

Recovering From COVID-19

Restoring civil rights and liberties for young people in Texas schools.

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Since the tragic shooting at Columbine High School in Colorado in 1999, federal, local, and state policymakers have engaged in numerous debates on how to prevent mass shootings and ensure school safety for K-12 learners. In the absence of movement on any meaningful gun control legislation, many policymakers turned to the idea of increasing policing, security, and surveillance budgets to address the issue of mass violence in schools. The result has been catastrophic for young people across the United States; based on the most recently available federal data, black children represented 15% of the nation's public school enrollment and accounted for 31% of referrals to law enforcement across the country—a 16% disparity.¹ Children are frequently arrested and surveilled for routine, age-appropriate behavior and unnecessarily placed into contact with the criminal legal system before they even begin high school.²

Tens of thousands of police officers patrol schools throughout the country, school districts dedicate millions of dollars to extra security services, and external companies bid for the opportunity to get their technology in the hands of state and local education agencies—to conduct facial recognition, social media monitoring, and other forms of surveillance of kids.³ This “hardening” of schools occurs as many of them face a crumbling physical infrastructure, inadequate investments in health care and mental health professionals, and high attrition rates for black teachers—who are often greatly impactful in instructing black students.⁴

With the introduction of the coronavirus pandemic onto the global stage, the lopsided spending on these hardening measures has come into full focus—especially in majority black and brown communities. With brick and mortar school buildings closed for the remainder of the 2019-2020 school year, state legislatures, state agencies, and school districts have had to contend with difficult questions:

Where can budget cuts be justified? How can essential public services be efficiently delivered in the 2020-2021 academic year and beyond?

In this moment, these agencies have a unique opportunity to divest from these policing and security measures in favor of resources that could truly create holistic learning environments—such as nurses, school counselors, and trauma-informed resources for staff members and young people. Moreover, such a shift in spending could stand to reinforce the idea that young people have civil rights and liberties while in school, as contemplated in the seminal U.S. Supreme Court decision of *Tinker v. Des Moines Independent Community School District*.⁵ Although that case dealt with a silent high school protest of the Vietnam War, it stood for a fundamental principle that young people do not shed their constitutional rights simply by crossing the threshold of a school door. Subsequent interpretations of the decision have ceded much deference to the security concerns of a school, but this point in the 21st century could be a pivotal moment for local districts to restore the teeth and spirit of the opinion.

The First Amendment does protect the freedom of speech, the Fourth Amendment does prevent the government from conducting unreasonable searches and seizures, and the 14th Amendment does extend equal protection of the law across the land. There should be no place where this should ring truer than within a school building, or, in this moment, a home where a young person has engaged in distance learning for the past few months. In fulfilling the promise of *Tinker*, state and local jurisdictions could transform the definition of school safety. Policing and surveillance measures are equated with the current, broadly accepted definition of school safety, and it must shift to one where a nurturing learning environment is the defining characteristic of this idea.

Although the landscape might be tricky, Texas could be a fertile testing ground for achieving some sense of actual school safety. There are a few factors to consider for adopting this approach in Texas. In 2019, the Texas Legislature passed SB 11, which—in part—mandates behavioral threat assessment teams in local school districts across the state. However, the law also creates a per-student school safety spending allotment.⁶ This money can either be spent on mental health support services or the hardening measures previously discussed. Data must be collected and analyzed to determine how local education agencies across Texas chose to spend this money but parents, young people, and advocates have consistently called for districts to prioritize the former category of spending.⁷ Finally, the federal Coronavirus Aid, Relief, and Economic Security, or CARES, Act allocated money to the states to deal with various budget shortfalls associated with the coronavirus pandemic; the Texas Education Agency will distribute this money to local education agencies in stages over the next several months.

In surviving the coronavirus pandemic, young people and their communities will undoubtedly face unprecedented levels of trauma. In addition to processing mass death, which has likely personally affected them in some way, they must navigate the economic devastation and the academic demands placed upon them. They will have to deal with disciplinary referrals that may have arisen from their use of district-loaned technological resources, as virtual threat assessments may still proceed in Texas at this time. They will return to schools in the early fall—or even later—attempting to balance the expectations of a new school year with the impact of prodigious loss.

With all of this considerable information in mind, districts can employ various concrete policies to minimize violations of civil rights and liberties. As an initial matter, school districts should explore the idea of a moratorium on suspensions and expulsions for the 2020-2021 academic year. As they work through the PTSD caused by COVID-19, young people may express themselves in unconventional ways at school, which may be interpreted as school disruption. A moratorium on exclusionary discipline would give young people the license to process this trauma and also protect the First Amendment's guarantee for freedom of speech. In a post-COVID-19 world, even when a young person might yell out in

frustration, there should be resources present in their schools—championed by school administrators and teachers—to allow them to be heard and work through the pain they’re experiencing.

Next, the state of Texas should reimagine how it approaches threat assessment teams. The Secret Service developed the method that is widely used by threat assessment teams across the country, and a number of states have formally adopted these provisions into their education codes.⁸ Ostensibly, threat assessment teams identify a credible threat made by a young person at school or online and move to act before it could be carried out.

The Texas version of this program requires for school districts to engage in thorough data collection and use other school resources to address certain behaviors, such as substance use. Even before SB 11 went into effect, social media conduct formed the basis of many terroristic threat prosecutions throughout the state.⁹ Based on anecdotal evidence, it appears that the use of threat assessments has not greatly altered that result. Texas Appleseed has heard fairly consistent stories from parents saying that their black daughters often receive threat assessment and disciplinary alternative education program referrals for content posted on their personal social media pages. School administrators and school police officers will collaborate to save the material they find on these social media channels and use it for the purpose of disciplining students. School police officers will confront the young people about the social media content and inform them that they will face a disciplinary alternative education program referral—all before a threat assessment team has been convened. Following the formal threat assessment process, further disciplinary action may be taken against the students. So often, the statements that kick off the threat assessment process appear to be those that were made in jest, not at all the basis of a credible threat.

