HOUSE COMMITTEE ON JUVENILE JUSTICE AND FAMILY ISSUES
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2002

A REPORT TO THE
HOUSE OF REPRESENTATIVES
78TH TEXAS LEGISLATURE

TOBY GOODMAN
CHAIRMAN

COMMITTEE CLERK
CHRIS YOUNG

Committee On
Juvenile Justice and Family Issues

October 2, 2002

Toby Goodman
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable James E. "Pete" Laney
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Juvenile Justice and Family Issues of the Seventy-Seventh Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Seventy-Eighth Legislature.

Respectfully submitted,

Toby Goodman, Chairman

Arthur "Art" Reyna

Phil King

Jose Menendez

Geanie Morrison

Elliott Naishtat

Joe Nixon

Elvira Reyna

Dale Tillery

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INTERIM STUDY CHARGES

CHARGE Examine the roles of an attorney ad litem and guardian ad litem in certain suits affecting the parent-child relationship.

CHARGE Review disposition patterns, uniformity of reporting, and evaluation of juvenile offense cases under the progressive sanctions guidelines.

CHARGE Examine the role of gestational agreements and their potential impact on Texas Family Law.

CHARGE Review state and local school district efforts to deal with problems of truancy, drop-outs, and disruptive behavior (pursuant to the Safe Schools Act) including in-school and out-of-school suspensions. The review should include examination of performance outcomes in alternative education, disciplinary alternative education and juvenile justice alternative education programs, and the effects of these programs on the educational progress of students who are removed from the regular classroom. (Joint with House Committee on Public Education).

CHARGE Actively monitor agencies and programs under the committee's oversight jurisdiction.

EXAMINE THE ROLES OF ATTORNEY AD LITEM AND GUARDIAN AD LITEM IN CERTAIN SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP

Background

Prior to the beginning of the 77th legislative session, inadequacies regarding the statutory provisions concerning guardian ad litems (GAL) and attorney ad litems (AAL) were brought to the Juvenile Justice and Family Issues Committee's (JJFI) attention. The inadequacies revolved around potential conflicts that may arise regarding the roles of GALs and AALs in certain suits affecting the parent child relationship (SAPCR). Consequently, House Bill 847 (HB 847) was filed to address these inadequacies. Although a substituted bill passed out of JJFI, it failed to make the local and consent calendar prior to the session's end.

Although HB 847 passed out of JJFI, many committee members and practitioners felt that this issue required further discussion and analysis. Consequently, JJFI contacted several judges, practitioners, professors, and other professionals to form an ad hoc committee to review the ethical, substantive and procedural problems associated with ad litem appointments. The ad hoc committee on ad litems (hereinafter referred to as committee) formed and began meeting on a regular basis.[1] To date, the committee has met several times and has plans to meet, if necessary, beyond the date by which this report is due. However, in its endeavors, the committee has made significant progress in addressing the problems associated with ad litem appointments. The committee's progress, to date, is reflected in the following.

History of Ad Litem Appointments

The seminal case that opened the door for the concept of ad litems in the United States was the 1967 United States Supreme Court case *In Re Gault*.[2] In *Gault*, the court held that children had a right to court appointed counsel in delinquency cases.[3] In 1974, Congress passed the Child Abuse Protection and Treatment Act (CAPTA), which requires all states, in child protection proceedings, to appoint a guardian ad litem to represent and protect the rights and best interests of the child.[4] Texas enacted its first ad litem statute in 1973, which, in anticipation of the federal legislation, required that a court appoint a GAL in any case in which termination of parental rights was sought. Since that time, the Family Code underwent several modifications regarding ad litems, notably was the addition of the AAL in 1979.[5] However, most notably, was the absence of any specific guidance on the roles of each type of appointment.

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[1] A complete list of the participants is contained in the appendix to this section.

[2] *In Re Gault*, 387 U.S. 1 (1967).

[3] *Id*. at 13.

[4] 42 U.S.C. 5101, *et seq*.

[5] Fam. § 11.10(d). In response to a federal court decision, the 66th legislature provided for appointment of an attorney ad litem for a child in all suits filed by a governmental entity in which conservatorship of the child, or termination of parental rights was sought. The 67th legislature added § 11.10(e) to mandate a reasonable fee for the attorney ad litem to be paid by the county, based on the juvenile justice fee schedule.

Current Statutory System in Texas

The statutory provisions concerning ad litem appointments are contained in Chapter 107 of the Texas Family Code. Subchapter A specifically relates to GAL appointments while Subchapter B addresses AAL appointments. In short, a GAL is required to advise the court regarding the "best interests" of the child, while an AAL is required, not only statutorily, but ethically, to represent the child-client's interests, which may or may not coincide with what is best for the child.

Appointment of a GAL and/or a AAL in a SAPCR is done in one of two situations. The first is in suits filed by a governmental entity, which, in the context of a SAPCR, will be the Texas Department of Protective and Regulatory Services, Child Protective Services (CPS) division. Such cases are invariably abuse and neglect cases in which CPS is seeking permanent managing conservatorship of the child or to terminate parental rights. In suits filed by CPS, both the appointment of a GAL and an AAL are mandatory.[6] The rationale for this approach is based on the idea that neither the government nor the parents are adequately situated to represent the child's interests.[7] The GAL appointment is often filled by volunteers, generally from charitable organizations[8] that specifically provide such services, or an attorney. The AAL appointment is generally filled from a pool of qualified candidates established by a county's administrative district judge.[9] However, in certain areas of the state, the availability of both a GAL and AAL may be limited, thus resulting in the appointment of an attorney to act in the dual role as both GAL and AAL.

The other situation involves suits in which CPS is not a party, i.e., private suits. These suits generally arise out of divorce or modification proceedings and involve contested issues of custody and visitation. As opposed to CPS suits, the appointment of a GAL or a AAL in private custody and visitation suits is entirely discretionary for the court.[10] Notwithstanding the discretionary nature of appointments in these types of suits, one or both of the ad litem appointments occurs with some degree of regularity in Texas. Appointment of either a GAL and AAL, or both, in private custody suits sometimes utilizes the same pool of candidates as CPS suits, but often is composed of a very different pool of lawyers.

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[6] Fam. § 107.001(b) and § 107.012 (2001).

[7] The premise is that the interests of CPS in its own litigation are too partisan or mired in bureaucracy to adequately represent a child; and because a parent's ability to care for a child is in issue in these cases, it would be contrary to core issues in the lawsuit to assume that an allegedly un-fit parent could represent that child's interests.

[8] The preeminent organization providing such services is Court Appointed Special Advocates (CASA).

[9] Fam. § 107.006 (2001).

[10] Fam. § 107.001(c) and § 107.011 (2001).

Based on the situations above, the following charts illustrate the variety of appointments that can be made in Texas:

CPS Case

GAL	AAL	GAL/AAL
volunteer, including attorney or other professional serving only as a volunteer, or other adult having expertise and training	attorney	attorney

Private Custody Case

GAL	AAL	GAL/AAL
volunteer,[11] attorney, or other adult having expertise and training	attorney	attorney

The current statutory scheme is relatively unambiguous regarding the various powers and duties of

[11] Many charitable organizations, such a CASA, that provide volunteer services are specifically trained to deal with suits alleging abuse and neglect and thus believe that their services should be limited to such cases, which are invariably CPS suits.

GALs and AALs in both types of suits. The following chart illustrates the powers and duties associated with ad litem appointments.

GAL (**not a party to the suit**)	AAL	GAL/AAL
A GAL **may**:	A AAL **may**:	A GAL/AAL **may not**:
conduct an investigation necessary to determine the best interests of the child	call, examine, or cross examine witnesses	testify in court
review medical, psychological and school records	A AAL **shall**:	A GAL/AAL **shall**:
receive pleadings	investigate to determine the facts of the case	become familiar with the American Bar Association's standards of practice for lawyers who represent children in abuse and neglect cases
receive notice of hearings	review medical, psychological and school records	comply with the requirements of the Texas Disciplinary Rules of Professional Conduct
participate in case staffings by an authorized agency	become familiar with the American Bar Association's standards of practice for lawyers who represent children in abuse and neglect cases	withdraw as GAL if a conflict arises
attend all legal proceedings, but may not call or question witnesses	interview the child if the child is four years of age or older	continue to serve as AAL
review, sign or decline to sign any agreed order	interview individuals the AAL believes to have significant knowledge of the child's history and condition	request appointment of a new GAL
testify in court	interview all parties to the suit	
A GAL **shall**:		
interview the child if the child is four years of age or older		
interview individuals the GAL believes to have significant knowledge of the child's history and condition		

As the chart illustrates, GALs have specific powers and duties.[12] Similarly, an attorney appointed solely in the role of AAL has specific powers and duties.[13] An attorney appointed specifically in the dual role of GAL and AAL is explicitly provided with guidance, including how to address potential conflicts that may arise by assuming the dual role.[14] However, what is left unclear is the role of an attorney who is appointed as a GAL. Theoretically, the attorney's role should be akin to that of any other person appointed as a GAL, but, as many practitioners in Texas have indicated, the expectations and responsibilities of an attorney appointed as a GAL are frequently greater than non-attorney GALs.

Issues Concerning Ad Litem Appointments in Texas

In order to fully understand the issues concerning ad litem appointments, some background is necessary. The focal point for any case involving a child, whether a governmental suit or private custody case, is the requirement that judges render orders consistent with a determination of the child's best interest. In the context of a CPS case, such a determination is fairly straightforward given that the nature of the suit specifically calls into question the fitness of the child's parent(s) or other caretaker. However, because the context of a private custody case generally involves two presumably fit parents, a best interest determination is not always as clear. Consequently, in the context of a private custody case, judges often use their discretion by utilizing means, aside from the evidence presented by the litigants, to ascertain best interest. Once such means is an ad litem appointment.

Attorney Ad Litem

An AAL, similar to any attorney authorized to practice in Texas, owes a professional duty to the child client to zealously represent that child's interests. This duty presumes that a direct lawyer-client relationship exists. Issues concerning appointments of this nature revolve around making a determination as to whether a child client is of sufficient age or maturity to form such a relationship. Furthermore, once such a relationship exists, a conflict may still arise when the child client expresses a preference that the attorney believes may not be in the best interests of the child.

Another issue concerning AAL's is their right to be compensated. The Family Code provides that an AAL is entitled to reasonable fees and expenses, which are to be paid by the parents of the child, unless the parents are indigent.[15] In the context of a termination of parental rights suit, if the parents are indigent, the attorney is paid from county funds.[16] Although the Family Code permits the court

[12] Fam. § 107.002(a) - (c) (2001).

[13] Fam. § 107.014 (2001).

[14] Fam. § 107.002(d) -(f) (2001).

[15] Fam. § 107.015 (2001).

[16] Fam. § 107.015(c) (2001). The statute does not limit payment of attorney's fees to termination of parental rights suits filed solely by CPS; consequently, when an attorney is

to order one or both of the parties to pay the fees into the court registry,[17] common practice has indicated that this provision often is not enforceable and many attorneys find themselves providing involuntary pro bono services.

