

U.S. Department of Education
Office for Civil Rights
Dallas Office
1999 Bryan Street, Suite 1620

February 20, 2013

RE: The Bryan Independent School District's ticketing practice violates Title VI of the Civil Rights Act of 1964 and its implementing regulations

Dear Dallas Office:

Like many school districts in Texas and across the country, The Bryan Independent School District ("Bryan ISD"), a mid-sized school district located in Brazos County, Texas, stations police officers in each of its middle and high schools. These officers, known as "School Resource Officers" ("SROs"), are provided to the school district through a written agreement with the local police department and they have the same powers as any other police officer, including the ability to issue criminal citations to students for criminal conduct that occurs within schools. All too often, however, the important distinction between matters of school safety that might warrant police involvement and matters of school discipline that should be handled at the school level has been blurred.

As detailed below, Bryan ISD's SROs have not focused on school safety or criminal activity. Instead, they have been used improperly to sanction typical student misbehavior by issuing "Class C" misdemeanor tickets, particularly to African-American students, for minor non-violent offenses. The SROs essentially function as the disciplinary arm for Bryan ISD, addressing minor misconduct that should be handled by parents, teachers and school leaders—not the criminal justice system. Specifically, Bryan ISD utilizes SROs to enforce routine school rules by issuing tickets for two Class C misdemeanor violations—"Disruption of Class" and "Disorderly Conduct – Language."¹ This pervasive practice of using criminal sanctions to address minor student misbehavior has led to the criminalization of youthful misbehavior in the district, and created a direct pathway from schools into the criminal justice system.

This complaint alleges that Bryan ISD's ticketing practice violates Title VI of the Civil Rights Act of 1964. First, the practice disproportionately affects African-American students; their chances of receiving a ticket for either of these offenses is *more than four times greater* than the risk faced by students of all other races. Second, the ticketing practice is not educationally necessary. Third, there are equally effective, less discriminatory alternatives for preventing and/or responding to minor student misbehavior.²

¹ Texas Penal Code § 42.01, "Disorderly Conduct," has several subsections; we will refer to §42.01(a)(1) as "Disorderly Conduct – Language." For further discussion, *see* section III(C), *infra*.

² The United States Department of Education, Office for Civil Rights ("OCR") has investigated the disparate impact of other districts' disciplinary procedures on African-American students. *See, e.g.*, Letter from Arthur Zeidman, Director, OCR San Francisco, to Superintendent Anthony Smith, Oakland Unified School District,

I. INTRODUCTION

Bryan ISD has, by written agreement, contracted with the Bryan Police Department (“BPD”) to provide officers to serve as SROs on its school campuses, and has, in many respects, delegated to these SROs the authority to enforce school rules by issuing Class C misdemeanor tickets to students under the Texas Penal Code. During the 2011-12 school year, a total of 621 “Class C” misdemeanor tickets were issued to students in Bryan ISD by SROs stationed on school campuses. Well over half (61%) of these tickets were issued for the kind of school-based behavior that should be handled by an internal school discipline system, rather than for dangerous or criminal acts that pose a threat to the school or community. For example, 271 of these misdemeanor tickets were issued to students who were charged with the mundane and common adolescent behavior of “Disruption of Class.” Another 105 tickets were issued for “Disorderly Conduct – Language,”—in other words, using bad words, which by itself hardly merits judicial intervention, let alone the possibility of a criminal record. In a very real sense, the Bryan ISD is using its SROs as disciplinarians, rather than as a method of ensuring school safety.

Class C tickets are not merely a slap on the wrist. These citations can have an immediate and lasting impact on the students who receive them, far beyond what a student might experience after receiving a detention or in-school suspension for similar behavior. Students who receive Class C misdemeanor tickets in Bryan are required to attend court to face a judge—often removing the student from school and his or her parent from work. These students can then face sentences including fines, court costs, community service, probation and mandatory participation in “First Offender” programs. To make matters worse, Bryan ISD students who receive Class C misdemeanor tickets for school-based conduct often receive school-based disciplinary sanctions *in addition* to these criminal sanctions. In other words, they face a double punishment.³

The practice of criminalizing minor misbehavior also exposes students to a host of other consequences. For example, under Texas State law, if a student fails to appear in court, or if the student or parent cannot afford to pay the court-imposed fines, the student can be arrested when he or she reaches the age of seventeen. (Students who are seventeen or older may face immediate sanctions.) And because these tickets are processed through a municipal court or justice of the peace, students receiving tickets are not entitled to the protections of juvenile court,

(Sept. 27, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-a.pdf> (regarding OCR Case No. 09-12-5001) (affirming OCR’s commitment to investigating the disparate impact of a district’s disciplinary procedures on students of a protected class by noting: “The administration of student discipline can result in unlawful discrimination based on race in two ways: first, if students are subject to different *treatment* based on their race, and second, if a policy is neutral on its face and administered neutrally but has a disproportionate and unjustified *effect* on students of a particular race.”) (emphasis in original).

³ While not the subject of this complaint, data related to exclusionary school discipline shows many similar patterns. Taking this into account with the disparities in ticketing, this data paints a stark picture of a district that undermines educational opportunities for African-American students. African-American students in Bryan ISD are more likely to receive referrals to in-school suspension (“ISS”) and out-of-school suspension (“OSS”), and referrals to Disciplinary Alternative Education Programs (“DAEPs”). And they have the highest risk ratios for discretionary disciplinary referrals. See Appendix A (Data responsive to Texas Public Information Act Requests filed by Texas Appleseed with Bryan Independent School District (2011-12)).

including confidentiality.⁴ Therefore, tickets for “disrupting” a classroom or using bad language can follow students past high school into their adult lives with many of the same consequences as a criminal conviction for a more serious offense, including having to report their convictions on applications for college, the military or employment.

While the criminalization of non-dangerous, minor adolescent behavior in the Bryan ISD is in itself troubling, the school district’s practice of addressing school-related discipline through ticketing students for non-violent, minor misbehavior also disproportionately affects African-American students. During the 2011-12 school year, African Americans comprised only 21 percent of the students in Bryan ISD, yet they received 46 percent of all tickets issued to students. The racial disparity was particularly acute for two specific categories: African-American students received 53 percent of the 271 tickets issued to Bryan ISD students for “Disruption of Class” and 51 percent of the tickets issued for “Disorderly Conduct – Language” in the 2011-12 school year. African-American students’ risk of receiving a ticket for either of these two categories was four times as high as the risk faced by students of other races in Bryan ISD.

In addition to having a racially adverse impact, Bryan ISD’s ticketing practice is inconsistent with sound pedagogical practices. Research demonstrates that imposing punitive sanctions, especially those that remove students from the classroom, do more to undermine academic achievement than to support it.⁵ The use of ticketing for minor school misbehavior may also impede educational progress for the school as a whole, including those students who do not receive tickets.⁶ The practice of imposing criminal sanctions for minor misbehavior and relying on exclusionary discipline methods do not make schools safer, more orderly or more academically successful, especially when the behavior being criminalized does not pose a danger to other students in the first place. In fact, relying on police to address minor student misbehavior can foster a highly restrictive, distrustful environment that makes it more difficult to maintain school order and safety. Moreover, as set forth below, there are equally effective, less discriminatory alternatives available to respond to disruptive classroom behavior.

⁴ Indeed, Bryan Municipal Court docket sheets are posted online, resulting in the publication of the names of children who receive citations. *See, e.g.* Bryan Municipal Court, Docket for Feb, 11-15, 2013, *available at* <http://www.bryantx.gov/departments/court/dockets.pdf> (last visited Feb. 15, 2013).

⁵ *See* M. Karega Rausch & Russell J. Skiba, *The Academic Cost of Discipline: The Relationship Between Suspension/Expulsion and School Achievement* 6 (2006), *available at* <http://www.agi.harvard.edu/Search/download.php?id=45>.

⁶ Catherine Y. Kim, *Policing School Discipline*, 77 *Brook. L. Rev.* 1, 26-27 (2012), *available at* <http://ssrn.com/abstract=2037579>.

II. PARTIES

The organizational complainants bring this complaint on behalf of African-American students who have been and will continue to be disproportionately harmed by the ticketing policies in Bryan ISD. The complainants are Texas Appleseed and the Brazos County (TX) NAACP Branch.

The Brazos County NAACP is a local branch of the NAACP, the nation's oldest and largest civil rights organization. Among the members of the Brazos County NAACP are parents, grandparents, educators and other community members who advocate for civil rights in their communities. The Brazos County NAACP monitors equal opportunity in the public and private sectors, including in the areas of education and policing.

Texas Appleseed is a public interest law center headquartered in Austin, Texas. Appleseed has published several major reports documenting systemic problems with exclusionary discipline in Texas school districts, including over-representation of African-American students in exclusionary disciplinary referrals (such as suspensions, expulsions and disciplinary referrals to Alternative Education Programs) as well as ticketing and arrest by SROs. Appleseed has worked at the local and state level to encourage stakeholders to address racial disparities in disciplinary methods and to adopt alternative approaches to student discipline that work to improve school climate for all students.

Counsel for the complainants are the NAACP Legal Defense and Educational Fund, Inc. ("LDF") and the National Center for Youth Law ("NCYL"). LDF is a non-profit legal organization established under New York law that has worked for over seven decades to dismantle racial segregation and ensure equal educational opportunities for all. NCYL is a non-profit legal organization that has worked for over four decades to ensure that low-income children have the resources, support and opportunities they need for healthy and productive lives.

Respondent Bryan ISD is the local educational agency responsible for the administration and operation of Bryan, Texas, public schools. Bryan ISD is a recipient of federal funding from the U.S. Department of Education.⁷ Bryan ISD school officials are responsible for implementing discipline, school safety and security policies for all schools under its jurisdiction.

⁷ See Bryan ISD, *2011-12 Budget*, adopted Aug. 15, 2011, http://ci.bryanisd.org/docs/2011_12Budget.pdf; Bryan ISD, *2011-12 Summary of Budgeted Funds, Budget Amendment 2011-12*, Aug. 20, 2012, http://www.bryanisd.org/finance_docs/Budget_Information/2011_12FinalAdoptedBudget.pdf; Bryan ISD, *2012-13 Budget*, adopted Aug. 20, 2012, http://www.bryanisd.org/finance_docs/Budget_Information/2012_13Adopted_Budget.pdf.

III. BACKGROUND

A. The History of Policing in Texas Schools

People who attended public schools just a couple of decades ago remember a time when police officers were not a daily presence on campus. The increase in police presence on Texas school campuses began in the mid-1990s.⁸ Today, approximately 170 school districts in Texas have commissioned their own police forces and many others contract for a police presence, as does Bryan ISD. The increased presence of police on school campuses is reflected in school districts' spending on "security and monitoring." During the 1997-98 school year, Texas school districts reported spending \$103,877,919 on security;⁹ by 2010-11, though the student population had only increased 26 percent, districts' spending on security had more than tripled to \$327,376,988.¹⁰

The increased presence of police officers in Texas schools has resulted in what has been called the "passing of the paddle."¹¹ This term describes the shift from reliance on principals, teachers and school administrators to handle student discipline toward reliance on school police or SROs, to discipline students. In Texas, the consequence of this policy shift over a relatively short time period has been the overuse of the court system to punish students for engaging in behavior that bears little resemblance to what most people think of as "criminal."¹²

Texas students bear the brunt of the consequences of the "passing of the paddle." Last year, more than 229,000 non-traffic citations were issued to juveniles in Texas.¹³ Many—if not most—of these tickets are issued to students by school-based police officers.¹⁴

⁸ See Appendix B (Texas Appleseed, *Texas' School to Prison Pipeline: Ticketing, Arrest & Use of Force in Schools* 38 (2010)) (documenting the rise of police/student contact in Texas schools).

⁹ Division of Performance Reporting, Texas Education Agency, *Academic Excellence Indicator System, State Performance Report* (1997-98), <http://ritter.tea.state.tx.us/perfreport/aeis/98/state.html>.

¹⁰ Division of Performance Reporting, Texas Education Agency, *Academic Excellence Indicator System, State Performance Report* (2010-11), <http://ritter.tea.state.tx.us/perfreport/aeis/2011/state.html>.

¹¹ Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases, Juvenile Law Section, State Bar of Texas* 13 (2010), available at <http://www.juvenilelaw.org/Newsletters/201012.pdf>.

¹² *Id.* ("In a little over two decades, a paradigm shift has occurred in the Lone Star State. The misdeeds of children – acts that in the near recent past resulted in trips to the principal's office, corporal punishment, or extra laps under the supervision of a middle school or high school coach, now result in criminal prosecution, criminal records, and untold millions of dollars in punitive fines and hefty court costs being imposed against children ages 10 through 16.").

