



*Office of the Independent Ombudsman
for the Texas Youth Commission*

OIO Special Report¹:

**SB 103 and Rising Adult Certification Rates in Texas Juvenile
Courts**

January 12, 2009

INTRODUCTION

Texas juvenile courts certified 30.9% more children to stand trial as adults in fiscal year 2008 than in the year before.² Furthermore, adult certifications as a percentage of serious dispositions³ increased 11.3% between 2006 and 2008, and by 16.9% between 2007 and 2008, a fairly significant increase, indicating that adult certifications have become relatively more attractive vis-à-vis the most “serious” alternative, the TYC’s determinate sentence.⁴ This report argues that today’s higher adult certification rates are a serious, unintended consequence of an otherwise well-intentioned legislative change that reduced the maximum age of TYC jurisdiction and control from 21 to 19. This was one of several changes

¹ This Special Report was prepared at the behest of Senator Juan Hinojosa and with the assistance of OIO Graduate Researcher Rex Baker IV (UT School of Law). It builds on research done by OIO Graduate Researcher Terry Schuster (UT School of Law).

² Texas Juvenile Probation Commission (“TJPC”), records request received December 10, 2008. Note: At the time of this request, TJPC was still in the process of finalizing its data for fiscal year 2008. Some of these numbers may change after publication of this report. However, any changes will likely be *upward* and therefore will not adversely impact the conclusions of this report.

³ As used here, “serious dispositions” includes determinate TYC sentences and certifications to stand trial as an adult.

⁴ In 2006, adult certifications accounted for 7.4% of serious dispositions in Texas, and in 2007, they accounted for 7.7%. In 2008, by contrast, adult certifications accounted for 12.9% of this total. TJPC, request received October 28, 2008.

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introduced in Senate Bill 103 (“SB 103”), the full text of which became effective shortly before the beginning of fiscal year 2008.⁵

This report is divided into four parts. Part I lays out the details and historical context of Texas’ blended sentencing and adult certification regimes, as well as the policy goals of SB 103. Part II examines the recent data showing a marked increase (statewide and in selected counties) in certifications of children to stand trial as adults. Part III presents the perspectives of juvenile court judges, prosecutors and other players in the Texas juvenile justice system. Additionally, Part III offers the narratives and perspectives of several young offenders to illustrate, on an individual level, some of the consequences of SB 103. Finally, Part IV offers several policy recommendations aimed at reducing adult certification rates to their pre-SB 103 levels while ensuring the safety of TYC’s youngest students. There, we argue that Human Resources Code 61.079(a) should be amended to restore TYC jurisdiction over children serving determinate sentences (“sentenced youth”) until they reach the age of 21. We also argue that certain safeguards, such as separate housing and/or facilities for older TYC residents, can effectively protect younger children in TYC while continuing to ensure the best rehabilitation opportunities for older residents.

PART I: Historical Background, Sentencing Regimes, and SB 103

Texas’ juvenile justice system has been the target of several substantial reform efforts over the last two decades. One major change came in 1987 with the introduction

⁵ S.B. 103, 2007 Leg., 80th Reg. Sess. (Tex. 2007).

of determinate, or “blended,” sentencing.⁶ This type of sentence can be tailored to provide the appropriate blend of juvenile and adult sanctions as a child progresses (or fails to progress) through TYC treatment. Later, in 1995, the Legislature expanded the list of crimes that qualify a child for determinate sentencing from five to thirty offenses.⁷ And in 1996, the Legislature lowered the minimum age for adult certification to 14 years for certain felonies.⁸

In 2007, following an abuse scandal at TYC and a subsequent investigation, the Legislature enacted SB 103. One of the important changes in SB 103 reduced the maximum age of TYC control and supervision from 21 to 19 years.⁹ Many Texas legislators felt that the TYC’s main focus should be on the rehabilitation of younger students, and they enacted this change to redirect that focus, keep the younger residents safe and reduce the overall population of TYC facilities.¹⁰ Other important changes included prohibiting commitment of misdemeanor (i.e., non-felon) children to TYC,¹¹ and enhancing agency accountability, transparency and minimum training requirements for certain staff.

The following section explores the statutory regimes most relevant to the topic of this report: Adult certification, blended sentencing, and the recent changes made in SB 103.

⁶ Robert Dawson, *Texas Juvenile Law, 7th Ed.*, updated by Christian A. Hübner, (Texas Juvenile Probation Commission: Austin, 2008), p. 507.

⁷ Texas Family Code § 53.

⁸ Texas Family Code § 54.02(a)(2)(A).