Guardian Ad Litem

The majority of confusion regarding GAL appointments occur when an attorney is appointed as a GAL. Currently, the Family Code is extremely vague as to whether an attorney appointed as a GAL in the private custody context is expected to serve solely as a GAL or required to don the attorney cap as well. Many practitioners believe that once an individual receives their license to practice law, regardless of what other role they assume, they are always an attorney, and subject to the Rules of Professional Conduct, which encompasses issues of confidentiality and zealous representation of the client. An attorney appointed in such a role is inherently faced with a conflict. The GAL is required to ascertain and report to the court what it believes is in the best interests of the child; however, an attorney is required to represent and advocate for the child's interest.

Similar to attorneys, there is a potential issue regarding the compensation of certain GALs. Currently, the code contains no provision for the payment of a GALs' services, creating a general presumption that all GALs provide their services for free. As the Code states, a GAL may be an attorney, volunteer, or another adult having the competence, training, and expertise to represent the child's best interests.[18] Arguably, this provision contemplates that a professional, other than an attorney, may be appointed as a GAL. Because an attorney is always an attorney, he or she may utilize the AAL payment provision to be compensated; however, a "professional" GAL has no such fall back provision.

Conclusion

Since the majority of confusion amongst practitioners centered around ad litem appointments in the context of private custody cases, the committee felt that substantive modifications to the Family Code, in such cases, were warranted. Conversely, the committee felt that the current statutory scheme regarding ad litem appointments in the context of CPS cases is sound, thus only minor amendments have been recommended. Following is a list of the recommended changes to date:

(1) Reorganize Chapter 107 into five subchapters, as opposed to four. The reorganization flows from the idea that Chapter 107 should be separated by subchapter based on the type of suit for which an appointment is being made. Consequently, Subchapter B relates specifically to appointments in a suit by a governmental entity (CPS case) and Subchapter C relates specifically to appointments

appointed, as an AAL or GAL, in private termination suits, they may be paid out of county funds. This was not the intent of the law and has been corrected by the committee's recommendations.

[17] Fam. § 107.015(b) (2001).

[18] Fam. § 107.001(d) (2001).

in a suit other than a governmental entity (private custody case).

Subchapter A

(2) Proposed Subchapter A will be titled *Court-Ordered Representation in Suit Affecting Parent Child Relationship*. As the title indicates, this subchapter will provide general information regarding court appointments in SAPCRs, including definitions of the various appointments and explicit instruction as to the powers and duties of each. Although the concept of "powers and duties" is in the current statutory scheme, there is not a definitions section. The committee believed that defining potential appointments would clarify more about each role. In addition, Subchapter A introduces the concept of the "Amicus Attorney."

(3) Recommended definitions include:

> "Amicus Attorney" means a lawyer appointed by the court in a suit, other than a suit filed by a governmental entity, who provides legal services for the purpose of protecting the child's interests without being bound by the child's expressed preferences. The creation of this potential appointment was specifically crafted to alleviate the conflicts that have arisen when an attorney is appointed as a GAL.
>
> "Attorney ad litem" means a lawyer who provides legal services for a person including a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult child.
>
> "Dual Role" means a lawyer acting in the dual role of guardian ad litem and attorney ad litem for a child.
>
> "Guardian ad litem" is defined as "an individual, ordinarily a volunteer advocate or a professional other than a lawyer, whose training relates to the determination of the child's needs.

(4) The committee recommends slight modification of the powers and duties of a GAL. Changes include the addition of the requirement that a GAL interview the parties to the suit; encourage settlement and alternative forms of dispute resolution; provide reasons why a GAL opposes the terms of a proposed order; and be allowed to submit a report in lieu of testifying at trial. Notably, the committee added language to insure that, subject to the rules of evidence, a GAL's testimony or report will be included as part of the case whether or not a GAL is called as a witness.

(5) The committee recommends adding language to the powers and duties of AALs by requiring an AAL to elicit a child-client's preferences, advise the client, provide guidance, represent the child's expressed preferences, and follow the child's direction provided that the child is competent to understand the nature of the attorney-client relationship. In the event that a child is unable to formulate a position, or if the child is too young or lacks sufficient maturity to form an attorney-client relationship, the committee recommends that the AAL be allowed to either use substituted judgment or request that a GAL be appointed. If an AAL employs substituted judgment, the committee recommends that objective criteria, as opposed to the AAL's personal life experiences,

be used.

(6) The committee recommends adding new language to address the powers and duties of an amicus attorney. An amicus attorney's duty is to advocate what the amicus attorney finds to be in the best interests of the child. An amicus attorney is required to investigate to determine the facts of the case; participate in the litigation to the same extent as an attorney for a party or an AAL; consider, but not be bound by the expressed wishes of the child; encourage settlement and other forms of alternative dispute resolution; interview the child, if the child is four years of age or older, and individuals the amicus attorney considers likely to have knowledge of the child's history and condition, and subject to the rules of professional responsibility, the parties to the suit.

(7) The committee further recommends that an amicus attorney not testify in court except as allowed by the Texas Disciplinary Rules of Professional Conduct § 3.08, and that an amicus attorney explain to a child that the amicus attorney's role is not to act as the child's attorney, but to perform legal services necessary to assist the court in protecting the child.

Subchapter B

As noted above, this subchapter is dedicated solely to suits brought by a governmental entity.

(8) Recommendations include a specific indication that an attorney may be appointed in the dual role of GAL and AAL, but that a court may not appoint a separate GAL if an attorney has been appointed in the dual role unless the court wishes to restrict the attorney to a pure AAL role. The committee recommends that a court be allowed to appoint an attorney solely in the role of GAL if the attorney is specifically appointed to serve in the capacity of a volunteer advocate. An attorney appointed in this capacity is not authorized to perform legal services. The committee further recommends language which limits a court's ability to appoint an attorney in the dual role to situations of constrained personnel or fiscal considerations.

(9) The committee recommends a specific prohibition on the appointment of an amicus attorney in a suit by a governmental entity.

Subchapter C

This subchapter relates solely to court appointments in a suit other than a governmental entity and consistent with the current statutory scheme, all appointments in this context are discretionary for the court. The scope of appointments are an amicus attorney, a AAL or a GAL.

(10) The committee recommends a specific provision that the court may make an appointment if it finds that such appointment may be necessary to ensure adequate determination of the best interests of a child. Furthermore, the committee recommends that the court give due consideration to the ability of the parties to pay for an appointment.

(11) The committee recommends specific language stating that the court may not appoint an attorney in a dual role as GAL and AAL in a suit not filed by a governmental entity. Furthermore, the committee recommends that in such suits, the court may not appoint a volunteer advocate as a GAL

unless the training of volunteer advocate provides for participation in suits not filed by a governmental entity. This provision is a recognition that CASAs are not trained, nor is their organization established, to handle custody suits.

As previously noted, the committee is continuing to meet to flesh out remaining unresolved issues. The issues currently still under consideration by the committee include: (1) Further means to limit appointments of amicus attorneys to an absolute minimum; (2) insure payment of appointees; and, (3) whether the proposed legislation should provide for the appointment of an amicus attorney even when the payment of the amicus cannot be assured.

APPENDIX

REVIEW DISPOSITION PATTERNS, UNIFORMITY OF REPORTING, AND EVALUATION OF JUVENILE OFFENSE CASES UNDER THE PROGRESSIVE SANCTIONS GUIDELINES

Background

In 1995, one of the Texas Legislature's top priorities was to address the issue of juvenile crime in the state of Texas. Consequently, the legislature passed House Bill 327, which significantly amended Title 3 of the Texas Family Code.[19] Arguably, one of the most substantive additions to Title 3 was the implementation of Chapter 59, Progressive Sanctions Guidelines (hereinafter guidelines). The guidelines set forth seven sanction levels, which, depending on the severity of the offense and the criminal history of the juvenile, may be used in determining the punishment for that particular juvenile offender.[20] As the severity of the offense increases, or if the juvenile is a repeat offender, the sanction level may also increase, with the ultimate sanction (Level 7) being a determinate sentence commitment to the Texas Youth Commission (TYC).

The statutorily stated purpose of the guidelines are to:

> (1) ensure that juvenile offenders face uniform and consistent consequences and punishments that correspond to the seriousness of each offender's current offense, prior delinquent history, special treatment or training needs, and effectiveness of prior interventions;
>
> (2) balance public protection and rehabilitation while holding juvenile offenders accountable;
>
> (3) permit flexibility in the decisions made in relation to the juvenile offender to the extent allowed by law;
>
> (4) consider the juvenile offender's circumstances; and
>
> (5) improve juvenile justice planning and resource allocation by ensuring uniform and consistent reporting of disposition decisions at all levels.[21]

As promulgated, the guidelines are discretionary for both a juvenile board and a juvenile court judge.[22] However, a juvenile court or probation department that deviated from the guidelines was required to state in writing its reason for the deviation and submit that statement to the juvenile board, regardless of whether the guidelines had been adopted by the juvenile board.[23] In turn, a

[19] H.B. 327, 74th Legis. Sess. (1995).

[20] Fam. § 59.004 - 59.010 (2001). A copy of the guidelines is contained in the appendix to this section.

[21] Fam. § 59.001 (2001).

[22] Fam. § 53.013 (2001).

[23] Fam. § 59.003(e) (2000). Amended by 77th Legis. Sess.(2001), H.B. 1118, eff. Sept.1, 2001 by exempting the juvenile court from reporting deviations.

juvenile board was required to report to the Texas Juvenile Probation Commission (TJPC), at least quarterly, its reasons for deviating from the guidelines.[24] TJPC, along with TYC, were then required to submit the information they had collected to the Criminal Justice Policy Council (CJPC), who would then analyze the data and prepare an annual report to the governor and both houses of the legislature.[25] The accumulation and analysis of this data was meant to assist in improving resource allocation and planning in the juvenile justice system.

CJPC submitted two reports to the legislature during the 77th legislative session. One report analyzed the data collected for 1999,[26] while the other detailed the impact of the guidelines from 1995 to 1999.[27] In both reports, CJPC utilized data collected from 17 juvenile probation departments[28] in 23 counties.[29] Since 1995, the overall rate of cases referred to juvenile probation declined, referral offenses were less severe, but the percentage of cases disposed to probation or to TYC increased.[30] In 1995, 31% of dispositions would have met the guidelines,[31] while 44% of the dispositions matched the guidelines in 1999.[32] Conversely, 56% of the dispositions deviated from the guidelines.

The statistical fact that more than half of the juvenile dispositions deviated from the guidelines caused concern among the legislature that the guidelines were not meeting their purpose, and in essence, the state was failing in its juvenile justice efforts. As a consequence of the perceived failure of the effectiveness of the guidelines, this committee requested that this issue be researched

[24] Fam.§ 59.011 (2000). Amended by 77th Legis. Sess.(2001), H.B. 1118, eff. Sept.1, 2001 by requiring a juvenile probation department to report progressive sanctions data in electronic format to the TJPC, as specified by TJPC.