¹³ This figure is based on juvenile cases filed in municipal and justice courts statewide – however some courts do not report data to the Office of Court Administration (such as specialized courts for "failure to attend school" Class C misdemeanor cases), so this figure is conservative. See Office of Court Administration, *Annual Report for the Texas Judiciary, FY 2012* (Jan. 2013), <http://www.courts.state.tx.us/pubs/AR2012/toc.htm>

¹⁴ Appendix B at 76-79.

B. Bryan ISD’s Contractual Relationship with the BPD

Bryan ISD is a mid-sized school district located in the city of Bryan, Texas, the county seat of Brazos County and the city adjacent to College Station, home of Texas A&M University. Bryan ISD operates 16 elementary schools, four middle schools and four high schools, and educates a relatively diverse student body:¹⁵

Table 1: Student Demographics, 2011-12

Total Student Enrollment	15,611
African-American	3,252 (21%)
Hispanic	7,955 (51%)
White	4,123 (26%)
Other	281 (2%)

Bryan ISD has contracted with the BPD to provide School Resource Officers since 1988.¹⁶ Under the terms of the contract, a Memorandum of Understanding (“MOU”), the BPD provides eight officers and one sergeant whose duties include “assist[ing] District staff in maintaining order on school property” and working “in concert” with school principals.¹⁷ The contract also requires SROs to make “follow-up home visits when needed as a result of school-

¹⁵ Data related to various measures of academic success and opportunity show that Bryan ISD’s entire student body does not receive the same education. While not the subject of this complaint, this data combines with the disparities in ticketing to paint a stark picture of a district that undermines educational opportunities for African-American students. African-American students in Bryan ISD score significantly lower than their peers on standardized tests, are underrepresented in the Gifted and Talented program and are less likely to be placed in advanced courses or attend schools that prepare students for higher education. Of the 1,772 students enrolled in “Gifted and Talented” in Bryan ISD schools in the 2011-12 school year, only 9 percent were African-American, while more than half (55 percent) were white and about 33 percent were Hispanic. Similarly, of the 141 eighth grade students in Bryan ISD who were enrolled in Algebra I, only 10 percent were African-American, while 59 percent were white and 28 percent were Hispanic. And while white students make up only about 26 percent of Bryan ISD high school students, they comprise approximately 69 percent of the students enrolled in advanced courses during the 2011-12 school year. District-wide, African-American students are less likely to be college ready and they score significantly lower on SAT and ACT tests than their peers. *See* Appendix A.

¹⁶ *See* Video Testimony of Chief Eric Busky, Bryan City Council Workshop (Nov. 8, 2011), *available at* <http://bryantx.pegcentral.com/player.php?video=e2031f448dbfddff54a1c8c7eb3d705a>, at 0:51 (discussing history of Bryan Police Department’s SRO program).

¹⁷ Appendix C-1 at 4 (City of Bryan, Bryan Police Department and Bryan Independent School District School Resource Officer Program Memorandum of Understanding (2011-12)); Appendix C-2 at 4 (City of Bryan, Bryan Police Department and Bryan Independent School District School Resource Officer Program Memorandum of Understanding (2012-13)). The contract outlines other SRO duties, including a program of “education leadership” by speaking with students about various law enforcement issues and providing information programs to parents and district staff on issues related to drugs, gangs, and tobacco. Appendix C-1 at 4; Appendix C-2 at 4. The terms of the contract have, upon information and belief, remained consistent over time. In fact, the relevant provisions of the MOUs executed for the 2011-12 and 2012-13 school years are identical.

related student problems.”¹⁸ During the 2011-12 school year, SROs were assigned to every middle and high school in Bryan ISD. The school district is responsible for half the salaries of the SROs along with fringe benefits, for a total cost to the district of \$376,789.08 in the 2011-12 school year and a projected cost of \$405,427 in the 2012-13 school year, as well as “necessary training specific to the function of the SRO[s].”¹⁹ Through this contractual arrangement, SROs function as agents of the Bryan ISD.

The MOUs state that an SRO “shall not act as a school disciplinarian.”²⁰ Nonetheless, Bryan ISD cannot eschew responsibility for the actions of the campus-based SROs. Texas school districts have the discretion to determine the function of SROs and the ambit of their authority either via an MOU (as in Bryan ISD) or through a policy approved by the school district’s superintendent. Tex. Educ. Code § 37.081. Some school districts in Texas and elsewhere have opted to rein in the authority of police to issue tickets or arrest students for minor misbehavior through policy directives or through specific language in an MOU.²¹ But Bryan ISD has not done so.²²

This is all the more noteworthy because Texas law does not require Bryan ISD or any other public school administrators to call the police for minor offenses that amount to little more than a violation of a student code of conduct. Rather, the Texas Education Code mandates notification of law enforcement only for those offenses that the legislature determined might threaten school or student safety. Tex. Educ. Code §37.015 (mandating reporting by school officials of offenses including deadly conduct, terroristic threat, use, sale or possession of a controlled substance and possession of weapons). The Texas Legislature did not include

¹⁸ Appendix C-1 at 6; Appendix C-2 at 6.

¹⁹ Appendix C-1 at 10; Appendix C-2 at 10.

²⁰ Appendix C-1 at 4; Appendix C-2 at 4.

²¹ For example, in Texas during the 2011-12 school year the Waco Independent School District (“Waco ISD”) began its “Positive Policing” program, which included a change in policy that set guidelines to limit the number of tickets issued to students. This program requires school officials to use other alternatives unless the student’s behavior poses an immediate threat or danger to the community. The policy change and the alternatives implemented by Waco ISD reduced ticketing by 77 percent. *See* section V(C)(3), *infra*. Several years ago, Austin Independent School District (“Austin ISD”) adopted a policy allowing ticketing to be used only as “a last resort.” Austin ISD, Board Policy CKE, *Safety Program/Risk Management – Security Personnel/Peace Officers 3* (Sept. 1, 2011), [http://pol.tasb.org/Policy/Download/1146?filename=CKE\(REGULATION\).pdf](http://pol.tasb.org/Policy/Download/1146?filename=CKE(REGULATION).pdf). While ticketing has fluctuated in Austin ISD since the policy was introduced, a renewed focus on alternatives significantly reduced ticketing in Austin ISD during the 2011-12 school year. McAllen and Brownsville ISDs have severely restricted the use of ticketing, resulting in the complete elimination of ticketing for “Disruption of Class” and “Disorderly Conduct” in McAllen and very low ticketing numbers in Brownsville ISD. Email from Chief Cris Esquivel, Police Chief, McAllen ISD, to Deborah Fowler, Deputy Director, Texas Appleseed (Sept. 28, 2012) (on file with Texas Appleseed); Email from Chief Oscar Garcia, Police Chief, Brownsville ISD, to Deborah Fowler, Deputy Director, Texas Appleseed (Sept. 27, 2012) (on file with Texas Appleseed).

²² Bryan ISD’s Student Code of Conduct lists “referral to an outside agency or legal authority for criminal prosecution in addition to disciplinary measures imposed by the district” alongside disciplinary “techniques” ranging from “cooling off time or ‘timeout’” to expulsion with no indication as to which disciplinary techniques should be applied to which type of disciplinary incident. Appendix D at 9 (Bryan Independent School District, Student Code of Conduct, 2012-13 (2012)).

“Disruption of Class” and “Disorderly Conduct – Language” as offenses requiring law enforcement notification. *Id.* Therefore, although the MOU disclaims the SRO’s role as a “school disciplinarian,” the reality is quite different. Through the BPD’s contractual arrangement with Bryan ISD, SROs function in both letter and spirit as disciplinary agents of the school district.

C. Bryan ISD’s Use of SRO Ticketing to Discipline Students for “Disruption of Class” and “Disorderly Conduct – Language”

While ticketing is an unfortunately common practice in many Texas school districts, Bryan ISD’s rate of ticketing still stands out as unusually high. In a sample of 2010-11 ticketing data from 42 school districts recently analyzed by Texas Appleseed, Bryan ISD had the second highest ticketing rate, with 59.6 tickets issued per 1,000 students.²³ It was nearly tied with Galveston ISD, the district with the highest rate at 59.9 per 1,000 students.²⁴ For Bryan ISD, this marked a significant increase from the prior year, 2009-10, when the ticketing rate was 44.4 per 1,000 students.²⁵ Though the number of tickets issued in Bryan ISD decreased somewhat during the 2011-12 school year, the ticketing rate has remained high at about 39.4 tickets per 1,000 students.²⁶ Overall, while the number of tickets and rate of ticketing are subject to episodic spikes and declines, they remain consistently high. And there has been no change in Bryan ISD’s practice or policy that would ensure that any particular decrease represents a trend, rather than merely an aberration.

While students in Texas are ticketed for a range of misbehavior, “Disruption of Class” and “Disorderly Conduct” are the two most commonly ticketed offenses in many school districts. Appendix A at 82. “Disruption of Class” is named as a Penal Code offense, although it is located in the Texas Education Code. “Disrupting the conduct of classes” includes:

- Emitting noise of an intensity that prevents or hinders classroom instruction;
- Enticing another student away from class;
- Preventing a student from attending class; or
- Entering a classroom without permission and disrupting class.

Tex. Educ. Code § 37.124. To be actionable under the “Disruption of Class” statute, a student’s behavior must have been intentional—in other words, the student must have acted with the intent to disrupt class. *Id.*

²³ Texas Appleseed, *Ticketing and Arrest Data Update 27, 29* (2012), available at <http://www.senate.state.tx.us/75r/senate/commit/c530/handouts12/1030-TexasAppleseed-2.pdf> (hereinafter “*Ticketing and Arrest Data Update*”).

²⁴ *Id.* at 5, 14.

²⁵ See Appendix E at 3 (Documents responsive to Texas Public Information Act Requests filed by Texas Appleseed with Bryan Police Department (2011-12)) (reporting 691 citations among a student population of 15,579).

²⁶ See *id.* at 9 (reporting 621 citations among a student population of 15,611); *Ticketing and Arrest Data Update*, *supra* note 23, at 29.

The “Disorderly Conduct” statute is found in the Texas Penal Code and includes a range of behavior that constitute offenses if committed in public, such as:

- Using profanity or abusive language;
- Making an offensive gesture;
- Creating “by chemical means” a noxious and unreasonable odor;
- Abusing or threatening a person in an obviously offensive manner; or
- Making unreasonable noise in a public place “other than a shooting range.”

Tex. Penal Code § 42.01.

Bryan ISD’s enforcement of “Disruption of Class” and “Disorderly Conduct – Language” statutes through student ticketing is particularly troubling because it represents a complete misuse of the statutory provisions in question. The Texas Legislature never intended for these penal code provisions to be used as a mechanism for punishing garden-variety, school-based misbehavior. They were instead drafted to address behavior so disruptive that it posed a risk to a peaceful and productive community – whether in a school (as in the case of “Disruption of Class”)²⁷ or in the larger community (“Disorderly Conduct”).²⁸

²⁷ In 1969, at the height of the Vietnam War era and amid ongoing student protests, the Texas Legislature passed a bill that criminalized “disruptive activities” on school campuses in response to “the increase in frequency and intensity of disruptive activity against institutions of higher education . . . illustrated by such actions . . . developing within the State of Texas.” Committee on Criminal Jurisprudence, Bill Analysis: HB 141, Tex. Leg. 61st R.S. (1969). The Legislature added the offense of “Disruption of Class” to the Code the following session, in response to concern that existing law “[did] not give enough authority to law enforcement officers to deal with persons who willfully disrupt school activities.” Committee on Criminal Jurisprudence, Bill Analysis: HB 186, Tex. Leg. 62nd R.S. (1971).

²⁸ While a person may be charged with “Disorderly Conduct” for using profanity or “abusive language,” he or she may only be properly charged if he or she “intentionally or knowingly” uses language that “by its very utterance tends to incite an immediate breach of the peace.” Tex. Penal Code § 42.01(a)(1). To act intentionally or knowingly, a student must have the conscious objective or desire to engage in the conduct or cause the result, Tex. Penal Code § 6.03(a) (defining intentionally), or must be aware that his conduct is reasonably certain to cause the result, *id.* at 6.03(b) (defining knowingly). The test for determining a “breach of the peace” is whether the words or gestures at issue are “inherently likely to provoke a violent reaction.” *Coggins v. State*, 123 S.W.3d 82, 90 (Tex. App.—Austin 2003); *see Texas v. Johnson*, 491 U.S. 397, 408-10 (1989). Language that is merely harsh and insulting does not violate the statute. *Duran v. Furr’s Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App.—El Paso 1996, writ denied) (“Derisive and annoying words can be taken as coming within the purview of the statutes only if they have this characteristic of plainly tending to excite the addressee to a breach of the peace.”).