⁹ Texas Human Resources Code § 61.079(a).

¹⁰ Texas House Research Organization, Bill Analysis for HB 2807, May 7, 2007. HB 2807 was the House committee substitute version of SB 103. The provisions relating to maximum age of TYC residents were substantively identical to SB 103.

¹¹ Texas Family Code § 54.04(d)(2). *See* Dawson p. 233.

Adult Certification

“Adult certification” is the process by which courts in Texas certify offenders to stand trial as adults for crimes they committed while under the age of 17.¹² Relative to total referrals to the juvenile courts, adult certifications account for only a small percentage of all dispositions (1.1% in calendar year 2007, for example).¹³ However, despite their small share of all referrals, adult certifications “remain extremely important cases for the community and for the respondent, since they [often, but not always,] involve extraordinarily serious offenses.”¹⁴ Some proponents of adult certification support its application in cases where a young offender is not amenable to rehabilitation or will likely pose a serious risk to other children in a juvenile detention setting.¹⁵ Additionally, prosecutors and judges often face pressure from victims’ families and others to impose – in the popular discourse – “adult time for adult crime.”

In Texas, a 14-year-old child may stand trial as an adult for capital felonies, first degree felonies or aggravated controlled substance felonies.¹⁶ When charged with any other felony, the minimum age at which a child may be certified to stand trial as an adult is 15.¹⁷ With the exception of imposing the

¹² See Texas Family Code § 54.02.

¹³ See Dawson, p. 158.

¹⁴ *Id.*

¹⁵ F. E. Zimring, “The punitive necessity of waiver,” in *The changing borders of juvenile justice: Transfer of adolescents to the criminal court*, J. Fagan & F. E. Zimring (Eds.), (University of Chicago: Chicago, 2000), pp. 207-226.

¹⁶ Texas Family Code § 54.02 (a) (2) (a).

¹⁷ All qualifying crimes are felonies. A court may not certify a mere misdemeanor child to stand trial as an adult.

death penalty, courts may apply any adult sanction to children who are so certified and convicted, including life imprisonment without parole.¹⁸

Texas does make some accommodations for youthful offenders (inmates ages 14 through 17) in TDCJ custody: before a child in TDCJ turns 18, he may qualify for sheltered housing and therapeutic programming in the Youthful Offender Programs (“YOPs”). The YOPs, however, are not without serious problems, and they do not house all juveniles sent to the adult system. An unpublished 2008 report found that the YOPs “are disorganized, inadequately staffed, and lack both clear policies and performance based accountability systems.”¹⁹ For a more detailed description of that study and the problems facing YOPs in Texas, see Part IV below.

Blended Sentencing

For people who want stiffer sanctions for serious juvenile offenders than TYC alone can provide, but who worry that adult prison sentences may go too far, “blended sentencing” offers an attractive middle ground. Texas joins 27 other states in providing a blended sentencing option for serious youth offenders.²⁰ While the particulars of blended sentence regimes vary from state to state, the “determinate sentence” form used in Texas and several other

¹⁸ Texas Penal Code § 8.07(c). See also *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁹ Terry Schuster, “Meeting the special needs of TDCJ’s youthful offenders,” LBJ School of Public Affairs seminar paper, April 27, 2008. On file with author and available upon request.

²⁰ Patrick Griffin, “National Overviews: Which states try juveniles as adults and use blended sentencing?,” *State Juvenile Justice Profiles*, Pittsburgh, PA: National Center for Juvenile Justice, 2007. available at http://www.ncjj.org/stateprofiles/overviews/transfer_state_table.asp. Accessed: March 5, 2008. Note that Maine recently changed its law to allow for a blended sentencing option. *An Act To Allow Blended Sentencing for Certain Juveniles*, Maine Statutes, L.S. 1897, S.P. 691 (2008).

jurisdictions²¹ operates as follows: First, a child between the age of 10 and 17 commits a qualifying crime.²² In the juvenile court, the prosecutor seeks, and the judge imposes, a determinate sentence. This sentence provides for a minimum period of confinement (“MPC”) at a TYC facility as well as a total sentence of a number of years. For example, the determinate sentence for capital murder carries a MPC at TYC of 10 years and a total maximum sentence of 40 years.