[25] Fam.§ 59.012 (2000). Amended by 77th Legis. Sess. (2001), H.B. 1118, eff. Sept.1, 2001, by requiring CJPC to report to the governor and both houses of the legislature on or before January 15 of each odd-numbered year.

[26] Criminal Justice Policy Council, An In-Depth Analysis of the Use of Progressive Sanction Guidelines In 1999 (2001).

[27] Criminal Justice Policy Council, The Impact of Progressive Sanction Guidelines: Trends Since 1995 (2001). Complete copies of both reports can be found at www.cjpc.state.tx.us.

[28] Cameron, Cherokee, Dallas, El Paso, Galveston, Harris, Harrison, Hidalgo, Lubbock, Nueces, Pecos, Potter, Randall, Tarrant, Tom Green, and Webb.

[29] Id. The Tom Green Juvenile Probation Department includes Coke, Concho, Irion, Runnels, Schleicher, and Sterling counties in addition to Tom Green County.

[30] Id. at I.

[31] Id. The guidelines became effective in 1996.

[32] Id.

and analyzed as an interim charge.[33]

To deviate or not to deviate, that is the question?

To assist in reviewing this issue, the committee asked TJPC to assemble an ad hoc committee to review the guidelines. Over the course of several months, the ad hoc committee on progressive sanctions (hereinafter committee) met to discuss the status of the progressive sanctions model and its effectiveness and usefulness in achieving the State's intended purpose. The committee was comprised of representatives from various counties' juvenile probation departments, judges, prosecutors, public defenders, state agencies, and academics.[34]

Amidst the backdrop of a perceived failure, the committee collectively agreed that the guidelines were not a failure and that the statistical implication as such was unwarranted. In other words, the committee believed that deviations from the guidelines should not be viewed as a pariah to the juvenile justice system, but as a positive example of how the juvenile system ought to operate.

Many practitioners were quick to point out that deviations are an inherent consequence of the guidelines given their statutorily stated purpose. For example, the first stated purpose seeks to ensure uniform and consistent consequences and punishments for juvenile offenders, while the third stated purpose allows for flexibility in the decisions made in relation to the juvenile offender.[35] Furthermore, the fourth stated purpose allows for consideration of the juvenile offender's specific circumstances.[36] As such, practitioners are often faced with situations where, based on the juvenile's offense, a certain sanction level is suggested, but after analyzing the juvenile's specific circumstances, the practitioner decides that a different sanction level, either up or down, is warranted. Consequently, a deviation occurs.

Another common reason for deviation from the guidelines centered around the ability or inability of certain counties' probation departments to follow the guidelines in lieu of their available resources. In larger counties where resources are seemingly abundant, a juvenile offender may be assigned a higher sanction level based on an evaluation of that juvenile's needs and the resources available in that county to address those needs. On the other hand, smaller counties that may not have comparable resources, may be forced to deviate downward based on its lack of resources. However, a lack of resources for any size county does not always translate to a downward deviation. For example, one county's probation department indicated that they are often forced to deviate to a higher sanction level because they have exhausted all their resources that correspond to the suggested sanction level or lower sanction levels.

[33] The Texas Senate Committee on Jurisprudence has also been charged with studying the progressive sanctions guidelines.

[34] A complete list of participants is located in the appendix to this section.

[35] Fam.§ 59.001 (1) and (3) (2001).

[36] Fam. § 59.001 (4) (2001).

Following are specific case situations from three counties, ranging from a large county to a small county, illustrating an upward and downward deviation from each county. The examples provided illustrate deviations related to both resource issues as well as an assessment of a juveniles particular needs.

Harris County

In 1999, Harris County had 8,270 juvenile dispositions. Of that, 2,195 of the cases deviated from the guidelines. 2,063 cases deviated upward, while 132 cases were downward deviations. Following are two cases in Harris County, one case illustrates an upward deviation while the other reflects a downward deviation.[37]

> Case 1: Juvenile, age 14 with no prior referrals, was arrested for criminal trespass and evading arrest. Juvenile had been living with his grandmother, along with his younger brother, for the past four years since their mother had been incarcerated for violations of probation and drug offenses (mother sentenced to 25 years; older brother was also incarcerated for a drug offenses). Juvenile's father is deceased. Juvenile, once active in school and extracurricular sports activities, began a pattern of negative behavior, including marijuana use and sale, and an attempted suicide. Based on this juvenile's offense, the guidelines suggested a level 2 sanction; however, given the juvenile's specific circumstances, the probation department recommended a level 5 sanction providing for a secure environment.
>
> Case 2: Juvenile, age 16, was adjudicated for burglary, a first degree felony. Juvenile had no prior criminal history. Prior to his court hearing, the juvenile completed the Massachusetts Youth Screening Instrument, which screens for mental health concerns. The test failed to identify any concerns. In interviews with the juvenile's mother, she indicated that he was respectful of her authority and that he did not show signs of alcohol or drug abuse. Based on his offense, the guidelines suggested a level 4 sanction requiring intensive supervision. The probation department recommended a level 3 sanction based on its assessment of the juvenile's needs. The juvenile received a drug and alcohol assessment, which indicated no services were needed; he attended educational workshops on the dangers of weapons; he participated in community service projects including assisting the elderly and a community beautification project; and he was required to make restitution. The juvenile has not re-offended.

Randall County

In 1999, Randall County had 457 juvenile dispositions. Of that, 321 cases deviated from the guidelines. 69 cases resulted in an upward deviation, while 252 cases were downward deviations. Following are two cases in Randall County, one case illustrates an upward deviation while the other

[37] Information provided by the Harris County Juvenile Probation Department.

reflects a downward deviation.[38]

> Case 1: Courtney, age 14, was referred to probation for a runaway offense. Based on the probation department's risk assessment, she was a high risk, having prior runaways, drug and alcohol use and truancy. Based on her offense, the guidelines suggested a level one sanction; however, the probation department deviated to a level three sanction so that she could be placed in a child care facility. Courtney, a member of the honor roll, graduated this past spring.
>
> Case 2: Robert, age 12, was referred for delivery of a controlled substance. He had given his prescription medication to another student. Based on risk assessment, Robert was a low risk with no prior criminal history. Based on his offense, the guidelines suggested a level three sanction; however, the probation department recommended to the court a level two sanction. Consequently, Robert was given deferred prosecution, a level two sanction. Robert has not been referred to probation since.

Kendall County

From September 2001 to April 2002, Kendall County had 45 juvenile dispositions. Of that, 13 cases deviated from the guidelines. Four cases were upward deviations, while nine were downward deviations. Following are two cases in Kendall County, one illustrates an upward deviation while the other reflects a downward deviation.[39]

> Case 1: Juvenile, age 16, was placed on deferred adjudication for possession of marijuana. The child lived with his father, stepmother and older brother. Upon failing his first drug test, the probation department set up drug and alcohol counseling and one on one counseling with a therapist. He did not attend either program and continued to use drugs and subsequently failed 5 more drug tests for a total of six failures in a six month period. The probation department spoke at length with the his parents, who both felt that the he did not have a drug problem. The child was evaluated using the Substance Abuse Subtle Screening Inventory and was determined to have met the DSM-IV definition of a substance abuser. He also began missing school and associating with other juveniles on probation, both of which were in violation of his probation terms. Based on his behavior and record, the guidelines provided for a level three sanction. The juvenile probation department felt that given his situation at home and his parent's inability to control him, it was in his best interest to receive a level five sanction for purposes of placement into a drug treatment facility.
>
> Case 2: Juvenile was referred to probation for the offense of assault on a teacher.

[38] Information provided by the Randall County Juvenile Probation Department.

[39] Information provided by the Kendall County Juvenile Probation Department.

At the time of the incident, the child was in the 5th grade. The child's parents were divorced and he lived with his father, who worked full time. According to the probation department, the child's mother would stop in every once in a while and "stir up" trouble. Upon meeting with the child and his father, the probation department determined that the child needed mental health services as opposed to the criminal justice system. Based on the offense, the guidelines suggested a level two sanction, but for the reasons stated above, the probation department deviated to a level one sanction.

Federal Legislation

Currently, H.R. 863, the Consequences for Juvenile Offenders Act of 2001,[40] is working its way through Congress.[41] H.R. 863, to a great extent, was conceptually modeled after Texas' statutory scheme.[42] H.R. 863 would authorize the Attorney General to provide grants to states that develop, implement and administer graduated sanctions for juvenile offenders.[43] As a condition to grant eligibility, the bill requires that a state's system of graduated sanctions be discretionary.[44] "Discretionary" is defined as "a system of graduated sanctions that is not required to be imposed by each and every juvenile court in a State or unit of local government."[45] Based on this language, the drafters of this legislation recognize the need for flexibility in the disposition of juvenile cases.

Conclusion

The culmination of the committee's work came in the form of amending and adding language in the Family Code.[46] One of the committee's goals was to eliminate the perceptions generated by some of the current language. For example, the committee believed that the use of "deviate" or "deviation" connoted some form of misconduct on the part of juvenile probation departments and juvenile courts. Consequently, the committee removed any reference to that term and replaced it with the term "departure." Similarly, the committee replaced "progressive sanctions" with "progressive dispositions," and instead of "guidelines," the committee opted for the term "model."

Substantively, the committee amended and added language to § 59.001 regarding the purposes of

[40] H.R. 863, 107th Cong. (2001).

[41] H.R. 863 has passed the House and is currently in the Senate Judiciary Committee.

[42] TJPC representatives testified before Congress on the Texas model.

[43] H.R. 863, 107th Cong. § 1801(b)(1) (2001).

[44] H.R. 863, 107th Cong. § 1802(d)(1)(A) (2001).

[45] H.R. 863, 107th Cong. § 1802(e)(1) (2001).

[46] A complete copy the committee's draft legislation is contained in the appendix to this section.

the guidelines.[47] Notably, the committee opted to rewrite subsection (a)(3) to explicitly state that "departures from the 'model' are not 'undesirable' and in certain cases, 'highly desirable.'" Furthermore, the committee deleted subsection (a)(4) and created a new subsection (b). Subsection (b) delineates several factors that a prosecutor or probation department may consider when making a disposition in a juvenile's case.

The committee deleted sections 53.013(b) and 59.003(e), which require juvenile courts and probation departments to report deviations in writing to their juvenile boards. As originally promulgated, the intent was that this written information would eventually make its way to CJPC for its analysis and report to the legislature. However, due to the cumbersome nature of this process, CJPC found the data unreliable and opted to fulfill its report obligations by utilizing the 23 county sampling method described earlier in the report.

Similarly, the committee determined that a juvenile board's duty to report progressive sanctions data to TJPC electronically, as required by § 59.011 was also obsolete based on TJPC's ability to access such information as needed. Consequently, that section was deleted as well. Ultimately, the committee believed that by deleting these provisions, the Family Code would better reflect the current practice and would free up personnel in many counties who were statutorily responsible for reporting data that went unused. In sum, the deletion of these sections, as recommended by the committee, does not result in any net loss of information.