Typically, when a student utters profanity among his or her peers or even uses profanity with a teacher or administrator, this behavior does not cause a “breach of the peace” that would be likely to provoke a “violent reaction.” *Coggins*, 123 S.W.3d at 90. Analyzing a student’s use of profanity with a teacher under a similar statute, the Arizona Supreme Court noted, “We do not believe that the natural reaction of the average teacher to a student’s profane and insulting outburst . . . would be to beat the student.” *In re Nickolas S.*, 245 P.3d 446, 447-48 (Ariz. 2011). Similarly, a Texas Appellate court recognized that a student who extended his middle finger under his school principal’s nose at a graduation ceremony may have engaged in “foolish, childish” behavior, but had not breached the peace for purposes of the “Disorderly Conduct” statute. *Estes v. Texas*, 660 S.W.2d 873, 877 (Tex. App.—Ft. Worth 1983).

Yet students in Bryan ISD are routinely ticketed for using profanity, even when it is clear that the use of profanity is neither intended to nor does provoke a violent reaction. Criminal sanctions are thus being used improperly as a method of school discipline rather than as a law enforcement tool. And Bryan ISD leadership has been brazen about its efforts to issue criminal sanctions for behavior that could not possibly constitute a violation of Texas law. For example, in a recent interview with PBS NewsHour, the Bryan ISD Superintendent defended this ticketing practice by saying: “If a student tells a teacher to go ‘f’ themselves, calls them a ‘b,’ ... *those are all ticketable offenses*, and we’ve got to have order in the classrooms.”²⁹ Contrary to the practice in Bryan ISD, while this type of adolescent behavior may fairly warrant *within-school* discipline, it does not warrant issuance of a *criminal* citation that results in children being hauled into court and faced with a criminal record that can follow them throughout their lives.

The juvenile docket at the Bryan Municipal Court regularly includes cases exemplifying this misuse and overuse of the “Disruption of Class” and “Disorderly Conduct” statutes.³⁰ For example, during recent observations of public court proceedings, Texas Appleseed staff encountered the following students who had received tickets for “Disruption of Class”:

- A 13-year-old Bryan middle school student was overheard by his teacher using profanity before class started. The teacher sent the student to the principal, who, in turn, called the SRO and asked the officer to issue a ticket to the student based on the teacher’s referral. In addition to the ticket, the student also received a referral to in-school suspension for the behavior.
- A 16-year-old Bryan high school student was sent to the principal’s office after she got into a verbal argument with a classmate. The principal asked the SRO to write a ticket based on the teacher’s referral.
- A Bryan middle school student got into a verbal argument with a second student after the second student hit him in the face with his student identification badge during class. Both students were sent to the principal’s office and the SRO was called, resulting in the first student receiving a “Disruption of Class” ticket.

These cases demonstrate the common and ongoing pattern through which ticketing is improperly used by school administrators and SROs as a mechanism for disciplining students for behavior that may violate school rules, but does not threaten individual or school safety.³¹

²⁹ Mike Fritz & Kelly Chen, *Early Punishments Can Have Lasting Impact for Some Students*, PBS NewsHour, (June 26, 2012, 11:47 AM) video at 3:08-3:33, http://www.pbs.org/newshour/updates/american-graduate/jan-june12/tx-ticketing_06-21.html (interview with Dr. Tommy Wallis) (emphasis added).

³⁰ The Bryan Municipal Court generally holds a juvenile non-traffic docket on Monday and Thursday afternoons. Complainants and/or their counsel have observed these court proceedings on five different occasions: May 24, 2012, November 8, 2012, December 13, 2012, February 11, 2013 and February 14, 2013.

³¹ Although these examples involve schools officials requesting that SROs issue tickets, equally problematic are instances in which SROs issue tickets for mundane misbehavior without prompting by school officials.

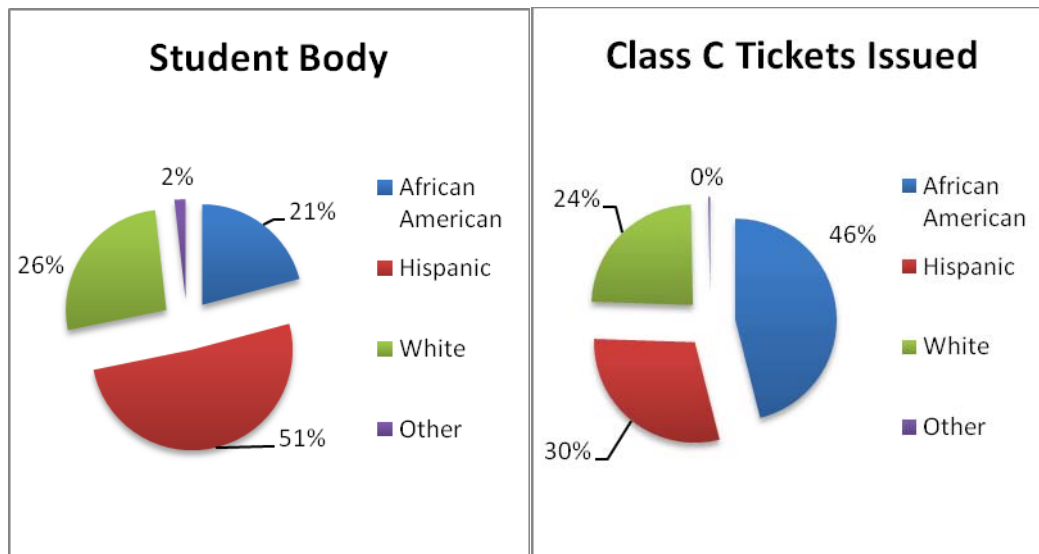
Imposing criminal sanctions on children is not only unnecessarily harsh, it also drains valuable law enforcement and judicial resources that could be used to address legitimate safety concerns. During a recent visit to Bryan Municipal Court, one frustrated judge lamented that he felt like his courtroom was “the vice principal’s office”—a reference to the school administrators who traditionally have served as disciplinarians.

Bryan ISD has chosen to rely upon SROs as *de facto* disciplinarians and has effectively “passed the paddle” from the principal’s office to the Bryan Police Department. By failing to distinguish between law enforcement functions and school discipline functions in its MOUs with the Bryan Police Department, and by directing, encouraging or allowing SROs to issue tickets at a high rate year-after-year for minor student misbehavior, Bryan ISD is using criminal sanctions as an integral part of its disciplinary process. This alone is objectionable, but it is all the more troubling because of its racially disparate consequences.

D. Racial Disparities in the Issuance of Class C Misdemeanor Tickets

Data provided by the Bryan Police Department in response to an open records request made by Texas Appleseed³² clearly demonstrates that Bryan ISD’s use of law enforcement officers to discipline students for common, youthful misbehavior has a large and ongoing disparate impact on African-American students. Data from the 2011-12 school year, the most recent year for which data is available, shows that African-American students received nearly half of all Class C misdemeanor tickets in Bryan ISD, although they constituted less than a quarter of the overall student population:

Figure 1: Comparison of Student Body Demographics to Class C Tickets Issued by Race, 2011-12



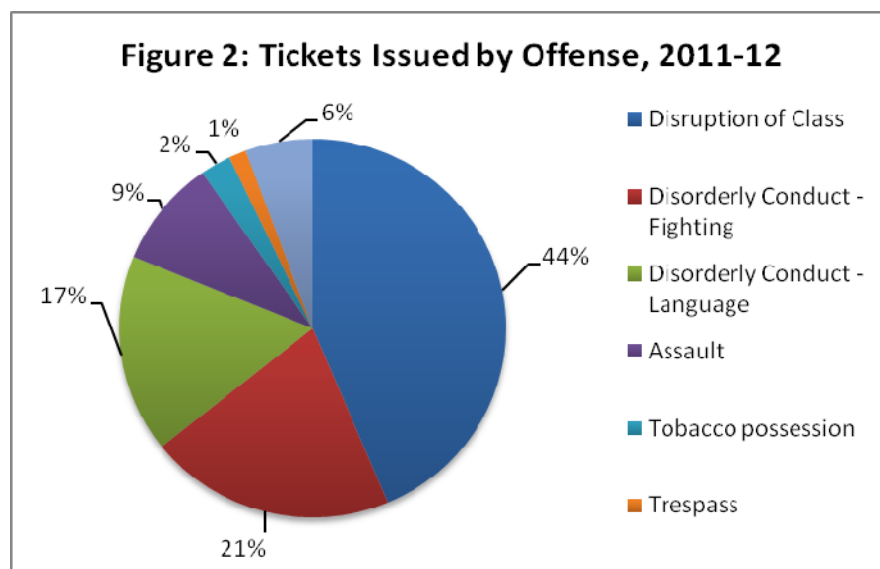
³² Appendix E. The Bryan Police Department responded to two open records requests made by Texas Appleseed, providing data for three school years: 2009-10, 2010-11 and 2011-12.

This disparity has persisted over time. In fact, over the last three school years African-American students received just over half of the total number of tickets issued:

Table 2: Total Number of Tickets Issued by Race/Ethnicity

School Year	African-American	Hispanic	White	Other ³³	Total Tickets
2009-10 ³⁴	360	(N/A) ³⁵	312	1	673
2010-11 ³⁶	444	165	271	1	881
2011-12 ³⁷	286	183	150	2	621
TOTAL	1090	348	733	4	2175

This racial disparity is even more evident when the ticketing numbers are disaggregated by specific offense. A review of the data illustrates how African-American students bear the brunt of the ticketing burden because they are most significantly overrepresented in two of the most highly-ticketed offenses—“Disruption of Class” and “Disorderly Conduct – Language.” As illustrated in Figure 2 below, “Disruption of Class” and “Disorderly Conduct – Language” were two of the three offenses most frequently cited by Bryan ISD SROs in the 2011-12 year.



³³ The “Other” category includes tickets issued to Asian students and students whose race was unknown or otherwise recorded as “other” in data provided by the Bryan Police Department.

³⁴ Appendix E at 27.

³⁵ The Bryan Police Department SROs’ disaggregation of tickets by race/ethnicity did not include tickets issued to Hispanic students until 2010-11. Additionally, the very low numbers in 2010-11 and 2011-12 may indicate that Hispanic students may have not been accurately counted in the first two years that this category was added.

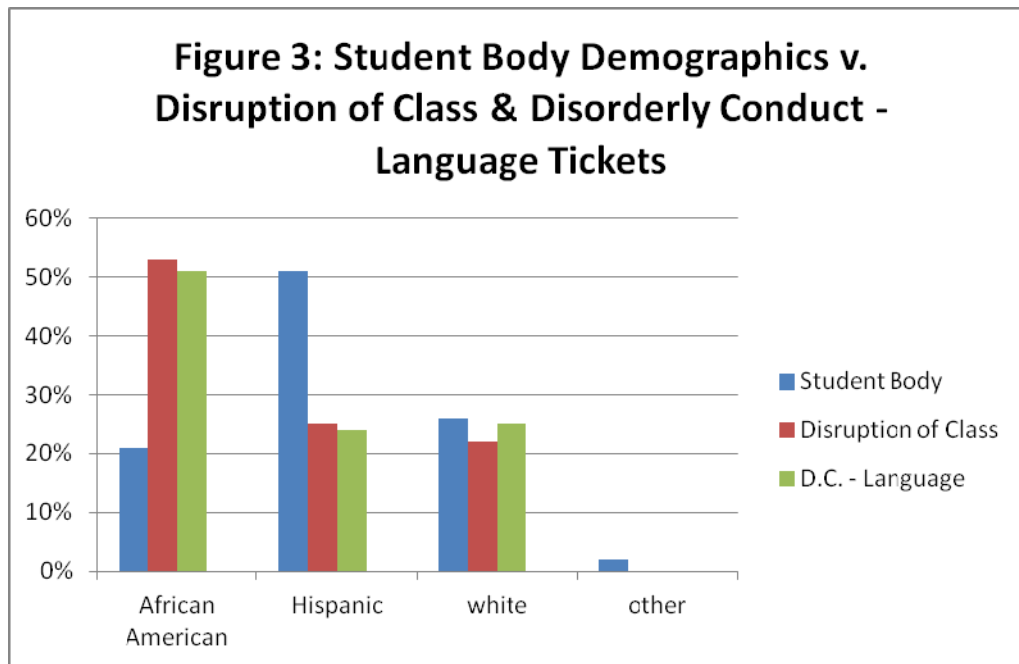
³⁶ Appendix E at 45.