Determinate sentencing provides a great deal of flexibility in determining the most appropriate sentence for an individual child. If a child has completed his MPC in a TYC facility before his 19th birthday, the TYC may, in its sole discretion, parole the child.²³ If a child has *not* completed his MPC, TYC may nonetheless petition the juvenile court for the child’s early release before the child’s 19th birthday.²⁴ A sentenced youth, whether serving his sentence in a TYC facility or on TYC parole, will be eligible for transfer to either TDCJ’s Institutional or Parole Division for the completion of his or her sentence, on or about the youth’s 19th birthday.²⁵ A former TYC resident serving adult parole, however, is still subject to parole revocation, leading to transfer to TDCJ’s institutional division, i.e., prison, state jail, etc.

Adult parole revocation does not represent a TYC resident’s only path to adult incarceration. For example, a youth whose TYC parole has been revoked

²¹ These are Colorado, Massachusetts, Rhode Island and South Carolina.

²² Originally, these crimes only included murder; capital murder; aggravated kidnapping; aggravated sexual assault; deadly assault on a law enforcement officer, corrections officer, or court participant; and attempted capital murder. This list of six qualifying offenses has since expanded to include a total of about thirty different crimes. Dawson, p. 509.

²³ Texas Human Resources Code § 61.081(f).

²⁴ Texas Human Resources Code § 61.081(f) and (g).

²⁵ Texas Human Resources Code § 61.084(e) and (g).

may similarly be transferred to adult prison.²⁶ Additionally, if a “child’s conduct ... indicates that the welfare of the community requires the transfer,” TYC may petition the juvenile court to transfer the child to adult prison at any time between the child’s 16th and 19th birthdays.²⁷

The main advantages of blended sentencing are flexibility and leverage. Because of the availability of transfer to TDCJ, TYC staff have significant leverage in providing incentives for positive behavior among children serving determinate sentences. If a child performs well, TYC may recommend early release or parole. On the other hand, if a child proves unsuitable for rehabilitation, TYC may recommend (and the juvenile court may grant) transfer to TDCJ-ID. Factors that may inform the transfer decision include a resident’s refusal to participate in TYC programs,²⁸ violent or anti-social behavior, gang-related activity,²⁹ the seriousness of the underlying offense,³⁰ TYC parole violations,³¹ and behavior that indicates a high risk of re-offending,³² among others.

Lowering the maximum age of TYC jurisdiction contradicts the purpose of blended sentencing for several reasons. First, it reduces the flexibility available to judges and prosecutors in sentencing youth. Second, the new law diminishes the leverage available to TYC staff in rehabilitating residents, especially those

²⁶ Human Resources Code § 61.079(c).

²⁷ Human Resources Code § 61.079(a)(2).

²⁸ *In the Matter of M.P.*, UNPUBLISHED, No. 03-99-00477-CV, 2000 WL 301093 (Tex.App.—Austin 2000, no pet.).

²⁹ *Id.*

³⁰ *In the Matter of D.T.*, 217 S.W.3d 741 (Tex.App.—Dallas 2007, no pet.).

³¹ *Id.*

³² *Id.*

who cannot complete their MPC before their 19th birthdays. We consider these and other drawbacks to SB 103 in Parts III and IV of this report.

Substantive Changes in SB 103

The Texas Legislature enacted SB 103 to address allegations of sexual abuse of students at TYC that surfaced in the spring of 2007. The substantive aspects of SB 103 include increased training requirements for staff, a reduced staff-to-youth ratio of 1:12, the creation of an Independent Ombudsman and an Inspector General, limiting TYC commitments to children who have committed felonies, and – most importantly for the purposes of this report – reducing the maximum age of TYC supervision and control from 21 to 19.³³

These reforms addressed several important objectives. Another important objective was to reduce the population of children in TYC, primarily through the age reduction provision and the provision prohibiting commitment of misdemeanor children. Isela Gutierrez, the Juvenile Justice Initiative Director at the Texas Criminal Justice Coalition, tells us, “The overarching reason [for the age reduction provision] was to decrease the population at TYC. At the time, some of the legislators with adult criminal justice experience viewed this as a practical solution for a troubled agency. But unfortunately, this kind of practical solution doesn’t take into account serious issues like adolescent brain development.”³⁴ Nonetheless, supporters of these measures argued that to

³³ Michele Y. Deitch, “Report on the Texas Youth Commission Soap Opera,” *Correctional Law Reporter*, Vol. XIX No. 4, (December/January 2008), p. 53.

³⁴ Telephone interview by Rex Baker with Isela Gutierrez, Juvenile Justice Initiative Director, Texas Criminal Justice Coalition, Austin, Texas (January 9, 2009).

