

AMERICAN BAR ASSOCIATION
COMMISSION ON YOUTH AT RISK
COMMISSION ON HOMELESSNESS AND POVERTY
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 RESOLVED, That the American Bar Association urges federal and state legislatures to pass laws
2 and national, state, and local education, child welfare, and juvenile justice agencies to implement
3 and enforce policies that:
4
- 5 1. Help advance the right to remain in school, promote a safe and supportive school
6 environment for all children, and enable them to complete school;
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 - 8 2. Limit exclusion from and disruption of students' regular educational programs as a response
9 to disciplinary problems;
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 - 11 3. Provide full procedural protections, including the opportunity to have representation by
12 counsel in proceedings to exclude students from their regular education program, appropriate
13 provisions of due process in other school disciplinary processes, and implementing
14 disciplinary procedures in a fair, non-discriminatory and culturally responsive manner;
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 - 16 4. Reduce criminalization of truancy, disability-related behavior, and other school-related
17 conduct; and
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 - 19 5. Establish programs and procedures to assist parents, caregivers, guardians, students, and their
20 legal representatives in understanding and exercising student rights to remain in school; and
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- 22 FURTHER RESOLVED, That the American Bar Association urges federal and state legislatures
23 to legally define, and assure standardized on-going monitoring, reporting, and accountability for,
24 measuring graduation rates, school dropout rates, school truancy, and disciplinary violations
25 resulting in student suspensions and expulsions, with data disaggregated by race, disability and
26 other disparately affected populations, and ensure that no group of students is disparately
27 subjected to school discipline or exclusion.

REPORT

Building on the longstanding commitment of the American Bar Association (ABA) to promote the rights of children and youth, including rights that pertain to education-related matters, this recommendation focuses on the right of students to remain in school. While varying statistics have been presented on high school graduation and dropout rates,¹ it is clear that large numbers of students leave school without a diploma and that the numbers are especially large for certain subgroups, including African American and Latino students² and students with disabilities, in particular those identified as having an emotional disturbance.³ This recommendation addresses the need for targeted prevention and intervention programs for students at risk of leaving and for steps to reduce practices that result in students leaving school – whether they are being “pushed out” (through policies and practices that have the byproduct of increasing dropouts), “kicked out” (as a disciplinary measure), or “pulled out” (by criminalization of school-related behavior). This recommendation should be read in conjunction with the ABA recommendations concerning the right to a high-quality education and the right to resume education.⁴

1. Advancing the Right to Remain in School, Promoting a Safe and Supportive School Environment for All Children, and Enabling Them to Complete School

a. The Need for Effective Truancy and Dropout Prevention and Intervention

Under the No Child Left Behind Act (NCLB) of 2001, states are required to report on graduation rates, disaggregated by subgroup populations (low-income status, race/ethnicity, disability, and limited English proficiency) as part of their “adequate yearly progress” (AYP) determinations.⁵ Until recently, states and local districts were using various methods for calculating graduation rates, making it difficult to obtain an accurate assessment of the situation.⁶ In the fall of 2008, the U.S. Department of Education finalized implementing regulations under NCLB, which now require all states to adopt the same method of calculating graduation rates.⁷ At the same time, a

¹ Compare CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., CITIES IN CRISIS: A SPECIAL ANALYTIC REPORT ON HIGH SCHOOL GRADUATION 1 (Apr. 1, 2008) <http://www.americaspromise.org/uploadedFiles/AmericasPromiseAlliance/Dropout_Crisis/SWANSONCitiesInCrisis040108.pdf> (last visited Apr. 9, 2009), with Joydeep Roy & Lawrence Mishel, Econ. Pol’y Inst., *Using Administrative Data to Estimate Graduation Rates: Challenges, Proposed Solutions and Their Pitfalls*, 16 EDUC. POL’Y ANALYSIS ARCHIVES 24 (June 4, 2008) <<http://epaa.asu.edu/epaa/v16n11/v16n11.pdf>> (last visited Apr. 9, 2009).

² See EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., NATIONAL SUMMARY SCHOOL TO COLLEGE: CAN STATE P-16 COUNCILS EASE THE TRANSITION? (SPECIAL SUPPLEMENT TO EDUCATION WEEK’S DIPLOMAS COUNT 2008), at 2 (June 2008) <<http://www.edweek.org/media/ew/dc/2008/40sgb.us.h27.pdf>> (last visited Apr. 9, 2009); Roy & Mishel, *supra* note 2, at 24.

³ CHRISTOPHER B. SWANSON, EDITORIAL PROJECTS IN EDUC. RESEARCH CTR., SPECIAL EDUCATION IN AMERICA: THE STATE OF STUDENTS WITH DISABILITIES IN THE NATION’S HIGH SCHOOLS 20 (Nov. 3, 2008) <http://www.edweek.org/media/eperc_specialeducationinamerica.pdf> (last visited Apr. 9, 2009).

⁴ Portions of this report have been adapted from Joanne Karger, Jenny Chou, & Kathleen B. Boundy, Center for Law and Education, *Dropouts and Push-outs: How School Discipline Policies Are Failing Our Students* (forthcoming).

⁵ 20 U.S.C. § 6311(b)(2)(C)(vi). Graduation rates are defined as “the percentage of students who graduate from secondary school with a regular diploma in the standard number of years.” *Id.*

⁶ See Paul E. Barton, *The Dropout Problem: Losing Ground*, 63 EDUC. LEADERSHIP 14, 14 (Feb. 2006).

⁷ 34 C.F.R. § 200.19(b).

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uniform method for calculating the dropout rate has not been determined.⁸ Important questions relate to whether states should include certain youth in their dropout calculations – e.g., those who are incarcerated and those enrolled in high school equivalency programs.⁹

Despite the challenges associated with the calculation of dropout rates, there is widespread agreement that dropping out results in significant, negative consequences for both the individual and society. Youth who drop out have fewer prospects of obtaining work, and if they succeed in finding employment, they generally are in low-paying jobs that require only low-level skills with limited opportunity for advancement.¹⁰ In 2005, the average annual income for a high school dropout was just two-thirds of that for a high school graduate and only one-third of the average income for an individual with a bachelor's degree.¹¹ Moreover, students who leave high school without a diploma are more likely to be unemployed¹² and are approximately three times as likely to be dependent on welfare.¹³ In addition, students who drop out have higher rates of incarceration.¹⁴ Students who drop out also tend to have a greater number of health problems¹⁵ and are responsible for significant health costs to the states and the nation overall.¹⁶

Not surprisingly, high levels of truancy are a strong predictor of dropping out.¹⁷ Truancy is broadly defined as an unexcused absence from school. The specific number of absences required for a student to be deemed truant varies by state and local school district.¹⁸ Given these varying

⁸ Two common data collection methods are: (1) “event dropout rate,” which calculates the percentage who left school over the course of one school year and (2) “status dropout rate,” which calculates the percentage within a particular age range who left school without a diploma regardless of when they dropped out. See U.S. DEP'T. OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2006, at 1-2 (Sept. 2008) <http://www.dropoutprevention.org/stats/docs/Dropout_Rates-2006.pdf> (last visited Apr. 9, 2009).

⁹ Franklin P. Schargel, *School Dropouts: A National Issue*, in HELPING STUDENT'S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 11 (Jay Smink & Franklin P. Schargel, eds., 2004).