³⁷ *Id.* at 9.

And *within* these highly-ticketed categories, African-American students were significantly overrepresented. Table 3 and Figure 3 below illustrate the scope of the disparity:

Table 3: Comparison of Student Body Demographics to “Disruption of Class” and “Disorderly Conduct – Language” Tickets by Race, 2011-12³⁸

	African-American	Hispanic	White	Other	TOTAL
Bryan ISD Student Body	3,252 (21%)	7955 (51%)	4123 (26%)	281 (2%)	15,611
“Disruption of Class” Tickets	143 (53%)	68 (25%)	59 (22%)	1	271
“Disorderly Conduct – Language” Tickets	54 (51%)	25 (24%)	26 (25%)	0	105



³⁸ *Id.* at 9.

The racial disparity can also be understood by considering the “risk ratio”, a technique that allows one to compare the risk of receiving a ticket faced by one group of students to the risk faced by all other students.³⁹ A risk ratio of 1.0 indicates that the risk between the two groups is equal, whereas a risk ratio of *greater than one* indicates that the risk for the comparison group is higher than the risk for all other students.⁴⁰ Conversely, a risk ratio of *less than one* indicates that the risk for the comparison group is lower than the risk for all other students.⁴¹

The risk ratios for two specific offense categories—“Disruption of Class” and “Disorderly Conduct – Language”—show that significant racial disparities result from Bryan ISD’s practice of criminalizing the most minor student misbehavior. For example, as reflected in Table 4 below, the risk ratio for African-American students receiving “Disruption of Class” tickets is 4.25 and the risk ratio for “Disorderly Conduct – Language” tickets is 4.02. This means that the likelihood that an African-American student will receive a ticket for either of these offenses is *more than four times greater* than the risk faced by all other students.

Table 4: Risk Ratios by Race/Ethnicity for “Disruption of Class” and “Disorderly Conduct—Language,” 2011-12⁴²

Offense	African-American	Hispanic	White
“Disruption of Class”	4.25	0.32	0.78
“Disorderly Conduct – Language”	4.02	0.30	0.92

Furthermore, although there is minor variation in the number of tickets issued each year, the racial disparities in these categories persist. For example, though the total number of tickets issued has fluctuated, data from the two school years preceding 2011-12 show that the risk ratio for African-American students remained consistently high in tickets issued for “Disruption of Class” and “Disorderly Conduct – Language”:

Table 5: Risk Ratio for African-American Students for “Disruption of Class” and “Disorderly Conduct—Language,” 2009-10 to 2011-12⁴³

Offense	2009-10	2010-11	2011-12
“Disruption of Class”	4.45	3.75	4.25
“Disorderly Conduct – Language”	4.76	4.93	4.02

³⁹ See Julie Bollmer, *Using Risk Ratio to Assess Racial/Ethnic Disproportionality in Special Education at the School-District Level*, 41 J. Special Educ. 186, 187 (2007), available at <http://www.eric.ed.gov/PDFS/EJ785951.pdf>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Appendix F (Methodology) for a step by step explanation of the calculations in this Table.

⁴³ *Id.*

Similarly, while there is some variation across school campuses, it is important to note that the racial disparities in ticketing, both overall and for specific categories, exist district-wide. In fact, on *every* middle school and high school campus in Bryan ISD, African-American students are ticketed at rates that exceed their representation in the student body. As Table 6 illustrates, the overrepresentation of ticketing for African-American students is largely driven by tickets issued for “Disorderly Conduct – Language,” “Disruption of Class,” or both. At each of the middle and high schools in Bryan ISD, tickets issued for these two offense categories represented close to, or more than, half of all the tickets issued at that campus. And African-American students were significantly overrepresented in ticketing for those offenses:

Table 6: Comparison of Student Body Demographics to Ticketing of African-American Students in all Bryan ISD Middle Schools and High Schools, 2011-12⁴⁴

School	Percentage of African Americans in Student Body	Percentage of all Tickets Issued to African Americans	Percentage of “Disruption of Class” and “Disorderly Conduct – Language” Tickets Issued to African Americans
A. Davila MS	18%	39%	45%
J. Long MS	19%	42%	40%
S. Rayburn MS	28%	63%	91%
S.F. Austin MS	19%	39%	41%
Bryan HS	21%	50%	62%
Bryan Collegiate HS	4%	47%	49%
J.E. Rudder HS	28%	42%	46%

⁴⁴ See Appendix E at 10-26.

IV. JURISDICTION

Because Bryan ISD receives federal funding, the U.S. Department of Education's Office for Civil Rights has jurisdiction over complainants' allegations that Bryan ISD's policies or practices violate Title VI through their discriminatory effect on African-American students. *See* 34 C.F.R. § 100.2; 34 C.F.R. § 100.13(i) (for purposes of Title VI, a recipient of federal funds includes any "instrumentality of any State or political subdivision, [and] any public or private agency, institution, or organization, or other entity . . . to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assign, or transferee thereof . . .").

Specifically, OCR has jurisdiction over a claim involving the discriminatory impact of Bryan ISD's historical and ongoing criminalization of minor student misbehavior through its use of SROs as disciplinarians. It has long been understood that, for Title VI purposes, a funded entity cannot avoid its obligations under Title VI by hiring a contractor or agent. 34 C.F.R. § 100.3(b)(2); U.S. Dep't of Justice, *Title VI Legal Manual* 25-26 (2001). That is the case where, as here, law enforcement officers function as the agents of a school district. As set forth in section III(B), *supra*, SROs operate in Bryan ISD through a Memorandum of Understanding between Bryan ISD and the BPD.⁴⁵ In this case, the MOU requires BPD to assign uniformed police officers and marked patrol cars to Bryan ISD's middle and high schools. The contract provides *inter alia* that the SROs "will work with school administrator(s) to . . . maintain a peaceful campus environment, and take appropriate action regarding illegal activity occurring on-campus or at school related functions." In exchange for its services, Bryan ISD paid BPD an estimated \$405,427 for salary, benefits and vehicle operations costs during the current school year and supplies the SROs with offices on school campuses.

With respect to what qualifies as a "program or activity" where a school district is involved, Title VI extends to "*all the operations of* . . . a local educational agency." 42 U.S.C. § 2000d-4a(2)(B); 34 C.F.R. § 100.13(g)(2)(ii) (emphasis added). This includes security and discipline operations, whether the school district opts to handle these matters internally or through contracts with an outside entity, as does the Bryan ISD. The activities of school-based police officers, whose presence on campus is the result of a district-initiated contract, and whose school-based work is partially funded with district funds, fall well within the ambit of "operations of a local education agency."

⁴⁵ *See generally* Appendix C.

V. BRYAN ISD'S PRACTICE OF USING CRIMINAL SANCTIONS TO DISCIPLINE STUDENTS FOR MINOR MISBEHAVIOR VIOLATES TITLE VI OF THE CIVIL RIGHTS ACT

Title VI of the Civil Rights Act of 1964 provides that recipients of federal financial assistance may not discriminate on the basis of race, color, or national origin. 42 U.S.C. § 2000d. The regulations promulgated by the U.S. Department of Education to implement Title VI prohibit a recipient of federal funds from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.” 34 C.F.R. § 100.3(b)(2). Thus, OCR may bring enforcement actions against recipients of federal funds that implement disciplinary policies or practices that result in a disparate impact, regardless of whether the policy or practice in question was motivated by discriminatory intent. Bryan ISD’s practice fails the three-pronged test used to analyze disparate impact claims and thus violates Title VI.

First, a prima facie case of a Title VI disparate-impact violation is established if a recipient of federal funds institutes a policy or practice that disproportionately affects students of a particular racial or ethnic group. See *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); U.S. Dep’t of Justice, *Title VI Legal Manual* 49-50 (2001). While there is “no rigid mathematical threshold” for demonstrating a prima facie case of disparate impact, *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1526 (M.D. Ala. 1991) (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality)), federal courts use “one of several forms of statistical analysis to reach reliable inferences about racial disparities in a population based on the performance of a particular sample.” *Id.* at 1527. As discussed in section III.A., Bryan ISD’s practice of using criminal sanctions to discipline students for minor misbehavior clearly has a disproportionately negative effect on African-American students.

Second, once a prima facie case is established, the burden shifts to the respondent to demonstrate that the policy or practice is “required by educational necessity.” *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412 (11th Cir. 1993). To meet this burden, the recipient of federal funds must show that the challenged practice bears a manifest relationship to an objective that is “legitimate, important, and integral to [its] educational mission.” *Id.* at 1413; U.S. Dep’t of Justice, *Title VI Legal Manual* 50-53 (2001). Therefore, justifications that do not further or run counter to the respondent’s educational mission, or that are superficial or nominal, are entirely insufficient to satisfy this standard. Because Bryan ISD cannot show that its ticketing practice has a manifest relationship to a legitimate educational goal, it cannot justify its practice through educational necessity.

Third, even when a recipient of federal funds can justify a policy or practice through educational necessity, the recipient may still be held accountable under Title VI if there are alternative practices available that would be equally effective in serving the recipient’s educational mission while having less of a racially disparate impact. See *Elston*, 997 F.2d at 1413; U.S. Dep’t of Justice, *Title VI Legal Manual* 53 (2001). Even if Bryan ISD could show an educational necessity for its ticketing practice, there are less discriminatory alternatives that are at least equally effective, if not more effective, in achieving its educational purpose.

A. Bryan ISD's Ticketing Practice Disproportionately Harms African Americans

Bryan ISD's African-American students are significantly overrepresented as recipients of "Disruption of Class" and "Disorderly Conduct – Language" tickets. This disparity can be demonstrated in two distinct ways, both of which have been recognized by courts as reliable measures of statistical proof of disparate impact.

1. "Proportion Comparison" Method

The first method compares a group's representation within an overall population to its representation within the affected population (here, those being ticketed for "Disruption of Class" and "Disorderly Conduct – Language"). Absent discrimination, one might expect that the percentages should be comparable. This rough approximation is considered the "expected outcome." When the difference between the expected and actual outcomes for particular racial or ethnic groups is substantial, a prima facie case of discrimination may be established.

In *Castaneda v. Partida*, 430 U.S. 482, 496-97 (1977), the Supreme Court considered the percentage-point difference between expected and actual outcomes and found that a difference of 40 percentage points between expected and actual outcomes was *more than sufficient* to make out a prima facie case of disparate impact.⁴⁶ In other cases, the Court has found that even much smaller differences are sufficient to establish a prima facie case.⁴⁷

Similarly, in Bryan ISD, the percentage point difference between African-American representation in the student population and African-American representation among those who receive "Disruption of Class" and "Disorderly Conduct – Language" tickets is substantial enough to establish a prima facie case. In the 2011-12 school year African Americans represented 21 percent of the student population, yet received 53 percent of the tickets issued for "Disruption of Class", representing a 32 percentage point difference, and 51 percent of the tickets issued for "Disorderly Conduct – Language", representing a 30 percentage point spread. *See* Table 3 and Figure 3, *supra*.

In addition to calculating the percentage point difference, the *Castaneda* Court described in a footnote how the concept of "standard deviation" could be used to evaluate the strength of

⁴⁶ In *Castaneda*, while a county's population was 79.1 percent Mexican-American, for over a decade only 39 percent of those summoned for grand jury service were Mexican-American, a difference of just over 40 percentage points.

⁴⁷ *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 337, 339-42 (1977) (noting, in an employment discrimination case where 5 percent of employees were Black and 4 percent were "Spanish-surnamed Americans" but only 0.4 percent of line drivers were Black and only 0.3 percent of line drivers were Latino, that the Court has "repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases" and that statistics are equally as relevant in employment discrimination cases); *Turner v. Fouche*, 396 U.S. 346, 361 (1970) (holding that a the 23 percentage point difference between African Americans in the general population and those on grand jury lists was sufficient to establish a prima facie case of disparate impact); *Whitus v. Georgia*, 385 U.S. 545 (1967) (holding that the percentage point disparity of African Americans listed on the tax digest (27.1 percent) and their percentage of the grand jury venire (9.1 percent) was sufficient to make out a prima facie case of disparate impact);

proof for a prima facie case of disparate impact. It noted that a difference greater than 2 to 3 standard deviations between the actual and the expected results is sufficient to establish that an outcome is not the result of random chance, and is thus likely to be the result of discrimination.⁴⁸

In Bryan ISD, the dramatic gap between African-American representation in the student population and African-American representation among those who receive Class C misdemeanor tickets is substantial enough to establish a prima facie case. In the 2011-12 school year, Bryan ISD issued 271 class C misdemeanor tickets for “Disruption of Class” and 105 tickets for “Disorderly Conduct – Language.” Based on this data, one should expect that African-American students would have been issued tickets in an amount proportionate to their share of the student population of about 21 percent. That would mean approximately 56 tickets for “Disruption of Class” and 22 for “Disorderly Conduct – Language.”

