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# Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs

Patty Blackburn Tillman

# PROCEDURAL DUE PROCESS FOR TEXAS PUBLIC SCHOOL STUDENTS RECEIVING DISCIPLINARY TRANSFERS TO ALTERNATIVE EDUCATION PROGRAMS

*Then call them to our presence - face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .*[1]

## INTRODUCTION

In 1995, the Texas Legislature, prompted by increasing violence in public schools,[2] passed legislation requiring school districts to transfer students with disciplinary problems to alternative education programs.[3] The Texas Education Code at section 37.006(a) ("section 37.006(a)")[4] currently mandates removal and transfer of public school students who engage in proscribed conduct. Such disciplinary transfers are to be imposed for certain disruptive acts, violent acts, or acts punishable as felonies, whether they occur *on* or *off* campus.[5] These acts include selling drugs, making terroristic threats, committing assault, and behaving lewdly or indecently.[6]

In *New Jersey v. T.L.O.*,[7] the Supreme Court recognized that control of public school systems is the responsibility of state and local officials, stating:

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1. WILLIAM SHAKESPEARE, RICHARD II, act 1, sc. 1.

2. *See* JOINT SELECT COMMITTEE TO REVIEW THE CENTRAL EDUCATION AGENCY, FINAL REPORT OF THE JOINT SELECT COMMITTEE TO REVIEW THE CENTRAL EDUCATION AGENCY, 74th Legis. 17-18 (Tex. 1994) [hereinafter FINAL REPORT].

3. *See* TEX. EDUC. CODE ANN. § 37.006 (West Supp. 1996).

4. TEX. EDUC. CODE ANN. § 37.006(a) (West Supp. 1996).

5. *See id.* § 37.006-.007.

> [A] student shall be removed from class and placed in an alternative education program . . . *if the student engages in conduct punishable as a felony*, or commits [assault; terroristic threats; sells, gives or delivers marihuana or a controlled substance or dangerous drug; sells gives, or delivers alcoholic beverages, commits a serious offense while under the influence of alcohol, or possesses, uses, or is under the influence of alcohol; abuses glue or aerosol paints; or engages in public lewdness] on school property or while attending a school-sponsored or school-related activity on or off of school property . . . .

*Id.* (emphasis added).

6. *See id.*

7. 469 U.S. 325 (1985) (holding that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials).



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> The primary duty of school officials and teachers . . . is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.[8]

Although maintaining discipline in public schools is necessary to provide students with safe learning environments, public school students do not, however, "shed their constitutional rights" at the schoolhouse door.[9] Therefore, "[t]he authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards."[10]

*Nevares v. San Marcos Consolidated Independent School District*[11] is the first Texas case to challenge whether disciplinary transfers of public school students without notice and a hearing are unconstitutional, because they deny students procedural due process.[12] This article will explore whether Texas public school students accused of committing felony offenses while off campus should be afforded the procedural due process protections of notice and hearing *prior* to their disciplinary transfer to alternative education programs.

## I. *NEVARES V. SAN MARCOS CONSOLIDATED INDEPENDENT SCHOOL DISTRICT*

Timothy Nevares was a fifteen year-old student enrolled in the tenth grade at San Marcos High School.[13] Timothy alleged the driver of an automobile threatened or attempted to run over him and his companions while they were walking down a public street in San Marcos, Texas on January 23, 1996.[14] The driver told the police that Timothy threw rocks at his car and injured his passenger.[15] The boys, however, contended that they fled from the approaching car and

8. *Id.* at 350 (Powell, J., joined by O'Connor, J., concurring).

9. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (holding that public school students have a freedom of speech right to wear black arm bands to school in protest of the United States' participation in the Vietnam conflict, that this speech right is protected by the First Amendment, and that the Fourteenth Amendment Due Process Clause requires public school officials to respect that right).

10. Goss v. Lopez, 419 U.S. 565, 574 (1975).

11. Nevares v. San Marcos Consol. Indep. Sch. Dist., No. A-96-CA-093 JN, 1996 WL 786122 (W.D. Tex. May 16, 1996).

12. *See id.* at *5.

13. *See id.* at *1.

14. *See* Brief in Support of Issuance of a Preliminary Injunction at 1, *Nevares* (No. A-96-CA-093 JN).

15. *See id.* at 2.

threw "gravel" at the car in an effort to defend themselves against a vehicular assault.[16]

Although none of the alleged activity occurred on school property or while Timothy was attending a school-related function, a police offense report was furnished to the San Marcos Consolidated Independent School District on February 12, 1996, [17] as mandated by statute.[18] The report stated that Timothy had been detained and was being investigated for committing aggravated assault, a felony offense.[19] The assistant principal summoned Timothy to his office, escorted him to the on-campus police office, and informed him the school had received an offense report indicating a complaint had been filed against him for aggravated assault.[20]

The assistant principal asked Timothy whether the report was accurate and whether he had been charged with aggravated assault.[21] Timothy responded that his father had hired an attorney and that school officials would have to talk to his father or to the attorney.[22] The assistant principal then informed Timothy that if the charge was accurate, the law required that he be removed from classes at San Marcos High School and placed in Rebound, an alternative education school.[23]

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16. *See id.* at 1-2.

17. *See Nevares,* 1996 WL 786122, at *1.

18. *See* TEX. CODE CRIM. PROC. ANN. § 15.27(a) (West Supp. 1996). Notification to the superintendent of the school district is required if a law enforcement agency takes into custody or arrests an individual who the agency knows or believes is enrolled as a student in a public primary or secondary school. *See id.*

19. *See Nevares*, 1996 WL 786122, at *2. Aggravated assault is a felony offence under the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 22.02(b) (West 1994).

20. *See* Plaintiff's Motion for Summary Judgment at 3, *Nevares* (No. A-96-CA-093 JN).

21. *See id.*

22. *See* Defendant San Marcos Consol. Indep. Sch. District's Rule 59(e) Motion to Alter or Amend Judgment at 4, *Nevares* (No. A-96-CA-093 JN).

23. *See id.*

> Placement in Rebound usually lasts ten weeks; however, students who successfully complete each of the required levels [of education], and do not receive more than two disciplinary referrals, are eligible to return to the general population in eight weeks. Students placed in Rebound for engaging in conduct punishable as a felony remain there until the felony charge is disposed of in court; if no conviction results, the student will be released from Rebound and returned to regular classes.

Plaintiff's Motion for Summary Judgment at 4-5, *Nevares* (No. A-96-CA-093 JN). Although Timothy had attended San Marcos public schools all his life, maintained grades of A's and B's, and had never been the subject of juvenile court proceedings, *see* Brief in Support of Issuance of a Preliminary Injunction at 1, *Nevares* (No. A-96-CA-093 JN), the assistant principal "was not interested in hearing Timothy's side of the story and did not give him an opportunity to tell it; all [the assistant principal] wanted to do was confirm that Timothy was one and the same person *detained* for the alleged felonious assault." Plaintiff's Motion for Summary Judgment at 3, *Nevares* (No. A-96-CA-093 JN) (emphasis added).