¹⁰ Christine A. Christle, Kristine Jolivet, & C. Michael Nelson, *School Characteristics Related to High School Dropout Rates*, 28 REMEDIAL & SPECIAL EDUC. 325, 325 (2007).

¹¹ JASON AMOS, ALLIANCE FOR EXCELLENT EDUC., DROPOUTS, DIPLOMAS, AND DOLLARS: U.S. HIGH SCHOOLS AND THE NATION'S ECONOMY 11 (Aug. 2008) <<http://www.all4ed.org/files/Econ2008.pdf>> (last visited Apr. 9, 2009).

¹² CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIV., AN ASSESSMENT OF THE LABOR MARKET, INCOME, HEALTH, SOCIAL, AND FISCAL CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL: FINDINGS FOR ILLINOIS ADULTS IN THE 21ST CENTURY 8 (Oct. 2007)

<http://www.clms.neu.edu/publication/documents/An_Assessment_of_the_Consequences_of_Dropping_Out_of_High_School_in_Illinois.pdf> (last visited Apr. 9, 2009).

¹³ U.S. GEN. ACCOUNTING OFFICE, SCHOOL DROPOUTS: EDUCATION COULD PLAY A STRONGER ROLE IN IDENTIFYING AND DISSEMINATING PROMISING PREVENTION STRATEGIES (GAO-02-240), at 4 (2002).

<<http://www.gao.gov/new.items/d02240.pdf>> (last visited Apr. 9, 2009) [hereinafter GAO, SCHOOL DROPOUTS].

¹⁴ CAROLINE WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS: BUREAU OF JUSTICE STATISTICS SPECIAL REPORT 3, t.2 (Jan. 2003)

<http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/20/5a.pdf> (last visited Apr. 9, 2009).

¹⁵ U.S. DEP'T. OF EDUC., *supra* note 8, at 1.

¹⁶ AMOS, *supra* note 11, at 15.

¹⁷ See, e.g., Gary G. Wehlage & Robert A. Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?* 87 TCHRS. C. REC. 374, 380 (1986).

¹⁸ Compare, e.g., CAL. EDUC. CODE § 48260(a) (defining truant as a student who is absent without a valid excuse for 3 days in one school year, or who is tardy or absent for more than 30 minutes without a valid excuse on three occasions in one school year (or some combination)), with WIS. STAT. § 118.16(1) (defining truancy as part or all of

definitions, it is difficult to develop a national picture of the problem or to conduct any meaningful cross-state analyses. As of the 2005-06 school year, NCLB has required state education agencies to report truancy rates to the U.S. Department of Education.¹⁹ The statute, however, does not include a standard definition of truancy.

While the causes of truancy are complex, a number of school factors have been identified, including uninteresting curriculum, lack of engaging instruction, lack of attention to the specific learning needs of students, unwelcoming atmosphere,²⁰ negative attitudes of teachers and/or other students, and inflexibility toward meeting students' cultural needs.²¹ Research has found that truancy is associated with negative outcomes for youth, including dropping out of school, substance abuse, delinquency, and teen pregnancy.²² Truancy rates are highest in urban school districts with large percentages of low-income students and students from racial and ethnic minority backgrounds.²³

In order to combat the large numbers of students leaving school each year and thereby implement the recommendation's call to advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school, enactment of laws and implementation of policies that promote effective truancy and dropout prevention and intervention programs is necessary. Such programs should include an array of school-based programs, wrap-around services, and targeted programs for at-risk youth that encourage them to remain in school and succeed, regardless of age or prior school performance. The "wrap-around" service delivery model involves the implementation of a range of supports and services, including mental health and counseling services, to address the individualized needs of the student and family through a community-based, collaborative process.²⁴ Supports to be considered may include behavioral and reading interventions, community mentors, or basic assistance for families in areas such as housing, childcare, or healthcare.²⁵ Research has shown that the use of an effective wrap-around process can result in improvements in student motivation, attendance, and grade point average as well as fewer disciplinary actions.²⁶

one or more days without notification of the legal cause for the absence, while a habitual truant is a student who is absent without an acceptable excuse for part or all of 5 or more days in a semester).

¹⁹ 20 U.S.C. § 7112(c)(3).

²⁰ Nat'l Ctr. for Sch. Engagement, *Truancy: An Overview in Denver: Prevalence, Effects, and Intervention* (2006) <<http://www.ncjrs.gov/pdffiles1/ojdp/188947.pdf>> (last visited Apr. 9, 2009).

²¹ MYRIAM L. BAKER, JANE NADY SIGMON, & M. ELAINE NUGENT, U.S. DEP'T. OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE JUSTICE BULLETIN, TRUANCY REDUCTION: KEEPING KIDS IN SCHOOL 2* (Sept. 2001) <<http://www.ncjrs.gov/pdffiles1/ojdp/188947.pdf>> (last visited Apr. 9, 2009).

²² *Id.*

²³ See BAKER, SIGMON, & NUGENT, *supra* note 21, at 2-3.

²⁴ See Lucille Eber & C. Michael Nelson, *School-Based Wraparound Planning: Integrating Services for Students with Emotional and Behavioral Needs*, 67 AM. J. OF ORTHOPSYCHIATRY 385, 387-88 (1997).

²⁵ Lucille Eber et al., *Wraparound and Positive Behavioral Interventions and Supports in the Schools*, 10 J. EMOTIONAL & BEHAV. DISORDERS 171 (2002).

²⁶ Eric J. Bruns et al., *Spreadsheets, Service Provides, and the Statehouse: Using Data and the Wraparound Process to Reform Systems for Children and Families*, 38 AM. J. COMMUNITY PSYCHOL. 201, 207 (2006).

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Policies that promote positive relations between faculty and students²⁷ as well as meaningful parent and community involvement²⁸ can also help improve attendance and reduce the likelihood that students will drop out. When teachers create more positive relationships with their students, student motivation, educational persistence, and student achievement improve.²⁹ As a critical component of effective truancy and dropout prevention programs, schools need to provide high-quality professional development for all school personnel,³⁰ including training with respect to culturally responsive pedagogy and discipline practices.³¹

As attempts are made to address the dropout problem, it is critical to understand the link between dropping out and educational program quality in that the vast majority of students who drop out have first experienced academic problems, become disengaged from their classes, and fallen far behind in the credits they need to graduate.³² The relationship between the right to a high-quality education and the right to remain in school is reciprocal. On the one hand, in order to receive a high-quality education, students must be in school. At the same time, a key element for ensuring that students will complete school is providing them with a high-quality educational program.

b. Changing Policies and Practices that Increase the Likelihood of Dropping Out

Behind the ostensibly voluntary decision of a student to leave school lies a variety of policies and practices that can have the effect of “pushing” students out of school by increasing the likelihood that they will drop out.³³ Fulfilling the recommendation’s call for addressing the dropout problem and enabling students to complete their education requires attention to and revision of such policies and practices.

Failing to count all students, including those who have left school or have been retained in grade, when determining the proportion of students who have attained proficiency

The proportion of students who have become proficient on the state’s academic standards has

²⁷ See Sabrina ZirkeI, *The Influence of Multicultural Educational Practices on Student Outcomes and Intergroup Relations*, 110 TCHRS. C. REC. 1141, 1161-62 (2008).