However, the actual results were grossly out of line with these expected values. *See* Table 3 and Figure 3, *supra* and Table 8, *infra*. African-American students received more than twice as many tickets than should have been expected for both offense categories. Put another way, these gaps translate to *12 standard deviations* between the expected number and actual number of “Disruption of Class” tickets issued to African-American students, and *7 standard deviations* between the expected number of tickets and the actual number of “Disorderly Conduct – Language” tickets issued to African-American students. Both figures significantly exceed the benchmarks for establishing disparate impact noted by federal courts. *See, e.g., Hazelwood Sch. Dist.*, 433 U.S. at 309 (noting in dicta that a disparity of 2 or 3 standard deviations is “suspect”).

⁴⁸ The *Castaneda* Court set out the standard deviation analysis as follows:

Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. The measure of the predicted fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican-American (0.209). Thus, in this case the standard deviation is approximately 12. ... [I]f the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.

430 U.S. at 496 n.17 (internal citations omitted); *accord Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977).

Table 8: Expected Outcomes, Actual Outcomes and Standard Deviations for Tickets Issued to African-American Students⁴⁹

	“Disruption of Class”	“Disorderly Conduct – Language”
Total tickets issued to all students	271	105
<i>Expected</i> number of tickets for African Americans	56.45	21.87
<i>Actual</i> number of tickets issued to African Americans	143	54
Difference between expected and actual tickets	86.55	32.13
Number of Standard Deviations between expected and actual number of tickets issued	12.95	7.72

2. “Risk Ratio” Method

Complainants can also establish a prima facie case through a second method—an analysis of risk ratios. For purposes of this complaint, risk ratio means the chance African-American students have of receiving a ticket for “Disruption of Class” and “Disorderly Conduct – Language” compared to the chance of students of other racial groups receiving a ticket for the same offenses.

While courts have not set a specific threshold over which a risk ratio can be said to be significant for purposes of establishing a racially disparate impact, one court has noted by way of example that the Pennsylvania Department of Education uses a risk ratio of 3.0 to judge disparities and the United States Department of Education has reported that a risk ratio of 1.5 indicates over-representation. *See Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 756 (E.D. Pa. 2011). Courts have also examined risk ratios in the context of epidemiological causation and in at least one case held that a risk ratio of 2.0 is sufficient to show causation. *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1226-27 (D. Colo. 1998).

Compared to all other students in Bryan ISD, the risk ratio for African-American students receiving a ticket for “Disruption of Class” is 4.25 and the risk ratio for receiving a ticket for “Disorderly Conduct – Language” in the 2011-12 school year was 4.02. *See* Table 4, *supra*. This means that the likelihood that an African-American student will receive a ticket for either of these offenses is more *than 4 times greater* than the risk faced by all other students. The same was true in the 2009-10 and 2010-11 school years. *See* Table 5, *supra*. Given the number of students in Bryan ISD, both forms of ticketing and their corresponding risk ratios for the 2011-12 school year more than satisfy accepted standards for statistical significance.⁵⁰

⁴⁹ Appendix E at 9. Numbers in these tables have been rounded to the second decimal place. *See also* Appendix E.

⁵⁰ *See* Appendix F (outlining the application of chi-square test to risk ratios from 2011-12 school year. The chi-square test is an accepted method to determine the statistical significance of a risk ratio. The statistical significance of a risk ratio created using duplicated counts can be tested using the chi-square test. *See, e.g.,* Russell

B. Bryan ISD Cannot Demonstrate that its Practice of Using Criminal Sanctions to Discipline Students For Minor Behavioral Infractions Constitutes an Educational Necessity

Because Bryan ISD's ticketing practice disproportionately harms African-American students, the district must show specifically a "manifest demonstrable relationship" between this practice and either "classroom education" or "an important educational goal." *Elston*, 997 F.2d at 1394, 1413; *Georgia State Conference of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985). Bryan ISD cannot demonstrate such a relationship to any one of a number of possible education-related goals or justifications.

Bryan ISD cannot show that its ticketing practice furthers the aims of maintaining order, promoting school safety or any effort to quell criminal activity among students in district schools. As discussed in section III(C), *supra*, the behaviors for which Bryan ISD students commonly receive "Disruption of Class" and "Disorderly Conduct – Language" tickets often do not rise to the level of criminal behaviors even according to those statutes. Moreover, available data on juvenile Class C misdemeanor cases collected since 2000 shows that ticketing in Bryan ISD has increased independent of statewide rates of juvenile or school-based crime, which have decreased.⁵¹

In addition, the ticketing practice does not further Bryan ISD's stated mission of providing "positive educational experiences that ensure high school graduation and post-secondary success."⁵² While there are many factors that inform academic success, high ticketing and exclusionary discipline rates have the opposite effect. These practices have been linked to higher rates of grade retention and dropout.⁵³ And students who have police or court involvement are significantly less likely to graduate than their peers who do not have such involvement.⁵⁴ Moreover, the use of ticketing for minor school misbehavior may also impede

J. Skiba et al., *Disproportionate Minority Contact: Qualitative Analyses Final Report*, Submitted to the Indiana Criminal Justice Institute Title II Grant, 2006-2007 (June 30, 2007), available at www.indiana.edu/~equity/docs/ICJI_FinalReport2007.pdf.)

⁵¹ See Appendix B at 4-5, 23-24.

⁵² Bryan ISD, District Mission, http://www.bryanisd.org/apps/pages/index.jsp?uREC_ID=180519&type=d&pREC_ID=375550 (last visited February 17, 2013).

⁵³ See Appendix G (Tony Fabelo et al., The Council of State Governments Justice Center, *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* 54-60 (2011)) (hereinafter "Council of State Governments"); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 *Justice Quarterly* 462, 473-477 (December 2006), available at http://www.nocurfew.org/yahoo_site_admin/assets/docs/Who_Will_Graduate_Sweeten.235183607.pdf (hereinafter "Who Will Graduate?").

⁵⁴ See *Who Will Graduate?*, *supra* note 53, at 473-77; Jon Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 *Criminology* 1287, 1311 (2003), available at <http://www.colorado.edu/ibs/pb/thornberry/socy7004/pdfs/Labeling,%20Life%20Chances,%20and%20Adult%20Crime.pdf>.

educational progress for the school as a whole, including those students who do not receive tickets. Schools with highly restrictive school climates have not been shown to have lower rates of problem behavior than other schools.⁵⁵ Instead, relying on police to address student behavior can foster a highly restrictive, distrustful environment that diminishes students' views of teachers' authority and can make it more difficult to maintain school order, safety and academic achievement.⁵⁶ As detailed below, the cumulative negative academic and life outcomes have a significant impact on the economic and civic well-being of schools as a whole, individual students and even entire communities.

1. Impact on students and school as a whole

Reliance on school police to address school discipline does not increase, and may negatively impact, the safety, order and educational progress of the school as a whole.

While the MOU between Bryan ISD and the BPD requires SROs to “assist District staff in maintaining order on school property,”⁵⁷ there is no evidence that ticketing students for minor offenses improves school order. A recent meta-analysis of 178 individual studies assessing the effectiveness of different school-based disciplinary interventions determined that the use of police to handle school disorder does not reduce the occurrence of problem behavior in schools.⁵⁸ Indeed, relying on police to address student behavior may hinder Bryan ISD's efforts to maintain order on school property. Highly-restrictive efforts to control students by involving police in school disciplinary matters actually cause higher levels of school disorder by diminishing students' belief in the legitimacy of school staff authority.⁵⁹ Aggressive security measures produce alienation and mistrust among students which, in turn, can disrupt the learning environment and create an adversarial relationship between school officials and students.⁶⁰ Because students often perceive school police practices as fundamentally unfair, the actions of

⁵⁵ See Matthew J. Meyer & Peter E. Leone, *A Structural Analysis of School Violence and Disruption: Implications for Creating Safer Schools*, 22 *Education and Treatment of Children* 333, 349 (1999) (creating a highly scrutinized school environment may result in higher levels of disorder), available at http://www.popcenter.org/problems/bomb_threats/pdfs/mayer%26leone_1999.pdf; cf. Philip J. Cook, et al., *School Crime Control and Prevention* 74-76 (Mar. 23, 2009), <http://ssrn.com/abstract=1368292> (draft) (finding that “little high quality evaluation research has been conducted to assess SRO effectiveness, but it seems reasonable that the increased presence of SRO officers in schools at the very least increases the referral of problem behaviors to law enforcement agencies.”).

⁵⁶ See Kim, *supra* note 6, at 26; Meyer & Leone, *supra* note 55, at 352.

⁵⁷ Appendix C-1 at 4; Appendix C-2 at 4.

⁵⁸ Kim, *supra* note 6, at 26; Cook, et al., *supra* note 55, at 74-76.

⁵⁹ See Meyer & Leone, *supra* note 55, at 352. The frequent use of exclusionary discipline for students who have also been ticketed can exacerbate these negative impacts: schools that regularly rely upon exclusionary discipline, particularly for minor offenses, have lower overall scores on state tests and lower overall student connectedness. M. Karega Rausch & Russell Skiba, Center for Evaluation & Education Policy, *Unplanned Outcomes: Suspensions and Expulsions in Indiana*, 2 *Education Policy Briefs* 1, 5 (2004), available at http://ceep.indiana.edu/projects/PDF/PB_V2N2_UnplannedOutcomes.pdf (hereinafter “*Unplanned Outcomes*”); Rausch & Skiba, *supra* note 5, at 14-17.

⁶⁰ Randall R. Beger, *The Worst of Both Worlds*, 28 *Crim. Just. Rev.* 336, 340 (2003).

school police can serve to trigger, not curb, misbehavior.⁶¹ Fostering such restrictive environments may lead to violence, thus jeopardizing, instead of promoting, school safety.⁶²

In addition, reliance on ticketing for minor offenses does not support schools' educational progress. Negative interaction with SROs on school campuses can damage students' views of teachers' authority and thus disrupt the learning environment.⁶³ Increased school police presence leads students to a "shared sense of grievance" which decreases student ratings of school climate and academic engagement.⁶⁴ Additionally, by diverting resources that might otherwise be used to improve academic instruction and school culture, employing highly-restrictive security measures may impede school improvement.⁶⁵ Consequently, rather than improving school-wide academics and behavior, Bryan ISD's reliance on "Disruption of Class" and "Disorderly Conduct – Language" ticketing harms the overall school environment.

Increasingly, other school districts provide evidence that reliance on ticketing is unnecessary. A district can simultaneously support school safety and academic achievement while reducing reliance on ticketing, suspension and expulsion. For example, six schools operated by the New York City Department of Education ("NYCDOE") improved academic achievement, graduation rates and school safety by limiting the role of New York City's school police (School Safety Agents or "SSAs") in responding to school discipline incidents.⁶⁶ These six schools all served similar percentages of at-risk youth as nearby NYCDOE schools and several served as "transfer schools" for students who had been removed from other NYCDOE schools due to disciplinary reasons.⁶⁷ However, the six schools that limited the use of SSAs had

⁶¹ Kathleen Nolan, *Police in the Hallways: Discipline in an Urban High School* 53 (2011).

⁶² Meyer & Leone, *supra* note 55, at 349; see Gary D. Gottfredson et al., *School Climate Predictors of School Disorder: Results from a National Study of Delinquency Prevention in Schools*, 42 *J. of Research in Crime & Delinquency* 412, 433 (2005), available at www.joanmaher.com/my_documents/courses_hs_english_012/unit_2/sidcra/resources/schoolclimatepredictors.pdf. (finding students rate their schools higher on scales of student delinquency and victimization when they report unfair implementation of arbitrary rules).

⁶³ See Arrick Jackson, *Police-school Resource Officers' and Students' Perception of the Police and Offending*, 25 *Policing: Int'l J. Police Strategies & Mgmt.* 631, 634 (2002) (finding that officers' presence on school campuses posed obstacles for free and open learning environments by damaging students' view of teachers' authority).

⁶⁴ See Rachel Garver & Pedro Noguera, *For Safety's Sake: A Case Study of School Security Efforts and Their Impact on Education Reform*, 3 *Journal of Applied Research on Children* 23-24 (2012), available at <http://digitalcommons.library.tmc.edu/childrenatrisk/vol3/iss2/5/>.