After the meeting, Timothy telephoned his father and informed him of the school's intended action.[24] Timothy's father telephoned the principal and requested a meeting and a hearing.[25] The principal told Timothy's father that Timothy would be placed in an alternative education school if Timothy had engaged in conduct punishable as a felony.[26] Although Timothy's father and the principal discussed Timothy's self-defense defense to the aggravated assault charge,[27] the principal stated that "according to the education code she had no choice but to place Timothy in Rebound, and that since the statute did not provide for a hearing, he was not entitled to one."[28] Thereafter, the assistant principal processed Timothy's referral to Rebound, and when Timothy arrived at San Marcos High School to attend classes, the assistant principal instructed him to report to in-school suspension to await processing and physical transfer to Rebound.[29] Thus, "Timothy was to be placed in the Rebound program solely on the basis of statements [contained] in the [police] offense report."[30]

Timothy's father subsequently brought suit for a declaratory judgment challenging the constitutionality of section 37.006(a).[31] Timothy's father also sought issuance of temporary and permanent injunctions to prohibit the school from enforcing section 37.006(a).[32] On May 16, 1996, the United States District Court found section 37.006(a) violates the Fourteenth Amendment of the United States Constitution by permitting the removal of public school students from regular classes for placement in alternative education programs without notice or a hearing.[33] Presently, *Nevares* is on appeal with the United States Fifth Circuit Court of Appeals, and no criminal proceedings have been instituted against Timothy.[34]

## II. DUE PROCESS

Under the Fourteenth Amendment of the United States Constitution, state governments are prohibited from depriving "any person of

24. *See* Plaintiff's Motion for Summary Judgment at 4, *Nevares* (No. A-96-CA-093 JN).

25. *See id.*

26. *See* Defendant San Marcos Consol. Indep. Sch. District's Rule 59(e) Motion to Alter or Amend Judgment at 4, *Nevares* (No. A-96-CA-093 JN).

27. *See id.*

28. *See* Plaintiff's Motion for Summary Judgment at 4, *Nevares* (No. A-96-CA-093 JN).

29. *See id.*

30. *See id.*

31. *See* Brief in Support of Issuance of a Preliminary Injunction at 2-3, *Nevares* (No. A-96-CA-093 JN).

32. *See id.*

33. *See Nevares,* 1996 WL 786122, at *5.

34. *See id.* at *2.

life, liberty, or property, without due process of law."[35] The purpose of this language, according to judicial opinions, legal commentaries, and some state constitutions, is to protect individuals from arbitrary, capricious or irrational government acts which interfere with citizens' lives, liberty and property interests.[36]

The Fourteenth Amendment's Due Process Clause has been a source of two branches of constitutional law: substantive due process and procedural due process.[37] "[S]ubstantive due process . . . defines rights belonging to citizens as citizens, including personal liberty [rights] and private property [rights], and [imposes] an external check on the policies government may adopt."[38] Thus, "[b]y virtue of the substantive component, courts identify fundamental values not explicit in the Constitution, translate them into substantive rights and then deny to government — including legislatures — the power to infringe those rights without some compelling justification."[39] Substantive due process prohibits state action from infringing upon an individual's fundamental liberties and provides a means for attacking the substance of a law, rule, policy, or decision that offends basic notions of fairness.[40]

Procedural due process usually requires that notice and hearing procedures be provided before state action may deprive an individual of life, liberty, or property.[41] Procedural due process involves the

35. U.S. CONST. amend. XIV, § 1. Notably, the Texas Supreme Court considers Article I, § 19 of the Texas Constitution to be the functional equivalent of the federal due process clause. *See* University of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 929 (Tex. 1995). Thus, a statute violating the federal due process clause likewise violates the Texas due process clause.

36. *See* EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY 31 (1996).

37. TYLL VAN GEEL, THE COURTS AND AMERICAN EDUCATION LAW § 8.6 (1987). According to one commentator, "[d]ue process may be the most frequently litigated concept in the Constitution." Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 941 n.1 (1990).

38. VAN GEEL, *supra* note 37, § 8.6.

39. Riggs, *supra* note 37, at 942.

40. *See* J. DEVEREAU WEEKS, STUDENT RIGHTS UNDER THE CONSTITUTION: SELECTED FEDERAL DECISIONS AFFECTING THE PUBLIC SCHOOL COMMUNITY 40 (Inge Whittle et al. eds., 1992); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 197-98 (1979) (holding that a school teacher's due process rights were not compromised because she was afforded notice and hearing before the Harrah School Board voted not to renew her teaching contract after she refused to comply with continuing education requirements mandated by the Oklahoma legislature); Nebbia v. New York, 291 U.S. 502 (1934) (holding New York's regulation of milk prices was not arbitrary, discriminatory, or irrelevant to legislative policy and therefore was not an unnecessary and unwarranted interference with a grocer's individual liberty, but that the due process clause requires that the means selected to accomplish the State's goal shall have a real and substantial relation to the goal).

41. *See* WEEKS, *supra* note 40, at 40.

method or procedure by which official decisions are made.[42] The core element of procedural due process is fairness.[43]

Once it is determined that due process applies, questions remain regarding *what* process is due and *when*, before or after state action.[44] In 1972, the Supreme Court, in two separate opinions, articulated a general two step approach for determining whether an individual's procedural due process rights are implicated in state action.[45] First, does the state action adversely impact the individual's protected liberty or property interest and second, if so, what form of notice and hearing must be afforded the individual.[46]

In 1976, in *Mathews v. Eldridge*,[47] the Supreme Court promulgated a three-part balancing test to determine what procedures are required when state action impinges upon an individual's protected property or liberty interest.[48] The *Mathews* balancing test consists of the following factors:

> First, the private interest that will be affected by official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[49]

Thus, under *Mathews*, the process an individual is due when state action infringes upon an individual's property or liberty interest is determined by a flexible standard.

As currently written, section 37.006(a) does not afford Texas public school students notice or a hearing *prior* to their disciplinary transfer to alternative education programs.[50] In fact, Texas public schools are not required to afford students notice and hearing until *after* their transfer to alternative education programs.[51]

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42. *See* WILLIAM D. VALENCE, LAW IN THE SCHOOLS 222 (Linda A. Sullivan et al. eds., 3d ed. MacMillan Publ'g Co. 1994) (1980).

43. *See id.*

44. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

45. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

46. *See generally Roth*, 408 U.S. 564 (1972); *Perry*, 408 U.S. 593 (1972).

47. 424 U.S. 319 (1976).

48. *See id.* at 334-35.

49. *Id.* at 335.

50. *See* TEX. EDUC. CODE ANN. § 37.006(a) (West Supp. 1996).

51. *See id.* § 37.009.