²⁸ See Sam F. Drew, Jr., *The Power of School-Community Collaboration in Dropout Prevention*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 65-77 (Jay Smink & Franklin P. Schargel, eds., 2004); Karen L. Mapp, *Family Engagement*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 99-113 (Jay Smink & Franklin P. Schargel, eds., 2004).

²⁹ ZirkeI, *supra* note 27, at 1161 (internal citations omitted).

³⁰ Mary Reimer, *Professional Development*, in HELPING STUDENT’S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 187-96 (Jay Smink & Franklin P. Schargel, eds., 2004).

³¹ Ana Maria Villegas, *Preparing Culturally Responsive Teachers*, 53 J. TEACHER EDUC. 20 (2002); KATHLEEN A. KING, NANCY J. HARRIS-MURRI, & ALFREDO J. ARTILES, U.S. DEP’T. OF EDUC., CTR. FOR CULTURALLY RESPONSIVE EDUC. SYS., PROACTIVE CULTURALLY RESPONSIVE DISCIPLINE (2006)

<http://www.ncrest.org/Exemplars/exemplar_culturally_responsive_discipline.pdf> (last visited Apr. 9, 2009).

³² MELISSA RODERICK, CLOSING THE ASPIRATIONS-ACHIEVEMENT GAP IMPLICATIONS FOR HIGH SCHOOL REFORM: A COMMENTARY FROM CHICAGO 7 (2006) <http://www.nslc.org/highschools/pdfs/MDRC_CPSstudy.pdf> (last visited Apr. 9, 2009).

³³ Portions of this section are adapted from PAUL WECKSTEIN, CENTER FOR LAW AND EDUCATION, CLOSING THE CIRCLE ON THE RIGHT TO QUALITY EDUCATION (forthcoming).

become a crucial measure of accountability under NCLB that determines whether a school is making “adequate yearly progress” (AYP). Under current state approaches, schools’ proficiency rates are artificially inflated when students who are struggling academically and drop out or are retained in grade are not counted in determining the proportion of the cohort that has become proficient. This practice creates an inaccurate picture and also reduces the likelihood that schools will make efforts to help these students catch up and remain in school with their peers.

A student who is struggling academically is treated as a “liability” if s/he remains in school and fails to show proficiency on the state assessments. If, instead, that student leaves, the liability is taken off the books³⁴ – i.e., the school’s proficiency rate looks better, even though the real proportion of the class that has demonstrated proficiency has not changed. Meanwhile all efforts to help the student become proficient cease. Similarly, if a student is left back, s/he no longer counts in determination of how many of his/her original cohort attained proficiency, likewise creating an inaccurate picture and an incentive for the practice of grade retention, which is associated with continued low achievement and eventually dropping out.³⁵ In contrast, counting the entire cohort, including those who have left school or been left behind, provides a more accurate picture of real proficiency rates, removes incentives to push students out, and creates positive incentives to attend to the achievement of those students most in need of attention.³⁶

Failing to Treat Students Who Must Pass Tests for Promotion or Graduation with Basic Fairness

Students denied promotion or graduation on the basis of their performance on a test, even if they have passed their courses, are at risk of dropping out. Therefore, this recommendation supports adherence to two basic principles of fundamental fairness for the use of high-stakes testing that are required by law³⁷ and widely accepted professional standards for educational testing.³⁸ These

³⁴ Under NCLB, graduation rates are used as an additional, separate measure of AYP in high schools, and, along with regulations to require more uniform, accurate ways of measuring them, there are proposals to create a more uniform standard for adequate progress in them. But even the most ambitious of these proposals will still allow schools to be deemed to be making AYP on graduation rates even though large numbers of students are dropping out. Thus, unlike anything that can be done with the graduation rate alone, the recommendation here will truly mean leaving no child behind.

³⁵ See *infra* notes 39-42 and accompanying text for a discussion of grade retention.

³⁶ This approach will not necessarily cause a dramatic increase in the number of identified schools – on average the true proficiency rates will be lowered by including these children, but so will the annual targets, which are based on the state’s starting point. See 20 U.S.C. § 6111(b)(2)(E).

³⁷ See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS (Dec. 2000) <www.ed.gov/offices/OCR/archives/testing/TestingResource.doc> (last visited Apr. 9, 2009); NAT’L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION (Jay P. Heubert & Robert M. Hauser eds., 1999). The legal principles flow from both the Due Process Clause, in assuring fundamental fairness when denying students of their property and liberty interests in education, and the civil rights requiring that educational institutions receiving federal funds must demonstrate the educational necessity of policies and practices that have a disproportionate impact in terms of race, national origin, disability, or gender (and if there are other means of accomplishing the important educational goals equally well with less disproportionate impact, they must be used instead). Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and 34 C.F.R. § 100.3(b)(2), art 100; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 34 C.F.R. Part 104; and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and 34 C.F.R. Part 99. Cf. C.F.R. § 100, App. B, Part K. See

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principles are as follows: (1) students have received sufficient high-quality curriculum, instruction, and assistance to master the skills/knowledge that the tests seek to measure (it is fundamentally unfair to deny students the means to learn what they are held accountable for mastering); and (2) the assessments provide a fair and accurate determination of each student's mastery and can adequately distinguish between students who have reached sufficient levels of mastery and those who have not, for all students, including students of different races and backgrounds and students with disabilities. These principles are key to scrutiny of practices such as: the use of tests that have not been shown to be a good measure of mastery of the skills and knowledge embedded in state standards; the use of varying definitions of proficiency and cut-off scores based on political considerations; and claims that students who fail these tests have had an adequate opportunity to learn when they are concentrated in the very schools that the state has determined, using the same tests, are not making AYP in enabling students to become proficient.

Rigorous adherence to these two legal and professional principles should not be seen as an unfortunately necessary counterweight to efforts at school reform, but rather as a major tool for stimulating and ensuring reform. By insisting, in this high-stakes context, on good evidence that educational programs actually deliver the elements of a high-quality education that enable mastery of the skills and knowledge students are supposed to learn and that the tests accurately determine whether students have attained them, these principles will help ensure that the reforms in the systems for program delivery and for student assessment are real, not just claimed.

Reliance on Grade Retention as a Response to Students' Academic Struggles

Research has shown that grade retention does not result in improved student achievement and, in fact, is a strong predictor of students' dropping out.³⁹ Students who are retained are more likely to leave school because retention does not address the reasons that the instruction the student had received was ineffective and because retained students, who are older than their classmates, are more likely to feel further disconnected from their peers. One study found that being retained a grade increases the risk of dropping out by 40-50% and that being retained for more than one grade, increases the risk of dropping out by 90%.⁴⁰ Moreover, students from racial and ethnic minorities, male students, and students from low-income backgrounds tend to be retained at significantly higher rates than their peers.⁴¹ In place of grade retention, schools should focus on providing each student with a high-quality education, including the provision of effective instruction and individualized assistance. Preventive and intervention strategies should also be

also *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Brookhart v. Illinois Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Anderson v. Banks*, 540 F. Supp. 761 (S.D. Ga. 1982).