Finally, the committee made minor substantive changes to the various 'Disposition' levels. For a 'Disposition' Level Two, the committee decided to modify the period for which a juvenile could be placed on deferred adjudication from, "not less than three months or more than six months," to "a period not to exceed six months." Similarly, for 'Disposition' Level Three, 'Disposition' Level Four and 'Disposition' Level Five, the specific time frames stated were deleted and replaced with non-specific language. The rationale for deleting and or modifying these time frames was to allow practitioners a greater degree of flexibility in assessing a punishment for a particular disposition. By allowing more flexibility, the probability that a disposition conforms to the 'Disposition' level is increased. In other words, less deviations or 'departures' may result.

The foregoing recommendations by the committee flow naturally from the premise that not all juvenile cases are the same, nor should they be treated the same. Individual circumstances should always be considered. Undoubtedly, the state has a substantial interest to ensure that juveniles at opposite ends of the state, who commit comparable offenses, are treated similarly with respect to their disposition. The committee believes that when all factors are equal, juveniles are treated similarly. However, the state's interest in uniformity of dispositions must be balanced to reflect the practical nature by which juvenile dispositions are handled in the state. The committee believes that the recommended changes achieve this balance.

[47] *See supra* p. 15.

APPENDIX

EXAMINE THE ROLE OF GESTATIONAL AGREEMENTS AND THEIR POTENTIAL IMPACT ON TEXAS FAMILY LAW

Background

In July of 2000, the National Conference of Commissioners for Uniform State Law (NCCUSL) finalized its revisions to the 1973 Uniform Parentage Act.[48] The Texas Legislature adopted the 2000 Uniform Parentage Act (UPA) during the 77th legislative session by way of House Bill 920.[49] House Bill 920 was signed by Governor Perry in June of 2001, and became effective immediately.[50] The NCCUSL drafted the UPA with one optional chapter (Article 8) dealing with the issue of gestational agreements. Consequently, that chapter was not included as part of House Bill 920, but was introduced to the legislature as House Bill 1246.[51] House Bill 1246 received a public hearing and generated much debate; however, consensus on the statutory language and the policy concerning such agreements could not be reached by all committee members, thus, the bill was left pending in committee.[52]

A gestational agreement, under the UPA, is a contract between, at a minimum, a gestational mother and the intended parents. The UPA defines a gestational mother as a woman who gives birth to a child under a gestational agreement.[53] Intended parents are defined as individuals who enter into an agreement providing that the individuals will be the parents of a child born to a gestational mother by means of assisted reproduction,[54] regardless of whether either individual has a genetic relationship with the child.[55] A gestational agreement may involve more than just the parties mentioned above. If a prospective gestational mother is married, her husband must be a party to the agreement.[56] In situations requiring the use of egg and/or sperm donors, the donor(s) must also be a party to the agreement.[57] Furthermore, the intended parents must be

[48] Uniform Parentage Act (2000).

[49] H.B. 920, 77th Sess. (2001).

[50] Id. Signed by Governor Perry on June 14, 2001.

[51] H.B. 1246, 77th Sess. (2001).

[52] A committee substitute was offered that addressed many of the concerns asserted by some committee members; however, consensus still could not be reached.

[53] Uniform Parentage Act § 102 (11) (2000).

[54] Uniform Parentage Act § 102 (4) (2000). Assisted reproduction means a method of causing pregnancy other than sexual intercourse and includes such methods as: (1) intrauterine insemination; (2) donation of eggs; (3) donation of embryos; (4) in-vitro fertilization and transfer of embryos; and (5) intracytoplasmic sperm injection. Id.

[55] Uniform Parentage Act § 102 (12) (2000).

[56] Uniform Parentage Act § 801 (a) (2000).

[57] Id.

married and both must be parties to the agreement.[58]

The cornerstone of a gestational agreement under the UPA is the requirement that any gestational mother, her husband, if applicable, and the donors, if any, agree to relinquish any rights and duties as the parent(s) of a child conceived through assisted reproduction and that the intended parents become the parents of the child.[59] Equally important to the effectiveness and purpose of gestational agreements under the UPA is the requirement that such agreements are enforceable only if validated in the appropriate court.[60] A court's validation process is initiated by petition of the intended parents and the gestational mother.[61] A court may then, in its discretion, issue an order validating a gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the agreement.[62] However, before issuing such an order, the court must first find that certain requirements are met.[63]

Once a court validates a gestational agreement, that court retains the exclusive, continuing jurisdiction of all matters arising out of the gestational agreement until a child born to the gestational mother attains the age of 180 days.[64] Furthermore, a gestational agreement may be terminated after the issuance of a validating order, by any party, before the prospective gestational mother becomes pregnant, by providing written notice to all other parties.[65] Once a child is born to a gestational mother, the intended parents are required to file written notice with the court that a child has been born to the gestational mother within 300 days after assisted

[58] Uniform Parentage Act § 801 (b) (2000).

[59] Uniform Parentage Act § 801(a)(2) and (3) (2000).

[60] Uniform Parentage Act § 803 (2000).

[61] Uniform Parentage Act § 802 (2000).

[62] Uniform Parentage Act § 803(a) (2000).

[63] (1) jurisdictional requirements have been met; (2) medical evidence shows that the intended mother cannot bear a child or is unable to do so without unreasonable risk to herself or the unborn child; (3) unless waived, a child-welfare agency has conducted a home study of the intended parents and concluded that they meet the standards of fitness applicable to adoptive parents; (4) the parties have all voluntarily entered into the agreement and understand its terms; (5) the gestational mother has carried at least one pregnancy to term and bearing a child will not pose an unreasonable health risk to the unborn child or to the prospective gestational mother; (6) all reasonable health-care expenses associated with the gestational agreement until the birth of the child, including expenses if the agreement is terminated, have been provided for; and (7) consideration, if any, paid to the prospective gestational mother is reasonable.

[64] Uniform Parentage Act § 805 (2000).

[65] Uniform Parentage Act § 806 (2000).

reproduction.[66] The court is then required to issue an order: (1) confirming that the intended parents are the parents of the child; (2) if necessary, order that the child be surrendered to the intended parents; and (3) directing the appropriate agency to issue a birth certificate naming the intended parents as parents of the child.[67]

The UPA provides two additional sections dealing with potential eventualities concerning gestational agreements. The first deals with the possibility that a gestational mother marries after entering into a gestational agreement. The UPA explicitly states that the subsequent marriage of the gestational mother does not affect the validity of a gestational agreement and that his subsequent consent is not required, nor can he be considered the presumed father of the child.[68] Finally, the UPA addresses the situation of a non-validated gestational agreement. A gestational agreement that is not judicially validated is unenforceable and any resulting child born to an unenforceable agreement is subject to Article 2, Parent-Child Relationship of the UPA.[69]

Other States

As of August 2002 two states, Texas and Washington, had adopted the UPA. Washington, like Texas, did not adopt Article 8 of the UPA; however, Washington has had statutory law covering gestational agreements since 1989.[70] Also like Texas, Minnesota introduced the UPA and Article 8 as separate pieces of legislation;[71] however, both failed to get out of committee.[72] West Virginia has introduced the UPA in its entirety as HB 2522.[73] The bill has been sent to the House Judiciary Committee and no other action is known as of the date of this report. Several states plan to introduce the UPA in their next legislative session.[74]

As with the situation in Washington, several states have promulgated non-UPA statutes dealing

[66] Uniform Parentage Act § 807 (2000).

[67] Uniform Parentage Act § 807 (a)(1) - (3) (2000).

[68] Uniform Parentage Act § 808 (2000).

[69] Uniform Parentage Act § 809 (2000).

[70] Wash. Rev. Code § 26.26.210 et seq. (1989).

[71] HF 2478 and HF 2819, 82nd Leg., (Minn. 2002).

[72] Phone interview with Dennis Virden, Civil Law Committee Administrator, Minnesota House of Representatives (August 6, 2002).

[73] H.B. 2522 (W.Va. 2001).

[74] Delaware, Idaho, Montana, Nevada, Utah and the U.S. Virgin Islands.

with gestational agreements.[75] California currently recognizes gestational agreements by way of case law.[76] Some states declare that gestational agreements are void and unenforceable;[77] however, the majority of states do not have any laws, whether statutorily or judicially, regarding gestational agreements.

The fact that some jurisdictions allow such agreements, others prohibit them, and yet still more have no legislative guidance whatsoever, creates serious legal considerations. Without question, the prohibition of such arrangements in certain states will force individuals to find gestational hosts in friendlier jurisdictions. The question then becomes one of full faith and credit. Does that child have a defined legal status once he or she returns to the home state? Arguably, in jurisdictions that do not recognize gestational agreements, the child would, for purposes of parentage, be considered the child of the gestational mother and her husband, if she is married.

Selected Cases

The issue of gestational and surrogacy agreements has sparked considerable controversy in the United States beginning with the infamous "Baby M" case in 1988.[78] It should be noted that this case involved a surrogacy agreement as opposed to a gestational agreement. The distinction between surrogacy and gestational hinges on the genetic makeup of the unborn child. In a surrogacy arrangement, the surrogate agrees to be inseminated with the intended father's sperm. In a gestational situation, the gestational host provides none of her genetic makeup.

In the "Baby M" case, the birth mother refused to carry out her contractual obligation to terminate her parental rights or surrender custody of the child.[79] The New Jersey Supreme Court reviewed the agreement and determined that, because the surrogacy agreement contained a compensation provision for the "personal services" of the birth mother, the agreement was void and unenforceable.[80] The court considered the compensation as analogous to a payment for a

[75] New Hampshire Chapter 168-B; Arkansas ACA § 9-10-201 et seq.; Florida Chapter 742.15; Nevada NRS126.045; Virginia Title 20, Chapter 9

[76] *See generally In re Marriage of Buzzanca*, 61 Cal. App. 4th 1410 (1998); *Johnson v. Calvert* 5 Cal. 4th 84 (1993).

[77] District of Columbia - D.C. Code Ann. § 16-402 (2001); Indiana - Ind. Code § 31-20-1 and 3 (1997); Louisiana - La. Rev. Stat. Ann. § 2717 (1987); Michigan - Mich. Comp. Law Ann. § 722.855; Nebraska - Neb. Rev. Stat. § 25-21, 200 (1988); New York - N.Y. Domestic Relations Law Art. 8, § 122 (2001); North Dakota - N.D. Cent. Code § 14-18-05 (2001); Utah - Utah Code Ann. § 76-7-204 (2001).

[78] *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).

[79] *Id*. at 1237.

[80] *Id* at 1240.

private placement adoption, which is prohibited in New Jersey.[81] Ultimately, however, the court applied a "best interest" standard and awarded custody to the intended father, but granted visitation rights to the birth mother.[82]

More recently, a high profile case emerged in California. In that case, the gestational mother filed suit against the intended parents for breach of contract, emotional distress and fraud. The gestational mother entered into an agreement that provided for her to be compensated $20,000.00 by the intended parents for her role as the gestational host. The gestational mother became pregnant via in vitro fertilization with a donor egg and the intended father's sperm.