⁶⁵ *Id.* at 25. Cf. Texas Appleseed, *Breaking Rules, Breaking Budgets: Cost of Exclusionary Discipline in 11 Texas School Districts* 13-14 (2012), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=867&Itemid= (finding that during the 2010-2011 school year Bryan ISD spent approximately the same amount on SROs as it did on school social workers).

⁶⁶ Udi Ofer et al., New York Civil Liberties Union, *Safety with Dignity: Alternatives to the Over-Policing of Schools* 12-13 (2009), available at <http://www.nyclu.org/content/safety-with-dignity-alternatives-over-policing-of-schools-2009>.

⁶⁷ *Id.* at 12.

higher attendance and graduation rates as well as significantly lower rates of suspension and criminal incidents compared to other NYCDOE schools.⁶⁸ While each school took an individual approach to improving school climate, many of their strategies represent evidence-based, commonsense practices, including making educators (instead of police officers) responsible for maintaining school discipline and order;⁶⁹ implementing school-wide approaches to discipline that anticipated instances of school disruption, reduced confrontation and resolved conflicts in positive, proactive ways;⁷⁰ involving students in revising the schools' discipline codes and in resolving conflicts between students;⁷¹ addressing students' non-academic needs through in-house services or partnerships with community organizations;⁷² supporting innovative teaching and teacher leadership and creating a culture of respect that welcomed and valued all students.

Schools can, therefore, improve school climate, academic performance and student safety without relying on ticketing for minor offenses.

2. Impact on academic and life outcomes for individual students

Because Bryan ISD's use of ticketing for school-based incidents reduces instructional time, school connectedness and opportunities for pro-social development, it fosters negative academic outcomes for individual students.⁷³

⁶⁸ *Id.* at 13.

⁶⁹ Sample memoranda and materials for limiting police involvement to matters of school safety – not discipline – are available free of charge on the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative's website, <http://www.jdaihelpdesk.org>.

⁷⁰ For example, School-Wide Positive Behavior Support (SWPBS) is an evidence-based approach to school discipline that monitors trends in student behavior to anticipate disciplinary incidents and encourages schools to implement positive interventions at school-wide, targeted and individual levels. SWPBS is currently being implemented in over 12,000 schools across the country and has been shown to reduce disciplinary referrals and improve student attendance, academic achievement and staff perceptions of school safety. Technical assistance is available through the Technical Assistance Center on Positive Behavioral Interventions and Supports housed at the U.S. Department of Education Office of Special Education Programs. *See* OSEP Technical Assistance Center on Positive Behavioral Interventions & Supports, <http://www.pbis.org> (last visited Feb. 16, 2013).

⁷¹ Involving both students and teachers in school leadership and governance are hallmarks of successful education reform efforts. Training and technical assistance on such efforts are available in Texas from the Intercultural Development Research Association ("IDRA") in San Antonio, one of ten Equity Assistance Centers funded by the U.S. Department of Education. *See* IDRA, South Central Collaborative for Equality, http://www.idra.org/South_Central_Collaborative_for_Equity/ (last visited Feb. 16, 2013).

⁷² The U.S. Department of Education's Promise Neighborhoods initiative encourages partnership between schools and community-based service providers to address students' non-academic needs. *See* U.S. Dep't of Ed., Promise Neighborhoods, Program Overview, <http://www2.ed.gov/programs/promiseneighborhoods/index.html> (last visited Feb. 16, 2013).

⁷³ When students also receive exclusionary discipline on top of ticketing, these negative outcomes can be compounded. *See generally* Appendix G at 59; D. Mark Anderson, *In School and Out of Trouble? The Minimum Dropout Age and Juvenile Crime* 33 (2012), available at http://dmarkanderson.com/MDA_crime_9_26_2012.pdf (finding that interventions to keep kids in school reduce the amount of time available for delinquent acts).

- a. Bryan ISD’s ticketing practice reduces students’ chances to succeed by decreasing their instructional time.

Bryan ISD’s ticketing practice immediately impedes disciplined students’ educational progress because mandatory court appearances require absences from school to attend municipal and justice of the peace court proceedings, which are in session during the school day. Unnecessarily removing students from instructional settings runs counter to the research which consistently documents a positive relationship between instructional opportunity and student achievement.⁷⁴ In the long term, lost instructional time makes future academic tasks more difficult and, consequently, incentivizes student misbehavior to avoid increasingly difficult academic work.⁷⁵ This interruption of educational opportunities makes it more likely that a student will leave school before graduating. Studies show that a first-time court appearance nearly quadruples the likelihood that a student will drop out.⁷⁶ As a result, Bryan ISD’s reliance on “Disruption of Class” and “Disorderly Conduct – Language” ticketing to discipline students for behavior that could be remediated without impacting instructional time increases the ticketed students’ risk of academic failure.

- b. Bryan ISD’s ticketing practice stunts academic progress by weakening students’ sense of connectedness to their schools, decreasing their academic motivation and limiting students’ opportunities for pro-social development at school.

Bryan ISD’s reliance on “Disruption of Class” and “Disorderly Conduct – Language” ticketing endangers ticketed students’ school connectedness—students’ belief that adults within the school care about them and their educational progress. That sense of connectedness is critical to protect against a number of risk factors for poor academic and life outcomes.⁷⁷ By reducing the ticketed student’s sense of belonging in the school community, Bryan ISD’s ticketing practice increases the probability of academic failure and poor life outcomes.

For students to feel connected to a school community, they must perceive school authorities to be caring and fair. However, reliance on ticketing undermines these relationships.⁷⁸ Because ticketing decisions are often subjective, both on the part of the police

⁷⁴ Rausch & Skiba, *supra* note 5, at 6.

⁷⁵ Aaron Kupchik, *Things are Tough All Over: Race, Ethnicity, Class and School Discipline*, 11 *Punishment & Society* 291, 307, available at <http://www.suspensionstories.com/wp-content/uploads/2010/10/things-are-tough-all-over.pdf> (finding that lost instructional time served to aggravate students’ academic deficits because they fell further behind their classmates).

⁷⁶ *Who Will Graduate?*, *supra* note 53, at 473-77.

⁷⁷ See Centers for Disease Control and Prevention, *School Connectedness: Strategies for Increasing Protective Factors Among Youth* 3 (2009), available at <http://www.cdc.gov/healthyyouth/adolescenthealth/pdf/connectedness.pdf> (hereinafter "CDC").

⁷⁸ See Jaana Juvonen, RAND, *School Violence: Prevalence, Fears and Prevention* 3 (2001), available at http://www.rand.org/pubs/issue_papers/IP219.html (concluding that the presence of police on campus can “breed a sense of mistrust among students”).

officer issuing the ticket and the school staff who may have requested the police intervention, a ticketed student may view school and police authorities as unfair and untrustworthy.⁷⁹ Moreover, where students of color disproportionately receive police intervention within schools, students are “likely to interpret the disparity as rejection and, as a result, develop a collective, self-fulfilling belief that they are incapable of abiding by schools’ social and behavioral codes.”⁸⁰

The consequences of reduced school connectedness are significant, both inside and outside the school environment. Students with high levels of connectedness to school have better attendance, higher grades, higher standardized test scores and fewer behavioral incidents than their peers who are less connected to school. Indeed, middle school students with high degrees of school connectedness were 75 percent more likely to do well on measures of academic achievement and school attendance than their peers who were less engaged.⁸¹ School connectedness functions as a critical factor in supporting academic achievement for economically disadvantaged students and also protects against health risks that reduce students’ focus on academics and achievement.⁸² School connectedness also influences how students

⁷⁹ See Johanna Wald & Lisa Thureau, *First Do No Harm: How Educators and Police Can Work Together More Effectively To Preserve School Safety and Protect Vulnerable Students* 8 (2010), available at <http://www.jjcmn.com/public/2010/10/First-Do-No-Harm-article.pdf>. Even police officers stationed at schools report that requests by school staff to intervene are often driven more by the student involved rather than the seriousness of the offense. Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. Sch. L. Rev. 977, 1015 (2009), available at http://www.nyls.edu/user_files/1/3/4/17/49/1001/Thureau%20&%20Wald%2054.4.pdf. Cf. Clea A. McNeely et al., *Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health*, 72 Journal of Sch. Health 138, 145 (2002), available at <http://www2.gsu.edu/~wwwche/Promoting%20School%20Connectedness%20Evidence%20from%20the%20Nat%20Longitudinal%20Study%20of%20Adolescent%20Health.pdf> (finding that, in secondary schools where harsh discipline is widely used for minor rule infractions students rate their teachers as less caring and report feeling less belonging in school).

⁸⁰ Advancement Project & The Civil Rights Project at Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline* 9-10 (2000), available at <http://www.advancementproject.org/resources/entry/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and> (hereinafter “*Opportunities Suspended*”); cf. Amanda Petteruti, Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools* 21-22 (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf (hereinafter “*Education Under Arrest*”) (students of color experience police intervention at disproportionate rates).

⁸¹ Adena M. Klem & James P. Connell, *Relationships Matter: Linking Teacher Support to Student Engagement and Achievement*, 74 J. of Sch. Health 262, 266 (2004), available at <http://www.fifeschools.com/fhs/documents/RelationshipsMatterLinkingTeacherSupporttoStudentEngagementandAchievement.pdf>; CDC, *supra* note 77, at 5; Richard F. Catalano et al., *The Importance of Bonding to School for Healthy Development: Findings from the Social Development Research Group* 74 Journal of School Health 252, 256, 259 (2004), available at <http://thepinnaclesgroup.com/wp-content/uploads/2010/09/importance-of-bonding-with-schools-copy.pdf> (hereinafter “Catalano”).

⁸² See Bronwyn E. Becker & Suniya S. Luthar, *Social-Emotional Factors Affecting Achievement Outcomes Among Disadvantaged Students: Closing the Achievement Gap*, 37 Educ. Psychologist 197-214 (2002), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3523355/>; Dorian Wilson, *The Interface of School Climate and School Connectedness and Relationships with Aggression and Victimization*, 74 Journal of School Health 293, 298 (2004), available at http://www.jhsph.edu/departments/population-family-and-reproductive-health/_archive/wingspread/Septemberissue.pdf.

behave in school. Students with high levels of school connectedness are less likely to be aggressive or to feel victimized within school and increased school connectedness has been shown to reduce problem behaviors in school.⁸³ Furthermore, school connectedness protects against a range of negative behaviors beyond the classroom. Students with high degrees of school connectedness are less likely to attempt suicide, abuse illegal substances, engage in early sexual conduct, participate in violent or delinquent behavior or affiliate with gang members.⁸⁴ Additionally, school connectedness has a positive relationship with a student's overall level of life satisfaction.⁸⁵ Therefore, to the extent Bryan ISD's ticketing practice decreases individual student's school connectedness, it puts students at greater risk for poor academic and life outcomes.

Similarly, ticketing practices such as Bryan ISD's can undermine the necessary predicates for adolescent development within the school environment. If students believe that they have been ticketed unfairly or that their punishment is disproportionate to their behavior, they may withdraw from relationships with school staff, lose trust in school authorities and perceive that they do not have efficacy within school.⁸⁶ When students' developmental needs are unmet within school structures, they lose motivation to engage in school,⁸⁷ so they seek counterproductive supports for their developmental needs, including associating with antisocial peers and redefining punishment as a positive experience, which reinforce their growing alienation from school.⁸⁸

⁸³ Wilson, *supra* note 82, at 299; *see also* Cook et al., *supra* note 55, at 359.

⁸⁴ CDC, *supra* note 77, at 5; Catalano, *supra* note 81, at 256.

⁸⁵ *See, e.g.,* Sukkyung You et al., *Relations Among School Connectedness, Hope, Life Satisfaction, and Bully Victimization*, 45 *Psychology in the Schools* 446, 456 (2008), available at http://education.ucsb.edu/sharkey/documents/PITS_Bullying_Published.pdf.

⁸⁶ *See* Russell Skiba et al., American Psychological Association, Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations* 69-70 (2006), available at <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> (hereinafter "APA"); *Opportunities Suspended*, *supra* note 80, at 9-10; Jackson, *supra* note 63, at 634 (finding that officers' presence on school campuses was psychologically damaging to students, particularly in their view of authority and supportiveness of the learning environment); *see also* Karen F. Osterman, *Students' Need for Belonging in the School Community*, 70 *Rev. of Educ. Res.* 323, 361 (2000), available at, http://people.hofstra.edu/Karen_F_Osterman/Student%20need%20for%20belonging%20in%20the%20school%20community.pdf (discussing the importance of students developing a sense of community in their schools).