³⁸ AM. EDUC. RESEARCH ASS'N, AM. PSYCHOL. ASS'N & NAT'L COUNCIL ON MEASUREMENT IN EDUC., STANDARDS OF EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999). See also NAT'L COUNCIL ON MEASUREMENT IN EDUC., CODE OF PROFESSIONAL RESPONSIBILITIES IN EDUCATIONAL MEASUREMENT (1995); U.S. DEP'T OF EDUC., *supra* note 37; NAT'L RES. COUNCIL, *supra* note 37.

³⁹ Linda Darling Hammond, *Standards, Accountability, and School Reform*, 106 TCHRS. C. REC. 1047, 1049 (2004); Melissa Roderick, *Grade Retention and School Dropout: Investigating the Association*, 31 AM. EDUC. RESEARCH J. 729, 747 (1994).

⁴⁰ See Franklin P. Schargel, *Who Drops Out and Why*, in HELPING STUDENTS GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 33 (Jay Smink & Franklin P. Schargel, eds., 2004) (internal citation omitted).

⁴¹ Samuel J. Meisels & Fong-Ruey Liaw, *Failure in Grade: Do Retained Students Catch Up?* 87 J. EDUC. RES. 69, 71 (1993).

used to address problems early on before they escalate.⁴²

Failing to Address Credit and Graduation Issues for Highly Mobile Students

Students whose families have moved (including migrant and homeless families) can face severe problems in not having their work properly credited. Because multiple districts within the same state often have different graduation requirements, and because various schools offer different classes and use different methods for calculating credit, highly mobile students often have difficulty obtaining credit for previously-completed work.⁴³ Moreover, even when these students receive the proper credits, these credits may not be counted as core courses for graduation but, rather, may be counted as electives. The denial of credit for highly mobile youth often results in their being retained and becoming older than their grade-level peers.⁴⁴ This recommendation urges that there be a fair way of crediting these students and adjusting for work done elsewhere.

Age Restrictions on the Right to Remain in School

Age restrictions on the right to attend are another type of policy that improperly pushes youth out of school. Students with disabilities have an entitlement under federal law to receive educational services until the age of 22.⁴⁵ Other students, however, are sometimes pushed out when they are unable to complete high school by a certain age.⁴⁶ There are approximately 40 states that have a maximum age limit, beyond which students are not entitled to a free education.⁴⁷ The upper age limit among state statutes ranges from 19 in Montana⁴⁸ to 26 in Texas,⁴⁹ with the average being 21. Even when states allow students to receive an education up until a particular age, school districts sometimes encourage older students who have not yet reached the upper threshold, but who are at risk of bringing down the district's test scores, to withdraw.⁵⁰

Particularly affected by this issue are older students who have been retained, students who have failed several classes, or immigrant students who have had minimal formal education.⁵¹ Because

⁴² See Shane R. Jimerson & Phillip Ferguson, *A Longitudinal Study of Grade Retention: Academic and Behavioral Outcomes of Retained Students Through Adolescence*, 22 SCH. PSYCHOL. QUARTERLY 314, 334-35 (2007); Lynn S. Fuchs & Douglas Fuchs, *A Framework for Building Capacity for Responsiveness to Intervention*, 35 SCH. PSYCHOL. REV. 621, 621 (2006).

⁴³ Legal Center for Foster Care & Education, Am. Bar Ass'n, *Foster Care & Education Q & A: Credit Transfer and School Completion* 1 (2008) <http://www.abanet.org/child/education/publications/qa_credit_transfer_final.pdf> (last visited Apr. 9, 2009).

⁴⁴ *Id.*

⁴⁵ 20 U.S.C. § 1412(a)(1)(A).

⁴⁶ See BETSY GOTBAUM & ADVOCATES FOR CHILDREN, PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES (Nov. 21, 2002) <<http://www.advocatesforchildren.org/pubs/pushout-11-20-02.html>> (last visited Apr. 9, 2009).

⁴⁷ Anthony De Souza, Education Commission of the States, *School Attendance Age Limits* (last modified June 2007) <<http://www.ecs.org/clearinghouse/74/74/7474.pdf>>.

⁴⁸ MONT. CODE ANN. § 20-5-101.

⁴⁹ TEX. EDUC. CODE ANN. § 25.001.

⁵⁰ See JAY SMINK & JOANNA ZORN HEILBRUNN, NATIONAL DROPOUT PREVENTION CENTER/NETWORK, LEGAL AND ECONOMIC IMPLICATIONS OF TRUANCY 11 (2005) <http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dd/ec.pdf> (last visited Apr. 9, 2009).

⁵¹ *Id.*

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interventions for English language learners (ELLs) tend to focus on younger students, the educational needs of older immigrants are often overlooked.⁵² These students have a shorter amount of time in which to gain language fluency while concomitantly trying to master complex material.⁵³ If an ELL arrives in this country at an older age, the student's entitlement to education ends once s/he reaches the upper age limit, even if the student has not had sufficient time to learn English or acquire the knowledge/skills embedded in the state content standards. In this situation, the district is essentially able to "push out" the student. Moreover, even for ELLs who have not yet reached the upper age limit, there is the possibility that districts may informally counsel older students to drop out. It is important for school districts to have adequate interventions to address the educational needs of older immigrant students as well as a sufficient number of qualified personnel. In addition, districts should utilize high-quality, age-appropriate instructional materials to engage these students as active participants in the learning process.

2. Limiting Exclusion from and Disruption of Students' Regular Educational Programs as a Response to Disciplinary Problems

This recommendation urges schools to limit the use of exclusion as a disciplinary response to problematic behavior. Removing a student from his/her educational program through suspension or expulsion, when the student's behavior is not substantially likely to cause injury to self or others, runs counter to the goal of schools to ensure that all students receive a high-quality education aligned with challenging state standards. In fact, research has found that suspension is associated with poor academic achievement and grade retention.⁵⁴ Moreover, once students are suspended, they may develop low self esteem, feel alienated from their peers, and have negative attitudes about school.⁵⁵ For disengaged students, exclusion rewards the desire not to attend school, and the practice results in students' missing important classroom instruction, falling even further behind in their work, and ultimately dropping out of school.⁵⁶ Exclusion may also contribute to students' involvement in delinquency by providing them with extra time without adult supervision, during which they can become targets for gang recruitment and other problems.⁵⁷ Research suggests that using exclusion as a means of punishment is ineffective in

⁵² Erica Higgs, *Specialized High Schools for Immigrant Students: A Promising New Idea*, 34 J.L. & EDUC. 331, 331-32 (2005).

⁵³ JORGE RUIZ-DE-VELASCO & MICHAEL FIX, *OVERLOOKED & UNDERSERVED: IMMIGRANT STUDENTS IN U.S. SECONDARY SCHOOLS* 45 (The Urban Institute, 2000) <<http://www.urban.org/UploadedPDF/overlooked.pdf>> (last visited Apr. 9, 2009).

⁵⁴ See Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE* 26 (Johanna Wald & Daniel J. Losen, eds. 2003) (internal citations omitted). See also Lawrence M. DeRidder, *How Suspension and Expulsion Contribute to Dropping Out*, 56 EDUC. DIGEST 44-47 (Feb. 1991).

⁵⁵ See COMMISSION FOR CHANGE IN THE OAKLAND PUB. SCHS., *CHILDREN IN SCHOOL: SOUNDING THE ALARM OF SUSPENSIONS* 11 (Aug. 1992), available in ERIC, ED No. 350680.