## III. STUDENT DUE PROCESS RIGHTS

### A. *Historical Development*

"Historically, public education was not considered a right."[52] However, in 1954, in the seminal case of *Brown v. Board of Education*,[53] the Supreme Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[54]

Although *Brown* involved segregation of public school students,[55] the Supreme Court held that public education becomes a right when the state undertakes a responsibility to provide it.[56]

In *Dixon v. Alabama State Board of Education*,[57] the Fifth Circuit Court of Appeals held that the Fourteenth Amendment's Due Process Clause requires that students attending public, tax-supported colleges receive notice and hearing *prior* to deprivation of education rights.[58] In *Dixon*, students attending a state college were expelled or placed on probation without any notice of the charges or a hearing because they participated in a sit-in at a lunch counter.[59] The *Dixon* court held that students attending tax-supported colleges who face suspensions or expulsions are entitled to: (1) the names of witnesses testifying against them, (2) an oral or written report of the facts to which each witness testifies, (3) an opportunity to present a defense against the charges, and (4) an opportunity to produce oral or written testimony of defense witnesses, *prior* to imposition of sanctions.[60]

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52. WEEKS, *supra* note 40, at 40.

53. 347 U.S. 483 (1954).

54. *Id.* at 493.

55. *See id.* at 487-88.

56. *See id.* at 493.

57. 294 F.2d 150 (5th Cir. 1961). "The judicial recognition that students had a right to procedural due process in connection with suspensions and expulsions began in the late 1960s in the face of the student activism of the period." VAN GEEL, *supra* note 37, § 8.6.

58. *See Dixon*, 294 F.2d at 151.

59. *See id.* at 151-54.

60. *See id.* at 159.

### B. *Public School Students Have Constitutionally Protected Property and Liberty Interests in a Public Education*

In 1975, in *Goss v. Lopez*,[61] the Supreme Court held that public elementary and secondary school students have a right to an education and students facing temporary suspensions have property and liberty interests protected by the Due Process Clause.[62] In *Goss*, school authorities suspended students from school for periods of up to ten days based on charges of misconduct.[63] The public school administrators contended that students do not have a constitutional right to receive a public education and therefore the Due Process Clause did not apply to students expelled from the public school system.[64]

The Supreme Court rejected this argument, holding that courts must look to the *nature* of the interest at stake, not to the weight of the interest, to determine whether due process attaches.[65] The Court stated, "Protected interests in property are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits."[66]

The Court concluded that under Ohio law, students have legitimate claims of entitlement to a public education because Ohio extended the right of an education to students when it enacted mandatory school attendance laws.[67] Thus, Ohio could "not withdraw that right on grounds of misconduct, absent fundamentally *fair procedures* to determine whether misconduct has occurred."[68] Furthermore, the Court found the level of due process afforded students accused of misconduct should be commensurate with the punishment.[69]

The *Goss* Court further determined that a student has a liberty interest in his or her good name and reputation, and that damage to that reputation could harm a student's later opportunities for higher education and employment.[70] The *Goss* Court held that even a short sus-

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61. 419 U.S. 565 (1975).
62. *See id.* at 574-75.
63. *See id.* at 567-72.
64. *See id.* at 572.
65. *See id.* at 575-76 (citing Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)).
66. *Id.* at 572-73 (1975) (citing *Roth*, 408 U.S. at 577).
67. *See id.* at 573-74; *see also* OHIO REV. CODE ANN. §§ 3313.48 & 3313.64 (Anderson 1972 & Supp. 1973) (directing authorities to provide free education to all residents between five and twenty one years of age); OHIO REV. CODE ANN. § 3321.04 (Anderson 1972) (compulsory school attendance law).
68. *Goss*, 419 U.S. at 574 (emphasis added).
69. *See id.* at 572-76.
70. *See id.* at 574-75. *Compare* Board of Regents v. Roth, 408 U.S. 564 (1972) *with* Perry v. Sindermann, 408 U.S. 593 (1972). *Roth* and *Perry* are considered companion cases because both were decided on June 29, 1972. The cases involved non-tenured professors dismissed from employment by a university or college. The *Roth* Court held that a state university's refusal to rehire a non-tenured university assistant

pension of up to ten days may adversely impact a student's education.[71] Thus, when public education is recognized as a right because the state has undertaken to provide it, safeguards must be employed to "minimize the risks of wrongful punishment and provide for the resolution of disputed questions of justification."[72] Therefore, the Court determined that school officials are not free to choose any suspension procedure they prefer.[73]

## IV. SECTION 37.006 OF THE TEXAS EDUCATION CODE

The growing violence in public schools prompted the Texas Legislature to create a discipline scheme [74] that "attempts to strike a balance between two opposing philosophies: 'zero rejection,' which calls for

professor did not seriously damage the professor's standing and associations in his community, and that there was no suggestion that the state imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. *See Roth*, 408 U.S. at 573. Further, the Court held the university's refusal to rehire the professor did not deprive him of a liberty interest protected by the Fourteenth Amendment because the professor remained free to seek another job. *See id.* at 575. The Court then held that where the terms of the professor's appointment secured him no interest in reemployment and where no state statute, university rule, or policy existed that secured his interest in reemployment or created any legitimate claim to it, he did not have a property interest protected by the Fourteenth Amendment that required university authorities to afford him a hearing when they declined to renew his contract of employment. *See id.* at 578. In *Perry,* a college professor alleged that the Board of Regents' decision not to rehire him was based upon his public criticism of college administration policies and thus the Board's decision infringed upon his freedom of speech rights. *See Perry*, 408 U.S. at 594-95. The professor also alleged that the Board's failure to afford him a hearing violated the Fourteenth Amendment's guarantee of procedural due process. *See id.* at 595. The Supreme Court held that although the professor's interest in continued employment at a state college was not secured by an express contractual tenure provision, he was entitled, when his contract was not renewed, to the protections of procedural due process, including a hearing and notice of grounds of his non-retention, if by reason of rules and understandings promulgated and fostered by state officials, the college had a de facto tenure program and the professor had tenure under that program. *See id.* at 602-03.

71. *See Goss*, 419 U.S. at 574-76.

72. Ingraham v. Wright, 430 U.S. 651, 676 (1977). *Ingraham* held that the Eighth Amendment's cruel and unusual punishments clause does not apply to disciplinary corporal punishment in public schools, however, the Court noted that where public school officials, acting under color of state law, intentionally punish a child for misconduct through bodily restraint, a child's Fourteenth Amendment liberty interest is implicated. *See id.* at 671, 673-74. *Ingraham* also held that the Due Process Clause does not require notice and hearing prior to the imposition of corporal punishment in the public schools, because that practice is authorized and limited by preservation of common law constraints and remedies which provide safeguards against abuses. *See id.* at 682. However, where any punishment goes beyond that which is reasonably necessary for proper education and discipline of a child, civil and criminal liability may result. *See id.*

73. *See Goss,* 419 U.S. at 576.

