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ALTERNATIVE EDUCATION PROGRAMS: A RETURN TO "SEPARATE BUT EQUAL?"

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I. INTRODUCTION

In *Brown v. Board of Education*,[1] the United States Supreme Court announced that "in the field of public education the doctrine of 'separate but equal' has no place."[2] While some perceive alternative education programs ("AEPs") as the last hope for "at risk" students, others contend that such programs merely function as "dumping grounds" reserved for disruptive, underprivileged, minority students. Reflecting on the *Brown* decision, school officials should not only recognize the legal exposure arising from poorly-administered exclusionary programs that have the effect of creating

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1. 347 U.S. 483 (1954).
2. *Id.* at 495.

an underclass, but such officials should also evaluate their compliance with the moral imperative that the *Brown* Court articulated some fifty years ago.

Part II of this article examines the various forces driving the development and implementation of AEPs in our public school districts. Part III then describes the form and function of the typical AEP. This part discusses common transfer schemes and also provides a snapshot of AEP student enrollment around the nation. Part IV considers various legal issues arising from the implementation of AEPs in our school districts. This part offers the reader an array of case law dealing with one's rights to an education, and also outlines prospective legal challenges that may emerge with the growth of AEPs. Finally, Part V examines the overall justification of AEPs against the backdrop of the *Brown* decision. This section identifies components that comprise an educational program that is both legally and educationally legitimate under *Brown*, and also considers alternatives to AEPs that might more closely approximate the vision of the *Brown* Court.

II. THE DEVELOPMENT OF ALTERNATIVE EDUCATION PROGRAMS

The creation and development of AEPs across the country can be attributed to a number of external and internal motivating forces. Outside our school systems, the media has aided the development of AEPs by depicting our public schools as madhouses of chaos and violence. Political external forces have also contributed to the development of AEPs by the advancement of legislation and funding schemes which require schools to take stern disciplinary measures against students who are characterized as violent and disruptive. Inside our school systems, administrators, teachers, and parents have also encouraged the development of AEPs. Although their motivations may be as numerous as they are diverse, these groups purport that AEPs not only better serve the needs of disruptive students, but they also advance the interests of traditional school teachers who want to teach, and traditional school children who want to learn.

A. *External Forces*

Scholars have long recognized that fear of school violence has played a prominent role in the proliferation of AEPs across the country.[3] It is gener-

3. *See* Jonathan Wren, *"Alternative Schools for Disruptive Youths"—A Cure for What Ails School Districts Plagued by Violence?*, 2 VA. J. SOC. POL'Y & L. 307, 309–10 (1995); Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 FORDHAM URB. L.J. 539, 543 (2001); Eric Blumenson & Eva S. Nilsen, *How to Construct an*

ally accepted that public schools are no longer considered places of safety and stability.[4] Doubtlessly, this bleak outlook has been shaped by the media's fixation on the apparently omnipresent specter of violence and chaos in our schools.

The media portrays public school classrooms as noisy and chaotic places in which students and teachers are subject to a culture of intense fear and intimidation.[5] According to some journalists, teachers are not even remotely interested in the welfare of their students, and chaos reigns supreme in their classrooms.[6] The *New York Times* recently reported that Mayor Michael Bloomberg planned to dispatch a task force of 150 police officers to 12 of New York City's most violent high schools and middle schools to curb violence.[7] Joining suit, the *Boston Herald* also recently informed its readers that the number of students implicated in school weapons or assault crimes has soared exponentially in Massachusetts from 2000 through 2003.[8] Beyond its exposure of the egregious levels of violence present in school halls across America, the media has also suggested that school authorities routinely underreport violent incidents that occur on school grounds.[9]

Statistical findings lend support to the media's depiction of pervasive violence in our schools. In recent years, the United States Department of Justice reported that an estimated nine percent of students have experienced one or more violent crimes while attending school.[10] More chillingly, the National Education Association recently found that 100,000 students across the country bring guns to school every day and another 2000 students are attacked each hour of the school day.[11]

The general public has heard the media's repeated messages of school violence loud and clear—and that message has also reached the ears of the

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Underclass, or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61 (2002).

4. Wren, *supra* note 3, at 309–10.

5. Bob Herbert, *Failing Teachers*, N.Y. TIMES, Oct. 24, 2003, at A23, 2003 WLNR 5654908.

6. *See id.*

7. Elissa Gootman, *Police to Guard 12 City Schools Cited as Violent*, N.Y. TIMES, Jan. 6, 2004, at A1, 2004 WLNR 5598486.

8. Kevin Rothstein, *Ed Records: School Weapons, Assault Crimes On the Rise*, BOSTON HERALD, Aug. 9, 2003, at 10, 2003 WLNR 647920.

9. Sam Dillon, *School Violence Data Under a Cloud in Houston*, N.Y. TIMES, Nov. 7, 2003, at A1, 2003 WLNR 5683140. The *New York Times* recently reported that the Houston Independent School District reported 761 assaults in its annual disciplinary summaries sent to Austin whereas its own police, who patrol the schools, reported 3,091 assaults during the same time period. *Id.*

10. Wren, *supra* note 3, at 310.

11. *Id.*

country's judiciary. Indeed, courts have explicitly acknowledged the depiction of chaos in our schools. As the Fifth Circuit Court of Appeals recently noted, "[t]oday it is generally recognized that students are being deprived of their education by lack of discipline in the schools. Not only does disorder interfere with learning school studies, it also defeats the charge to 'inculcate the habits and manners of civility.'"[12]

Political and economic forces have also aided the proliferation of AEPs across the country. To combat school violence, politicians who have adopted a "tough on crime" political posture have sought to bar violent students from schools altogether.[13] Perhaps the most well known legislation resulting from that camp's activist position is the Gun-Free Schools Act of 1994.[14] Under the Act, the United States Department of Education may cease funding to states that do not adopt a policy requiring one-year expulsions of students caught with guns at schools.[15]

Such politicians have found great appeal in AEPs, and for good reason. "Tough on crime" political figures that wish to avoid attacks from critics of zero tolerance exclusionary measures have found a comfortable middle ground in supporting the advancement of AEPs.[16] Lending their support to AEPs, these figures are seen as responding to those constituencies who are calling for an end to school chaos while avoiding critics' claims that traditional exclusionary tactics are short-sighted and irresponsible.[17]

There are also economic factors that compel the development of AEPs. As explained more thoroughly below, most AEPs serve students who are considered "at risk" of dropping out of school. Roughly one million students drop out of school each year.[18] "Dropping out of high school . . . is associated with a greater need for such expensive social services as public assistance and unemployment assistance."[19] These societal costs grow exponen-

12. Nevares v. San Marcos Consol. Indep. Sch. Dist., 111 F.3d 25, 26–27 (5th Cir. 1997) (citation omitted).

13. Wren, *supra* note 3, at 312–13.

14. 20 U.S.C. § 8921 (1994) (repealed 2002, current version at 20 U.S.C.A § 7151 (West Supp. 2003)); Wren, *supra* note 3, at 313.

15. Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 604–05 (1996); Rene Sanchez, *Expulsions Becoming Popular Weapon in U.S. Schools*, WASH. POST, Jan. 20, 1995, at A1, 1995 WL 2074258; Kenneth J. Cooper, *President Directs Schools to Bar Students with Guns; Law Threatens Elimination of Federal Funds*, WASH. POST, Oct. 23, 1994, at A8, 1994 WL 2447095.

16. Wren, *supra* note 3, at 347–48.

17. *Id.*

18. Reed, *supra* note 15, at 605.

19. *Id.* at 606.

tially when taking into consideration the foregone income of dropouts.[20] One study estimated that "the foregone income of dropouts from the class of 1981 amounted to $228 billion and that the foregone government revenues totalled [sic] $68 billion."[21] Indeed, it has been estimated that "for every dollar spent on 'early intervention and prevention . . . $4.74 [can be saved] in costs of remedial education, welfare, and crime.'"[22]

B. *Internal Forces*

AEPs have also been promoted by groups of teachers and school-site administrators. Teachers have protested that they spend the majority of their time on small groups of students who are "conduct-disordered."[23] Such teachers apparently maintain that excluding disruptive students from the traditional classroom will allow them to adequately teach the remainder of students in their classrooms who are willing to learn and cooperate.[24] It has also been reported that teachers who are outright "unable to deal with disruptive students" have also encouraged the development of AEPs, because the programs themselves allow those teachers to avoid behaviorally troubled students altogether.[25]

School administrators also find AEPs appealing, if not solely for reasons related to school finance.[26] Depending on the time of year that a student is expelled, a school may sacrifice the financing that such a student would generate if the school could report the student as enrolled.[27] If the school district offered an AEP, the amount of funding an excluded student generated at the transferor school may still be available to that school even after the student is transferred to the AEP.[28] Further, removing potentially low-performing students from campus presents an opportunity for administrators to boost their school's performance ratings, which, in turn, could lead to cash rewards for administrators in certain school systems.[29]

20. *Id.*
21. *Id.*
22. *Id.*
23. Wren, *supra* note 3, at 346.
24. *See id.* at 346–47.
25. *Id.* at 346.
26. *See id.*
27. *See* Dillon, *supra* note 9.
28. *See* Reyes, *supra* note 3, at 548.
29. *Id.* at 546.

C. *The Debate: Proponents and Opponents*

Proponents of AEPs point to several additional reasons to advance such programs. First, they maintain that AEPs increase a student's belief in his or her academic ability while decreasing their disruptive behavior.[30] Such advocates suggest that unruly students will perform better in alternative schools because they offer individualized curricula and because the students are given the opportunity to be among similarly-situated youth, encouraging them "to reflect upon their lives and consider their actions, resulting in heightened self-esteem and eventually better performance."[31]

Some supporters suggest that AEPs present a "less harmful way" of reducing the tension between the state's interest in maintaining discipline and the student's interest in receiving an adequate public education.[32] Furthermore, AEPs are seen as the most reasonable solution to disruptive behavior because they "save" disruptive minority students from being condemned to a life without education by total exclusion.[33] These advocates tout alternative education as a form of education intervention that "would break the cycle of violence that drives these youth, before they commit criminal acts."[34] Moreover, this camp maintains that failing to offer such programs actually contributes to problems of drug abuse, crime, and increased utilization of public assistance.[35]

Critics view AEPs as "dumping grounds" reserved for problematic and mostly minority students.[36] Many contend that "alternative schools are nothing more than a convenient place to warehouse students the conventional system is unprepared to handle."[37] Instead of helping these troubled students, the traditional schools simply abandon them by placing these students in exclusionary programs that offer virtually no academic content.[38]

Opponents making such charges point to programs like those administered under Texas law, where "disciplinary" AEPs are administered by county juvenile board officials who lack the instructional expertise to run a successful academic program.[39] The critics' fears are well taken, considering

30. Reed, *supra* note 15, at 587.
31. Wren, *supra* note 3, at 347.
32. *Id.* at 341.
33. Reed, *supra* note 15, at 609.
34. Wren, *supra* note 3, at 347.
35. *See* Reed, *supra* note 15, at 609.
36. Wren, *supra* note 3, at 349.
37. *Id.*
38. *Id.*
39. *See* Steve Bickerstaff et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, 26 J.L. & EDUC. 1, 18–19 (1997).

that under Texas law, although the academic mission of "Juvenile Justice Alternative Education Programs" is to enable students to perform at grade level, the programs are not required to provide courses necessary to fulfill a student's high school graduation requirements.[40]

Beyond the central criticism that AEPs offer virtually no academic content, the programs have been attacked for their punitive methodologies. Experts in the field of alternative education have stated that alternative schools "are like soft jails, and that is not the most productive way to deal with human beings. It's a way of draining off the problem from the system rather than changing the . . . system."[41] That camp contends that although AEPs may have been originally created to meet the needs of students that were not being met by traditional schools, the programs "have started to look less like educational alternatives for students and more like discipline alternatives for schools. A student now attends an alternative school because she is 'bad,' not because the new school will provide her with an educational alternative."[42] Such schools tend to "look less like schools and more like juvenile detention centers."[43] Opponents argue that prison-like schools "blur the line between education and punishment for students"[44] to the extent that some accuse our traditional schools of the "criminalization" of low student achievement.[45]

Even worse, school officials have been accused of using the threat of AEP placement to coerce students who perform inadequately or who engage in inappropriate behavior to "straighten up."[46] That threat can be particularly ominous, considering the fact that students in some alternative schools are subject to levels of violence which are dramatically higher than those found in traditional schools.[47] For example, alternative schools in one of Florida's largest school districts routinely report "ten times more violent offenses—including assault, battery, robbery, and weapons possession—per person than do their conventional counterparts."[48]

Finally, critics of AEPs find that they present a new form of segregation, generally separating Latinos and African Americans from the rest of the

40. *Id.* at 18 & n.92.

41. Wren, *supra* note 3, at 349–50 (quoting Jessica Portner, *A New Breed of School for Troubled Youths*, 13 EDUC. WEEK, June 8, 1994, at 30).

42. Jessica Falk, *Overcoming a Lawyer's Dogma: Examining Due Process for the "Disruptive Student,"* 36 U. MICH. J.L. REFORM 457, 469 (2003).

43. *Id.* at 470.

44. *Id.*

45. *See* Reyes, *supra* note 3, at 540, 555–56.