⁵⁶ See AM. PSYCHOL. ASS'N, *ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS* 5, 49-50 (2006) <<http://www.apa.org/releases/ZTTFReportBODRevisions5-15.pdf>> (last visited Apr. 9, 2009); Ruth B. Ekstrom *et al.*, *Who Drops Out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 563 (1986).

⁵⁷ Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 376 (1999).

helping students change problematic behavior or in making schools safer.⁵⁸ Because of the significant, negative effects of exclusion and the disruption of the student's educational program, the use and educational impact of exclusions should be limited in the following manner:

a. Implementing Evidence-Based Preventive School-Wide Practices for Improving Student Behavior and Creating a Safe School Climate More Conducive To Learning

Research has highlighted the effectiveness of school-wide proactive and positive approaches to avoid problematic behavior as opposed to approaches that are reactive and punitive in nature.⁵⁹ School-wide programs that promote a safe learning environment⁶⁰ and target bullying and aggression have also been found to reduce behavior problems, vandalism, and delinquency.⁶¹ In addition, schools should emphasize the development of appropriate behavioral intervention plans (BIPs) for students exhibiting behavioral challenges. BIPs specify strategies, interventions, supports, program modifications, and supplementary aids and services that will help the child improve challenging behavior and become more successful in school.⁶² Under current federal law, schools are required to develop a BIP based on a functional behavioral assessment (FBA) for a child with a disability when it has been determined that the child's violation of a school rule has been a manifestation of his/her disability.⁶³ Schools should likewise be encouraged to develop such a plan for *any* student whose challenging behavior places him/her at risk of being removed from his/her learning environment. Furthermore, schools should consider using "restorative justice" practices, according to which all those affected by an alleged incident are involved in determining a resolution.⁶⁴ The use of restorative justice in schools focuses on repairing relationships and involving the school community, and may include practices such as peer mediation, classroom circles, and family group conferences.⁶⁵

b. Restricting Exclusion Offenses to Those That Are the Most Serious or Dangerous and Cannot Be Handled Without Such Exclusion

First, it is recommended that exclusion from a student's regular education program be limited to those most serious or dangerous offenses that cannot be handled without such exclusion. As

⁵⁸ Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, in HANDBOOK OF CLASSROOM MANAGEMENT: RESEARCH, PRACTICE, AND CONTEMPORARY ISSUES 1063, 1071-72 (Carolyn M. Evertson & Carol S. Weinstein, eds., 2006). 9

⁵⁹ See, e.g., George Sugai et al., *Applying Positive Behavior Support and Functional Behavioral Assessment in Schools*, 2 J. OF POSITIVE BEHAV. INTERVENTIONS 131, 133 (2000).

⁶⁰ Ronald D. Stephens, *Creating Safe Learning Environments*, in HELPING STUDENT'S GRADUATE: A STRATEGIC APPROACH TO DROPOUT PREVENTION: 15 RESEARCH-BASED STRATEGIES FROM THE NATIONAL DROPOUT PREVENTION CENTER/NETWORK 79-95 (Jay Smink & Franklin P. Schargel, eds., 2004).

⁶¹ JAMES ALAN FOX ET AL., FIGHT CRIME: INVEST IN KIDS, *BULLYING PREVENTION IS CRIME PREVENTION* 1-2 (2003) <<http://www.fightcrime.org/reports/BullyingReport.pdf>> (last visited Apr. 9, 2009).

⁶² See ROBERT A. GABLE ET AL., ADDRESSING STUDENT PROBLEM BEHAVIOR—PART III: CREATING POSITIVE BEHAVIORAL INTERVENTION PLANS AND SUPPORTS 5 (2000), available in ERIC, ED No. 443 245.

⁶³ 20 U.S.C. § 1415(k)(1)(F)(i).

⁶⁴ See, e.g., SMALL SCHS. PROJECT, DISCIPLINE APPROACHES (2004), www.smallschoolsproject.org/PDFS/Planning_Resources/winter2004/winter2004-discipline.pdf.

⁶⁵ Carol Chmelynski, *Restorative Justice for Discipline with Respect*, 25 SCH. BD. NEWS 5 (2005) <<http://www.nsba.org/HPC/Features/AboutSBN/SbnArchive/2005/May2005/Schoolsfind%e2%80%98restorativejusticemoreeffectivethanexpulsion.aspx>> (last visited Apr. 9, 2009).

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stated in the 2001 ABA Report, harsh zero tolerance discipline policies lead school administrators to utilize a one-size-fits-all model, according to which all disciplinary incidents – both minor and major – are treated with the same degree of severity.⁶⁶ Although the purpose behind such policies is to remove students perceived as violent and dangerous, in actuality the majority of school-based incidents for which students are excluded relate to minor disciplinary offenses such as tardiness, absenteeism, disrespect, and altercations between students.⁶⁷

c. Requiring Use of Other Preventive and Supportive Interventions to Resolve Disciplinary Issues Prior to Exclusion. (Note: While a. deals with positive schoolwide approaches to reduce discipline issues, this calls for positive approaches when they arise.)

Because disciplinary exclusions should be limited to those incidents that are narrowly defined as *the most* serious or dangerous, schools should be required, prior to removing a student from his/her regular program, to try other preventive and supportive interventions. Such interventions, which are varied in nature, can be provided in a small group setting (e.g., social skills training); on an individualized basis (e.g., a behavioral contract or self-management strategies); or for the entire class (e.g., a timeout or differential reinforcement).⁶⁸ The goal should be for schools to reconceptualize discipline in a manner that, to the greatest extent possible, avoids exclusion.

d. Minimizing the Length and Educational Impact of Exclusions

To offset the significant consequences associated with exclusion, laws and policies should limit the length of time and educational impact of exclusion once the decision has been made to remove a student from his/her regular educational program for alleged disciplinary violations. For all periods of exclusion, regardless of the length, students should be provided every opportunity to complete missed class work, homework, or exams. Furthermore, such exclusions should take place within the school building when the student's continued presence does not constitute a danger. For example, the use of in-school suspensions can allow students to remain in school and receive in-school academic tutoring and support in those limited instances when a student is unable to return immediately to his/her regular classroom after a serious disciplinary incident. Students receiving in-school suspensions should also be provided instruction in skill-building related to the behavioral problem or to conflict resolution, including de-escalation strategies and peer mediation, as well as effective academic assistance.⁶⁹

e. Assuring that Each Excluded Child is Provided High-Quality Education During Exclusion Periods and Given Aid in School Reintegration

In order to ensure that students do not fall further behind in their coursework during periods of exclusion from their regular program, during such times students be provided access to a high-quality education. Above it was recommended that exclusion take place within the school

⁶⁶ AM. BAR ASS'N (ABA), ZERO TOLERANCE POLICY REPORT (2001) <<http://www.abanet.org/crimjust/juvjus/zerotolreport.html>> (last visited Apr. 9, 2009).

⁶⁷ Skiba & Peterson, *supra* note 64, at 373.

⁶⁸ See Frank M. Gresham, *Current Status and Future Directions of School-Based Behavioral Interventions*, 33 SCH. PSYCHOL. REV. 326, 330 (2004).