“properly refocus its effort and implement ... lower staff-to-youth ratios, the agency must downsize.”³⁵

The Legislature also sought to keep TYC students, especially the younger ones, safe from what has been alleged to be systemic abuse. While adults perpetrated the sexual abuse that provided the impetus for SB 103, many legislators viewed older TYC residents as possible abusers, as well. Supporters of this provision said that “housing 19 year olds in prisons is more appropriate than housing them with 13 year olds in TYC,” and that, at any rate, the older offenders are “really adults.”³⁶ As added justification for this position, supporters cited the far higher population of 18-and-19-year-olds in TDCJ than currently exists in TYC.³⁷

Opponents of this provision, however, noted that the adult prison system does not provide the kind of rehabilitative opportunities available in TYC. They also raised the possibility that this change might “influence judges to order the transfer of more of these youths to the adult system” because of shorter permitted stays at TYC, and that the adjustment would “increase the number of youths being certified to stand trial as adults.”³⁸ As noted above, our research indicates that there has indeed been a significant increase in adult certifications, as predicted by opponents of the provision.

PART II: Certification Rates Increase since the Passage of SB 103

³⁵ House Research Organization, p. 10.

³⁶ *Id.*, p. 11.

³⁷ *Id.*

³⁸ *Id.*, p. 14.

Fiscal year 2008 witnessed a marked increase (up approximately 30.9% from the year before, an increase of 50 children) in the number of children in Texas certified to stand trial as adults, the most since 1999.³⁹ At the same time, the overall number of referrals to the juvenile justice system *decreased* by 5.9%.

The following section lays out data on juvenile crime, referrals, TYC commitments and adult certifications from 2006, 2007, and 2008. The full text of SB 103 became effective on September 1, 2007. Therefore, when possible, data from these periods has been separated by *fiscal* year, beginning and ending on September 1. To facilitate a discussion of prosecutorial and judicial culture in select counties in Texas, this section presents specific data for Bexar, Dallas, Harris, Tarrant, and Travis Counties.⁴⁰

Additionally, it is useful to note that sentenced offenders and children certified to stand trial as adults are two very similar, but not identical, populations in terms of the seriousness of the underlying offense.⁴¹

Statewide Data

Figure 1 below shows the number of children in Texas certified to stand trial as adults for fiscal years 2006-2008. Fiscal year 2007 witnessed an overall decline in adult certifications from the year before, with the 16- and 15-year-old populations accounting for most of the decline. Fiscal year 2008, beginning on SB 103's effective date, saw a

³⁹ Dawson, p. 158.

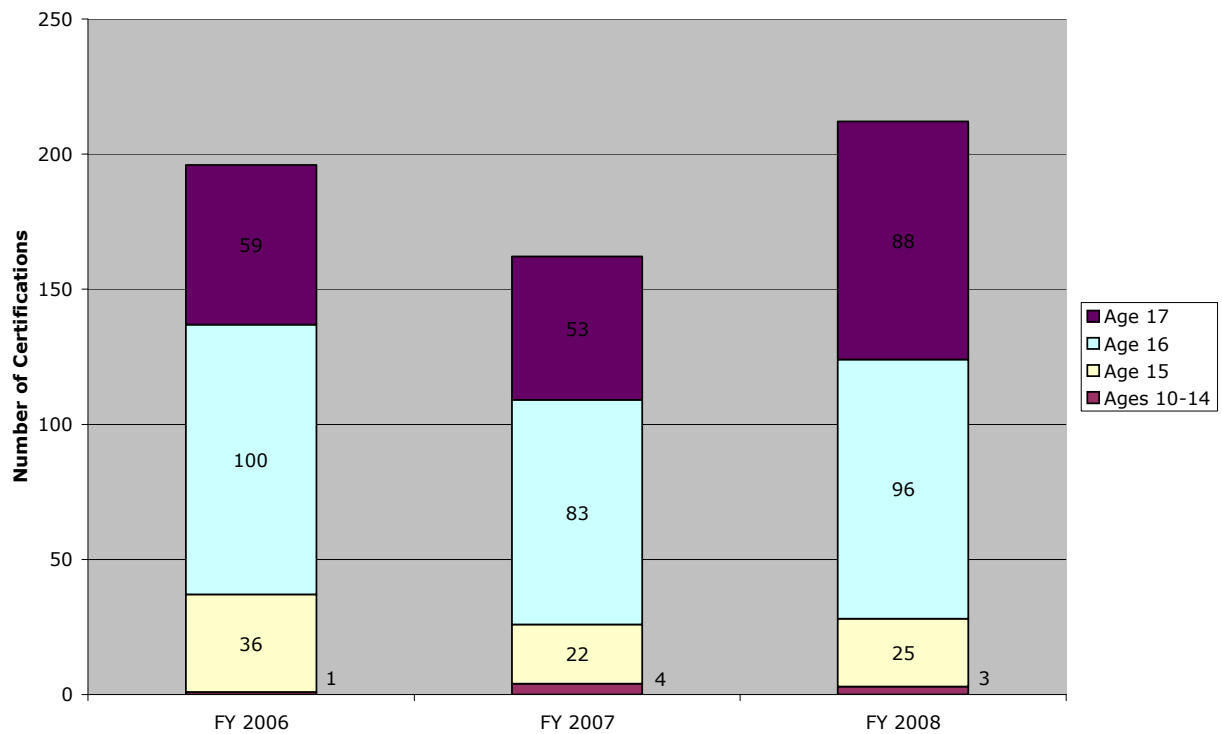
⁴⁰ In fiscal year 2008, these five counties account for nearly 50% of new TYC residents. Harris County accounted for 20.7%; Dallas, 11.7%; Bexar, 8.2%; Tarrant, 5.6%; Travis, 1%.