46. Falk, *supra* note 42, at 469–70.

47. Wren, *supra* note 3, at 351.

48. *Id.*

student population.[49] Indeed, some opponents maintain that alternative schools are paramount to segregated schools.[50] Disparate enrollment trends among poor and minority groups in exclusionary programs throughout the country help to substantiate these claims.[51]

While Blacks comprise 21.4% of the students enrolled in public schools across America, they comprise 38% of those suspended on an annual basis.[52] "Black high school students are suspended from school at a rate of three times that of white students."[53] Courts that have observed this disparity have called it a form of "institutional racism."[54]

Research on student discipline demonstrates that minority students receive a disproportionate measure of discipline for their misbehavior in schools.[55] "When minority and non-minority students engage in an identical discipline infraction, minority students receive harsher punishments by school officials [than do their white counterparts]."[56] This might explain why underprivileged black students are disproportionately represented in AEPs across the country. In Texas, for example, data for one school district recently revealed that while 28% of its student enrollment was black, 43% of those diverted into AEPs were black.[57]

Some studies suggest that the racially disparate enrollment trends can be attributed to a lack of classroom management skills among inexperienced teachers.[58] For example, an analysis of case study data covering elementary school disciplinary referrals in Texas revealed that over 80% of the referrals came from inexperienced teachers who lacked the skills necessary to manage diverse student bodies.[59] One school in the case study showed that "75% of the discipline referrals were for African American males on a campus with a less than 20% African American male student population."[60]

There is some criticism that making AEPs available actually exacerbates the problems related to school violence and mismanaged classrooms. Some suggest that exclusionary tactics present "band aid" solutions that fail to treat the underlying problems that cause students to act out in the first

49. Reyes, *supra* note 3, at 539.
50. *See* Wren, *supra* note 3, at 353.
51. *See* Reyes, *supra* note 3, at 548.
52. Reed, *supra* note 15, at 608.
53. *Id.*
54. *Id.* at 608–09.
55. Reyes, *supra* note 3, at 548.
56. *Id.*
57. *Id.* at 549.
58. *Id.* at 547.
59. *Id.*
60. Reyes, *supra* note 3, at 547.

place.[61] Moreover, the National School Boards Association found that exclusionary practices, in general, actually reward teachers for avoiding classroom responsibilities.[62] Further, the Association warned "removing troublemakers ... often harden[s] delinquent behavior patterns, alienate[s] troubled youths from the schools, and foster[s] distrust."[63]

III. THE FORM AND FUNCTION OF THE TYPICAL ALTERNATIVE EDUCATION PROGRAM

AEPs typically combine a personalized curriculum and smaller class size with the stringent restrictions and social controls found in correctional institutions. Many have no grades and no homework requirements.[64] They may offer attendance incentives and self-paced schedules.[65] In addition, AEPs frequently focus on conflict resolution and behavior modification courses, and often offer outreach services for students' families.[66] In most school systems, the overt goal is to return the student to the traditional school setting after being placed temporarily in an AEP.[67]

School district policies governing student placement in an AEP vary. Some school districts will place a student in a disciplinary AEP for horseplay, copying another student's work, inappropriate displays of affection, or loitering in unauthorized areas.[68] Others, however, resort to AEP placement for students who commit more serious legal and school policy violations.

Although there is some variation across school districts with regard to placement procedures, the policies and procedures adopted by public schools throughout North Carolina are relatively common. The State's POLICIES AND PROCEDURES FOR ALTERNATIVE LEARNING PROGRAMS AND SCHOOLS manual[69] provides a comprehensive set of procedures used to place a student in an AEP.

The first step in the process is labeling a student "at risk." Exactly what the term means in its technical sense may vary from one school system to the

61. *See* Falk, *supra* note 42, at 469; Wren, *supra* note 3, at 349.
62. Wren, *supra* note 3, at 332.
63. *Id.*
64. *Id.* at 344.
65. *Id.*
66. *Id.* at 345.
67. Wren, *supra* note 3, at 344.
68. Reyes, *supra* note 3, at 543–44.
69. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION, POLICIES AND PROCEDURES FOR ALTERNATIVE LEARNING PROGRAMS AND SCHOOLS GRADES K-12 (2003), http://www.ncpublicschools.org/docs/schoolimprovement/alternative/learning/alpmanual.pdf [hereinafter POLICIES AND PROCEDURES].

next. North Carolina Public Schools describe an "at risk" student as "a young person who, because of a wide range of individual, personal, financial, familial, social, behavior or academic circumstances, may experience school failure or other unwanted outcomes unless intervention occurs to reduce the risk factors."[70]

Under North Carolina's transfer scheme, circumstances which place students at risk include:

a. not meeting state/local/proficiency standards,

b. grade retention,

c. unidentified or inadequately addressed learning needs,

d. alienation from school,

e. unchallenging curricula and/or instruction,

f. tardiness and/or poor school attendance,

g. negative peer influence,

h. unmanageable behavior,

i. substance abuse and other health risk behaviors,

j. abuse and neglect,

k. inadequate parental, family, community and/or school support,

l. limited English proficiency *or*

m. *other risk factors.*[71]

According to the *Policies and Procedures* manual, a student transferred as a result of poor academic performance and/or disruptive conduct is generally referred by parent, teacher, and/or school administrator to a student assistance team or child study team.[72] This team is comprised of at least one

70. *Id.* at 10.
71. *Id.*
72. *Id.*

school or "area" administrator, curriculum specialist, teacher, school psychologist, and hopefully, the parents.[73]

The student assistance team reviews evidentiary information supporting transfer, documents the individuals involved in the decision, documents parental participation, or lack thereof, develops an action plan, reviews progress, and recommends whether or not to transfer a student.[74] If a student is transferred, this body is also typically responsible for facilitating successful transition into and, hopefully, out of the alternative school.[75]

North Carolina also requires the student assistance team to submit a report to a "multi-disciplinary team," which makes a final placement decision.[76] The multi-disciplinary team is considered to be "necessary to keep the decision-making process open, and it increases objectivity [and] fairness."[77]

When a student subject to transfer is also disabled (and therefore has an individual education plan ["IEP"]), there are further procedures. Such procedures center on the continuity and execution of the IEP from one school to the next, and remain focused on determining whether the transferee alternative school provides the same educational services for the student.[78]

IV. THE LEGAL LANDSCAPE

School administrators and attorneys should beware the many legal pitfalls associated with the decision to transfer a student into an AEP. This part views the legal landscape of AEP administration through the lenses of federal and state law in order to expose those pitfalls. In light of relevant case law, the first section of this part considers the impact of an AEP transfer on the rights of the traditional K-12 student under federal law and under state law. The second section then turns to the impact of an AEP transfer on the more particularized rights of the exceptional K-12 student.