⁸⁷ Jacquelynne S. Eccles & Robert W. Roeser, *Schools, Academic Motivation, and Stage-Environment Fit*, 3 *Handbook of Adolescent Psychol.* 404, 408 (Richard M. Lerner & Laurence Steinberg eds. 2009), available at <http://www.rcgd.isr.umich.edu/garp/articles/eccles09.pdf>; *cf.* McNeely et al., *supra* note 79, at 138.

⁸⁸ *See* Peter E. Leone et al., Nat'l Ctr. on Educ., Disability and Juvenile Justice, *School, Failure, Race and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System* 11 (2003), available at http://www.edjj.org/Publications/list/leone_et_al-2003.pdf (hereinafter "School Failure").

3. Impact on the community at large

Bryan ISD's reliance on ticketing, particularly for minor offenses that could be handled without excluding a youth from school, produces negative outcomes and a high cost for the Bryan community as a whole. The greater likelihood that students who have police or court involvement will leave school before graduating has a large impact on a community's economic future. Because students who do not graduate are more likely to be unemployed, they are also substantially more likely to require government assistance and incur uninsured medical expenses than high school graduates.⁸⁹ The impact on the African-American community is particularly stark since, among students who leave school before graduating, African Americans are significantly less likely to be employed than Latinos or whites.⁹⁰ Those who drop out (or are pushed out) of high school are also significantly more likely to be incarcerated than high school graduates.⁹¹

Due to these negative life outcomes, the net public benefit, conservatively estimated, of preventing one high school student from dropping out is \$127,100.⁹² If half of any given year's cohort of dropouts were to graduate, tax revenues would likely increase by \$713 million in an average year.⁹³ Less tangibly, high school graduation promotes community ties and civic responsibility in young adults.⁹⁴ Ultimately, therefore, Bryan ISD's reliance on "Disruption of Class" and "Disorderly Conduct – Language" ticketing is not only counterproductive for the progress of Bryan's students and schools, but it also damages future outcomes for the entire community.

C. There Are Equally Effective, Less Discriminatory Alternatives Available for Bryan ISD to Promote Safety and Order While Fulfilling its Educational Mission

Even if Bryan ISD could demonstrate that its ticketing practice is justified by educational necessity, it is still in violation of Title VI if there are alternative practices available that would be equally effective in serving the district's educational mission while having less of a racially disparate impact. *See Elston*, 997 F.2d at 1407; *Cureton v. Nat'l Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687, 713-14 (E.D. Pa. 1999), *rev'd on other grounds*, 198 F.3d 107 (identifying at least three successful alternative practices to prohibiting freshman athletic competition that met the

⁸⁹ John M. Bridgeland et al., Civic Enterprises, *The Silent Epidemic: Perspectives of High School Dropouts* 2 (2006), available at (hereinafter "Bridgeland"); APA, *supra* note 86, at 82.

⁹⁰ See Paul Hirschfield, *Another Way Out: The Impact of Juvenile Arrests on High School Dropout*, 82 Soc. of Educ. 368 (2009), available at <http://search.asanet.org/images/journals/docs/pdf/soe/oct09soefeature2.pdf>.

⁹¹ Bridgeland, *supra* note 89, at 2; cf. Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 Am. Soc. Rev. 151, 153 (2004), available at <http://www.wjh.harvard.edu/soc/faculty/western/pdfs/ASRv69n2p.pdf>.

⁹² Henry Levin et al., *The Costs and Benefits of an Excellent Education for All of America's Children* 18 (2006), available at http://www3.nd.edu/~jwarlick/documents/Levin_Belfield_Muennig_Rouse.pdf.

⁹³ Alliance for Excellent Education, *Education and the Economy: Boosting the Nation's Economy by Improving High School Graduation Rates* 2 (2011), available at http://www.all4ed.org/files/NationalStates_seb.pdf.

⁹⁴ *Education Under Arrest*, *supra* note 80, at 24.

NCAA's goal of raising student-athlete graduation rates); U.S. Dep't of Justice, *Title VI Legal Manual* 53 (2001).

In recent years, a number of school districts have recognized the harm of criminalizing school-based behavior and have accordingly acted to limit police involvement in matters that should be handled by a school's internal discipline system. Two school districts in particular, Clayton County School District in Georgia and Denver Public Schools in Colorado, warrant deeper review for their use of model, replicable practices that are less discriminatory and appear to be at least equally effective at preserving school safety and supporting academic achievement. More recently, Waco Independent School District in Texas has replicated many aspects of the Clayton County and Denver programs, resulting in a dramatic reduction in ticketing during the first year of the program.⁹⁵

1. Clayton County School District, Georgia

The unchecked expansion of a SRO program in Clayton County, Georgia, led to an astounding 1248 percent increase in local schools' court referrals, almost all of which were for misdemeanors, according to the juvenile court.⁹⁶ To reduce reliance on court referrals, the Clayton County School District partnered with the local juvenile court, law enforcement and mental health providers to develop a "school offense protocol" that allows officials to better distinguish less serious offenses from more serious offenses, and to respond to each accordingly.⁹⁷ By drawing a line between *safety* matters, to be handled by law enforcement, and *discipline* matters, to be handled by school officials, Clayton County reduced its court referrals by 86 percent⁹⁸ and effectively eliminated racial disparities in court referrals per enrollment.⁹⁹

⁹⁵ For further discussion of the practices in each of these districts, see Appendix H (Less Discriminatory Alternatives). In addition to these school districts, we note other nascent reform efforts at the state level. Colorado and Florida have recently enacted laws that limit the use of law enforcement to address school-based offenses to serious offenses. Colo. H.B. 1345 (2012) (requiring school districts to develop and enforce discipline codes in a manner designed to reduce referrals to law enforcement and minimize students' exposure to the juvenile and criminal justice system); Fla. S.B. 1540 (2009) (discouraging arresting students for minor offenses such as classroom disruption and fighting). In response to concerns about law enforcement action on school campuses, the Indiana Legislature established a study group to evaluate when and how schools and law enforcement should collaborate. Ind. H.B. 1193 (2010). The Maryland Board of Education adopted regulations that limit the types of disciplinary incidents that warrant reporting to law enforcement. Those regulations expressly provide that "conduct which has been traditionally treated as a matter of discipline to be handled administratively by the particular school" should not trigger law enforcement involvement. Md. Regs. Code tit. 13A.08.01.15 (2012).

⁹⁶ Judge Steven C. Teske & Judge J. Brian Huff, *The Court's Role in Dismantling the School-to-Prison Pipeline*, Juv. & Fam. Justice Today, Winter 2011, at 14, 16, available at <http://www.ncjfcj.org/sites/default/files/Today%20Winter%202011Feature%20%282%29.pdf>.

⁹⁷ Cooperative Agreement between the Juvenile Court of Clayton County, the Clayton County Public School System, the Clayton County Police Department, the Riverdale Police Department, the Jonesboro Police Department, the Forest Park Police Department, the Clayton County Department of Family & Children Services, the Clayton Center for Behavioral Health Services, Robert E. Keller, District Attorney, and the Georgia Department of Juvenile Justice (2004), <http://publichealth.lsuhsu.edu/iphj/pdf/solibrary1.pdf>.

⁹⁸ Court referral data was provided by the Clayton County Juvenile Court. Judge Steven C. Teske, *A Study of Zero Tolerance Policies in Schools: A Multi-Integrated Systems Approach to Improve Outcomes for Adolescents*, 24 J. of Child & Adolescent Psychiatric Learning 88, 93 (2011), available at <http://www.ncjfcj.org/sites/default/files/Zero%20Tolerance%20Policies%20in%20Schools%20%282%29.pdf>.

Clayton County’s reforms resulted in safer, more successful schools. The district’s graduation rate increased by 20 percent after instituting the protocol and rates of weapons possession fell by 73 percent.¹⁰⁰ Technical assistance is available for localities interested in replicating the protocol as well.

2. Denver Public Schools, Colorado

In 2005, after a 70 percent increase in the number of students referred to law enforcement by Denver Public Schools (“DPS”)—nearly half of whom were referred for “other violations of the code of conduct” like use of obscenities—advocates launched a multi-year campaign that led to an immediate drop in referral rates and culminated in revisions to DPS’ discipline code.¹⁰¹ The revised code established a graduated series of consequences and interventions designed to reduce reliance on both exclusionary punishment and referrals to law enforcement.¹⁰² The code encouraged the use of Restorative Justice, a method for resolving conflict and improving bonds among students and between students and teachers.¹⁰³ Since implementing the code, DPS’ referrals have dropped to their second lowest number in ten years, even though the district experienced a 12 percent increase in enrollment during this same period.¹⁰⁴ Referral rates for African-American students are at their second lowest rate in ten years and currently stand at half the peak referral rate in 2002-03¹⁰⁵ and Latino students and white students have both

⁹⁹ Appendix H (outlining the impact of the protocol on racial disparities).

¹⁰⁰ *Id.*

¹⁰¹ Advancement Project et al., *Education on Lockdown: The Schoolhouse to Jailhouse Track 23-24* (2005), available at http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf.

¹⁰² Advancement Project, *Test, Punish, and Pushout 35* (2010), available at http://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf.

¹⁰³ *Id.*

¹⁰⁴ DPS referred 512 students to law enforcement in the 2011-12 school year, down significantly from the 1,399 students referred to law enforcement in the 2003-04 school year. Colo. Dep’t of Educ., *Suspension/Expulsion Statistics for 2011-12*, <http://www.cde.state.co.us/cdereval/suspend-expelcurrent.htm>; Colo. Dep’t of Educ., *Suspension/Expulsion Statistics for 2003-04*, <http://www.cde.state.co.us/cdereval/rv2004SDIIIncidents.htm>. DPS’ enrollment rate increased from 72,361 in fall 2001 to 80,890 in fall 2011. Colo. Dep’t of Educ., *Fall 2001 Pupil Membership by School, Ethnicity, Gender & Grade Level*, <http://www.cde.state.co.us/cdereval/rv2001pmlinks.htm>; Colo. Dep’t of Educ., *Fall 2011 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/rv2011pmlinks.htm>.

¹⁰⁵ In the 2002-03 school year, the rate of African-American students referred to law enforcement peaked at 2.81 percent (387 African-American students referred out of 13,749 African-American students enrolled). Colo. Dep’t of Educ., *Suspension/Expulsion Statistics for 2002-03*, <http://www.cde.state.co.us/cdereval/rv2003SDIIIncidents.htm>; Colo. Dep’t of Educ., *Fall 2002 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/rv2002pmlinks.htm>. In the 2011-12 school year, the rate of African-American students referred to law enforcement dropped to 1.39 percent (159 African-American students referred out of 11,452). Colo. Dep’t of Educ., *Suspension/Expulsion Statistics for 2011-12*, <http://www.cde.state.co.us/cdereval/suspend-expelcurrent.htm>; Colo. Dep’t of Educ., *Fall 2011 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/rv2011pmlinks.htm>.

experienced a near three-fourths reduction in referral rates.¹⁰⁶ While the continued racial disparities in Denver's referral data indicate that reforms are far from complete, the significant reductions in referral rates suggest meaningful harm reduction for students of all races. Moreover, in collaboration with Padres y Jovenes and Advancement Project, DPS and the Denver Police Department are now entering into a new Intergovernmental Agreement to further reduce referral of DPS students to law enforcement for routine student behavior.¹⁰⁷ Finally, DPS appears to be more orderly and more academically successful since revising its code as well: the district has dramatically reduced suspensions¹⁰⁸ and expulsions and graduation rates are up district-wide.¹⁰⁹

¹⁰⁶ In the 2003-04 school year, the rate of Latino students referred to law enforcement peaked at 2.39 percent (982 Latino students referred out of 41,166 Latino students enrolled). Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2003-04*, <http://www.cde.state.co.us/cdereval/rv2004SDIIncidents.htm>; Colo. Dep't of Educ., *Fall 2003 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/download/pdf/2003PM/20032004PMBYDISTRICT%25MINORITY.pdf>. In the 2011-12 school year, the rate of Latino students referred to law enforcement dropped to 0.6 percent (283 Latino students referred out of 47,109). Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2011-12*, <http://www.cde.state.co.us/cdereval/suspend-expelcurrent.htm>; Colo. Dep't of Educ., *Fall 2011 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/rv2011pmlinks.htm>. In the 2001-02 school year, the rate of white students referred to law enforcement peaked at 1.20 percent (181 white students referred out of 15,124 white students enrolled). Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2001-02*, <http://www.cde.state.co.us/cdereval/download/pdf/2002SDI/2001-02SDIWhite.pdf>; Colo. Dep't of Educ., *Fall 2001 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/download/pdf/2001PM/2001DenverCountyPM.pdf>. In the 2011-12 school year, the rate of white students referred to law enforcement dropped to 0.32 percent (53 white students referred out of 16,506). Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2011-12*, <http://www.cde.state.co.us/cdereval/download/PDF/2012SDI/WhitebyDistrict.pdf>; Colo. Dep't of Educ., *Fall 2011 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/download/PDF/2011PM/PupilMembershipbyCountyDistrictRace-EthnicityandPercentMinority.pdf>.

