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Counsel Assist With Report That Alters Education Code

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Scott Fletcher isn't ready to hang a mission accomplished banner yet.

"There is still a long way to go," says the partner in Houston's Vinson & Elkins.

But during the recent 80th legislative session, Fletcher, 50 other Texas lawyers working pro bono and three nonprofit organizations that usually work on opposite sides of the political spectrum joined forces to persuade Texas lawmakers to reform some of the state statutes governing how public schools discipline their students.

As legislators left Austin last month, the coalition could claim considerable success: getting at least three significant reform bills passed and sent to the governor for signing.

The lawyers' pro bono efforts involved extensive interviews of school administrators, parents and students around the state that led to the development of an anecdotal and statistical picture of how Texas public schools discipline students. The research led to the May 17 release of a preliminary report outlining widely used, sometimes questionable disciplinary practices in Texas public schools, all of which the existing Texas Education Code allows.

The code, for example, permits school districts to send students who violate school rules — such as chewing gum or slamming lockers — to court to face Class C misdemeanor allegations. The code also allows school districts to send students with disciplinary problems en masse to alternative schools where the state has set no standards on the number of hours students must be in class or on teacher certification requirements. In the 2005-2006 school year, more than 60,000 students were sent to such alternative schools for nonviolent offenses, according to Texas Education Agency (TEA) statistics.

After the coalition issued its report, lawmakers passed H.B. 278, which says that school districts can no longer file a complaint with local prosecutors seeking to have students charged with Class C misdemeanors for alleged violations of the schools' codes of conduct. Also, legislators passed H.B. 426, which requires the TEA to develop minimum standards for Disciplinary Alternative Education Programs (DAEPs). Now DAEPs must employ certified teachers and establish the same hours of instruction per day as a regular school. And lawmakers passed H.B. 494, which says school districts must test students who are placed in DAEPs for longer than 90 days before they enter and after they leave the placement, to assess the children's academic growth.

Fletcher and his team from V&E joined lawyers from Patton Boggs, Mayer Brown Rowe & Maw, Greenberg Traurig and the in-house legal department of Irving-based Exxon Mobil Corp. to conduct the interviews of teachers, administrators, parents, and students used in the report. Initially, the lawyers planned to conduct the interviews at 15 school districts across the state, but six districts refused to cooperate, says Fletcher.

Three nonprofit organizations supervised the lawyers' work: the Texas Public Policy Foundation's Center for Effective Justice in Austin, a nonpartisan research institute guided by the core principles of individual liberty, personal responsibility, private property rights, free markets and limited government; Texas Appleseed, a nonprofit public interest law organization in Austin that promotes systemic reform of societal institutions; and Advocacy Inc., a nonprofit focused on the legal rights of the disabled.

Fowler says V&E contacted Appleseed and asked the group to come to the firm and explain the organization's work. At that meeting, Fletcher expressed an interest in pursuing a large-scale pro bono project. Other firms similarly approached Appleseed but Fletcher, once on board, also did some recruiting.

Having lawyers perform the interviews helped, says Deborah Fowler, the legal director and staff lawyer for Texas Appleseed. Fowler says the school districts responded more substantively to the inquiries, because lawyers were involved. "Lawyers improved our access," she says. "Superintendents and principals were much more likely to respond to lawyers."

Says Fletcher: "We're trained to ask questions and dig down a little bit."

The Early Stages

Much of the lawyers' research focused on Chapter 37 of the Texas Education Code. In 1995, Texas lawmakers, following the philosophy popular at the time — zero tolerance for teen troublemakers — introduced Chapter 37, which created DAEPs. The lawmakers' original intent was to make schools safer through the mandatory removal of violent students.

But the districts have come to rely upon DAEPs for housing a much larger group of students. The coalition's report, using data from the TEA, shows that nearly two-thirds of students referred to DAEPs had not committed a violent or criminal offense. Moreover, at 211 school districts over the past five years, administrators and teachers referred African-American students to DAEPs at a disproportionate rate, the report states. In 40 school districts in each of the past five school years, African-American students were referred to DAEPs in percentages about twice that of their representation in the student population. For example, in 2005-2006 in the Temple Independent School District, African-American students comprised 29 percent of the student body but constituted 65 percent of the referrals to Temple's DAEPs.