A. *Rights to an Education Under the Federal Constitution*

Federal courts have generally found that a student does not have a constitutional right to particular incidents of education such as participation in

73. *Id.*
74. POLICIES AND PROCEDURES, *supra* note 69, at 10–11.
75. *Id.*
76. *Id.* at 12.
77. *Id.*
78. *Id.* at 13.

interscholastic activities,[79] enrollment in advanced placement classes,[80] or attending the school of their choice.[81] However, as discussed in more detail below, there may be legal claims cognizable under federal law that can arise from one's placement into an AEP.

In *San Antonio Independent School District v. Rodriguez*,[82] the United States Supreme Court held that there is no fundamental right to an education under the United States Constitution.[83] The *Rodriguez* holding was reaffirmed, although somewhat qualified, by *Plyler v. Doe*,[84] where the Court again stated that education is not a fundamental right—but there could be no rational basis for the *complete denial of education* unless that deprivation "furthers some substantial goal of the State."[85] Despite its refusal to treat education as a fundamental right, in *Goss v. Lopez*,[86] the United States Supreme Court determined that states are constrained to recognize a student's legitimate entitlement to a public education as a property interest that is protected by the Fourteenth Amendment's Due Process Clause.[87] It also held that students have a reputation liberty interest in not being excluded from school for good cause.[88] In light of these constitutional constraints, the Court determined that a suspension of ten days or less only requires notice, an explanation of the evidence against the student, and an opportunity for him to be heard.[89]

Of course, in its landmark decision in *Brown v. Board of Education*, the Supreme Court also held that where a state chooses to provide its citizens with a public education, the Equal Protection Clause of the Fourteenth Amendment requires that such education be provided equally to all citizens, and that segregation on the basis of race violates the Equal Protection Clause.[90]

In several of the cases reviewed below, the respective plaintiffs have challenged school officials' AEP transfer decisions as a violation of their rights under the Fourteenth Amendment's Equal Protection and Due Process Clauses. As a point of clarification, it is important at this juncture to distin-

79. *See* Walsh v. La. High Sch. Athletic Ass'n, 616 F.2d 152, 156 (5th Cir. 1980).
80. Seamons v. Snow, 84 F.3d 1226, 1234–35 (10th Cir. 1996).
81. *See* Zamora v. Pomeroy, 639 F.2d 662, 668–70 (10th Cir. 1981).
82. 411 U.S. 1 (1973).
83. *See id.* at 35.
84. 457 U.S. 202 (1982).
85. *See id.* at 223–24.
86. 419 U.S. 565 (1975).
87. *Id.* at 576.
88. *Id.*
89. *Id.* at 582.
90. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

guish between the substantive and procedural components of the Fourteenth Amendment's Due Process Clause before delving into the case law.

The procedural due process challenges in all of the cases below consider the overall fairness of the exclusionary procedures underlying an AEP transfer, and whether those procedures were indeed implemented. In *Mathews v. Eldridge*,[91] the Supreme Court articulated factors to take into consideration when determining how much process is due when the government deprives someone of disability insurance.[92] The procedures sought in school-related due process claims are not significantly different.[93] Courts will consider: 1) "the private interest that will be affected by the official action;" 2) "the risk of an erroneous deprivation of [the] interest . . . and the probable value, if any, of additional or substitute procedural safeguards;" and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail."[94]

As demonstrated by the case law below, under Fourteenth Amendment procedural due process analysis, courts generally find no violation if the school officials gave the subject student notice and a right to be heard before AEP transfer. The analytical framework applied to substantive due process challenges is more involved and complex. Perhaps the best and most concise explanation of this framework was offered by Justice Stevens in *Daniels v. Williams*,[95] a case resolved by the Court in 1986. In *Daniels*, Justice Stevens explained that the Fourteenth Amendment "contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.'"[96]

Because there is no explicit or fundamental constitutional right to an education under the United States Constitution, claims for deprivation of substantive due process rights under the Fourteenth Amendment are subject only to "rational basis" scrutiny.[97] Under the rational basis standard of review, a court need only determine if the school official's action was *rationally related* to the promotion of a *legitimate* state interest.[98] If so, there is no

91. 424 U.S. 319 (1976).
92. *Id.* at 323, 334–35.
93. *See* Falk, *supra* note 42, at 461–62.
94. *Eldridge*, 424 U.S. at 335.
95. 474 U.S. 327 (1986).
96. *Id.* at 337.
97. Craig v. Selma City Sch. Bd., 801 F. Supp. 585, 594 (S.D. Ala. 1992).
98. *Id.* at 595.

violation of a student's substantive due process rights.[99] Generally speaking, a violation only arises where the school's academic decision is "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[100]

The cases below—all of which involve the transfer of traditional students into AEPs—have tested the contours of the Supreme Court's Fourteenth Amendment analytical framework as applied to a student's rights to a public education. In all of the cases, it is abundantly clear that rather than appreciating the "opportunity" to attend an alternative program, the subject plaintiffs viewed the transfer into an AEP as a harsh, exclusionary, and disciplinary measure analogous to an expulsion.[101]

In *Zamora v. Pomeroy*, the mother of a high school student brought action against a school board superintendent under 42 U.S.C. § 1983, claiming that her son's civil rights were violated when he was transferred to an alternative school after contraband was found in his locker.[102] Notably, the superintendent in that case characterized the alternative school as one which enrolled potential drop-outs and offered easier courses than were offered to the average student in the traditional school.[103] Plaintiff claimed that he was not given fair notice and an opportunity to be heard before being transferred to a school that lacked the academic standing of his original school.[104]

The district court granted summary judgment in favor of defendant school superintendent and plaintiff appealed.[105] The Tenth Circuit affirmed, explaining that absent a showing that the alternative school assignment was not "substantially prejudicial," plaintiff lacked standing.[106] The court came to this conclusion only after explicitly acknowledging that the student was readmitted to and graduated from his old high school.[107] As to the procedural

99. *Id.*
100. *Id.* (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).
101. Wren, *supra* note 3, at 354.
102. 639 F.2d 662, 663 (10th Cir. 1981).
103. *Id.* at 665.
104. *See id.* at 664.
105. *Id.* at 667.
106. *Id.* at 670. Specifically, the court stated:

> [i]nasmuch as the sanctions imposed were far less severe than expulsion, and in view of the fact that his offense was serious, it cannot be said that they evidence an injury within the framework of the constitution, one which is capable of supporting jurisdiction of this court. The Zamoras' allegations that the ESC was so inferior to amount to an expulsion from the educational system are not borne out by the record, and in the absence of a clear showing that the ESC assignment was substantially prejudicial, the Zamoras lack the requisite standing to attack the appellees' actions on that ground.