74. *See* Brief of Amicus Curiae In Support of Defendant San Marcos Consolidated Independent School District at 2, Nevares v. San Marcos Consol. Ind. Sch. Dist., 1996 WL 786122 (W.D. Tex. May 16, 1996) (No. A-96-CA-093 JN).

the education of all youth, and 'zero tolerance,' which calls for [school] districts to mete out stiff penalties for violent and disruptive students."[75] The zero tolerance philosophy is supported by educators who view suspension and expulsion as the solution to problems posed by students disrupting classes by fighting, bringing weapons to school, assaulting school personnel or other students, and committing other criminal offenses.[76] However, the zero rejection philosophy requires students to be kept within the education system.[77] The Texas Legislature attempted to strike a balance between these opposing philosophies by establishing alternative education programs in every school district in Texas[78] where violent and disruptive students may be transferred within the school system,[79] rather than being expelled.[80]

Alternative education programs may involve student disciplinary transfers to different campuses, to school-community guidance centers, or to community-based alternative schools.[81] However, under the current scheme, school districts are compelled to place students in alternative education programs when they commit violent or disruptive offenses, as described in section 37.006 of the Texas Education Code.[82]

The section 37.006 student offenses that trigger mandatory transfers to alternative education programs generally apply to student conduct occurring on school property, at school-related activities, or at school-sponsored activities.[83] However, section 37.006 also contains a provision requiring school officials to transfer any student who "engages in conduct punishable as a felony."[84] Consequently, section 37.006 significantly broadens school districts' jurisdiction over students because the provision applies to students' conduct occurring on campus, at school-related functions occurring off campus, and *to felonious conduct that occurs off campus and outside the scope of students' school days.*[85]

Furthermore, this mandatory felony removal provision applies independently of criminal proceedings[86] and imposes no express duty on

75. *Id.*

76. *See* FINAL REPORT, *supra* note 2, at 18.

77. *See* Brief of Amicus Curiae In Support of Defendant San Marcos Consolidated Independent School District at 2, *Nevares* (No. A-96-CA-093 JN).

78. *See* TEX. EDUC. CODE ANN. § 37.008(a) (West Supp. 1996).

79. *See id.* § 37.008.

80. *See id.* § 37.006.

81. *See id.* § 37.008(b)(1)-(3).

82. *See id.*

83. *See id.* § 37.006.

84. *Id.* § 37.006(a).

85. *See* Brief in Support of Issuance of a Preliminary Injunction at 2, Nevares v. San Marcos Consol. Ind. Sch. Dist., 1996 WL 786122 (W.D. Tex. May 16, 1996) (No. A-96-CA-093 JN).

86. *See Nevares*, 1996 WL 786122, at *2.

school officials to investigate whether the alleged conduct occurred.[87] Thus, school officials may transfer students from their normal classrooms to disciplinary alternative education programs under section 37.006(a) regardless of whether their conduct: (1) took place off school property, (2) is unrelated to a school-sponsored or school-related activity, (3) resulted in an arrest or the filing of a criminal charge, or (4) resulted in a conviction or acquittal.[88] In fact, "[t]he language of Section 37.006 obviates the need for police or judicial action by requiring a student to be removed when that student 'engages in conduct punishable as a felony,' rather than requiring a student to be removed only upon conviction, arrest, or charge by a law enforcement agency."[89] Therefore, based only on a school administrator's determination that a student engaged in conduct punishable as a felony, a student may be automatically removed from his regular classes and transferred to a disciplinary alternative education program, even if the student's alleged conduct occurred outside the school day and was not affiliated with school property or activities.[90] Moreover, the duration of the student's assignment to an alternative education program, like the determination that a student engaged in violent or disruptive conduct, is solely within the school district's discretion.[91]

Only if a student's placement in an alternative education program is to extend beyond the end of the next grading period may the student's parents or guardians receive notice and an opportunity to participate in any proceeding before the school district's board of trustees or the board's designee.[92] However, a student's placement in an alternative education program must be reviewed by the school district at intervals not exceeding 120 days,[93] and "the student or the student's parent or guardian must be given the opportunity to present arguments for the student's return to the regular classroom or campus."[94] Additionally, before a school district may place a student in an alternative education program for a term exceeding the end of the school year, the school board or its designee must determine that: "(1) the student's presence in the regular classroom program or at the student's regular campus presents a danger of physical harm to the student or to another individual; or (2) the student has engaged in serious or persistent misbehavior that violates the district's student code of conduct."[95]

87. *See* Brief in Support of Issuance of a Preliminary Injunction at 5, *Nevares* (No. A-96-CA-093 JN).

88. *See id.*

89. Brief of Amicus Curiae In Support of Defendant San Marcos Consolidated Independent School District at 3, *Nevares* (No. A-96-CA-093 JN).

90. *See* TEX. EDUC. CODE ANN. § 37.001(a)(4) (West Supp. 1996).

91. *See id.* § 37.009(d).

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.* § 37.009(c)(1)-(2). "Each school district shall, with the advice of its district-level committee established under Section 11.251 [of the Education Code] and jointly,

Nevertheless, "[a]ny decision by the board or its designee under [section 37.006] is final and may not be appealed."[96]

Section 37.006 requires that students who engage in conduct punishable as a felony be automatically removed from regular classrooms and placed in disciplinary programs. However, section 37.006 fails to state who determines and how it is determined that a student committed a felony. Presently, disciplinary transfers may be imposed based solely on *allegations* that a student committed a felony at any time or any place, with no requirement that such conduct be related to school property or functions.[97] In sum, Texas school districts must comply with the statute's mandatory removal provisions,[98] but no mechanism exists to ensure that school officials correctly and uniformly determine that students have actually engaged in such felonious conduct before imposing the punishment of removal to an alternative education program.[99]

## V. TRANSFER TO ALTERNATIVE EDUCATION PROGRAMS WITHOUT PROCEDURAL DUE PROCESS DEPRIVES STUDENTS OF CONSTITUTIONALLY PROTECTED PROPERTY AND LIBERTY INTERESTS

Under *Goss*, once a state undertakes the responsibility of providing public education, public school students are endowed with constitutionally protected property and liberty interests associated with the educational process.[100] Accordingly, the *Goss* Court held that a ten-day suspension of a public school student amounts to more than a de minimus property deprivation, and thus, due process attaches.[101] Consequently, prior to suspension, public school students must be afforded notice and hearing.[102]

Likewise, transfer of a public school student to an alternative education program constitutes more than a de minimus property deprivation. Similarly, public school students should receive notice and hearing prior to transfer to alternative education programs because transfer of public school students to alternative education programs

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as appropriate, with the juvenile board of each county in which the district is located, adopt a student code of conduct for the district." The student code of conduct establishes standards under which a student may be removed from a classroom, campus, or alternative education program. *Id.* § 37.001(a).

96. Nevares v. San Marcos Consol. Ind. Sch. Dist., No. A-96-CA-093 JN, 1996 WL 786122, at *2 (W.D. Tex. May 16, 1996).

97. *See* Brief in Support of Issuance of a Preliminary Injunction at 5, *Nevares* (No. A-96-CA-093 JN).

98. *See* Moseley v. City of Dallas, 17 S.W.2d 36, 40 (Tex. 1929) (holding the Board of Education has a duty to abide by the constitution and laws of the state).

99. *See* TEX. EDUC. CODE ANN. § 37.006(a) (West Supp. 1996); *Moseley*, 17 S.W.2d at 40.

100. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975).

101. *See id.* at 576.

102. *See id.*

without notice and hearing deprives them of constitutionally protected property and liberty interests.