⁴¹ When a child turns 15, he may be certified to stand trial as an adult for the commission of *any* felony. Therefore, while there is significant overlap between the qualifying offenses for adult certification and determinate sentencing, there are more qualifying offenses for the former. Because of this, children may be certified as adults for far less serious offenses than those that qualify them for determinate sentences.

fairly dramatic overall increase (30.9%), with an even sharper increase in certifications for the oldest children.

Figure 1.

Adult Certifications in Texas by Age at Disposition

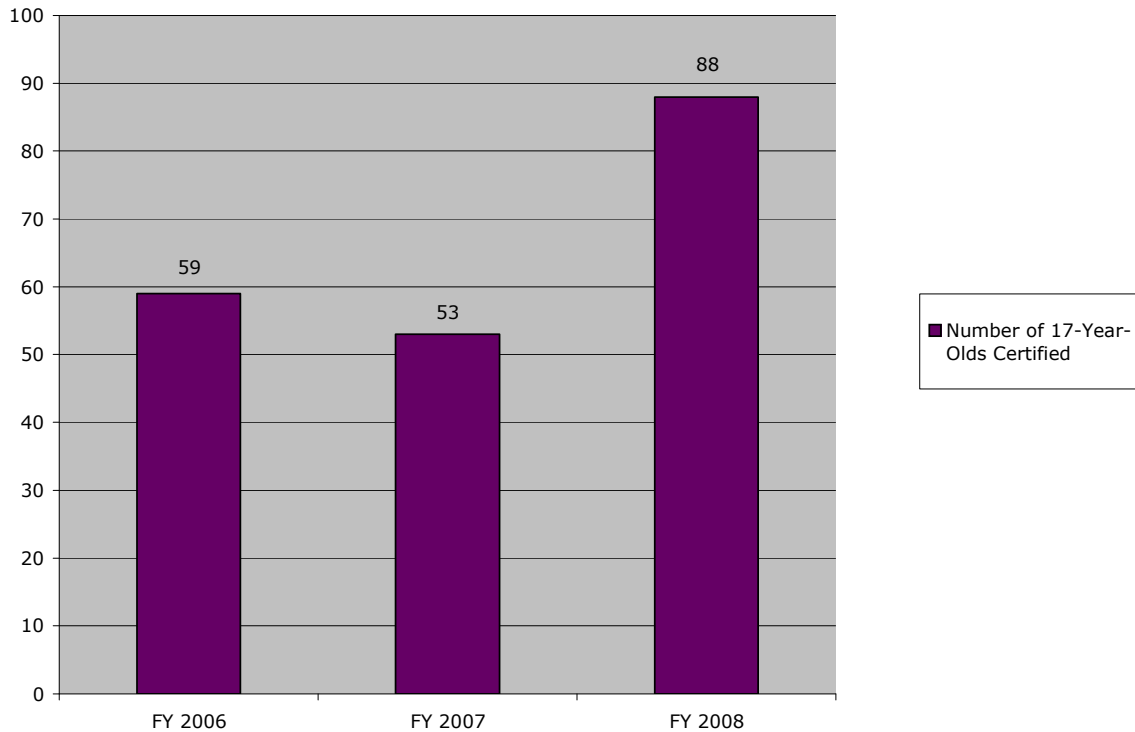


Source: TJPC, records request received December 10, 2008.

Between 2006 and 2007, the number of 17-year-olds certified to stand trial as adults remained fairly constant (59 in 2006, 53 in 2007). However, in 2008, certifications for 17-year-olds increased 66.0%, as shown in Figure 2, below:

Figure 2.

