile Justice Alternative Education Program (JJAEP) or maintaining the education of the student within the HISD system by referring the student to a discipline program for the period of the expulsion. A student shall continue to receive instruction and credit for course work through either the JJAEP or a discipline program. If the juvenile court finds the student guilty of the conduct, the juvenile court judge may order the student to attend the JJAEP, even when the school expulsion process did not mandate the transfer.

Expelled students who are charged but found not guilty by a juvenile court will be readmitted to the district. Students who plead to a lesser offense, or whom the Harris County District Attorney decides not to prosecute, may be readmitted at the discretion of the district. If readmitted, the district may place the student in a discipline program.

Students who are not readmitted may only continue their educational services at the JJAEP, the alternative setting that is not run by the public school system.

There are very strict procedural rules about the required length of an expulsion. Students who are expelled after the first six weeks of school must be expelled for the remainder of the fall semester and the entire spring semester. If the student is expelled after the fourth six-week school quarter, the student must be expelled and must attend the JJAEP for the remainder of the spring semester and the entire fall semester of the following school year. Principals have discretion to expel for a shorter period of time provided there is a discipline program that is willing to accept the student for the period of expulsion and provided there is no requirement to expel for a longer period.

RECOMMENDATIONS:

- 20) The length of an expulsion should never depend on the availability of space at an alternative education program.
- 21) The length of an expulsion should not be dictated by arcane rules that depend on when in the year the behavior took place.
- 22) Juvenile court judges should be discouraged from removing a child to the Juvenile Justice Alternative Educational Program when the school discipline proceeding did not mandate such a removal.

FINDING 8: NO INFORMATION AVAILABLE ABOUT THE QUALITY OF EDUCATION PROVIDED BY ALTERNATIVE SCHOOLS

Alternatives to expulsion exist under the HISD multi-level disciplinary scheme. For insignificant negative behaviors, a student may receive a broad range of disciplinary sanctions such as loss of extra-curricular activities or referral to an HISD discipline

program.¹⁴⁵ However, Texas state law mandates alternative education programs for expelled students and the removal and transfer of public school students who engage in proscribed conduct.¹⁴⁶ Transfers of Texas students to alternative education programs without a hearing have been upheld by the U.S. Fifth Circuit Court of Appeals.¹⁴⁷

In conformity with the state mandate for the establishment of alternative education programs cited above, if expelled for Level V misconduct, an HISD student may be placed in the Harris County Juvenile Justice Alternative Education Program or referred to a discipline program as a Level IV punishment. The JJAEP is a separate and distinct entity from the HISD discipline programs. The discipline programs are run by HISD, but the JJAEP is run by a private agency. Placement in a discipline program is not considered “expulsion” by the HISD system, while placement in the JJAEP is considered expulsion. Both provide continued education services, though interviewees disclosed anecdotes that raised questions about the quality of education.

One interviewee opined that students at alternative schools can get better grades because of the low ratio of students to teachers. She recommends that her clients take advantage of the extra attention by pulling up their grades while they are in smaller classes. Another interviewee praised the current quality of the HISD expulsion policy. He argued that prior to the creation of Chapter 37, the statute authorizing alternative school placement, these students were expelled with no educational alternatives. Now,

¹⁴⁵ CODE OF STUDENT CONDUCT, Levels of Student Misconduct and Disciplinary Options (Houston Independent School District, 2002-2003).

¹⁴⁶ Tex. Educ. Code Ann. § 37.006(a) (Vernon 2002) *as described in Notes and Comments: Procedural Due Process for Texas Public School Students Receiving Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209 at 209 (1996) (discussing Tex. Educ. Code § 37.006(a)).

¹⁴⁷ *See Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26-27 (5th Cir. 1997) (holding that student not entitled to a hearing regarding propriety of change in curriculum because change did not constitute deprivation of student’s interest in education); *see also Note: Redefining Punishment for Students: Nevares v. San Marcos I.S.D.*, 20 REV. LITIG. 777 (Summer, 2001).

even though they are removed from the traditional public school system, they remain in school and can graduate from high school. He argued that Chapter 37 has led to definite improvements in school safety and student behavior. There is less juvenile crime and all students may obtain a high school education. The existence of a policy that avoids expelling students from all school programs dates back to the 1970s when HISD was sued several times for expelling students, which at that time meant sending them home.

It was reported by one interviewee that HISD typically does not send students to a discipline program unless they do something very severe, and it is generally for a fairly long period of time. He contrasted this policy with his perception of suburban schools, which might send students to a discipline program for a “lesser offense,” but for less time.

Several interviewees had complaints about the alternative schools. One administrator expressed a concern about the varied quality of the alternative school programs. Some programs are excellent and others are very poor and “nothing more than babysitting services.” Others complain that the curriculum is much more basic than it is in regular programs and is inappropriate for a non-special education student.

Are the alternative schools better than no schooling at all? Most of the interviewees agreed that they are. However, a former judge criticized the alternative schools for mixing “generally good” kids in a school with “bad” kids. He believes that since the alternative school curricula are geared toward special education students, it is difficult for regular education students to remain working at grade level in the alternative school setting. Finally, he was concerned that the students were expected to transition

back to a regular school, without any additional education support, where they may not have been functioning well prior to expulsion.