Approximately seven weeks into the pregnancy, the gestational mother discovered that she was carrying twins. Allegedly, six weeks after that, the intended parents contacted the gestational mother and requested that she abort one of the fetuses. The gestational mother refused to do so, primarily due to an alleged verbal agreement between the parties requiring that any selective reduction would take place prior to 12 weeks. The gestational mother gave birth to the twins in November of 2001 and presently, she has custody of the children pending the outcome of the lawsuit in California.

Proponents v. Opponents

These cases highlight some of the complexities involved with gestational agreements and ultimately fuel the debate over whether such arrangements should be allowed. Conservative and religious organizations are adamantly opposed to such arrangements.[83] On the other hand, several groups endorsed Article 8 of the UPA.[84] In spite of the apparent polarity of views on this issue, it should be reiterated that, as indicated above, gestational agreements are void in only a handful of states, and the vast majority of states have no law, either by statute or through their judiciary, whatsoever. Consequently, gestational agreements may be arranged with some degree of regularity in those jurisdictions.

Opponents of gestational agreements site several reasons for opposing the practice. Many believe that such arrangements are tantamount to child selling, and thus, are illegal. Some are concerned with the possibility that a gestational arrangement would allow a homosexual couple to become parents. Yet another concern stems from the notion that gestational agreements may

[81] *Id.* at 1246

[82] *Id*. at 1263.

[83] *See generally* United States Conference of Catholic Bishops *Catholic Teaching on Bioethics and Reproductive Technologies, Donum Vitae* (1987); Texas Eagle Forum, Weekly Update, March 12, 2001.

[84] American Bar Association Family Law Section; The American Academy of Matrimonial Lawyers; The National Child Support Enforcement Association; The Center for Law and Social Policy; The American Academy of Adoption Attorneys; and The Organization of Parents Through Surogacy.

promote the practice of eugenics.[85] Finally, it is the opinion of these groups that gestational agreements are unnecessary given the availability of adoptees.

Proponents of gestational agreements provide equally compelling arguments for their existence. Contrary to the opposition's assertion that there exists a wealth of adoptees, proponents argue that there is a shortage of adoptable children in this country.[86] To counter the proposition that gestational agreements are tantamount to baby selling, proponents point out that such agreements are entered into prior to conception. Consequently, there is no child in existence at the time of the arrangement. Furthermore, under a gestational agreement, the genetic makeup of the child is generally derived from one of the intended parents, thus the notion that one is paying for a child created from their own genes is, according to proponents of the practice, absurd.

Conclusion

Undoubtedly, the issue of gestational agreements is controversial. However, in spite of the controversy, the practice of gestational agreements is a reality that should be addressed. The simple fact remains that a child born pursuant to a gestational agreement is entitled to have his or her maternity and paternity clarified. Ultimately, the question becomes who is going to address these issues. As indicated, many state's legislatures have chosen to address this issue by statutorily regulating such arrangements, while others have chosen to explicitly prohibit or render gestational agreements unenforceable. However, in the majority of states, their respective legislatures have left the issues arising from gestational agreements to the judiciary. Currently, there are no cases in Texas that address this issue; however, this fact begs the question as to who is, or should be, responsible for formulating the state's policy with regard to this issue.[87]

[85] Eugenics is defined as the science that deals with the improvement of hereditary qualities of a race or breed. Merriam Webster's Collegiate Dictionary 399 (10th ed. 1994).

[86] *See* Prefatory Comment to Uniform Parentage Act (2000) stating that the longstanding shortage of adoptable children in this country has led many to seek gestational services.

[87] In an effort to build on the legislation from the last legislative session, the Family Law Section of the State Bar of Texas has proposed legislation substantively similar to the bill that was left pending in committee. A complete copy of the proposed legislation is included in the appendix to this section.

APPENDIX

REVIEW STATE AND LOCAL SCHOOL DISTRICT EFFORTS TO DEAL WITH PROBLEMS OF TRUANCY, DROP-OUTS, AND DISRUPTIVE BEHAVIOR (PURSUANT TO THE SAFE SCHOOLS ACT) INCLUDING IN-SCHOOL AND OUT-OF-SCHOOL SUSPENSIONS. THE REVIEW SHOULD INCLUDE AN EXAMINATION OF PERFORMANCE OUTCOMES IN ALTERNATIVE EDUCATION, DISCIPLINARY ALTERNATIVE EDUCATION AND JUVENILE JUSTICE ALTERNATIVE EDUCATION PROGRAMS, AND THE EFFECTS OF THESE PROGRAMS ON THE EDUCATIONAL PROGRESS OF STUDENTS WHO ARE REMOVED FROM THE REGULAR CLASSROOM.

(JOINT WITH HOUSE COMMITTEE ON PUBLIC EDUCATION)

Truancy and Failure to Attend School

Prior to 1993, truancy was not considered a criminal offense, but was treated as a civil matter by juvenile courts.[88] Consequently, juvenile courts could order children, or their parents, to comply with the state's compulsory attendance law, but could not assess a monetary penalty. In 1993, the legislature created a new offense called *Failure to Attend School*, a Class C misdemeanor.[89] Because a Class C misdemeanor is a criminal offense punishable by a fine not to exceed $500,[90] the offense of *Failure to Attend School* fell under the jurisdiction of either the justice of the peace court[91] (hereinafter justice court) or the municipal court.[92] Although *Failure to Attend School* shifted the jurisdiction to these courts for the criminal offense, the juvenile courts still retained jurisdiction for "truancy" cases filed in their court; however, the juvenile court is granted the authority to waive its jurisdiction if certain criteria are met.[93] For purposes of this report the term truancy will be used; however, the reader should be aware of the distinction stated above.

Truancy is considered the first red flag that a child is "at-risk" and exhibiting behavior that leads to serious criminal activity. Consequently, prior to the 77th session, a workgroup of judges, school officials, educators and attorneys met to address issues related to school attendance in an effort to enhance the laws related to truant behavior. As a result of the workgroup's efforts, Senate Bill 1432 (S.B. 1432) was filed during the session. In addition to S.B. 1432, some of the workgroup's product made its way into House Bill 1118 (H.B. 1118). Although substantially similar in intent and content, the bills contained some conflicting provisions requiring correction.

Efforts to Deal with Truant Behavior

Harris County Department of Education (HCDE)

The HCDE provides an attendance handbook for all of the school districts in Harris County. The handbook provides educators with information on all the state's laws relating to attendance. In

[88] Fam. § 51.03(b)(2) the unexcused voluntary absence of a child on 10 or more days or parts of days within a six month period or three or more days or parts of days within a three week period from school without the consent of his parents. (1993).

[89] H.B. 681, 73rd Sess. (1993). The language used to create this offense mirrored the language *infra* n.88, thus creating confusion between the criminal offense proceedings and, as some refer to, the "civil" truancy proceedings.

[90] Penal § 12.23 (2001)

[91] Crim. P. § 4.11 (2001).

[92] Crim. P. § 4.14 (2001). As enacted, H.B. 681 *infra* n. 89, did not provide for the municipal courts to have jurisdiction over these cases, however, with the increase of juveniles entering the judicial system, the municipal courts were later added.

[93] Fam. § 54.021 (2001).

addition, the handbook provides: guidance on how an educator can combat truancy; suggestions to Attendance Officers in making attendance referrals; information on the Juvenile Probation Department including their procedures; general court procedures; suggestions to parents of children with attendance problems; and other general information related to truancy issues.

Alief Independent School District (AISD)

The AISD has been successful in controlling truancy rates in spite of the fact that the majority of its students fit into a high risk category. In the event that a student is truant, AISD first issues a court warning notice, which is mailed to the parent(s). In the event that a child is truant a second time, a second truancy notice, which is the final notice, is sent to the parent(s) either three days after the mailing of the court warning or the parent's receipt of the court warning notice. Finally, if the parent has not responded and the child is still truant after three days from the mailing of the final notice, an affidavit is completed and sent to the school district's attendance office. This affidavit is used in court as evidence on behalf of the school district against the student and parent. The Alief district attendance office handles the court proceedings and a copy of the summons for the parent and student to attend court is sent home with the student prior to their court date.

AISD Attendance Officer Wade Hudson testified before the committee that 93% of AISD's truancy cases are resolved at the warning stage and do not require judicial action. He stated the success of the truancy program is due to communication between school campuses, the district administrative office, and the courts. He also credited AISD's success to established detailed procedures, as well as the administration and the registrar's office's dedication to this responsibility.

Truancy Court, Travis County

Truancy Court is a partnership between the Austin Independent School District, the Travis County Juvenile Probation Department, the City of Austin and the Travis County District Attorney's Office. The program is designed to intervene with chronic truants at the student's home school. The program provides supervision, referrals to community services, and a regular review of a student's progress towards reduced truancy. The program is currently utilized for 7th and 8th graders at Mendez Middle School and for 9th graders at Travis High School.

Between January 30, 2002 and May 24, 2002, 154 juveniles were referred to the program. Of these juveniles, 99 were placed on deferred prosecution. Of those juveniles completing deferred prosecution prior to May 24, 2002, 97% completed the program successfully.

In addition to the examples provided above, several Texas counties have developed programs with the Independent School Districts (ISD) to combat truancy. In Dallas County, the county and the city are working with the Dallas ISD as part of a Truancy Intervention Program. In Tarrant County, the Ft. Worth ISD, the District Attorney's Office and the Juvenile Department provide a Comprehensive Truancy Intervention Program. In Nueces County, the Corpus Christi Juvenile Municipal Court has collaborated with the Juvenile Assessment Center to develop a Truancy Intervention Program.

Recommended Statutory Changes Related to Truancy

(1) Delete Art. 45.054 from the Code of Criminal Procedure. Art 45.054 is essentially identical to Art. 45.056.

(2) Amend Code of Criminal Procedure, Art. 45.056.

> Art. 45.056 Authority to Employ Juvenile ~~Truancy~~ Case Managers; Reimbursement
>
> (a) On approval of the commissioners court, city council, school district board of trustees, juvenile board, or other appropriate authority, a justice court, municipal court, school district, juvenile probation department, or other appropriate governmental entity may:
>
> > (1) employ a case manager to provide services in cases before the court dealing with juvenile offenders consistent with the court's statutory powers ~~in truancy cases~~; or
> >
> > (2) agree in accordance with Chapter 791, Government Code, to jointly employ a case manager ~~to provide services in truancy cases~~.
>
> (b) A local entity may apply or more than one local entity may jointly apply to the criminal justice division of the governor's office for reimbursement of all or part of the costs of employing one or more juvenile ~~truancy~~ case managers from funds appropriated to the governor's office or otherwise available for that purpose. To be eligible for reimbursement, the entity applying must present to the governor's office a comprehensive plan to reduce truancy or other juvenile crime in the entity's jurisdiction that addresses the role of the case manager in that effort.

(3) Amend Family Code § 51.08(d).

> **§ 51.08. Transfer from Criminal Court**
>
> (d) A court that has implemented a juvenile case manager program under Article 45.056 ~~45.054~~, Code of Criminal Procedure, may, but is not required to, waive its original jurisdiction under Subsection (b)(1).