### A. *Placement of Public School Students in Alternative Education Programs Are Punishments Depriving Students of Greater Than De Minimus Property Interests*

In *Everett v. Marcase*,[103] the court did not view student disciplinary transfers to alternative education programs merely as de minimus property deprivations but rather as constituting punishment comparable to suspensions.[104] Finding that such transfers of public school students involved protected property interests, the court held that disciplinary transfers of public school students trigger due process protections.[105] *Everett* involved consolidated class actions alleging the school district violated students' Fourteenth Amendment procedural due process rights and requesting the court "to compel the School District to employ more detailed and precise procedures for lateral [disciplinary] transfers [of public school students]."[106] The court concluded that "the terminology of a disciplinary transfer suggests punishment,"[107] and that transfers involve protected property interests, thus warranting due process protection.[108] Further, the court concluded that disciplinary transfers bear "the stigma of punishment,"[109] and are "as detrimental to the pupil's interests as a short suspension . . . ."[110] It found that a disciplinary transfer to another school is "'a serious event in the life of the [transferred] child'" similar to a *Goss* suspension and just as detrimental to a student's interests.[111] The court explained:

> To transfer a pupil during a school year from a familiar school to a strange and possibly more distant school would be a terrifying experience for many children of normal sensibilities. I think it not melodramatic to suggest the genuine danger of physical harm being intentionally inflicted upon a transferred pupil who may be required to pass through different and strange neighborhoods on the way to and from the transferee school. Any disruption in a primary or secondary education, whether by suspension or involuntary transfer, is a loss of educational benefits and opportunities. Realistically, I think many if not most students would consider a short suspension a less drastic form of punishment than an involuntary transfer, espe-

103. 426 F. Supp. 397 (E.D. Penn. 1977).
104. *See id.* at 400.
105. *See id.*
106. *Id.* at 399.
107. *Id.* at 400.
108. *See id.*
109. *Id.*
110. *Id.*
111. *Id.* (quoting Goss v. Lopez, 419 U.S. 565, 576 (1975)).

> cially if the transferee school was farther from home or had poorer physical or educational facilities.[112]

Thus, the *Everett* court held that students threatened with disciplinary transfers must receive notice and hearing prior to transfer.[113] The court further found that the hearing should be *fair* and *impartial*,[114] not merely a 'rubber stamp' approval of a school official's recommendations.[115] Finally, the court found

> no threat to the morale of the school by permitting the pupil to continue to attend classes pending a final determination on the transfer. Certainly, such would in many cases be less disruptive than initially transferring the pupil and then having the pupil re-transferred upon final determination by the hearing officer that the pupil should not have been transferred initially.
>
> . . . To require the pupil to transfer to another school or to remain out of school until the facts are finally determined could cause unnecessary harm to the pupil and would be potentially disruptive to the pupil's classroom.
>
> A transfer prior to a final hearing, where there exists no emergency situation, would appear to violate the due process prescribed in *Goss* type suspensions.[116]

Although disciplinary transfers are unlike suspensions or expulsions in that a student is not denied access to public education even for a limited time, the period of a student's transfer may exceed the ten-day suspension that *Goss* held required procedural due process. Furthermore, the transfer may cause the student to lose significant educational benefits and opportunities.

Removal of students from their regular classes for placement in alternative education programs is similar to suspensions and expulsions in that it constitutes punishment. First, in Texas, students may be forced to remain in alternative education programs for up to one hundred twenty days before receiving a placement review.[117] The duration of the transfer is significant when compared to the ten-day suspensions in *Goss*, which the Supreme Court concluded deprived students of liberty and property interests, and thus mandated a due process hearing.[118] Second, students placed in alternative education programs must return their regular school textbooks, "clean out their lockers . . . and undergo three days of testing and evaluation."[119]

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112. *Id.* at 400.
113. *See id.*
114. *See id.* at 403.
115. *See id.* at 402.
116. *Id.* at 403-04.
117. *See* TEX. EDUC. CODE ANN. § 37.009(e) (West Supp. 1996).
118. *See* Goss v. Lopez, 419 U.S. 565, 574-75 (1975).
119. Plaintiff's Motion for Summary Judgment at 5, 8, Nevares v. San Marcos Consol. Indep. Sch. Dist., 1996 WL 786122 (W.D. Tex. May 16, 1996) (No. A-96-CA-093 JN).

Third, students in alternative education programs "are under constant supervision, even being escorted to the restroom in groups."[120] Fourth, students are barred from their regular school campus, cannot contact former teachers, and "are forbidden to bring any [materials] from home . . . to take any materials home with them, including textbooks which must remain in the classroom."[121] Finally, students must attend lectures on 'life skills' and undergo counseling.[122]

Alternative education programs constitute deprivations of protected property interests in that they are generally academically inferior to regular education programs because students receive only limited classroom instruction.[123] For example, students at Rebound work independently with textbooks and receive instruction only if they encounter difficulties.[124] In addition, students may wait twenty minutes or longer for an instructor's help, and class may end before a student obtains aid.[125]

Alternative education programs also offer a limited curriculum. For instance, the only lectures given at Rebound are in life skills for which students receive no credit hours.[126] Furthermore, "[n]either electives nor honors classes are available at Rebound."[127] Moreover, "[n]o lectures are given in the 'core' courses"[128] and the Rebound campus does not even have a library.[129]

Additionally, students returning to their regular schools may be behind in their credit hours because of the different curriculum.[130] For example, "[s]tudents do not receive credit for their regular elective courses once they are assigned to Rebound."[131] Furthermore, the material taught at alternative education schools may not coincide with material taught at a student's regular campus.[132] Hence:

> there is no guarantee that material assigned and tests given by the Rebound teacher cover the material taught by the regular teacher. The Rebound student returning to the regular classroom may thus be confronted with material, or an approach to material, with which he is wholly unfamiliar, particularly as he will have missed all of the lectures and non-textbook material provided in the regular class.

120. *Id.*
121. *Id.*
122. *Id.*
123. *See Nevares,* 1996 WL 786122, at 4.
124. *See id.*
125. *See id.*
126. *See* Plaintiff's Motion for Summary Judgment at 6, *Nevares* (No. A-96-CA-093 JN).
127. *Id.*
128. *Id.*
129. *See id.*
130. *See id.*
131. *Id.*
132. *See id.*

> But the former Rebound student will be expected to know this regular class material.[133]

Thus, placement in alternative education programs, such as Rebound, may result in students not advancing to the next grade level or may prevent students from graduating with their peers.[134]

As the *Everett* court noted, suspensions and involuntary transfers that disrupt a child's primary or secondary education result in a loss of educational benefits and opportunities.[135] Further, the *Everett* court recognized that students would likely consider a short suspension a less drastic form of punishment than an involuntary transfer to an alternative education school because transferee schools are unfamiliar, may have substandard educational benefits and facilities, and require children to travel greater distances from home.[136]

### B. *Placement of Public School Students in Alternative Education Programs Infringe Upon Students' Liberty Interests*

The Due Process Clause protects an individual's liberty interest in his good name, reputation, honor, or integrity and prohibits an arbitrary denial of liberty or the imposition of a stigma that forecloses an individual's freedom to take advantage of educational or employment opportunities.[137] While a speculative liberty interest alone is not sufficient to trigger due process protections,[138] a liberty interest accompanied by a property interest *does* trigger due process protections.[139]

The *Goss* Court held that public school students have a liberty interest as well as a property interest in a public education, stating, "'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the [Due Process] Clause must be satisfied."[140] The Court concluded that "if sustained and recorded, . . . charges [of misconduct] could seriously damage students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[141] Thus, following *Goss* reasoning, Texas public school students have constitutionally protected liberty interests, as well as property interests, in public education.