Zamora, 639 F.2d at 670.
107. *Id.* at 669.

due process issue, it also acknowledged that he was given five occasions to explain and defend himself prior to the transfer.[108]

Interestingly, without inquiring into the nature of the alternative school or the services rendered there, the court expressly concluded that the "sanction" of transfer was less severe than an expulsion, which, by implication, would be more deserving of heightened procedural safeguards.[109]

Similarly, in *Buchanan v. City of Bolivar*,[110] a junior high school student's mother brought suit against her son's school principal under § 1983, claiming that the principal's decision to transfer her son to an alternative school as a form of discipline deprived him of his rights to procedural due process and equal protection.[111] She further alleged that the principal and two police officers discriminated against her son on the basis of his race.[112]

In that case, a junior high school student threw a rock that caused damage to an assistant principal's car.[113] The assistant principal witnessed the destructive behavior first-hand and contacted police, who took the student into their custody.[114] The police released custody of the student to his mother four hours later, and the student was not prosecuted.[115] However, the assistant principal determined that discipline was appropriate and allowed the mother and her son "to choose between serving a ten day at-home suspension or attending an alternative school for ten days. Plaintiff opted [for the] alternative school and signed an agreement indicating her consent to her son's attendance at alternative school."[116]

Although the district court granted summary judgment in favor of defendant, the Sixth Circuit reversed and remanded the case.[117] The court acknowledged that students facing suspension from school possess property rights under the Due Process Clause of the Fourteenth Amendment.[118] Applying the *Goss* rule to the facts, the Sixth Circuit found no evidence in the record as to what type of conversations took place between plaintiff, her son, and the school officials.[119] Furthermore, the court found neither evidence that the school officials informed plaintiff of the reasons behind their deci-

108. *Id.* at 668.
109. *Id.* at 670.
110. 99 F.3d 1352 (6th Cir. 1996).
111. *Id.* at 1355, 1358–60.
112. *Id.* at 1355, 1360.
113. *Id.* at 1354.
114. *Id.* at 1354–55.
115. *Buchanan*, 99 F.3d at 1355.
116. *Id.*
117. *Id.* at 1360.
118. *Id.* at 1359.
119. *Id.*

sion to transfer the student nor evidence showing that they gave him an opportunity to present his side of the story.[120] The Sixth Circuit remanded for the district court to develop the record.[121]

As to plaintiff's equal protection and race discrimination claims, the circuit court affirmed the lower court's ruling in favor of defendants.[122] The court explained that while the assistant principal filed an affidavit stating that he treated plaintiff's son no differently than any other student, plaintiff did not carry her burden of providing evidence to the contrary to survive summary judgment.[123] The Sixth Circuit affirmed the denial of plaintiff's race discrimination claims for the same reasons.[124]

In *Nevares v. San Marcos Consolidated Independent School District*,[125] the father of a fifteen-year-old high school student brought an action against the school district challenging his son's transfer to an alternative education program based on the fact that the student was detained by police for conduct punishable as a felony (again, throwing rocks at a car).[126] Weeks after the incident, the school received a police report of the detention and the assistant principal pulled the subject student from class.[127] The student was reassigned to an alternative school for "students whose violations . . . fall short of triggering suspension or expulsion, but for reasons of safety and order must be removed from the regular classroom."[128]

The district court held that the statute that permitted such a transfer without prior hearing was unconstitutional, and the school district appealed.[129] The Fifth Circuit held that the student lacked standing to challenge the statute or seek injunctive relief absent deprivation of a federally protected property or liberty interest.[130] Specifically, like the Tenth Circuit in *Zamora*, the Fifth Circuit found no due process violation because "no protected property interest [was] implicated in a school's denial to offer a student a particular curriculum."[131]

120. *Buchanan*, 99 F.3d at 1359.
121. *Id.*
122. *Id.* at 1360.
123. *Id.*
124. *Id.*
125. 111 F.3d 25 (5th Cir. 1997).
126. *See id.* at 26.
127. *Id.*
128. *Id.*
129. *Id.*
130. *See Nevares*, 111 F.3d at 26.
131. *Id.* at 27.

In *C.B. v. Driscoll*,[132] two students brought § 1983 actions against the school board after it took exclusionary disciplinary measures against them.[133] One student, C.B., was suspended for "nine days for the possession of a 'look-alike' illegal substance."[134] After the suspension, the principal transferred C.B. to an "'alternative school' where C.B. would do work assigned by [his] regular teachers . . . . C.B. then withdrew from school and filed [the] lawsuit. Later, tests revealed the substance not to be marijuana."[135]

C.B. claimed "that his procedural due process rights were violated because he was suspended without adequate notice or hearing."[136] Affirming the district court's ruling in favor of defendants on their motion for summary judgment,[137] the Eleventh Circuit stated "once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."[138] Finding that C.B. had two opportunities to discuss his acts, the court affirmed the lower court's decision.[139] The district court also granted summary judgment in favor of defendants on C.B.'s claim that his substantive due process rights were violated by the decision to send him to an alternative school.[140] The Eleventh Circuit affirmed the district court's holding once again.[141] The circuit court stated that executive acts such as the decision to send C.B. to an alternative school "warrant no substantive due process protection unless the right infringed is recognized by the Constitution as 'fundamental,' which is to say that 'our democratic society and its inherent freedoms would be lost if that right were to be violated.'"[142] The court explained that "[b]ecause the right to an education is state-created, that right can be restricted as long as adequate procedures are followed."[143] Accordingly, the court rejected the substantive due process claim.[144]

Interestingly, in a footnote, the Eleventh Circuit also expressed doubt that C.B. had a property interest under Georgia law in attending his traditional high school instead of attending the alternative school to which he was

132. 82 F.3d 383 (11th Cir. 1996).
133. *See id.* at 385.
134. *Id.*
135. *Id.* at 385.
136. *Id.* at 388.
137. *C.B.*, 82 F.3d at 385.
138. *Id.* at 386.
139. *Id.* at 388–89.
140. *Id.* at 389.
141. *Id.*
142. *C.B.*, 82 F.3d at 389.
143. *Id.*
144. *Id.*

assigned.[145] In support of this notion, the court cited *Doe v. Bagan*,[146] where the Tenth Circuit suggested that the right to a public education does not encompass "a right to choose one's particular school."[147]