As mentioned above, these changes eliminate almost identical provisions and correct references to what should be the correct provision. Additionally, these changes clarify that a juvenile case manager may be utilized for other juvenile crimes.

(4) Amend Education Code § 25.094(d) and re-alphabetize subsequent provisions to correct the problem of having two subsection (d)s.

> (d) If the justice or municipal court believes that a child has violated an order issued under Subsection (c), the court may proceed as authorized by Article 45.050, Code of Criminal Procedure ~~Section 54.023, Family Code~~, by holding the child in contempt ~~and imposing a fine not to exceed $500~~ or by referring the child to juvenile

court for delinquent conduct.

(5) Amend Code of Criminal Procedure, Art. 45.050.

Art. 45.050. Failure to Pay Fine; Contempt: Juveniles

(a) In this article, "child" has the meaning assigned by Article 45.058(h).

Text of subsection (b) as amended by Acts 2001, 77th Leg., ch. 1297, § 51:

~~(b) If a person who is a child under Section 51.02, Family Code, fails to obey an order of a justice or municipal court under circumstances that would constitute contempt of court, the justice or municipal court has jurisdiction to:~~

~~(1) hold the child in contempt of the justice or municipal court order as provided by Section 54.023, Family Code; or~~

~~(2) refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order.~~

Text of subsection (b) as amended by Acts 2001, 77th Leg., ch. 1514, § 8:

(b) A justice or municipal court may not order the confinement of a child for:

(1) the failure to pay all or any part of a fine or costs imposed for the conviction of an offense punishable by fine only; or

(2) contempt of another order of a justice or municipal court.

(c) If a child fails to obey an order of a justice or municipal court under circumstances that would constitute contempt of court, the justice or municipal court may:

(1) ~~has jurisdiction to~~ refer the child to the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order; or

(2) ~~may~~ retain jurisdiction of the case ~~and~~ , hold the child in contempt of the justice or municipal court by ordering either or both of the following:

(A) the contemnor pay ~~hold the child in contempt of the justice or municipal court order and impose~~ a fine not to exceed $500; ~~or~~

(B) ~~order~~ the Department of Public Safety ~~to~~ suspend the contemnor's ~~child's~~ driver's license or permit or, if the contemnor ~~child~~ does not have a license or permit, to deny the issuance of a license or permit to the contemnor ~~child~~ until the contemnor ~~child~~ fully complies with the orders of the court.

(d) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (c) if:

(1) the person as a child was placed under an order of the justice or municipal court;

(2) the person failed to obey the order while the person was 17 years of age or older; and

(3) the failure to obey occurred under circumstances that constitute contempt of court.

(e) A justice or municipal court may hold a person in contempt and impose a remedy authorized by Subsection (c) if the person, while younger than 17 years of age, engaged in conduct in contempt of an order of the justice or municipal court but contempt proceedings could not be held before the child's 17th birthday.

(f) ~~(d)~~ A court that orders suspension or denial of a driver's license or permit under Subsection (c)(2)(B) shall notify the Department of Public Safety on receiving proof of compliance ~~that the child has fully complied~~ with the orders of the court.

(g) A justice or municipal court may not refer a child who violates a court order while 17 years of age or older to a juvenile court for delinquency proceedings for contempt of court.

(6) Delete Family Code § 54.023 in its entirety.

(7) Add new § 521.3451 to Transportation Code.

§ 521.3451. Suspension on Order of Justice or Municipal Court for Contempt of Court

(a) The department shall suspend or deny the issuance of a license or instruction permit of a person on receipt of an order to suspend or deny the issuance of the license that is issued by either a justice or municipal court under Article 45.050, Code of Criminal Procedure.

(b) On receipt of notice from the justice or municipal court under Article 45.050, Code of Criminal Procedure that the court order has been complied with, the department shall eliminate the suspension of license or instruction permit or remove the denial of issuance of the license or instruction permit.

These changes consolidate all juvenile contempt provisions into Article 45.050, Code of Criminal Procedure. It clarifies that school attendance-related contempt, is to be handled under the same provisions as other cases involving contemptuous conduct in municipal and justice court. Provisions contained only in the Family Code pertaining to enforcement are incorporated into Article 45.050, Code of Criminal Procedure. With the consolidation of the two statutes, enforcement provisions are removed from the Family Code.

In the last session, local trial courts were authorized to impose an indefinite lien on the driving privileges of contemptuous juveniles. However, legislation was not passed authorizing DPS to impose such a sanction. These changes give DPS such statutory authority and clarify that such orders remain in effect until the contemnor complies with a court's order, regardless of the contemnor's age.

(8) Delete Family Code § 52.027 in its entirety.

This same basic information is covered in Code of Criminal Procedure § 45.058.

(9) Amend the titles to Education Code sections 25.093 and 25.092; and Family Code § 54.021.

§ 25.093. Parent Contributing to Non-Attendance ~~Truancy~~

§ 25.0952. Procedures Applicable to School Attendance-Related ~~Truancy-Related~~ Offenses

§ 54.021. Civil Truancy ~~Justice or Municipal Court: Truancy~~

These changes are intended to help clarify the confusion between the criminal offense of Failure to Attend School and civil truancy.

(10) Add new § 71.0351 to the Government Code.

Subchapter C. Powers and Duties

Section 71.0351. Juvenile Data: Justice, Municipal, and Juvenile Courts

As a component of the official monthly report submitted to the Office of Court Administration of the Texas Judicial System:

(1) Justice and municipal courts shall report the number of cases filed for the following offenses:

(A) Section 25.094, Education Code, Failure to Attend School;

(B) Section 25.093, Education Code, Parent Contributing to Non-Attendance;

(C) Violation of a local daytime curfew ordinance adopted pursuant to either Section 341.904 or 351.903, Texas Local Government Code;

(D) Violation of a local nighttime curfew ordinance adopted pursuant to either Section 341.904 or 351.903, Texas Local Government Code.

(2) In cases where a child fails to obey an order of a justice or municipal court under circumstances that would constitute contempt of court, the justice or municipal court

shall report the number of incidents in which the child is:

(A) referred to the appropriate juvenile court for delinquent conduct as authorized by Article 45.050(b)(1), Code of Criminal Procedure and Section 51.03 (a) (2), Family Code; or

(B) held in contempt, taken into non-secure custody, or denied driving privileges as provided in Article 45.050(b)(2), Code of Criminal Procedure.

(3) Juvenile courts shall report the number of:

(A) referrals of cases adjudicated for delinquent conduct as defined in Section 51.03 (a)(2), Family Code;

(B) disposition of cases adjudicated for delinquent conduct as defined in Section 51.03 (a)(2), Family Code;

(C) petitions indicating a need for supervision as defined in Section 51.03 (b)(2-3),

In order to assist the Legislature and the judiciary more effectively analyze and address school attendance issues, uniform and comprehensive data is needed. This section authorizes the Office of Court Administration to collect additional juvenile-related data in order to better ascertain: (1) the volume of school attendance and truancy cases throughout the state; (2) the number of justice, municipal, and juvenile courts adjudicating such cases; and, (3) what measures are most frequently being utilized by the courts to adjudicate "chronic truants." Currently, depending on the type of court, data collection efforts range from being inconsistent to non-existent. Informal efforts to collect such uniform data have been unsuccessful, consequently, a legislative mandate appears needed.

Non-traditional Schools & Programs for Drop-Outs

Several types of schools and programs fall under this large umbrella. There are in-district dropout recovery programs that are unique to each local school district and there is the State Funded 9th Grade Recovery Project led by the Texas Education Agency (TEA). In addition, there are instructional technology programs and charter schools in Texas school districts.

State Funded 9th Grade Recovery Project

Ninth graders in America's schools are at particular risk of failure. More students repeat ninth grade and more decide to drop out of school during or at the end of their ninth grade year than at any other time. In 1999, the 76th Texas Legislature allocated funds to support school districts' efforts to help ninth graders stay in school and succeed academically. Specifically, $42.5 million was appropriated for each year of the 2000-01 biennium for implementation of the Ninth Grade Success Initiative (NGSI). NGSI programs were expected to achieve four major objectives:

- decrease the rate of retention in ninth grade

- reduce the number of ninth-grade dropouts
- increase attendance rates in ninth grade
- support successful performance on the state's assessments, including the exit-level TAAS.

Through a competitive grant process, the Texas Education Agency (TEA) awarded NGSI grants to 226 school districts and five consortia, representing 12 school districts, for a total of 238 school districts implementing NGSI programs over five semesters. As part of the grant requirements, NGSI grantees must submit program evaluation and activity reports following each semester of NGSI activities. Densely populated regions containing large cities such as Dallas, Houston, Austin, and San Antonio have large numbers of NGSI programs. In addition, many NGSI programs have been implemented in the Rio Grande Valley. By contrast, relatively few programs exist in the sparsely populated areas of the northwestern part of the state.

By Texas law (Texas Education Code Chapter 29, Subchapter C 29.086 (a)), students are eligible to participate in NGSI programs if they meet one of the following eligibility requirements:

1. Ninth-grade student that is at risk of earning sufficient credit to advance to grade ten and who fails to meet the minimum skills levels established by the TEA Commissioner.

2. Ninth-grade student that has not earned sufficient credit to advance to grade ten and who fails to meet the minimum skill levels established by the commissioner.

3. Newly promoted ninth-grade student that meets the eligibility requirements established in the Request for Applications (RFA).

NGSI programs offer a range of activities for targeted ninth-grade students. The majority of NGSI districts have adapted existing curricula to better meet the needs of targeted ninth-grade students through the introduction of self-paced computer software and the creation of individualized academic plans. A number of districts offer guided, individualized academic assistance for students, which included tutoring, mentoring, homework assistance, and reading programs.

The significant obstacle for the NGSI program has been the calculation of success. According to TEA, currently there is no student-level data that has been analyzed solely for NGSI participants. Thus, the data provides an incomplete picture of the NGSI impact on targeted students. In addition, NGSI districts provide a variety of activities for targeted ninth-grade students, but the process for project implementation and links between program characteristics and student outcomes have not been examined. Particularly, the self-paced computer software, an essential element of many NGSI programs, has not been researched.

Further research should explore: student performance on end-of-course examinations; performance on TAKS (formally TAAS); and, enrollment and credit accrual in advanced mathematics and English or language arts courses. Future research should examine how districts implement activities, how activities are used, and the impact of activities and programs on student motivation and achievement. This will help identify model programs and best practices for the program that can be replicated across districts.

Instructional Technology

Local school districts wanted to expand on the scope of educational opportunities it offered students by using instructional technology. Districts began to offer electronic courses because virtual courseware was made available at a reduced rate for many school districts. Students involved in instructional technology programs are on the traditional campus full-time and take an extra virtual course.

Most of the students complete class work during the regular school day and the majority of electronic courses are given in a regular classroom. Students spend at least 1 to 3 hours interacting with the coordinating teacher and most instructors communicate approximately 75% of the time in person and 25% of the time through electronic mail. The amount of time a student spends on class-work is documented by on-line reports. The reports generate information including completed instructional modules, the time spent completing each module, and the time and data of log on to the courses. Districts verify that the student receiving credit for the course is the student taking the course by administering exit level tests. The exit level tests are given on-line upon completion of the course. Most school districts that offer instructional technology notify the students, and naturally, interest is generated when students are given the option of completing an on-line course instead of attending regular classroom instruction.