⁶⁹ See Russell J. Skiba *et al.*, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317 (Dec. 2002).

building where the student's continued presence does not constitute a danger and that the student be given the opportunity to complete any missed class work, homework, or exams. This complementary recommendation is to ensure that high-quality education, and not merely the capacity to make up work and exams, be provided during exclusion, whether or not the exclusion takes place in the school building. It is also consistent with the accompanying ABA recommendation concerning the right to a high-quality education. In addition, it recognizes that students who have been out of school will need help in reintegrating.

f. Prohibiting Use of School Exclusion as a Response to Truancy

Many schools have policies authorizing the suspension and further exclusion from learning opportunities of truant youth, who most likely are already behind in their work. Moreover, in many school districts, students are denied course credit and given a mandatory class failure after a certain number of unexcused absences in a marking period. Such an approach is counterproductive because it essentially removes any incentive for the student to return to class and hand in assignments.⁷⁰ As described earlier, research has found that a number of school-related factors are associated with the likelihood that a student will become truant, including lack of engaging curriculum and/or instruction, lack of attention to students' learning needs, unwelcoming climate, and inflexibility toward students' cultural needs.⁷¹ Given the illogic of punishing truant behavior through disciplinary exclusion, the use of exclusion as a response to truancy should be eliminated.

3. Providing Full Procedural Protections in Exclusion Proceedings and Appropriate Due Process in Other School Disciplinary Processes, and Implementing Disciplinary Procedures in a Fair, Non-Discriminatory and Culturally Responsive Manner

Because exclusion negatively impacts the academic performance of students and can ultimately lead them to drop out, this recommendation urges that students be afforded full procedural protections in any disciplinary proceedings that could result in exclusion from their regular education program. Ensuring such protections in expulsion proceedings was a focus of the IJA/ABA *Juvenile Justice Standards* on "Schools and Education," which included the following:

1. Prior to a private hearing before an impartial hearing officer or tribunal, the student has a right to written notice of the charge(s) against him or her that is received long enough before the hearing to enable the student to prepare a defense;
2. At the hearing, the student is entitled to be represented by counsel, to present and hear evidence, cross-examine witnesses, make oral and written arguments and obtain a record of the proceedings; and
3. The student is entitled to a decision made by an impartial decision maker, based on the facts and evidence presented at the hearing and has a right to judicial review of the final decision.⁷²

Affording students the opportunity to be represented by counsel helps to "improve the fairness

⁷⁰ See SMINK & ZORN HEILBRUNN, *supra* note 50, at 20-21.

⁷¹ See *supra* notes 20-21.

⁷² IJA/ABA *Juvenile Justice Standards* "Standards Relating to Schools and Education," Standard 5.3 (1982).

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and overall quality of the hearing,” helps ensure that the evidence is presented in a logical and appropriate manner, and facilitates an effective process for questioning witnesses and making legal arguments.⁷³ A number of states require by statute that students have the opportunity for representation when charged with certain offenses that may result in their removal from school.⁷⁴

Recent case law has affirmed the right to counsel for students in truancy proceedings affecting the youth’s rights to liberty, privacy, and education.⁷⁵ Similarly the ABA, through its “Civil Gideon” policy, has affirmed the need for a civil right to counsel in areas of basic human need. Access to counsel in proceedings that can lead to school exclusion can make a critical difference in terms of a student’s successful completion of education. For parents with adequate financial means, it would not be unusual to find counsel representing students at school exclusion hearings. For those families unable to afford counsel for their child, there should be access to counsel without cost. Unfortunately, there is a scarcity of legal counsel available to represent low-income youth, who are primarily urban and minority students, in school expulsion hearings, despite the fact that these students are disproportionately affected by suspensions/expulsions.⁷⁶

While the IJA/ABA standards focused on expulsion hearings, this recommendation urges that full procedural protections be extended to students in every disciplinary proceeding that could result in an exclusion from the regular education program, regardless of the length of removal – particularly in light of the core principle that the only time such exclusions should be considered is for the most serious or dangerous offenses. One of the shortcomings of the U.S. Supreme Court’s decision in *Goss v. Lopez* pertained to the fact that the case did not explicitly state that a student is entitled to a full hearing for short-term removals (i.e., less than 10 school days); rather, the case merely stated that, in such instances, the student is entitled to “an opportunity to be heard.”⁷⁷ As a result, principals often implement a low threshold of due process for short-term removals. Finally, given the significant loss of educational opportunity associated with exclusion, it is recommended that the school district bear both the burden of production (i.e., coming forward with the evidence) and burden of persuasion (i.e., convincing the impartial hearing officer that the allegation is true) in all such disciplinary proceedings.⁷⁸

4. Reducing Criminalization of School-Related Behavior

While recognizing that there are times when police and court involvement become necessary, this recommendation targets three areas in which the criminalization of school-related behavior

⁷³ *Id.* at 114-15.

⁷⁴ See CAL. CODE § 48918(b)(5)(expulsion); KAN STAT. ANN. § 72-8903(a)(1)(suspension and expulsion); MASS. GEN. LAWS CH. 71, §§ 37H (expulsion and appeal of expulsion for possession of dangerous weapon or controlled substance, or for assault on school staff), 37H ½ (appeal of suspension for issuance of felony complaint or felony delinquency complaint, and appeal of expulsion for felony conviction, or adjudication or admission in court of guilt); MINN. STAT. § 121A.47, subd. 2(f)(1)(exclusion and expulsion); N.Y. EDUC. LAW § 3214.3.c (suspension in excess of 5 school days); OHIO REV. CODE ANN. § 3313.66(D)(appeal of expulsion or suspension); WIS. STAT. § 120.13(1)(c)3 (expulsion). It is important to keep in mind that there is no uniform definition of suspension or expulsion; different states and school districts attach different meanings to these terms.

⁷⁵ See *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010, 1017 (Wash. Ct. App. 2009).

⁷⁷ 419 U.S. 565, 579 (1975).

⁷⁸ 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 409 (5th ed. 1999).

should be reduced. First, this recommendation seeks to reduce the criminalization of truant behavior. Although much has been written criticizing the use of truancy officers and juvenile courts to address truancy,⁷⁹ many jurisdictions continue to treat truancy as a status offense. There is little evidence, however, that juvenile courts succeed in rehabilitating truant youth.⁸⁰ Rather, such youth have the potential to become repeat offenders or to engage in adult criminal behavior.⁸¹ Moreover, juvenile court involvement results in youths' receiving a juvenile court record, raising serious implications with respect to future employment and educational opportunities.⁸² Examples of truancy diversion programs that have been found to be effective include community truancy boards, through which community volunteers help negotiate agreements between schools, students and families, as well as youth courts, through which truant youth appear before a court run by their peers.⁸³

Second, this recommendation urges the promotion of policies that reduce the criminalization of disability-related behavior. Schools too often criminalize the behavior of students with disabilities by making inappropriate referrals to law enforcement authorities rather than addressing the behavior as an educational issue. Although the 1997 reauthorization of IDEA added a provision stating that "[n]othing in this part shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities...,"⁸⁴ such referrals cannot be made in an effort to circumvent the obligations of the school district.⁸⁵ Under IDEA, the school is required to address the behavior of students with disabilities by providing appropriate special education and related services that meet students' individualized needs.⁸⁶ Referral of a student with a disability to law enforcement for school-related behavior may also implicate the student's rights under Section 504 of the Rehabilitation Act of 1973.⁸⁷

Third, this recommendation urges the promotion of policies that reduce the criminalization of other school-related conduct that can be handled within the school's disciplinary system. In recent years, the increased presence of law enforcement officers on school grounds has led to arrests of students for minor infractions and has raised constitutional concerns regarding the questioning of students and the searching of students' personal items.⁸⁸ The New York Civil Liberties Union has reported that between 2005 and 2007, approximately 300 students under the

⁷⁹ See, e.g., Gordon Bazemore, Leslie A. Leip, & Jeanne Stinchcomb, *Boundary Changes and the Nexus between Formal and Informal Social Control: Truancy Intervention as a Case Study in Criminal Justice Expansionism*, 18 N.D. J. L. ETHICS & PUB POL'Y 521, 540 (2004) (internal citations omitted). See also Michael A. Lindstadt, *Employing Mediation to Approach Truants*, 43 FAM. CT. REV. 303, 307-08 (2005).