Fletcher says among the more disturbing patterns was the referral of young students to DAEPs. The report calls the number of pre-kindergarten and kindergarten children in Texas who are placed in DAEPs "alarming," noting that school districts seem to ignore a statutory ban that does not allow placement of children under age 6 in DAEPs unless they have brought a firearm to school. Over the past five years, the report shows, 110 school districts have referred pre-kindergarten and kindergarten children to DAEPs, and 202 school districts have referred more than 3,000 first-graders to DAEPs. Over the past five years, Pasadena Independent School District officials referred 411 first-graders to DAEPs, and Dallas Independent School District officials referred 180 first-graders.

Some of the parents, students, administrators and teachers interviewed by the lawyers thought DAEPs could be effective since students with behavioral problems benefit from structured environments and low teacher-to-student ratios. At least one DAEP, the report noted, requires students to shake hands with all adults they see each day. Another DAEP program included a ropes course to reinforce lessons on choices, trust, teamwork and community.

But much of what the lawyers found in their interviews centered on concerns administrators and teachers had about the deficits in the DAEPs, including too few textbooks and instructional materials, a lack of transportation to the schools, a scarce amount of communication between regular schools and DAEPs during transition periods for incoming and outgoing students, and a slim selection of courses for older students at the DAEPs.

The interviewees also told the lawyers about examples of students inappropriately referred to DAEPs, including one student — who had no history of behavioral problems — sent to a DAEP because she had brought her own prescribed medication in her purse onto the school campus.

Fletcher recalls the counselor involved in that referral told interviewers that the student was learning the lesson that "life is unfair."

Lobbyists for teachers' associations and school administrations didn't resist the proposed reforms. Brock Gregg, the government relations director for the Association of Texas

Professional Educators, a 110,000-member non-union organization primarily made up of teachers statewide, says his constituency applauded the DAEP reforms. "Consistently our members have said since 1995 they didn't like the DAEP provision of Chapter 37," says Gregg. "Our teachers don't like the idea of students leaving their class. We have been pushing since its original passage for a change." Gregg believes that the coalition's work helped with the bills' passage as did the sponsorship of a state Rep. Jerry Madden, R-Plano.

Madden sponsored H.B. 426, which sets minimum standards for DAEPs, as well as H.B. 278, which eliminates school administrators' ability to seek Class C misdemeanor charges for violations of school codes of conduct. Mark Hey, Madden's legislative aide, says that parents who had negative experiences with school districts that had sought misdemeanor charges against their children for minor infractions such as chewing gum in school or arriving late to class were irate. Hey adds that Madden recognized such student cases were clogging the courts.

Jacqueline Lain, an associate executive director of governmental relations for the Texas Association of School Boards in Austin, which lobbies for school districts, says her members are happy with the reforms that passed. "Some of the other versions were not reasonable," she says, noting that the changes the coalition planned to propose regarding DAEP requirements were "too excessive."

Gregg says that, in general, school district administrators object when the Legislature makes requirements for DAEPs but doesn't provide the funding to support those changes. He says before the lawmakers meet again in 2009 he expects some school districts, lacking funding, will find ways to circumvent the DAEP standards established in H.B. 426.

J. David Thompson III, a partner in Houston's Bracewell & Giuliani who represents school administrators statewide, says he believes school administrations will embrace the reforms to Chapter 37.

"You are walking a very fine line to maintain a safe facility, and you want to be friendly as a school," Thompson says. He has no doubt, he says, that over the past 10 years a school district somewhere in Texas has overused the disciplinary tools, but he says districts have generally lost discretion and therefore have felt compelled to follow the state rules.

"The state has pre-empted the ability of districts to make the rules. The further you get away when you try and regulate something like school discipline, the worse you're going to be at doing it," says Thompson.

For his part, Fletcher has his eye on an even bigger picture. Over the next year, he expects to keep his team of pro bono lawyers working on conducting the next phase of research for a second installment of the report, which will deal with the consequences of school discipline. Specifically, he wants to interview adults in prison to see if they were disciplined while in school and how that discipline may have affected them in the long

term.

Notes Fletcher, "Maybe our society should focus on setting reforms for discipline a little bit earlier, and it will cost a lot less."