Adult Certifications in Texas of Children Aged 17 at Disposition



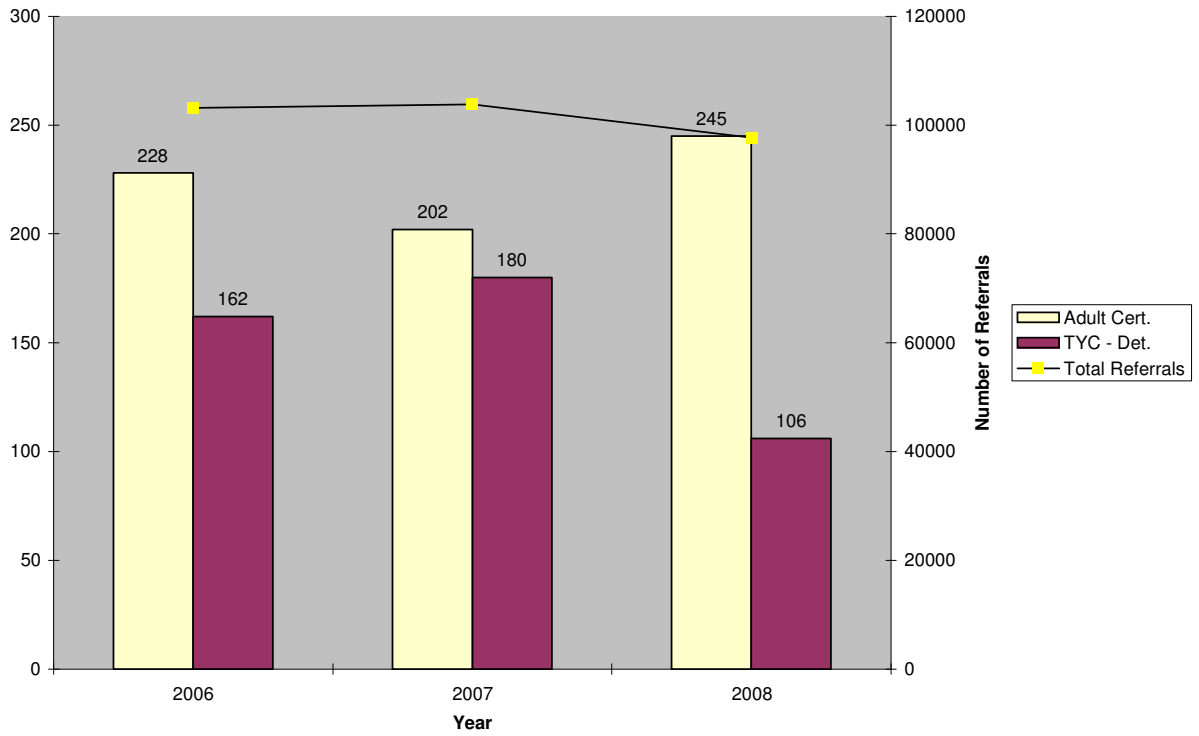
Source: TJPC, Records request received December 10, 2008.

Although 17-year-olds are ordinarily not eligible for commitment to TYC because of their age, the numbers above represent those children who committed crimes while under the age of 17, but appeared in court after their 17th birthdays. Under the pre-SB 103 rules, the youngest of these children could have spent nearly four years in TYC if sentenced under determinate sentencing scheme. Today, this time-frame has been effectively reduced by more than half, making determinate sentencing a much less attractive option for judges and prosecutors.

Figure 3, below, shows the number of adult certifications, determinate sentences, and total referrals for fiscal years 2006, 2007 and 2008. Note, however, that “adult certifications” below represents a slightly different metric than “children certified to stand trial as adults.” The difference is that adult certifications account for all defendants whose crimes are “certified,” and so includes defendants who committed their crimes while children, but who had reached their 18th birthdays when their cases were disposed. The total number of adult certifications granted in Texas dropped (by 26) between 2006 and 2007, and then increased sharply (by 43) between 2007 and 2008. At the same time that adult certifications increased, the total number of determinate sentences decreased dramatically, from 180 per year to 106, indicating that for at least some offenses, adult certification may be increasingly considered a substitute for determinate sentences. Note also that between 2007 and 2008, the total number of referrals dropped approximately 5.9%.

Figure 3.

Serious Dispositions and Total Referrals by Year, Texas



Source: TJPC, records request received November 10, 2008.

Where are the Certification Numbers Changing?