⁸⁰ Lindstadt, *supra* note 86, at 307-08.

⁸¹ *Id.* at 308 (quoting Cleveland Bar Ass'n President, *FROM THE PRESIDENT, Tackling Truancy* (Feb. 2002)); see also Tom Gavin, *Truancy: Not Just Kids' Stuff Anymore*, FBI LAW ENFORCEMENT BULLETIN (Mar. 1997) <http://findarticles.com/p/articles/mi_m2194/is_n3_v66/ai_19545728/> (last visited Apr. 9, 2009).

⁸² Lindstadt, *supra* note 86, at 308.

⁸³ NAT'L CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, *REDUCING TRUANCY: PREVENTION BRIEF* <http://www.promoteprevent.org/Publications/center-briefs/Truancy_Prevention_Brief.pdf> (last visited Apr. 9, 2009).

⁸⁴ 20 U.S.C. § 1415(k)(9)(A) (1997) (current version at 20 U.S.C. § 1415(k)(6)(A) (2008)).

⁸⁵ 143 CONG. REC. S4403 (May 14, 1997) (statement of Sen. Harkin).

⁸⁶ See *Morgan v. Chris L.*, 1997 U.S. App. LEXIS 1041, *16 (6th Cir. 1997).

⁸⁷ 29 U.S.C. § 794(a).

⁸⁸ N.Y. CIVIL LIBERTIES UNION, *CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 16-18* (2007) <http://www.aclu.org/pdfs/racialjustice/overpolicingschools_20070318.pdf> (last visited Apr. 9, 2009).

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age of 16 in the New York City Public Schools were arrested on school grounds for minor, non-criminal violations such as trespassing or loitering.⁸⁹ In place of the criminalization of school-related conduct, schools should treat student behavior as an education issue and provide training to school personnel on a variety of topics, including child and adolescent emotional and cognitive development and culturally responsive discipline.

5. Establishing Programs and Procedures to Help Parents, Students, and their Legal Representatives Understand the Rights of Students to Remain in School

Awareness by youth and their parents and representatives of the right of students to remain in school is an important part of securing that right. Without this awareness, large numbers of students will continue to leave school as a result of policies/practices that increase dropouts, disciplinary exclusions, and the criminalization of school-related behavior. Greater understanding on the part of students, parents, and representatives of their legal rights will facilitate the early identification of problematic school practices before the effects of such practices become exacerbated. Moreover, it is important for students and their parents and representatives to understand the interrelationship between the right to remain in school and the right to a high-quality education. In order to secure the right to remain in school, it is necessary for the right to a high-quality education within that school to be concomitantly enforced.

Defining and Assuring Standardized On-Going Monitoring, Reporting, and Accountability for Rates of Graduation, Dropout, Truancy, and Disciplinary Violations, with Data Disaggregated by Race, Disability and Other Disparately Affected Populations, and Ensuring that No Group is Disparately Subjected to School Discipline or Exclusion

Finally, this recommendation promotes the adoption of national definitions of dropout and truancy that will prevent states from allowing certain students to slip through the cracks. In addition, there is a need for improved systems to collect and analyze data on graduation rates, dropout rates, school truancy, and disciplinary code violations. Requiring the accurate collection and analysis of these data will lead to better oversight and accountability through more effective monitoring of policies/practices that result in students' leaving school. In addition, such improved data measures will enable individual schools, local districts, and states to evaluate their own practices and to develop targeted interventions that address potential problem areas. These data should be disaggregated by race, disability, and other subgroups in order to monitor the extent to which such populations are disproportionately impacted by unfair policies/practices.

The harmful effects of school exclusion are particularly disturbing in light of the fact that research has long highlighted the disproportionate impact of school discipline policies on students of color, in particular African American males. A recent report has indicated that African American males receive out-of-school suspensions at nearly three times the rate as white, non-Hispanic male students.⁹⁰ Moreover, research has shown that students of color tend

⁸⁹ Letter from Arthur Eisenberg, Legal Dir., N.Y. Civil Liberties Union and Catherine Kim, Attorney, Am. Civil Liberties Union, to Raymond Kelly, Comm'r, N.Y.C. Police Department (Oct. 7, 2008) <http://www.nyclu.org/files/16_Kelly_letter_10.07.08.pdf> (last visited Apr. 9, 2009).

⁹⁰ SCHOTT FOUND. FOR PUB. EDUC., GIVEN HALF A CHANCE: THE SCHOTT 50 STATE REPORT ON PUBLIC EDUCATION AND BLACK MALES (NATIONAL SUMMARY, 2008) <<http://blackboysreport.org/node/15>> (last visited Apr. 9, 2009).

to be disproportionately charged with minor offenses such as disobedience and disrespect, which are subjective in nature and allow for the introduction of racial bias.⁹¹

Students with disabilities are also disproportionately affected by suspensions and expulsions, often for behavior that is related to their disability, in violation of the Individuals with Disabilities Education Act (IDEA). A recent longitudinal study found that 33% of students with disabilities had been suspended or expelled at some point during their school careers.⁹² In addition, students identified as having an emotional disturbance (ED) were found to be significantly more likely than students in any other disability category to be suspended or expelled. Sixty-three percent of students with ED had experienced disciplinary action in one school year, with the average being seven discipline incidents per student.⁹³

Additionally, foster children have been shown to be more likely to be suspended or expelled. One study found that 67% of foster care youth had been suspended from school at least once.⁹⁴ Foster children are also more likely to be identified as eligible for special education services because of ED.⁹⁵ Moreover, children growing up in a home at or below the poverty level have been found to be more likely to be suspended/expelled than their peers.⁹⁶ Because of the strong evidence to suggest that students from certain subgroups are most affected by disciplinary exclusion and because of the harmful effects that this exclusion can have on the future life experiences of students, this recommendation urges the implementation of policies/practices that ensure that certain subgroups of students are not disparately subjected to school discipline.

Conclusion

A prior ABA policy from February, 1995 recommended that school districts utilize curricula on dispute resolution and school-based peer mediation. Similarly, an ABA policy from February, 2001 supported the principles that school officials exercise sound discretion in cases involving problematic student behavior, that schools develop alternatives to expulsion or court referral, and that "zero tolerance" policies be opposed. The recommendation presented in this report builds on these prior efforts by encouraging law and policy change that will help students remain in school, promote a safe and supportive school environment, and enable students to complete school.