The majority of school districts establish requirements for students taking instructional technology courses. Criteria for selection tends to be based upon if the student has not received course credit due to attendance and grades OR students have not received course credit due to attendance, no passing grade, or are not able to attend regular class due to disciplinary reassignment or illness. Most students selected for the course are high at-risk students. In most instances, the student has excessive absences or has been removed for the regular educational setting.

Alternative education and dropout prevention is the driving factor behind the decision to offer electronic courses. The courses allow these students to have an alternative mechanism for completing courses at their own pace. This alleviates student frustration and will increase successful course completion. The advantage of electronic courses is that students can access courses at any time and repeat learning modules as many times as needed. Additionally, specific areas and objectives can be targeted for remediation or extended practice. Instructional technology provides students with alternative means for credit recovery other than summer school; thus, preventing dropouts.

Senate Bill 975, passed in the 77th Legislative Session, requires the education commissioner to establish instructional technology in school districts by May 1, 2002. The commissioner cannot require school districts to participate in the program, but must allow the participation of school

districts with higher than average numbers of at-risk students and dropout rates. By December 1, 2002, the commissioner must submit a report to the lieutenant governor and the House speaker about the implementation of instructional technology.

The state funding for schools is based on their average daily attendance. SB 975 required districts to have methods to verify student attendance in electronic courses, participation by a specific student, and whether the student completed all required work. However, school districts have found that the most significant challenge with instructional technology is the issue of funding this program. There has been a lack of funds for the staff to be trained in course development and maintenance of Learning Management Software. Also, there has been a lack of money to buy equipment for the program.

Alternative Schools for At-Risk Students

There is a variety of alternative schools for the non-traditional student or pregnant mother in some Texas school districts. These alternative schools are by choice and students are not assigned to the alternative schools for disciplinary reasons. Most alternative schools are created to serve at-risk students between the ages of sixteen through twenty-one or dropout students who are returning to get their GED or diploma.

Circumstances sometimes prevent some students from doing well in a traditional structure. The alternative school recognizes this fact and provides instruction in ways that are matched to the student's way of learning. Students must make the choice to enroll and be committed to earning their diploma or GED. All students enrolled are expected to attend school every day and to make progress in earning credits for graduation.

Generally, students attend school four hours a day using electronic programs with a certified teacher in each classroom. There is individual and computer-aided instruction. Each student is allowed to take two classes each six-week period and there are no semester courses. The classes are usually small and have flexible scheduling. Students are allowed to come to school during the morning or afternoon. Students who attended alternative schools must complete all the state required credits for graduation and pass the Exit Level TAAS test or presently, the TAKS test.

The main problem with alternative schools for large school districts is that the alternative campus does not have enough room to occupy all the students that are applying to attend the school. There are limited resources and generally, the alternative schools have a capacity of 150 students. The enrollment is tailored to the maximum number of students a teacher can effectively teach. Therefore, the enrollments into the schools are limited, but the need is still present. For those who qualify for admission into alternative schools, but enrollment is closed, the student will be placed on a waiting list for future admission.

Charter Schools

Charter schools are independent public schools that do not have the same regulations of traditional public schools. The first Texas charter schools opened their doors in 1996. The state currently allows up to 215 open-enrollment charter schools, plus an unlimited number of university-sponsored

and locally approved charters. The 215 charter schools serve approximately 53,263 students. For the 1999-2000 school year, which provides the latest statistics available, 214 charters were granted and 146 schools were open for the entire year. The student population of charter schools grew 23% in 1999 and 13% in 2000; 77% of the growth in 1999 and 13% of the growth in 2000 was due to the opening of new charters.

According to Texas Education Agency statistics, a Texas charter school student is more likely to be African-American, less likely to be white and more likely to be economically disadvantaged than a traditional public school student. African-Americans comprise 39.7% and whites 20.5% of students enrolled in Texas charter schools, while traditional public schools enroll 14.4% African-Americans and 40.9% whites. Overall, 57.6% of students enrolled in Texas charter schools are economically disadvantaged to the degree that they qualify for federally subsidized lunches, a somewhat higher proportion than the 50.4% who qualify in traditional public schools.

Charter schools are a relatively new phenomenon, and each school is different by design. Consequently, it is difficult to make meaningful comparisons and at least as difficult to make generalizations. However, the available data does permit some evaluations. Current state audits reveal that 23 out of 176 charter schools are considered low performing, while 44 are acceptable, 6 are exemplary, 15 offer insufficient data as of this point, 23 need peer review, and 55 charters schools are new.

The performance of charter school students appears to lag behind that of traditional public school students. Using the latest organized data, from the 2000 Texas Assessment of Academic Skills (TAAS) test of a minimum skills, only 43.1% of charter students passed all the test sections, compared to a state average of 79.9 percent. This comparison does not look positive for charters. However, it is important to keep in mind that charter schools typically have a student population that is more difficult to educate because of their high concentration of at-risk and disadvantaged students. In addition, the reasons students leave their assigned public school and enter charter schools may include poor academic experiences in public schools.

A more efficient way to measure how charter schools prepare students for the future is to examine how test scores change from one year to the next for students who attend the same school for two years in a row. Thus, the education code would need to be modified to include this type of evaluation and the legislature would need to examine the findings of the effectiveness of charter schools. Using this method, researchers can come closer to capturing the effect an individual school has on a student's performance in charter schools.

Disruptive Behavior

In Texas, there are three basic types of placements for a student with disruptive behavior:

(1) In-School Suspension called ISS, which is a low-level discipline offense that requires a short-term removal from a regular class assignment.

(2) Disciplinary Alternative Education Placement Program (DAEP), which is for a higher-level offense and/or persistent misbehavior. The student is placed in DAEP by the principal, reviewed by the disciplinary committee, and returned to regular campus after documented behavioral/academic improvement. Placements are generally between 1 to 15 weeks.

(3) Juvenile Justice Alternative Education Programs (JJAEP) are for the serious level of offenses, which are required by statute in counties with over 125,000 people. School districts are mandated to place students in a JJAEP if they engage in conduct punishable as a felony. Consequently, JJAEPs are required to serve mandatory expulsions and may serve discretionary expulsions as well. The Juvenile Probation Commission has jurisdiction over JJAEPs.

In 1995, the Texas Legislature enacted the Safe Schools Act, which required all school districts to establish an alternative education setting for behavioral management, DAEPs. Also, the legislature mandated that counties with populations of 125,000 or more must implement a Juvenile Justice Alternative Education Program (JJAEPs) to serve expelled and adjudicated youth. Some less populated counties formed their own JJAEPs.

School districts are not only mandated to expel students for certain behaviors; they are also required to provide an educational setting for expelled youth. Students assigned to a DAEP are allowed to continue with core education classes in language arts, mathematics, science, and social studies. The average referral to a DAEP is for 20 days. The Texas Education Agency (TEA) encourages local school districts either to house DAEPs at a separate campus or to create separate instructional settings where referred students can be separated from others on the same campus.

Education Code, Chapter 37, states that students who commit certain high level offenses such as weapon possession, assault, murder, aggravated kidnaping, and indecency with a child while on school premises or at school sponsored activities shall be expelled and when the school district is in a county of more than 125,000 people, the student will automatically be referred to the JJAEP. Students who commit less serious offenses may be expelled at the discretion of individual school districts. Students can be removed from their school and sent to the alternative program if they:

- Engage in conduct punishable as a felony.
- Commit a series of specified serious offenses while on school or at a school-sponsored activity.
- Commit other violations specified in student "codes of conduct" developed by individual school districts.

Most students assigned to DAEPs in Texas are assigned for reasons that are within the discretion of school districts. 73.8% of students placed in DAEPs in 2000-01 were discretionary placements and 23.1% were mandatory placements. The remaining 3.1% of the students removed were expelled for major offenses specified in the state law. Increasing numbers of Texas children and youths are

receiving educational services in alternative education settings. The most recent report from the Texas Education Agency Division of Safe Schools (2001) showed that the number of students who were removed from their home campus to a DAEP rose from 87,560 during the 1997-98 school year to 122,931 during the 1999-2000 school year**.**

The accountability system established for DAEPs in Texas is different from accountability standards for regular schools. The TEA Commissioner must adopt rules necessary to evaluate annually the performance of each district's alternative education program as stated in Chapter 37. Thus, the accountability of DAEPs is not calculated by the uniform standards in the state Academic Excellence Indicator System, but is evaluated by the rules of the TEA Commissioner and the local school districts' ratings. The rules, as in effect, shift accountability back to a student's sending campus.

The 2001 Comprehensive Annual Report on Texas Public Schools provided by TEA states:

> "Even though data quality is improving, staff in the Division of Safe Schools has identified several issues regarding Chapter 37. Problems have been noted in reporting the number of days that students are assigned to DAEPs. In some instances, half-day assignments are not coded correctly; in other instances, students are reported as suspended for periods of time greater than the 3-day maximum allowed by law. Some schools under or over-report the number of students placed in DAEPs."

There is little empirical evidence concerning the success of students placed in alternative education settings. Unfortunately, there are no conclusive studies on the effectiveness of alternative education programs in Texas, since many programs collect little data as it relates to academic programs or discipline. What little data there is seems to validate conventional wisdom. The more often a student gets in trouble, the less the student achieves academically.

The data collected from DAEPs include name, ID number, date of birth, district type, reason for referral, and length of referral. Currently, the state does not require schools to track and report the student's academic progress once they return to their own schools. Alternative accountability systems may only be used on campuses serving pupils referred for 18 weeks or longer. For campuses serving students assigned for less than 18 weeks, data on the TAAS and dropout rates are attributed to the sending campus. The local school district must use at least two of the primary indicators below to measure the effectiveness of a DAEP if students reside at the school for more than 18 weeks:

- TAAS results
- Number of courses passed
- Percent of students passing the GED
- Percent of GED sections passed

- Number of students not retained

Currently, TEA is developing a desk-monitoring system to examine district DAEP programs. The system would help identify data errors, unsatisfactory student performance, disproportionate assignment of student groups, and high levels of recidivism. This system has not yet been implemented.

One possible solution would be to amend Education Code § 37.008(m) to include more data to measure the effectiveness of DAEPs. Suggested data to be collected include: how the student fared academically at the DAEP site; how the student performed when he or she returned to the home campus; pre- and post-test scores on standardized tests; drop-out recovery rates; graduation rates; and credentials of the DAEP staff members. Exploring possible relationships between educational placements and student outcomes can enhance and provide meaningful data to those making placement decisions.

As stated in § 37.008(m), the mission of alternative education programs shall be to enable students to perform at grade level. In order to measure the effectiveness of DAEPs, the state must examine the results once the student returns back to the original school. Plans to improve student achievement must include students who are assigned to alternative education programs, and attempts to raise standards for alternative schools must be designed knowing that these students have not been successful in traditional school settings.