Among interviewees, there seemed to be a consensus that a child is rarely turned out on the streets with no alternative education option of any kind. One interviewee stated that being expelled from school with no alternative education is like a death sentence. He is a firm believer that students should be in school and that the needs of the students should be identified. For example, if a student is not doing well academically, then schools should identify other avenues for the student, such as an apprentice program. He said students can excel in apprentice programs where there is more available than just strict academics. He feels there is too much emphasis on a college career, and schools should be prepared to provide appropriate alternatives. He asked, “Why deny students a right to learn a trade, but let them fail?” Teachers not only have to teach academics, but they also have to deal with dyslexia, learning disabilities, special education, and personal problems of the students. He would like to see a push to allow students to consider vocational training because given a choice, students who are not doing well academically and/or getting into trouble at school might succeed in a vocational training program and not get in as much trouble.

Concern Over Privately Run Companies

The Harris County Juvenile Justice Alternative Education Program is run by a private company, Community Education Partners, which charges HISD and other districts in the surrounding area per student. Several interviewees expressed concern that the private business contracts in which the school board enters may not serve the best

interests of the student or the community.¹⁴⁸ Interviewees expressed concern about the quality of education under this system and the large number of students who fail to return to regular school after attending one of these privately run schools. One interviewee was concerned about whether the profitability of privately run alternative education programs affects the choices made by administrators. Once the county has made a contract with these privately run alternative programs, the principals may be obligated to fill the contracted spots to clear their own schools, even where such exclusion is not necessary. He argued that there needs to be an evaluation of the quality of the referral to these private programs. Others expressed concern about the process of expulsions and suspensions which appeared to exclude from school a disproportionate number of minority students and students from lower income households.¹⁴⁹

RECOMMENDATIONS:

- 23) Greater attention must be paid to assure that the highest quality of education is provided in alternative education programs. A low teacher-to-student ratio can help the quality of education as long as the teaching staff is required to meet the same standards as the staff in regular schools. An alternative school should not have conditions that are so contrary to a healthy learning environment that it is, in effect, a slow process of encouraging children to drop out of school altogether. Alternative schools must be re-examined to see if the budget and curriculum design they have allow for any reasonable quality of education. They should be evaluated and the results of the evaluations made public. These schools should have test scores published just as the test scores of regular education schools are published. Unless the discipline programs secure students the same quality of

¹⁴⁸ For example, originally, because of the terms of its contract with a private discipline provider, HISD had to send students to a discipline program for 180 days. The contract has been changed (in response to public demand) so that, now, the administrator has more discretion regarding the length of time that a student is removed to the discipline program.

¹⁴⁹ No statistics were available to test this theory.

education they receive in a regular school setting, students should not be forced to attend such programs.

- 24) A thorough examination of available data about expulsions and suspensions in HISD should be conducted by an outside entity to ensure that expulsion decisions are not related to a student's socio-economic status, race, or ethnicity, or to a school's political contracts.
- 25) Every effort must be made to redesign any discipline system that has a disproportionate effect on minority or low income students. A full and fair discipline process requires blind decision-making that does not disproportionately affect a particular group or class of students. The private bar should form a task force to study each of the issues listed above, propose recommendations specifically tailored to achieve these outcomes, identify funding sources for needed training programs and implement those recommendations locally.
- 26) HISD should authorize and subsidize a comprehensive, objective evaluation of the quality of the Juvenile Justice Alternative Education Program and all discipline programs, including an assessment of students' performance when they return to their regular school program.

IV. CONCLUSION

The school discipline system of the Houston Independent School District needs to be studied, examined and re-designed so that it provides an education for all students and addresses discipline problems fairly and appropriately. The current school discipline practice at HISD disrupts the educational process of too many children because of unnecessary transfers to discipline programs and juvenile court referrals. The recommendations provided in this Report outline some steps to achieve a quality education and a safe setting for all students.

HISD is one of the five largest school districts in the nation. With over 200,000 students, it has many of the responsibilities, strengths and weaknesses of any urban

school system in the nation. Due to the size of the school district, an unsubstantiated belief that school violence is increasing,¹⁵⁰ and limited resources dedicated to ensuring the consistent application of school discipline standards, the HISD system enforces a policy of zero tolerance in all violations of school rules, whether big or small. In our observation, this policy of zero tolerance is often enforced inconsistently and unfairly. The system is criticized by students, parents and legal advocates, though no improvement in the system has resulted. Defenders of the system suggest that it meets the needs of the district by favoring removal of students accused of violations of school safety rules. Both system proponents and opponents agree that the fact that the school district provides alternative education for expelled students is a great strength of the system. Many believe, however, that the quality of this alternative education should be examined and evaluated on an ongoing basis. The recommendations made throughout this Report would ensure a positive, safe school environment within HISD.

¹⁵⁰ See Kim Brooks, Vincent Schiraldi and Jason Ziedenberg, *School House Hype: Two Years Later* (Justice Policy Institute, 2000), available at www.justicepolicy.org (discussing the public perception that serious school crime is on the rise while in fact the vast majority of schools are free from serious crime and school crime appears to be on the decrease).