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133. *Id.*

134. *See id.*

135. *See* Everett v. Marcase, 426 F. Supp. 397, 400 (E.D. Penn. 1977).

136. *See Everett,* 426 F. Supp. at 400. *See also* Brief in Support of Issuance of Preliminary Injunction at 3, 7, *Nevares* (No. A-96-CA-093 JN).

137. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

138. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) (holding that *reputation* alone does not implicate any liberty or property interest sufficient to invoke the procedural protection of the Due Process Clause).

139. *See Roth,* 408 U.S. at 574.

140. Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *Roth,* 408 U.S. at 573).

141. *Goss,* 419 U.S. at 575.

Alternative education programs deprive students of protected liberty interests because such programs likely stigmatize students.[142] Although a Texas student's transcript will not reflect his transfer to an alternative education program, it is reasonable to assume that his transfer will become common knowledge within the school community.[143] Therefore, student disciplinary transfers to alternative education programs may carry stigmas that can damage students' standing and reputation among their peers and among educators. Damage to a student's reputation may severely impact his grades and future higher education and employment opportunities.[144] As a result, student disciplinary transfers to alternative programs infringe upon students' protected liberty interests.

## VI. TEXAS STUDENTS SHOULD BE AFFORDED DUE PROCESS BEFORE A DISCIPLINARY TRANSFER IS IMPOSED

The purpose of Article VII of the Texas Constitution is to establish and maintain a comprehensive system of public education.[145] Under the Texas Education Code, children are compelled to attend school from age six to seventeen.[146] Compulsory school attendance laws represent the state's view that an enlightened citizenry is vital to ensuring the progress and stability of the state.[147] In enacting a free public education system with mandatory attendance, Texas established that students have a "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[148] Further, fol-

142. *See* Brief in Support of Issuance of a Preliminary Injunction at 7, Nevares v. San Marcos Consol. Ind. Sch. Dist., 1996 WL 786122 (W.D. Tex. May 16, 1996) (No. A-96-CA-093 JN).

143. *See Nevares*, 1996 WL 786122, at *4.

144. *See* Brief in Support of Issuance of Preliminary Injunction at 3, 7, *Nevares* (No. A-96-CA-093 JN).

145. *See* TEX. CONST. art. VII, § 1. "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." *Id.*

146. *See* TEX. EDUC. CODE ANN. § 25.085 (West 1996). "Unless specifically exempted by Section 25.086, a child who is at least six years of age . . . and who has not completed the academic year in which the child's 17th birthday occurred shall attend school." *Id.* § 25.085(b).

147. *See* H. C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION § 9.1 (4th ed. 1995).

148. Goss v. Lopez, 419 U.S. 565, 574 (1975). *See* Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981) (holding that when the State establishes a free public education system and compulsory attendance, students satisfying attendance requirements and passing required courses have an implied property right protected by the Due Process Clause and diploma sanctions are unconstitutional); Williams v. Austin Indep. Sch. Dist., 796 F. Supp. 251, 253 (W.D. Tex. 1992) (holding states enacting free public education systems with mandatory attendance create property interests which may be protected by the Due Process Clause).

lowing *Goss*, Texas public school students have constitutionally protected liberty interests in public education. Therefore, procedural due process protections attach when state action, such as disciplinary transfers to alternative education programs, threaten to deprive students of public education rights. Accordingly, the *Nevares* court held that section 37.006(a) is unconstitutional because it fails to afford Texas public school students due process *prior* to their removal from regular classes for placement in alternative education schools.[149]

### A. *Notice and Hearing Afforded Students Prior to Disciplinary Transfers Prevents Punishment Based on Erroneous Information and Assures That Sanctions Are Consistently Imposed*

Section 37.006 contains no safeguards to assure that accurate information reaches school authorities before they impose disciplinary transfers.[150] In fact, under section 37.006(a), students may be removed from regular classrooms and transferred to alternative education programs based "only upon someone's finding, somehow, that the student in question engaged in conduct which could be punished as a felony."[151] The provision fails to "specify the person, or the qualification of the person who is to decide when students have 'engaged in [such] conduct.'"[152]

School officials often rely on reports of others,[153] such as teachers, students, or the police. However, factual disputes often arise concerning whether a student engaged in proscribed conduct triggering punishment.[154] As the *Goss* Court stated,

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149. *See Nevares,* 1996 WL 786122, at 5.

150. *See* TEX. EDUC. CODE ANN. § 37.006 (West 1996).

151. Plaintiff's Motion for Summary Judgment at 8, *Nevares* (No. A-96-CA-093 JN).

152. *Id.* at 9.

153. *See* Goss v. Lopez, 419 U.S. 565, 580 (1975).

154. *See id.* The facts in *Nevares* are similar to the facts in *Goss*. In *Goss*, "[a student] was suspended for conduct which did not occur on school grounds . . . hardly guaranteeing careful individualized fact finding by the police or by the school principal. She claims to have been involved in no misconduct. However, she was suspended for 10 days . . . ." *Goss*, 419 U.S. at 580-81 n.9. The *Goss* court concluded that neither administrative burdens nor immediate need to preserve school order "justifies a disciplinary suspension without at any time gathering facts . . . ." *Id.* Because school officials failed to provide public school students notice and hearing *prior* to imposing ten-day suspensions, *Goss* held the students were deprived of constitutional rights. *See id.* at 579-80. Similarly, Timothy Nevares was to be transferred to an alternative education school for conduct which did not occur on school grounds, likewise hardly guaranteeing individualized fact finding. *See* Plaintiff's Motion for Summary Judgment at 4, *Nevares,* (No. A-96-CA-093 JN). Furthermore, Timothy was to be transferred to an alternative education program even though he claimed he acted only in self-defense when a driver allegedly threatened to assault him with a vehicle. *See* Brief in Support of Issuance of a Preliminary Injunction at 1-2, *Nevares,* (No. A-96-CA-093 JN). Just as in *Goss*, neither administrative burdens nor the need to preserve school order justified imposition of disciplinary penalties without gathering facts.

> The Due Process Clause will not shield [students from punishment] properly imposed, but [the clause] disserves both [the student's] interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is.[155]

Thus, blind reliance on information provided by others often may result in erroneous factual determinations. Furthermore, the risk that a school official will make an erroneous factual determination is not trivial,[156] when the determination may result in an innocent student being transferred to an alternative education program.

Under section 37.006(a), the removal process can be triggered by "an accusation, from any source, that the student engaged in conduct punishable as a felony."[157] For instance, Timothy Nevares was to be transferred to an alternative education school based solely upon an unsworn police offense report from the man Timothy accused of assaulting him with a vehicle.[158] Such police reports frequently contain incomplete, inaccurate, misleading, unverified, or false information. Thus, when a report alleges that a student committed a felony offense while off school property and outside of the school day, a student may be transferred to an alternative education program based on conduct not witnessed by school officials. Such cases aptly illustrate the need for an unbiased investigation to be conducted prior to a disciplinary transfer, because the possibility that a student may be erroneously transferred is great.