Figure 4, below, shows which counties have experienced an increase, decrease, or no change in the number of certifications granted between 2006 and 2008. In general, most of the increase in certifications has occurred in the eastern half of Texas, with pockets in the Panhandle as well as West and South Texas. In other words, this phenomenon is fairly wide-spread. Between 2006 and 2007, adult certifications decreased in 32 counties, and increased in 25 counties. This trend was dramatically reversed in 2008, however, when adult certifications *increased* in 39 counties, and decreased in only 21. In fourteen of the counties where certifications granted decreased in 2007, there were increases in 2008. Harris and Travis Counties are among these.

Figure 4.

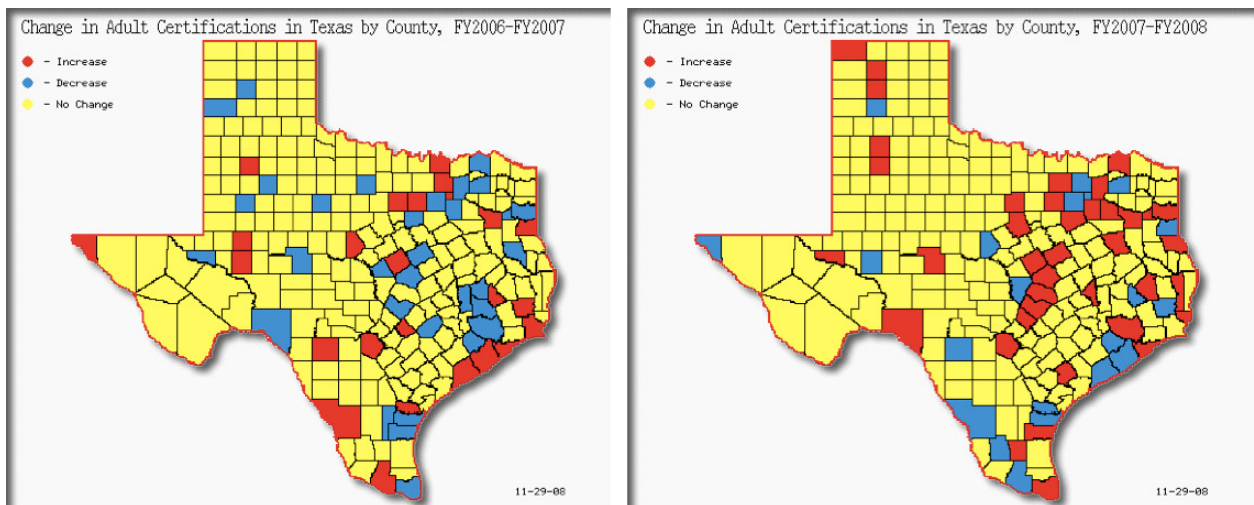
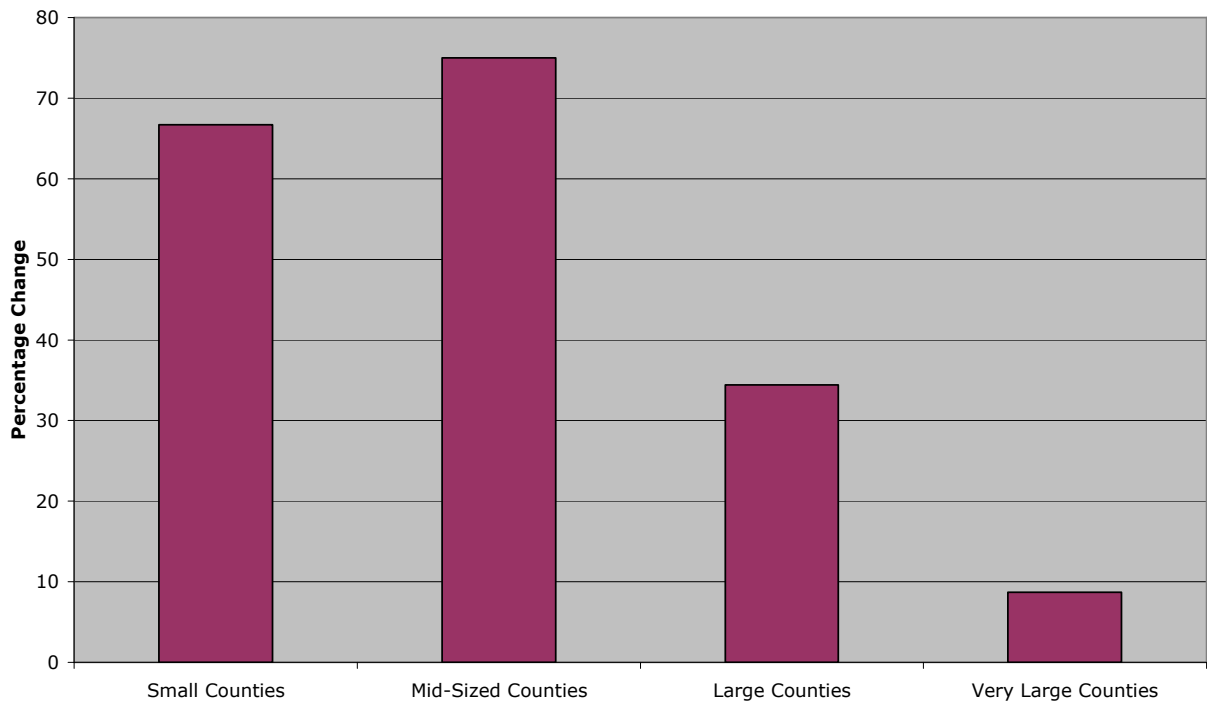