¹⁰⁷ Nirvi Shah, *With New Effort, Denver Tackles School-to-Prison Pipeline*, Education Week, Rules for Engagement Blog (Feb. 19, 2013, 7:09 AM), <http://blogs.edweek.org/edweek/rulesforengagement/IGA%20with%20summary.pdf>.

¹⁰⁸ In 2007-08, DPS enrolled 73,053 students, suspended 10,161 students (a 13.90% suspension rate) and expelled 123 students (a 0.17% expulsion rate). Colo. Dep't of Educ., *Fall 2007 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/download/PDF/2007PM/District/Dist%25Minority.pdf>; Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2007-08*, <http://www.cde.state.co.us/cdereval/download/PDF/2007-2008SDI/TotalRaceData.pdf>. DPS enrolled 80,890 students in the 2011-12 school year, suspended 7,523 (a 9.30% suspension rate) and expelled 63 students (a 0.078% expulsion rate). Colo. Dep't of Educ., *Suspension/Expulsion Statistics for 2011-12*, <http://www.cde.state.co.us/cdereval/download/PDF/2012SDI/2012AllbyDistrict.pdf>; Colo. Dep't of Educ., *Fall 2011 Pupil Membership by County, District, Race/Ethnicity, and Percent Minority*, <http://www.cde.state.co.us/cdereval/download/PDF/2011PM/PupilMembershipbyCountyDistrictRace-EthnicityandPercentMinority.pdf>.

¹⁰⁹ DPS' four-year graduation rate has increased from 49 percent in 2007-08, the year before the changes to the discipline code went into effect, to 59 percent in 2011-12. Colo. Dep't of Educ., *Graduates and Completers by District, Gender, Race/Ethnicity, Class of 2008*, <http://www.cde.state.co.us/cdereval/rv2008GradLinks.htm>; Colo. Dep't of Educ., *Graduates and Completers by District, Gender, Race/Ethnicity, Class of 2012*, <http://www.cde.state.co.us/cdereval/gradcurrent.htm>.

3. Waco Independent School District

In 2010, Texas Governor Rick Perry's office partnered with Waco ISD to implement a "positive policing" pilot project during the 2011-12 school year. The aim of the Waco ISD pilot project was to create a model for school districts with high ticketing rates, and ideally to identify alternatives to the use of Class C ticketing while supporting school safety. Drawing upon the success of Clayton County, Waco ISD created a three-tiered intervention system with school-wide prevention programs, targeted services for at-risk students and intensive interventions for students who needed additional supports.¹¹⁰ Waco ISD also amended its policy to limit the use of Class C ticketing, requiring the use of the three-tiered intervention system before ticketing unless the student posed a safety threat to the campus or general public.¹¹¹ The policy specifically required alternatives in lieu of ticketing for "Disorderly Conduct" violations if the student's behavior did not pose a threat or represent a willful violation after a warning.¹¹²

Prior to implementation of the pilot project, Waco ISD's ticketing numbers were similar to Bryan ISD's, with 649 tickets issued in 2010-11.¹¹³ Although this program is only in its second year of implementation, early data analysis provided by the Texas A&M Public Policy Research Institute is very promising. In 2011-12, during the first year of the pilot's implementation, only 148 tickets were issued, a 77 percent drop from the prior year.¹¹⁴ Given these positive results, Waco ISD is expanding the pilot to include alternatives to exclusionary school discipline this school year.

D. Replacing Police Ticketing with Out-of-School Suspension and Other Forms of Exclusionary Discipline is Not a Less Discriminatory Alternative

It is essential to note that replacing Class C citations with suspension and expulsion is *not* a less discriminatory alternative. Approaches that rely upon excluding students from the classroom environment have yielded similarly negative results and racial disparities. There are instead replicable practices for reducing reliance on police-student contact, suspension and expulsion that support school safety and promote academic achievement. Funding, training and technical assistance for implementing many of these best practices is available from the U.S.

¹¹⁰ See Appendix I (Office of the Governor, Criminal Justice Division, Waco ISD & Public Policy Research Institute of Texas A&M University, *Positive Policing in Waco ISD: Re-thinking Law Enforcement in Texas Schools*, PowerPoint presentation).

¹¹¹ See Appendix J at 4 (Waco ISD, Law Enforcement Operations Policy Section 7.26, Title – Juvenile Offender Guidelines (2012)).

¹¹² *Id.*

¹¹³ See Appendix I. This is substantially lower than the number of tickets issued when Texas Appleseed conducted its data analysis of school-based ticketing. The data provided for that analysis showed more than 1,000 tickets issued during the 2006-07 school year.

¹¹⁴ See Appendix I. While the number of African-American students ticketed is still disproportionate to their representation within the student body, the number of African-American students who received tickets fell 77 percent after the pilot was implemented, with 209 African American students receiving tickets the year prior to implementation and 48 receiving tickets after implementation.

Department of Education or the Center for Elimination of Disproportionally and Disparities in Texas.

In addition to ticketing, other forms of exclusionary discipline, including suspension and expulsion, substantially impede the educational progress of individual students and schools and fail to promote school safety. Reliance on exclusionary discipline methods harms all students, but particularly harms African-American students, who are three-and-a-half times as likely as their white peers to be suspended or expelled.¹¹⁵ In Bryan ISD, these disparities are already apparent in internal disciplinary referrals. *See supra* fn.15. Relying on suspension and expulsion as the sole alternative to ticketing would only exacerbate those disparities.

As with ticketing, suspension and expulsion impede students' academic achievement. The lost learning time and lack of school connectedness discussed in section V(B), *supra*, are also associated with suspension and expulsion.¹¹⁶ The academic harms of suspension and expulsion on Texas students are especially troubling. According to a study analyzing the disciplinary records of over one million Texas secondary school students, Texas students who received discretionary disciplinary removals were twice as likely to repeat a grade as similar peers who did not receive such removals.¹¹⁷ Texas students who received exclusionary discipline are also significantly at risk for negative life outcomes, including involvement with the juvenile or criminal justice systems.¹¹⁸

The impact of exclusionary discipline on academic success and safety extends beyond individual students. Schools with high rates of exclusionary discipline have lower overall standardized test scores and score worse on measures of school climate than schools with lower rates of exclusionary discipline, even when adjusting for demographic differences in enrollment.¹¹⁹ Reliance on suspension, expulsion and other forms of "zero tolerance" discipline policies have not been shown to make schools safer.¹²⁰

Relying on exclusionary discipline to address classroom disruption and similar adolescent behavior is no less discriminatory than relying on police ticketing to do so. African-American

¹¹⁵ U.S. Dep't of Educ., Office for Civil Rights, *The Transformed Civil Rights Data Collection 2* (Mar. 12, 2012), available at <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf> (summarizing the disciplinary data contained in the 2009-10 Civil Rights Data Collection, a national collection sampling half of the nation's school districts).

¹¹⁶ *See generally* APA, *supra* note 86, at 49-51 (summarizing research showing that a student receiving exclusionary discipline is a predictor of school dropout).

¹¹⁷ Appendix G at 59.

¹¹⁸ *Id.* at 70 (finding that a discretionary disciplinary removal almost tripled the likelihood of a student's juvenile justice contact in the subsequent academic year and that each additional discretionary disciplinary removal exponentially increased the likelihood of juvenile justice involvement). The impact of juvenile justice involvement additionally magnifies the risk of leaving school. Hirschfield, *supra* note 90, at 384.

¹¹⁹ Rausch & Skiba, *supra* note 5, at 14-17 (summarizing research showing that instructional time is positively related to academic achievement); APA, *supra* note 86, at 44-48.

¹²⁰ *See generally* APA, *supra* note 86.

students are disproportionately more likely to receive exclusionary discipline than are their white peers. However, this disproportionality is not explained by differences in student behavior or socioeconomic status.¹²¹ African Americans are more likely than their white peers to be referred by teachers to the school disciplinarian.¹²² Once they get there, African-American students are likely to receive a harsher punishment than their white peers for similar behavior.¹²³ Moreover, African Americans are disproportionately more likely to be disciplined for “subjective” offenses like “disrupting class” than their white peers, who are disproportionately likely to be disciplined for “objective” offenses like smoking cigarettes on school grounds.¹²⁴ These disparities are perhaps at their starkest in Texas, where 83 percent of African-American middle and high school students had been suspended or expelled at least once from 2001 to 2007, leading the Council of State Governments to conclude that race is a predictive factor in whether a student will be discretionarily disciplined at school—even when controlling for poverty and other factors.¹²⁵

Therefore, in examining and implementing alternatives to its current ticketing practice, Bryan ISD should not turn to an increased reliance on exclusionary discipline, which has been proven to result in similar negative repercussions for students, schools and communities.

¹²¹ See, e.g., Russell Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 Urb. Rev. 317, 335 (2002), available at <http://www.indiana.edu/~safeschl/cod.pdf>; APA, *supra* note 86, at 41-44; John M. Wallace, Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline Among U.S. High School Students: 1991-2005*, 59 Negro Educ. Rev. 47, 52-58 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2678799/>.

¹²² Russell Skiba et al, *Race is Not Neutral: a National Investigation of African American and Latino Disproportionality in School Discipline* 40 Sch. Psychol. Rev. 85, 92-93 (2011), available at <http://www.indiana.edu/~atlantic/wp-content/uploads/2011/12/Skiba-et-al.-Race-is-not-neutral..pdf>.

¹²³ *Id.* at 95.

¹²⁴ *Unplanned Outcomes*, *supra* note 59, at 6.

¹²⁵ Appendix G at 40-46.

VI. REMEDIES

Complainants respectfully request that OCR require Bryan ISD to engage an independent expert consultant, approved by all parties, to develop and implement a plan that contains strategies, objectives and timelines to accomplish the following:

1. Revise the Memorandum of Understanding (“MOU”) between Bryan ISD and the Bryan Police Department regarding SROs to:
 - Include clear guidelines for the kind of school-based behavior that is properly handled by SROs, including a specification that ticketing should not be used to address minor misbehavior;
 - Require additional training for SROs, and corresponding training for school administrators; and
 - Require annual training for school administrators, teachers, staff and SROs on what types of school incidents warrant referral to SROs.
2. Establish a complaint process to report the misconduct of SROs or other officers involved in a school-related incident.
3. Collect and publicly report data on police/student contact, including the issuance of Class C misdemeanor tickets and school-related arrests. All data should be sortable by charge, disaggregated by race and disability status and cross-tabulated by gender.
4. Revise the Bryan Student Code of Conduct to:
 - Emphasize keeping students within the learning environment;
 - Establish a system of graduated consequences that minimize loss of classroom time; and
 - Limit police/student contact, suspension and expulsion to only the most serious offenses.
5. Solicit and employ the feedback of affected community members, including ticketed students and their families, in the process of revising the MOU, complaint process and Student Code of Conduct.
6. Conduct an annual comprehensive review and issue a report analyzing all data regarding SRO issued Class C misdemeanor tickets to ensure that a revised ticketing practice align with the revised MOU and Student Code of Conduct as well as any Resolution Agreement that results from this investigation.
7. Implement evidence-based practices, such as School-Wide Positive Behavior Supports, shown to properly address minor misbehavior while improving school safety and academic achievement: <http://www.pbis.org>.
8. Implement early intervention programs for students who receive multiple Class C citations and/or disciplinary referrals and who are at risk of being retained in grade or dropping out of school.

VII. CONCLUSION

Bryan ISD's current ticketing practice results in the ongoing, improper and harmful criminalization of the district's African-American students. As set forth in this complaint, this practice disproportionately affects African-American students, is not required by educational necessity and is in fact antithetical to the district's goal of providing a safe learning environment in which all students can thrive. For the foregoing reasons, there is a pressing need for OCR to review the district's Class C Misdemeanor ticketing practice and to remedy the district's violation of Title VI and its implementing regulations.

Respectfully submitted,

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Dated: February 20, 2013

Enclosures