Moreover, a school administrator may or may not be familiar with the elements of felony offenses, as specified in the Texas Penal Code, or with the applications of the Penal Code's provisions. Thus, a panel of informed and trained officials should conduct a hearing to diminish the risk that an untrained school administrator may incorrectly determine that a student engaged in felonious conduct.

Section 37.006 contains no safeguards to assure that student transfers to alternative education programs are enforced fairly and consistently. The statute fails to specify who is responsible for enforcement of the provision or what training and qualifications school officials must possess to determine if students have engaged in proscribed conduct triggering mandatory removal.

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Thus, under the Court's reasoning in *Goss*, because section 37.006(a) permits school officials to impose disciplinary transfers *prior* to notice and hearing, the statute is unconstitutional.

155. *Goss*, 419 U.S. at 579-80.

156. *See id.* at 580.

157. *See* Brief in Support of Issuance of a Preliminary Injunction at 5, *Nevares* (No. A-96-CA-093 JN).

158. *See id.* at 2.

Finally, a finding that a student engaged in conduct punishable as a felony is made ex parte, with no prior notice or hearing required or provided.[159] In short, no mechanism exists to assure accurate information reaches school authorities or that the provision is enforced consistently and fairly or within constitutional boundaries.

### B. *Notice and Hearing Afforded Students Prior to Disciplinary Transfers Meets the* Mathews *Balancing Test*

Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case,"[160] at a meaningful time and in a meaningful manner.[161] Due process protections are particularly important in the public school context since events calling for discipline of students are frequent occurrences. Although "school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing . . . it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian . . . to make sure that an injustice is not done."[162]

Requiring effective notice and hearing permits a student to give his version of events precipitating potential sanctions and would provide a meaningful hedge against erroneous state action. School officials may then determine whether to summon the student's accuser, permit cross-examination, or allow the student to present his own defense witnesses.[163] Furthermore, notice would alert all parties as to the

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159. According to the *Goss* court,

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

*Goss*, 419 U.S. at 580 (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

160. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (holding that a statutory notice provision is not subject to due process objections from unknown beneficiaries, but is subject to such objections from known beneficiaries).

161. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

162. *Goss*, 419 U.S. at 580.

163. Courts have upheld a student's right to have counsel present and to cross-examine witnesses prior to imposition of severe sanctions. For example, in *Gonzales v. McEuen,* the court ruled that admission of hearsay statements without an opportunity for cross-examination deprived a student facing expulsion of his constitutional right to confront and cross-examine his accuser. *See* Gonzales v. McEuen, 435 F. Supp. 460, 469 (C.D. Cal. 1977). For cases involving the right to counsel in a public school setting, see *Jordan v. School District*, 583 F.2d 91, 96, 99 (3d. Cir. 1978), commenting that inclusion of a provision requiring public school officials to inform par-

existence of factual disputes. Finally, due process procedures ensure that school discipline will be impartially imposed and free of the taint of conclusions based on self-interest, personal malice, bias, and racial prejudice.

Due process, at the very minimum, requires that a student facing a disciplinary transfer under section 37.006(a) "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity" to defend himself against the allegations.[164] However, as explained in *Mathews v. Eldridge*,[165] the timing and content of the notice and the nature of the hearing depend upon balancing competing interests. In the case of student disciplinary transfers to alternative education programs, the competing interests include the interest of the student, the interest of the school, and the risk that state procedures will erroneously deprive students of protected property and liberty interests in public education.[166] The student's interest is to receive the continuing benefits of a public education. The school's interest is to prevent disruptive or violent students from frustrating the educational process. The risk is that students may be unfairly deprived of educational benefits or mistakenly excluded from the educational process.

Students committed to alternative education programs without procedural due process protections of notice and hearing may face irreparable harm to their grades, reputations, standing among their peers, future educational opportunities and deprivation of their constitutional rights. In contrast, affording public school students due process protections of notice and hearing prior to their placement in alternative education programs is not expensive nor would it interfere with

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ents or guardians of students facing disciplinary action of their right to legal counsel "goes far beyond the rudimentary precautions required by *Goss*," and *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973), affirming the lower court's ruling that [student] expulsion procedures that failed to provide for a hearing at which the student could be represented by [legal] counsel was unconstitutional. For cases regarding the right to cross-examine witnesses, see *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973), where "[t]he district court held [and the Ninth Circuit Court of Appeals affirmed] that the expulsion procedures [of Portland School District No. 1] were unconstitutional for failing to provide a hearing at which the student could, . . . through counsel, present witnesses on his own behalf, and cross-examine adverse witnesses," *Mills v. Board of Education*, 348 F. Supp. 866, 880-83 (D.D.C. 1972), ordering District of Columbia school officials to afford all students, including students with behavioral problems, due process, including the right "to confront and cross-examine any school official, employee, or agent of the school district . . . who may have evidence upon which the proposed action [to exclude, suspend, or transfer the student] was based," and *Fielder v. Board of Education*, 346 F. Supp. 722, 730 (D. Neb. 1972), holding the obligation to furnish due process rests upon the school board, and such due process includes an opportunity for disciplined students to cross-examine the "person or persons primarily aware of the reasons . . . for the proposed expulsion."

164. *Goss*, 419 U.S. at 581.

165. 424 U.S. 319 (1976).

166. *See id.* at 334-35.

the educational process. Affording Texas public school students notice and hearing will also serve the public interest of assuring that students' liberty and property interests are protected.

Although "[a]lternative education programs should be designed to maximize student achievement and improve [student] behaviors, attitudes and self-esteem,"[167] unfortunately, many alternative education programs become dumping grounds, especially for at-risk and special education students.[168] Because transferring students to alternative education programs diminishes the quality of education a student receives, it is a deprivation of the student's liberty and property rights. Therefore, school officials should afford students notice and hearing before transferring them to alternative education programs, especially those students with no prior history of violent or disruptive behavior.

### C. *Section 37.006 Affords Students Less Protections Than Similar Code Provisions*

Texas Education Code provisions similar to section 37.006 either require that student offenses be committed on school property, at school related functions or activities or that students receive notice and hearing prior to their transfer to alternative education programs.[169] For example, section 37.002 addresses removal of a student from the classroom by a teacher.[170] Under section 37.002, a teacher may remove a student from the classroom who has been documented by the teacher to *repeatedly* interfere with the teacher's ability to communicate effectively with the students in the class or with the ability of the student's classmates to learn, or whose behavior the teacher determines is so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to communicate effectively with the class or interferes with the ability of classmates to learn.[171] Thus, after *repeated* classroom interferences, the principal may place the disruptive student in another classroom, suspend the student, or place the student in an alternative education program.[172]

Section 37.007 addresses expulsion of a student from school for serious offenses, including using, exhibiting, or possessing firearms, illegal knives, clubs, or other weapons, and committing aggravated assault, arson, murder, indecency with a child, aggravated kidnaping, or other felonies while on school property or while attending a school-spon-