As the Texas Education Agency awaits data from local school districts on the first year of statewide threat assessments, which will likely be available in the last quarter of 2020, local school districts should take the bold step of halting threat assessments over the summer—and for at least the first half of the next school year. In their place, schools can employ Multi-Tiered Systems of Support, or MTSS, and Positive Behavioral Interventions and Supports, or PBIS. Pulling back on threat assessments would be especially important during a time when the lines are blurred between school-related activities and non-school-related activities, which are all occurring at home. Even if school districts don’t halt threat assessments, they should be viewed as an extraordinary measure and an action of last resort.

If schools suspect that conduct arises from mental health challenges or substance use, they should use the provisions of SB 11 that authorize existing school-based programs to step in and address the behavior. In a similar vein to the proposed exclusionary discipline moratorium, pausing threat assessments would allow young people to freely express themselves and openly communicate with each other during this tumultuous time—all without fear of getting in trouble for it. This approach would also honor the spirit of the Fourth Amendment, as such exhaustive examinations of young people’s social media accounts could trigger a search in the right case.

Finally, schools should broadly divest from school policing, security, and surveillance and repurpose those funds for mental health support services and professionals. In Texas, these hardening measures disproportionately harm black and Latinx children, LGBTQ young people, and kids with disabilities. The state response to the coronavirus pandemic, and efforts to rebuild, present a critical juncture where these harms can begin to be repaired. Prioritizing investments in school counselors, social workers, psychologists,

and nurses could create learning environments filled with grace and compassion. Moreover, a shift in spending in these areas could address the unequal protection of the law that so many children continue to experience in their K-12 education, demonstrated largely by the 16% disparity in the public school enrollment of black children and their referrals to law enforcement.¹⁰

Generally, the road to recovery after COVID-19 will not be easy; that is especially true for efforts to secure education justice. Civil liberties and rights for students have been slowly eroding for decades, given the overreliance on policing to address virtually all school-related issues.¹¹ However, a new standard can emerge from this moment. Toward the end of spring 2020, after the tragic murder of George Floyd, Minneapolis Public Schools and Portland Public Schools took historic steps to end their longstanding school policing contracts.¹² A significant change in spending priorities, accompanied with a philosophical shift, will have to deliver this form of justice—one that has long been denied to so many children in America. These recent actions prove that it is possible.

Indeed, it will be difficult, but the result will be long overdue and worth it. **TBJ**

NOTES

1. *2015-2016 Civil Rights Data Collection: School Climate and Safety*, U.S. Dept. of Educ. Office of Civil Rights (April 2018; revised May 2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.
2. See, e.g., Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 *Wash. Univ. Law Review* 919 (2016).
3. See, e.g., Cheryl Corley, *Do Police Officers In Schools Really Make Them Safer?*, NPR (Mar. 8, 2018, 5:00 AM), <https://www.npr.org/2018/03/08/591753884/do-police-officers-in-schools-really-make-them-safer>; see also Benjamin Herold, *Schools Are Deploying Massive Digital Surveillance Systems. The Results Are Alarming*, *Educ. Week* (May 30, 2019), <https://www.edweek.org/ew/articles/2019/05/30/schools-are-deploying-massive-digital-surveillance-systems.html>.
4. See, e.g., Laura Jimenez, *The Case for Federal Funding for School Infrastructure*, *Center for American Progress* (Feb. 12, 2019, 4:00 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2019/02/12/466104/case-federal-funding-school-infrastructure/>; see also Matt Barnum, *Black teachers leave schools at higher rates—but why?*, *Chalkbeat* (July 25, 2018, 5:06 PM), <https://www.chalkbeat.org/2018/7/25/21105406/black-teachers-leave-schools-at-higher-rates-but-why>.
5. 393 U.S. 503 (1969).
6. See generally *School Safety after Senate Bill 11*, *Tex. Ass’n of Sch. Bds.* (2019), <https://www.tasb.org/services/legal-services/tasb-school-law-esource/business/documents/school-safety-after-senate-bill-11.pdf>.
7. See, e.g., Tracy Maness, *Memorial students advocate for better mental health services*, *Houston Chronicle* (Feb. 14, 2019, 12:49 PM), <https://www.chron.com/neighborhood/memorial/news/article/Memorial-students-advocate-for-better-mental-13617046.php>.
8. See generally NTAC—National Threat Assessment Center, Dept. of Homeland Sec., <https://www.secretservice.gov/protection/ntac>; see also Stephen Sawchuk, *What Schools Need to Know About Threat Assessment Techniques*, *Educ. Week* (Sept. 4, 2019), <https://www.edweek.org/ew/articles/2019/09/04/what-schools-need-to-know-about-threat.html>.
9. See, e.g., Deborah Fowler & Morgan Craven, *Collateral Consequences*, *Tex. Appleseed*, available at <http://stories.texasappleseed.org/collateral-consequences> (last visited on June 8, 2020).
10. *Supra* n.1.
11. *Cops and No Counselors: How the Lack of School Mental Health Staff is Harming Students*, *ACLU*, https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf.
12. Katie Reilly, *‘Police Do Not Belong in Our Schools.’ Students Are Demanding an End to Campus Cops After the Death of George Floyd*, *Time* (June 5, 2020, 12:26 PM), https://time.com/5848959/school-contracts-police/?utm_source=twitter&utm_medium=social&utm_campaign=editorial&utm_term=&linkId=90212299.

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