ACTIVELY MONITOR AGENCIES AND PROGRAMS UNDER THE COMMITTEE'S OVERSIGHT JURISDICTION

TEXAS JUVENILE PROBATION COMMISSION

TEXAS YOUTH COMMISSION

TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

OFFICE OF THE ATTORNEY GENERAL
CHILD SUPPORT DIVISION

CRIMINAL JUSTICE POLICY COUNCIL

INTERIM HEARING SUMMARIES

April 25, 2002 Interim Hearing

The committee heard testimony from the following agencies:

- Criminal Justice Policy Council
- Texas Juvenile Probation Commission
- Office of the Attorney General, Child Support Division
- Texas Department of Protective and Regulatory Services
- Texas Youth Commission

Information related to the testimony of the individuals appearing before the committee at this interim hearing is contained in the oversight section of this interim report.

June 20, 2002 Interim Hearing

The committee heard testimony concerning each of its interim charges. Professor John J. Sampson of the University of Texas School of Law provided the committee with an update on the progress of the ad hoc committee on ad litems. Professor Robert O. Dawson, also of the University of Texas School of Law, as well as Elmer Bailey, Executive Director of the Harris County Juvenile Probation Department, addressed the committee regarding the committee's charge concerning the progressive sanctions guidelines. Judge Thomas Stansbury and Harry Tindall testified before the committee regarding gestational agreements. Finally, the committee heard testimony on its fourth charge from Judge Elena Diaz from the Justices of the Peace and Constables Association; Mike Griffiths, Director of the Dallas County Juvenile Department; Elby Wade Hudson of the Alief ISD and Harris County Department of Education; Karen Johnson from the United Way of Texas; Jean McClung from the Fort Worth ISD and Texas Association of School Boards; Judge Leonard Saenz from the Travis County Juvenile Court; and Ryan Turner from the Texas Municipal Courts Education Center.

In addition to the testimony regarding the committee's interim charges, the committee heard invited testimony from Angie Klein from the Texas Department of Public Safety (DPS). Ms. Klein was asked to testify before the committee regarding the status of DPS's efforts to comply with Chapter 58, Subchapter C, Automatic Restriction of Access to Records, of the Texas Family Code.[94] Ms. Klein reported that DPS has four systems that contain juvenile records for which access may be obtained by criminal justice agencies as well as non-criminal justice agencies.

The first is the Automated Fingerprint Identification System (AFIS). Approximately 50,000 fingerprint checks per year are submitted by non-criminal justice agencies. Consequently, DPS has modified the AFIS to indicate when a non-criminal justice agency is submitting fingerprint information. If the person for whom the request was made meets the restriction criteria, the agency receives a "no response" from the DPS.

The second system is the Criminal History File, which receives approximately 1.6 million name checks per year from non-criminal justice agencies. DPS modified the Criminal History File similarly to the AFIS by flagging non-criminal justice agency requests, and if appropriate, sending a "no response." The third means of access is via DPS's secured website. Approximately 10,000 users utilize the website to access record information. Of the 10,000, approximately 1,000 users are non-criminal justice users. DPS modified its website so that the non-criminal justice users could not reach an access level reserved solely for criminal justice agencies.

The final means of records access is through the Federal Bureau of Investigation (FBI) database. The FBI does not have a system in place to automatically restrict access, however, DPS is working with the FBI on a process to have such access restricted. Presently, DPS reviews its records and determines which records should be restricted. DPS then forwards that information to the FBI and those records are manually deleted.

[94] Fam. § 58.201 et seq. (2002)

Ms Klein reported that as of the date of this hearing, there were approximately 107,000 juveniles age 16 and under, for whom they had records. There were approximately 147,000 juveniles age 17 and over for whom DPS had records. Of the 147,000, approximately 44,000 were over age 21 and thus, met the first criteria for restriction. Of the 44,000, Ms. Klein informed the committee that, approximately 15,000 qualified for restricted access.

Ms. Klein indicated that DPS has initiated a process to review all its juvenile records at the end of each month to determine which juveniles will be turning 21 in the next month. If a juvenile meets this criteria, the record is flagged for further review to assess whether the juvenile meets the remainder of the restriction criteria. If all criteria are met, the above-mentioned DPS systems are modified and the FBI is notified of the access restriction.

In addition to the status of restricted access, the committee questioned Ms. Klein on DPS's role regarding the issue of juvenile sex offender de-registration. During the last legislative session, the legislature passed House Bill 1118 (H.B. 1118), which, among other things including the restricted access provision discussed above, provided a mechanism for a juvenile sex offender to have his or her name removed from the sex offender database maintained by DPS.[95] The background for the committee's concern on this issue centered around some practitioners' confusion over the procedural aspects of de-registration.

The law provides that a juvenile seeking de-registration must file a motion with the court seeking such action.[96] The motion requires, to the extent feasible, a list of the public and private agencies and organizations that possess sex offender registration information on that juvenile.[97] In the event that the court grants the motion, a copy of the court's order is required to be sent to each of the agencies and organizations listed in the motion, and those entities are to either delete the information or alter its status to nonpublic, as the order requires.[98] Entities that do not remove a juvenile's name within 30 days from the date of the entry of the order are barred from receiving sex offender information in the future.[99]

In a specific case, a juvenile filed his motion for de-registration, which was subsequently granted by the court. Confusion arose over who was responsible, the court or the juvenile, for sending the court order to the entities listed in a juvenile's motion. Adding to the complexity of the case was the fact that the juvenile's motion listed approximately 77 or so entities that had allegedly obtained

[95] H.B. 1118, 77th Legis. Sess. (2001)

[96] Crim. P. Art. 62.13 (l) (2002).

[97] Crim. P. Art. 62.13 (o) (2002).

[98] Crim. P. Art. 62.13 (q) (2002).

[99] Crim. P. Art. 62.13 (r) (2002).

the sex offender information on that juvenile. Consequently, a sub-issue arose regarding who was responsible for paying for the order's dissemination.[100]

As enacted, the intent of H.B. 1118 was that the clerk of court would be responsible for disseminating the order; however, the drafters of H.B. 1118 admittedly did not contemplate that a juvenile's motion would contain such a large number of entities requiring notification. Furthermore, the drafters did not foresee the extent of the cost issue. Consequently, the committee endeavored to determine how these issues could be rectified.

The original source of sex offender information comes from either the purchase of a copy of the DPS's sex offender database or from the DPS website. DPS sells its database information for $35.00, which covers the administrative cost of recreating the list. DPS generates no revenue from the sale. When the database is purchased, the purchaser receives only the information contained on the database at the particular date in time. A purchaser does not receive updates unless the entire database is repurchased. In other words, if a juvenile offender is either added or deleted the day after the database is purchased, the purchaser will not have that information. There are no limitations on a purchaser's dissemination of the information and there are no requirements for a purchaser to periodically update the information they have received. Consequently, database information is often obtained and re-disseminated, most often in the form of websites that provide such information as a public service.

Although the committee found surprising the number of entities listed in the above mentioned case, the reality is that the dissemination and re-dissemination of this information is very likely, and quite possibly common. Given that this information is an open record, and serves a legitimate purpose, the committee did not believe that any significant statutory modifications could be made regarding the dissemination of this information; however, the committee requested that Ms. Klein explore what DPS could do internally to address the issue of dissemination and re-dissemination of this information.

Regarding the cost issue, three alternatives have been suggested. The first would be to have the clerk of court absorb any expense associated with sending the order. This option was likely the original intent of the legislature; however, that intent was based on the assumption that there would be no more than ten or so entities requiring contact. As illustrated by the case above, this assumption was not accurate and most practitioners agree that requiring the clerk to absorb such a potentially high cost is both unrealistic and unfair.

The second option would be to have the juvenile assume responsibility for the cost. On its face, this seems like a plausible option, given that it is in the juvenile's sole interest to have his or her name removed from the database. However, some practitioners feel that this solution is inequitable because of the re-dissemination aspect of the information. In addition, there is concern that such a

[100] The clerk of court envisioned a de-registration case as analogous to how they handle a sealed records case, in which they send notice by certified mail. The cost associated with sending the order by certified mail to 77 entities was approximated at $900.00.

proposition could lead to increased legal expenses for the juvenile because, in all likelihood, the juvenile's attorney would handle the copying and dissemination of the order.

The final option, and most plausible, is a hybrid of the other two. The clerk would assume responsibility for copying and disseminating the order to all entities on the juvenile's motion. Orders sent to DPS and other law enforcement agencies would be at no cost to the juvenile, while orders sent to the remaining entities would be done for cost. That cost would be assessed to the juvenile's attorney and passed through, in kind, to the juvenile. This option has two obvious benefits. The first is that the original intent of the legislature is satisfied with respect to the entities originally contemplated requiring notification being done by the clerk. Secondly, this will cause the juvenile, or more accurately, the juvenile's attorney, to only include those entities in the motion that truly require notification.[101]

In the upcoming session, the committee anticipates that legislation will be filed to cover the issues addressed above. In addition to the committee's efforts to legislatively address issues arising from sex offender de-registration, Ms. Klein has indicated through correspondence with the committee that DPS will be posting on its website a list of all companies that purchase the sex offender database, as well as the date they purchased it. This should greatly assist juveniles and their attorneys in determining who obtained the information from DPS, thus making it easier for those companies to be contacted for purposes of sending a de-registration order and discovering who that company may have re-disseminated the information to. Additionally, she indicated that DPS, upon notification from a court, would be posting any company's name that did not comply with a court's removal order, consequently putting some teeth in the punishment provision of Article 62.13, Texas Code of Criminal Procedure.

[101] In the case illustrated above, some of the entities listed in the motion included were likely one time purchasers or users of the information, such as newspapers from cities outside the state of Texas. It is speculated that these such entities did not obtain the information for purposes of a specific juvenile, but for a larger story concerning juvenile sex offenders as a whole.

September 12, 2002 Interim Hearing

The committee heard invited testimony from the from the following people:

- Dr. Linda Reyes, Assistant Deputy Executive Director for Rehabilitation Services, Texas Youth Commission
- Vicki Spriggs, Executive Director, Texas Juvenile Probation Commission
- Vernon Newton, Program Manager, Dan Kubiak Buffalo Soldier Program
- Henry Darrington, Director of Prevention and Early Intervention, Texas Department of Protective and Regulatory Services
- Dr. Dave Wanser, Executive Director, Texas Commission on Alcohol and Drug Abuse

In addition to the invited testimony indicated above, Ken Pollard and Kevin Good from the Texas Parks and Wildlife Commission, and Ron Bruno also testified.

Dr. Reyes and Ms. Spriggs provided information to the committee concerning female offender programs offered by their respective agencies. Mr. Newton and Mr. Darrington discussed the status of the Buffalo Soldier Program in Tarrant County; and Dr. Wanser addressed the committee regarding potential statutory changes that would allow the Texas Commission on Alcohol and Drug Abuse to allow for increased services to schools. A complete audio copy of this hearing, as well as all the committee's interim hearings, may be accessed via the following web link: http://www.house.state.tx.us/house/commit/archive/c340.htm