167. FINAL REPORT, *supra* note 2, at 19.
168. *See id.* at 18-19.
169. *See* TEX. EDUC. CODE ANN. §§ 37.002, 37.007, 37.011 (West Supp. 1996). *See also* Nicholas B. v. School Comm., 587 N.E.2d 211, 212 (Mass. 1992). In *Nicholas*, a student was expelled for the remainder of the school year, even though the assault occurred away from school because the fight had actually begun on school grounds. *See id.*
170. *See* TEX. EDUC. CODE ANN. § 37.002 (West Supp. 1996).
171. *See id.*
172. *See id.*

sored activity occurring on or off school property.[173] Unlike section 37.006, section 37.007 only applies to a student's conduct occurring on campus or off campus at a school-sponsored or school-related function where school personnel would be present.[174] Thus, the student's misconduct is likely to be witnessed by school officials or other students. Section 37.007 further provides that no later than the third day after the day on which a student is expelled from class, the school principal shall schedule a hearing among the principal or the principal's designee, a parent or guardian of the student, the teacher removing the student from class, and the student.[175]

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173. *See* TEX. EDUC. CODE ANN. § 37.007 (West Supp. 1996). Section 37.007 states:

A student shall be expelled from a school if the student, on school property or while attending a school-sponsored or school-related activity on or off of school property:

(1) uses, exhibits, or possesses:
  (A) a firearm as defined by Section 46.01(3), Penal Code;
  (B) an illegal knife as defined by Section 46.01(6), Penal Code, or by local policy;
  (C) a club as defined by Section 46.01(1), Penal Code; or
  (D) a weapon listed as a prohibited weapon under Section 46.05, Penal Code;
(2) engages in conduct that contains the elements of the offense of:
  (A) aggravated assault under Section 22.02, Penal Code, sexual assault under Section 22.011, Penal Code, aggravated sexual assault under Section 22.021 Penal Code;
  (B) arson under Section 28.02, Penal Code;
  (C) murder under Section 19.02, Penal Code, capital murder under Section 19.03, Penal Code, or criminal attempt, under Section 15.01, Penal Code, to commit murder or capital murder;
  (D) indecency with a child under Section 21.11, Penal Code;
  (E) aggravated kidnaping under Section 20.04, Penal Code; or
(3) engages in conduct specified by Section 37.006(a)(2) or (3), if the conduct is punishable as a felony.

TEX. EDUC. CODE. ANN. § 37.007 (West Supp. 1996). Section 37.007 further provides that a student may be expelled for engaging in conduct that contains elements of the conduct listed above and is directed against an employee in retaliation for or as a result of the employee's employment with a school district. *See id.* at (c). A student may be expelled if the student, after being placed in an alternative education program for disciplinary reasons, continues to engage in serious or persistent misbehavior that violates the district's student code of conduct. *See id.* at 37.007(b). Further, a student who engages in conduct containing the elements of criminal mischief under section 28.02 of the Penal Code may be expelled at the district's discretion if the conduct is punishable as a felony under that section. *See id.* at 37.007(f). Accordingly, section 37.009(f) of the Education Code provides that before a student may be expelled, the board or the board's designee must provide the student a hearing at which the student is afforded appropriate due process, as required by the federal constitution, and where the student's parent or guardian is invited, in writing, to attend. *See id.* § 37.009(f). At the hearing, the student must be represented by the student's parent or guardian or another adult who can provide guidance to the student and who is not an employee of the school district. *See id.*

174. *Compare* TEX. EDUC. CODE ANN. § 37.007(b) (West Supp. 1996) *with id.* § 37.006(a).

175. *See id.* § 37.007(b).

Section 37.011 addresses juvenile justice alternative education programs.[176] Under section 37.011, a juvenile court must find that a student has engaged in delinquent conduct, as listed in Section 37.007, prior to imposing a disciplinary transfer.[177] In sum, other provisions in the Texas Education Code permitting students to be sanctioned for misbehavior either afford students a hearing before action is taken or require that student offenses be committed on school property or at school related functions or activities, where school personnel or other students are likely to be present and witness the student's misconduct. In contrast, section 37.006(a) fails to require that either student offenses be committed on school property, at school related functions or activities or that notice and hearing be afforded students prior to their placement in alternative education programs.[178]

### D. *Amendment of Section 37.006 of the Texas Education Code*

*Goss* permits a student whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process to be immediately removed from school.[179] Section 37.006(a) permits immediate removal of seriously disruptive or violent students from the general school population.[180] The provision provides an effective tool for school administrators to protect students, educators, and property from harm and to preserve discipline in Texas public schools. In such cases, section 37.006(a) adequately meets the needs of school officials. However, section 37.006(a) fails to afford students accused of felonious offenses due process before disciplinary transfers may be imposed. Absent procedural due process protections, a student may be transferred to a disciplinary school and remain there for up to 120 days before a hearing discloses that the charges of misconduct were unfounded or that the student poses no immediate threat to persons, property, or to the academic environment. However, where students allegedly commit off-campus felonies at non-school related functions or activities, a student may pose no immediate threat to persons, property, or to the academic environment, and the charges may be later proven to be completely without merit.

The Texas Legislature should amend section 37.006(a) to require that a public school student receive procedural due process *prior* to disciplinary transfer to an alternative education program.[181] School officials must not be automatically required to remove students from

176. *See id.* § 37.011.
177. *See id.* § 37.011(b).
178. *See id.* § 37.006(a).
179. *See* Goss v. Lopez, 419 U.S. 565, 582 (1975).
180. *See* TEX. EDUC. CODE ANN. § 37.006(a) (West Supp. 1996).
181. *See Goss*, 419 U.S. at 582. Indeed, the *Goss* Court concluded that "[s]ince the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should *precede* removal of the student from school." *Id.* (emphasis added).

regular classes for placement in alternative education programs based on unverified allegations of felonious conduct, especially without due process safeguards of notice and hearing prior to transfer, when such alleged conduct occurs off campus and is unrelated to school activities. All students facing deprivations of constitutionally protected property and liberty interests in education by placement in alternative education programs should be afforded due process *prior* to transfers being imposed.

Rather than automatically transferring students to alternative education programs, a panel of impartial school officials should first determine, after conducting an unbiased investigation of the alleged incident, whether the accused student poses a risk to other students, school personnel, school property, or to the educational process. If school officials determine that the student poses no immediate risk, school officials should be authorized to leave the student in the regular classroom until proper notification and a hearing can be arranged. If the hearing reveals that the allegations leveled against the student are false or unfounded, the student should be permitted to remain in the regular classroom and not suffer the stigma of being transferred to an alternative education program. Only if the hearing reveals that the student poses an immediate threat to others or committed the felonious offense should he or she be transferred to an alternative education program.

## CONCLUSION

Section 37.006(a) fails to require that Texas public school students receive due process before being transferred to alternative education programs. In the absence of guidelines and procedures to notify students of accusations and to provide a hearing where students can respond to charges, issues of fairness will continue to arise.

The Texas Education Code should be amended to require both notification and hearing prior to imposition of student disciplinary transfers to alternative education programs to guarantee that students are treated fairly and that section 37.006(a) meets minimum due process requirements.

*Patty Blackburn Tillman*