In *Bagan*, a mother brought suit under § 1983 on behalf of her nine-year-old son against two caseworkers for the Colorado Department of Social Services and other individuals for actions arising out of an investigation of John Doe, the son, on suspicion of possible child abuse.[148] After learning of a possible incident of sexual assault on a five-year-old girl, Bagan, one of the caseworkers, contacted Doe's school to arrange an interview.[149] He spoke to Doe alone in the principal's office for approximately ten minutes, and Doe denied the abuse.[150] Bagan later discussed the matter with Doe's mother.[151] Ultimately, for reasons unstated in the opinion, Doe's name was placed on a state registry as a child abuser.[152] Plaintiffs alleged that Doe subsequently endured humiliation at the hands of his classmates when they learned of the suspicion against him.[153] Although Doe's mother attempted to transfer him to another school, her request was refused because Doe's special education needs purportedly could not be fully met by the transferee school.[154]

Plaintiffs claimed that defendants violated Doe's due process rights by destroying his reputation that ultimately led to his denial of his state-guaranteed right to an education.[155] The Tenth Circuit affirmed the district court's grant of summary judgment in favor of defendants.[156]

Although the court acknowledged that school age children in Colorado must be given the opportunity to receive a free public education, the court found it obvious that Doe was not deprived of this right.[157] Rather, the court determined that Doe "was only denied his request to attend the public school of his choice. Plaintiffs cite no Colorado authority, and we have found none, indicating that the right to a public education encompasses a right to choose one's particular school."[158]

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145. *Id.* at 389 n.5.
146. 41 F.3d 571 (10th Cir. 1994).
147. *C.B.*, 82 F.3d at 389 (quoting Doe v. Bagan, 41 F.3d 571, 576 (10th Cir. 1994)).
148. *Bagan*, 41 F.3d at 573.
149. *Id.* at 574.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Bagan*, 41 F.3d at 575–76.
154. *Id.* at 576 n.5.
155. *Id.* at 575–76.
156. *Id.* at 577.
157. *Id.* at 576.
158. Bagan, 41 F.3d at 576.

Taken together, *Driscoll* and *Bagan* suggest that substantive due process claims can only succeed where the transferee alternative school is found to be so bereft of educational opportunity that enrollment in such a program is paramount to no education at all. One should note, however, that the student in *Bagan* did not claim that his *state* constitutional rights were violated. As explained in some detail below, education opportunity is a fundamental right under certain state constitutions. Therefore, it may be possible to successfully state a substantive due process claim for deprivation of a state-guaranteed right to a public education by transfer into an AEP where the plaintiff proves that the AEP is paramount to no education at all.

B. *Student Rights to an Education Under Various State Constitutions*

"Every state constitution has an education clause. The highest courts of many states have held that their state constitutions' education clauses afford individuals an enforceable right to education."[159] In California and Pennsylvania, education is considered a fundamental right under the state constitution.[160] Florida's constitution provides that "education of children is a fundamental value" of the state.[161]

The Supreme Court of Kentucky stated that "[a] child's right to an adequate education is a fundamental one under our Constitution."[162] Pennsylvania's highest court declared the same in *School District of Wilkinsburg v. Wilkinsburg Education Ass'n*.[163] In *Horton v. Meskill*,[164] the Supreme Court of Connecticut stated that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."[165] The Supreme Courts of North Dakota, Wisconsin, and Virginia have also found that education is a fundamental right under their states' constitutions.[166]

It follows that a student's state equal protection[167] and due process claims arising out of their transfer into an AEP would more likely succeed where their state recognizes a fundamental or enforceable right to education.[168]

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159. Reed, *supra* note 15, at 582.
160. *Id.* at 583.
161. FLA. CONST. art. IX, § 1.
162. Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).
163. 667 A.2d 5, 9 (Pa. 1995).
164. 376 A.2d 359 (Conn. 1977).
165. *Id.* at 373.
166. Reed, *supra* note 15, at 598–600.
167. *Id.* at 596–97. Several state courts have determined that education is a fundamental right for the purposes of an equal protection analysis under their states' constitutions. *Id.*
168. *Id.* at 591.

Where a student challenges a state action that discriminates against him on the basis of his race, courts will review the state action on a strict scrutiny basis.[169] Under strict scrutiny review, a court will determine whether the state action is narrowly tailored to the promotion of a compelling government interest.[170] Courts will also apply this standard of review where the basis of a student's challenge is the complete deprivation of a fundamental right.[171]

The Supreme Court of Wisconsin's decision in *Kukor v. Grover*, is illustrative as to a state court's treatment of the issue of educational deprivation where education is a fundamental right under the state's constitution.[172] In *Kukor*, a group of taxpayers and residents sued Wisconsin's Superintendent of Public Instruction and Wisconsin's Department of Revenue, attacking the constitutionality of a state formula of school funding.[173] The plaintiffs argued that because the funding formula did not address the greater financial needs of poor school districts (such as offering more dropout prevention units), the formula violated the educational uniformity requirement under the state constitution and the equal protection rights of underprivileged students under Wisconsin's state constitution.[174]

Although the Supreme Court of Wisconsin found that the districts with a high concentration of poverty faced an "overburden" in the area of dropout prevention programs for high-risk youth,[175] it held that the funding formula did not unconstitutionally impinge on the state constitution's uniformity requirement.[176]

The court also ruled unfavorably to plaintiffs' equal protection claims.[177] Importantly, the court interpreted plaintiffs' claims as challenging the funding formula and not as challenging state action depriving students of educational opportunity.[178] Acknowledging that an "equal opportunity for education" is a fundamental right under Wisconsin's constitution, the court found that such a right was not implicated by the challenged spending dispar-

169. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
170. Kukor v. Grover, 436 N.W.2d 568, 582 n.13 (Wis. 1989).
171. *Id.* at 579.
172. *See id.* at 568–94.
173. *Id.* at 570.
174. *Id.* at 573.
175. *Kukor*, 436 N.W.2d at 573.
176. *Id.* at 578.
177. *Id.* at 579.
178. *Id.*

ity.[179] With this characterization of plaintiffs' claim, the court applied a rational basis review and found the funding formula constitutional.[180]

Kukor suggests that a student challenging a transfer into an AEP may only successfully state an equal protection claim where the right to education is a fundamental right under the state constitution and where the student alleges a complete deprivation of that right by way of a transfer to the alternative program.[181] Obviously, this is an onerous burden.

C. *The Particularized Rights of Exceptional Students Under Federal Law*

Students sent to AEPs are often learning disabled.[182] In Texas, for example, twenty percent of all students served statewide in 1996-1997 were characterized as special education or special needs students under federal law.[183] Accordingly, school administrators should take note of the legal issues particularly pertaining to the transfer of an exceptional student into an AEP. The Rehabilitation Act of 1973 provides, *inter alia*, that:

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[184]

Further, the Individuals with Disabilities Education Act ("IDEA")[185] provides, *inter alia*, that a state qualifying for federal assistance under the Act must establish:

> [p]rocedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory . . . . [N]o single procedure shall be the sole criterion for determining an appropriate educational program for a child.[186]

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179. *Id.*
180. *Kukor*, 436 N.W.2d at 579.
181. *See id.* at 579–80.
182. Wren, *supra* note 3, at 352.
183. Bickerstaff, *supra* note 39, at 38.
184. 29 U.S.C. § 794(a) (2000).
185. 20 U.S.C. §§ 1400-1461 (2000).
186. § 1412(a)(6)(B).