Laura Farber, Chair
ABA Commission on Youth at Risk
August 2009

⁹¹ CIVIL RIGHTS PROJECT, HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 7 (2000).

⁹² SRI INTERNATIONAL, NATIONAL LONGITUDINAL TRANSITION STUDY 2, FACTS FROM NLTS2: SCHOOL BEHAVIOR AND DISCIPLINARY EXPERIENCES OF YOUTH WITH DISABILITIES 3 (Mar. 2006)
 <http://www.nlts2.org/fact_sheets/nlts2_fact_sheet_2006_03.pdf> (last visited Apr. 9, 2009).

⁹³ *Id.*

⁹⁴ Nat'l Working Group on Foster Care and Educ., *Educational Outcomes for Children and Youth in Foster and Out-of-Home Care: Fact Sheet 2* (Oct. 10, 2006)
 <http://www.fostercaremonth.org/GetInvolved/Toolkit/Support/Documents/Educational_Outcomes_and_Foster_Care.pdf> (last visited Apr. 9, 2009).

⁹⁵ *Id.* at 4.

⁹⁶ Comm. on Sch. Health, A.m. Academy of Pediatrics, *Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003).

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GENERAL INFORMATION FORM

Submitting Entity: The ABA Commission on Youth at Risk

Submitted By: Laura Farber, Chair

1. Summary of Recommendation(s).

The recommendation calls for improving laws and implementing and enforcing policies that will help advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school, by affirmatively addressing problems leading to students leaving school through dropping out, being excluded for disciplinary reasons, or being removed by criminal justice authorities.

2. Approval by Submitting Entity.

The Commission on Youth at Risk voted to approve this recommendation on April 21, 2009 at its Spring meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

There are no existing Association policies that are relevant to this recommendation that would be affected by its adoption. The following are existing recommendations that address discipline, safety and education.

Corporal Punishment in Child Care & Education Institutions (JULY 1985)

BE IT RESOLVED, that the American Bar Association opposes the use of corporal punishment in institutions where children are cared for or educated and urges that state laws which permit such corporal punishment be amended accordingly.

BE IT FURTHER RESOLVED, that the Association does not oppose such force as is reasonable and necessary to quell a disturbance threatening physical injury to persons or property, to remove a child causing a disturbance who refuses to cease or to leave when so ordered by the authority, or to obtain possession of weapons or other dangerous objects upon the person or within the control of the child. In addition, the use of accepted educational techniques and treatment approaches used as behavior modification for seriously disabled children does not constitute corporal punishment.

School-Based Dispute Resolution & Peer Mediation Programs (FEBRUARY 1995)

BE IT RESOLVED, that the American Bar Association recommends and encourages school boards and school administrators to incorporate, into their elementary through high schools, (1) curricula on dispute resolution for all students and (2) school-based peer mediation programs.

School Discipline "Zero Tolerance" Policies (FEBRUARY 2001)

RESOLVED, That the American Bar Association supports the following principles concerning school discipline:

1. Schools should be safe places for students to learn and develop.
2. In cases involving alleged student misbehavior school officials should exercise sound discretion that is consistent with principles of due process and considers the individual student and the particular circumstances of misconduct; and
3. Alternatives to expulsion or referral for prosecution should be developed that will improve student behavior and school climate without making schools dangerous; and

FURTHER RESOLVED, That the American Bar Association opposes principle, "zero tolerance" policies that mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the students history.

School Violence Prevention (FEBRUARY 2004)

RESOLVED, that the American Bar Association encourages federal, state, territorial and local governments to adopt legislation that promotes school violence prevention education, instruction, awareness training and programs for children, parents, teachers and school administrators; FURTHER RESOLVED, That the American Bar Association encourages lawyers to support school violence prevention education in schools and community settings by volunteering time after having received any necessary training or contributing resources to promote programs that help prevent violent acts by children through encouraging smart decisions and timely, appropriate resolution of conflict.

5. What urgency exists which requires action at this meeting of the House?

Congress will be considering significant public education reforms as a priority of the new Administration, and state education reform is happening now because the public is placing a higher importance on public school improvement, quality education and graduation. In addition, the entire Elementary and Secondary Education Act of 1965, including the largest federal education program, Title I, and many others, is due for reauthorization and is a critical potential vehicle for reform.

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6. Status of Legislation. (If applicable.)

Many bills have been submitted in Congress dealing with various aspects of elementary and secondary education that relate in some way to the subject matter of this recommendation, including many proposed as amendments to the Elementary and Secondary Education Act of 1965, which is due for reauthorization, we are not aware of any that encompass the particular recommendations themselves.

7. Cost to the Association. (Both direct and indirect costs.)

There are no direct or indirect costs.

8. Disclosure of Interest. (If applicable.)

Not applicable.

9. Referrals.

State and Local Government Law
Individual Rights and Responsibilities
Family Law Section
Young Lawyers Division
Criminal Justice Section
Commission on Homelessness and Poverty
Standing Committee on Public Education
Center for Human Rights
Council on Racial and Ethnic Justice
Commission on Women in the Profession
Section of Administrative Law
Government and Public Sector Lawyers Division

10. Contact Person. (Prior to the meeting.)

Alisa Santucci, Staff Director
Commission on Youth at Risk
Office: 202-662-1518
Cell: 240-476-0353
santucca@staff.abanet.org

11. Contact Person. (Who will present the report to the House.)

Laura Farber, Chair Commission on Youth at Risk
Office: 626-796-9123
Cell: 818-516-8621
Email: lfarber@hahnlawyers.com

EXECUTIVE SUMMARY

1. Summary of the Recommendation

The recommendation calls for improving laws and implementing and enforcing policies that will help advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school, by affirmatively addressing problems leading to students leaving school through dropping out, being excluded for disciplinary reasons, or being removed by criminal justice authorities.

2. Summary of the Issue that the Resolution Addresses

Large numbers of students leave school without graduating. Many drop out, seemingly voluntarily, but typically after a long period of falling behind and becoming increasingly disconnected; others are kicked out for school disciplinary offenses; while still others are pulled out through incarceration or institutionalization. This school-leaving comes at enormous cost both to their own opportunities for careers and further education and to society.

3. Please Explain How the Proposed Policy Position will Address the Issue

This recommendation, in tandem with the recommendation for ensuring every child's right to a high-quality education that is meaningful and engaging, addresses the multiple causes for school leaving. To stem the tide of students dropping out, the recommendation calls for laws and policies supporting effective truancy and dropout prevention and intervention programs; and for changing various education policies that, inadvertently or otherwise, tend to push youth out of school. To reduce students being removed from school under as a result of either school disciplinary action or involvement of police and the courts, the recommendation calls for laws and policies that result in adoption of positive schoolwide practices that improve behavior and create a safe school environment conducive to learning; limit as much as possible the use of, and the educational impact of, exclusion from students' educational programs as a response to disciplinary problems; improving procedural protections, fair and non-discriminatory treatment, and data collection and monitoring; reducing criminalization for truancy, disability-related behavior, and other school-related conduct that can be handled within the school. To address both sets of issues, the recommendation calls for programs and procedures to help students and their families in understanding their rights to remain in school.

4. Summary of Minority Views

No opposition to this recommendation has been identified.