As a condition for federal financial assistance, IDEA requires states to ensure a "free appropriate public education" for all disabled students.[187] The Act establishes a comprehensive system of procedural safeguards for ensuring this right, including the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then-current educational placement" pending completion of any review proceedings unless the parents and state or local educational agencies agree otherwise.[188] This is one of the most frequently contested safety measures under IDEA.[189]

Originally, IDEA was a response by Congress to the growing need to educate disabled students who were essentially abandoned by public schools.[190] In the congressional studies behind the formulation of the Act, Congress found that one out of every eight disabled students was excluded from the public school system altogether.[191] Congress also found that "many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out."[192] What is more disturbing is congressional statistics revealed that in 1974, the states failed to meet the educational needs of eighty-two percent of all children with emotional disabilities.[193]

IDEA "confers upon disabled students an enforceable substantive right to public education in participating [s]tates."[194] It also assures that, to the maximum extent possible, states will "mainstream" disabled students, "i.e. ... educate them with children who are not disabled."[195] Further, the Act assures that disabled students will be segregated or otherwise removed from the regular classroom setting "only when the nature or severity of the handicap is such that education in regular classes . . . cannot be achieved satisfactorily."[196] Of course, IDEA also requires that an individualized education program ("IEP") be constructed, reviewed, and, if necessary, revised at least once a year to ensure that the needs of the disabled student are being met.[197]

187. § 1412(a)(1)(A).
188. § 1415(j).
189. Elizabeth A. Bunch, *School Discipline Under the Individuals with Disabilities Education Act: How the Stay-Put Provision Limits Schools in Providing a Safe Learning Environment*, 27 J. L. & EDUC. 315, 316 (1998).
190. *See* Honig v. Doe, 484 U.S. 305, 309 (1988).
191. *Id.*
192. *Id.* (citing H.R. REP. NO. 94-332, at 2 (1975)).
193. *Id.* (citing S. REP. NO. 94-168, at 8 (1975)).
194. *Id.* at 310.
195. *Honig*, 484 U.S. at 311.
196. *Id.* (quoting 20 U.S.C. § 1412(5), current version at 20 U.S.C. § 1412(a)(5) (2000)).
197. *Id.*

IDEA provides procedural safeguards related to placement.[198] First, it grants parents the right to review "all relevant records pertaining to the identification, evaluation, and educational placement of their child."[199] Second, it provides them with prior written notice with respect to changes in placement.[200] Third, it gives them an opportunity to present complaints.[201] Finally, it provides them "an opportunity for 'an impartial due process hearing' with respect to any such complaints."[202] At the conclusion of any such hearing, parents and the educational agency may seek administrative review and then file a civil action.[203]

The landmark case dealing with exclusion of an exceptional student in light of IDEA was *Honig v. Doe*.[204] In that case, the parents of two emotionally handicapped students challenged the school board's unilateral exclusion of their children from the traditional classroom for purportedly dangerous and disruptive conduct stemming from their disabilities.[205] In both instances, the school, pursuant to the *California Education Code*, placed the students at issue on indefinite suspension pending the completion of expulsion proceedings.[206] The *Honig* Court found that the code violated the stay-put provision of the EHA.[207]

Recognizing the school officials' limited rights to suspend students for a period of ten days or less, the Court intimated that schools are not without recourse in keeping students out of the school at the conclusion of that period.[208] Rather, it found nothing in the Act, preventing schools from seeking to enjoin a dangerous child from attending the school.[209] In such a case, a school would have the burden of showing that administrative review would be futile.[210] They would also have to overcome the presumption in favor of the child's current placement by showing that maintaining the child in such a placement "is substantially likely to result in injury either to himself or herself, or to others."[211]

198. *Id.*
199. *Id.* at 312.
200. *Honig*, 484 U.S. at 312.
201. *Id.*
202. *Id.*
203. *Id.*
204. 484 U.S. 305 (1988).
205. *Id.* at 312–14.
206. *Id.* at 313 & n.2, 315.
207. *See id.* at 328 & n.10.
208. *Id.* at 327–28.
209. *Honig*, 484 U.S. at 327.
210. *Id.*
211. *Id.* at 328.

Some argue that, as a result of *Honig*, schools lack the flexibility needed to adequately deal with disruptive students who happen to be learning disabled.[212] Indeed, some contend that they lack flexibility with traditional students who might allege a disability after being subjected to an exclusionary disciplinary measure.[213]

Indeed, the Ninth Circuit, in *Hacienda La Puente Unified School District of Los Angeles v. Honig*,[214] held that the protection afforded by IDEA is not limited to those children who had been diagnosed with a disability prior to their misconduct.[215] Thus, the holding explicitly allows students to claim to have a disability under IDEA at any time before or after disciplinary action is taken, and thus misuses the stay-put provision to avoid punishment.[216] At least one scholar suggests that expelling a child immediately pending the due process hearing is one way to avoid this "loophole."[217]

Randy M. v. Texas City ISD[218] is also illustrative. There, the mother of a special education student filed an application for an injunction to prevent the school district from placing the student into an AEP.[219] In that case, "Randy, acting in concert with another male student, ripped the break-away wind pants off a female student."[220] Because he was disabled, the placement was abated until an admission review and dismissal committee determined whether Randy's actions manifested from his disability.[221] The committee concluded that they did not, and decided to transfer Randy to the AEP for the remainder of the school year.[222] The United States District Court for the Southern District of Texas held in favor of the school district and declined to enter an injunction.[223]

Interestingly, as to plaintiff's contention that Randy's misbehavior might have been due to an unidentified disability, the court determined that the committee "bent over backwards" to give her an opportunity to gather and present evidence of an unrecognized disability which may have caused him to rip off the student's pants.[224] Thus, the case provides a good example

212. Bunch, *supra* note 189, at 318.
213. *Id.*
214. 976 F.2d 487 (9th Cir. 1992).
215. *Id.* at 494.
216. Bunch, *supra* note 189, at 318.
217. *Id.* at 320.
218. 93 F. Supp. 2d 1310 (S.D. Tex. 2000).
219. *Id.* at 1310.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Randy M.*, 93 F. Supp. 2d at 1311.
224. *Id.*

of how districts may protect themselves from the "loophole" in IDEA by providing a potential litigant every reasonable opportunity to prove that the student's misconduct was attributable to an unidentified disability before sending the child into an AEP.[225]

In light of the relevant case law, critics of IDEA argue that it must be changed to allow schools to remove dangerous and consistently disruptive students from the regular classroom in order to ensure a safe and productive learning environment for all students.[226]

V. REDUCING LEGAL EXPOSURE AND ADHERING TO THE *BROWN* MORAL IMPERATIVE

School officials and legal practitioners should seriously evaluate the legal exposure that can arise from a student's transfer into an AEP. Based on the case law discussed in this article, it appears that students subject to transfer into an AEP may have the ability to set forth claims that are cognizable under both federal and state law if the conditions are right.

Although the United States Supreme Court has repeatedly held that education is not a fundamental right, in light of such cases as *Goss*, *Plyler*, and *Ewing*, there may be reason to apply a heightened standard of scrutiny in the face of a Fourteenth Amendment Due Process challenge for transfer into an AEP where a student can show on the record that his transfer into such a program resulted in the outright deprivation of his educational opportunity. The Eleventh Circuit hinted at this sentiment in *C.B.* when it noted in the face of a substantive due process claim that the state may only restrict educational opportunity.[227]

If, indeed, the AEP is shown to be absolutely bereft of any educational opportunity, it is likely that a federal court would at least find standing for a substantive due process claim, since an outright deprivation of education would undoubtedly constitute "a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[228]

Conversely, it is highly doubtful that a student can successfully challenge an AEP transfer as a violation of his or her procedural due process rights under the Fourteenth Amendment even where there are only slight procedural protections. As the Eleventh Circuit succinctly stated in *C.B.*, "once school administrators tell a student what they heard or saw, ask why

225. *See* Bunch, *supra* note 189, at 318.
226. *See id.* at 320.
227. *See* C.B. v. Driscoll, 82 F.3d 383, 389 (11th Cir. 1996).
228. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands."[229] Even the most rudimentary procedures underlying a school official's decision to transfer the student into an AEP would likely pass constitutional muster under a Fourteenth Amendment procedural due process attack.

Finally, as to cases arising under state law, school officials and legal practitioners should be particularly aware of their exposure where the state constitution recognizes education as a fundamental right. In such states, litigants opposing transfer into an AEP will likely achieve strict scrutiny review if they show that the AEP is completely devoid of academic opportunities. If the litigant in such a case is able to show on the record that the AEP at hand is indeed the "dumping ground" described by so many of the critics of AEPs, a school official's decision to transfer a student into such a program may be deemed unconstitutional as the transfer would effect the complete deprivation of the student's fundamental right to an education.

Beyond these most basic requirements of the law, however, school officials should also evaluate their compliance with the moral imperative articulated by the *Brown* Court more than fifty years ago when considering whether to implement a program like an AEP.[230] In *Brown*, Chief Justice Warren stated:

> [education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[231]

In light of this statement, and in view of the opinion as a whole, it is abundantly clear the *Brown* Court understood that schools do more than just teach academic skills; they also develop the social skills necessary to achieve in an adult society. As one scholar recently noted:

> [s]ociety itself has deep and legitimate interests in social reproduction—the intellectual, moral, and social development of the present youth who must become society's leaders in all fields of endeavor . . . . The collective future of our schools (a majority of whose students are expected to be nonwhite by 2020) and our society (a majority of whose members are expected to be nonwhite

229. *C.B.*, 82 F.3d at 386.
230. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
231. *Id.*

> by the middle of the 21st century), depends upon educating citizens who will be able to live and work comfortably across racial lines.[232]

In the face of these realities, there is ample evidence which suggests that our schools systematically deprive the nation's unruly minority students the very kind of opportunities discussed by the *Brown* Court by cordoning them off from the rest of their traditional school counterparts with their placement into AEPs. Even if the AEPs offer the same academic opportunities offered by the transferor schools, the only environment to which such students may "adjust normally" is one of isolation rather than integration.

Since the United States Department of Education first released the infamous "Coleman Report" in 1966, scholars have long recognized that a student's "achievement is strongly related to the educational backgrounds and aspirations of the other students in the school" and classroom.[233]

> The report concluded, in fact, that the *social* characteristics of a school's student body were the single most important school-related factor in predicting minority student achievement: "Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff.[234]

It follows that the systematic exclusion and isolation of unruly minority students through placement into AEPs ultimately frustrates *Brown's* most basic promise.[235] Although school officials may contend that the AEPs offer staff, curricula, and facilities exactly like that of the transferor school (an argument that still arises long after the "separate but equal doctrine" was purportedly obliterated by *Brown*), while easing the work of traditional school teachers and enhancing the education of those who "want to learn," these officials cannot credibly assert that such programs meet the moral imperative articulated by the *Brown* Court.

School officials and legal practitioners should recognize that AEPs will not, and indeed cannot, meet the dictates of *Brown* so long as they function on a philosophical framework contrary to the original mission of traditional schools. An AEP should not be created to function as a "soft jail" that keeps

232. John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1410–11 (2003).

233. *Id.* at 1415.

234. *Id.*

235. *See* Reyes, *supra* note 3, at 556.

disruptive or "bad" students away from the mainstream crowd. Rather, if AEPs are to function at all, they must do so with an eye toward academic and social equity, not only within the sphere of alternative schools, but also in the greater sphere of public schools in general.[236]

To relieve the very need for AEPs school administrators should document and track disciplinary referral trends among teachers working at their schools in order to identify causes precipitating exclusion. Once such causes are identified, administrators can attack the heart of the problem through any number of interventions.

As discussed earlier, there is evidence that the disparate representation of African Americans and Latinos in AEPs is, in part, attributable to poor class management skills and cultural ignorance exhibited by novice teachers. Indeed, it appears that culturally ignorant assumptions may work the greatest harm upon poor and minority student populations. In one study, for example, "teachers in middle-class, predominantly white schools viewed student inattention as an indication that the teacher needed to do more to gain the student's interest."[237] Conversely, teachers in lower class, predominantly black schools attributed student inattention to the students' inability to concentrate.[238] These findings exemplify the harm arising from false assumptions and illustrate the notion that fiction that is perceived as real *is real* in its consequences.

In any event, in light of the current state of affairs, the need for meaningful and effective teacher training to improve classroom management and to enhance cultural awareness is obvious. Such training will undoubtedly go a long way toward reversing the trend of excluding poor minority students from the rest of the student population based on their misconduct and will help to facilitate the type integration envisioned by the *Brown* Court.

It is this vision that should drive the efforts of school officials to create and sustain genuine academic and social equity in the nation's schools. It is this vision that should guide the legal analysis of controversies stemming from the development and implementation of AEPs across the country. It is this vision that cannot be forgotten.

236. *See* Wren, *supra* note 3, at 353.
237. Reed, *supra* note 15, at 608.
238. *Id.*