Figure 5, below, shows the percentage increase in adult certifications in Texas by county size. Small and mid-size counties had the highest percentage increase in adult certifications at 66.7% and 75.0%, respectively. For large

counties, adult certifications increased by 34.4%, and for the five largest counties in Texas, certifications increased by 8.7% (due in part to the fact that in Dallas county, adult certifications actually decreased by 33.3% between 2007 and 2008).

Figure 5.

Percentage Increase in Adult Certification by County Size, FY 2007-2008



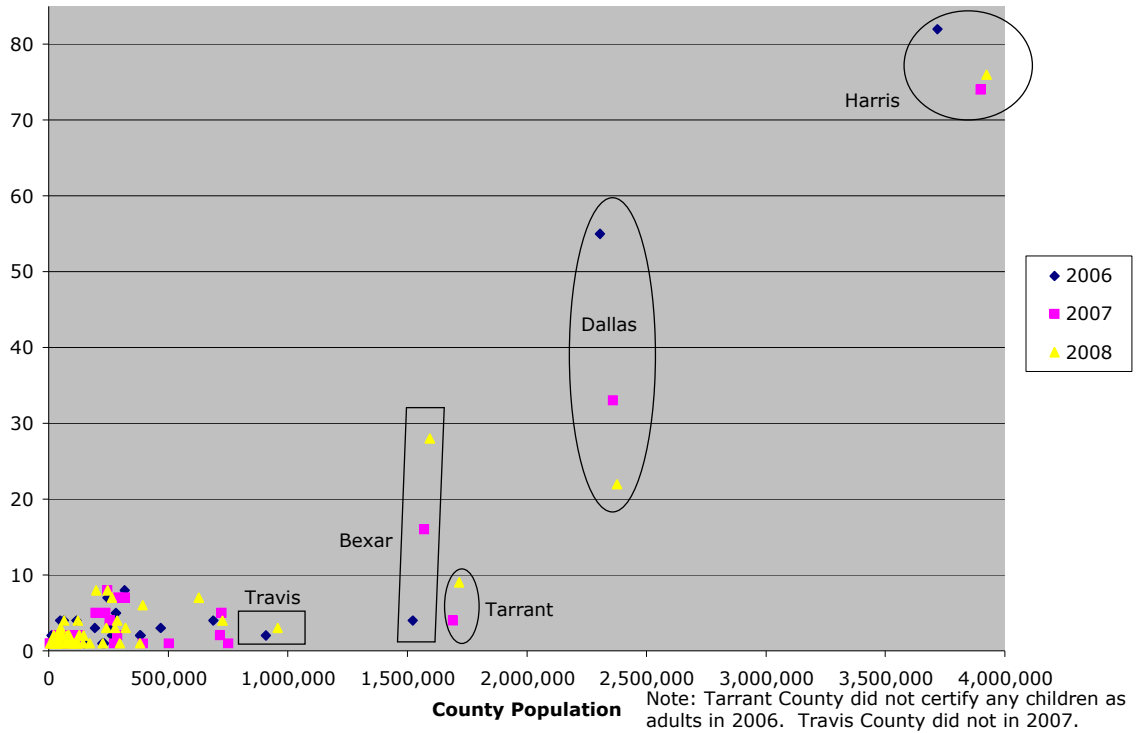
Source: TJPC, records request received November 10, 2008. Population estimates from Texas State Data Center. For the purposes of this chart, “small” counties have populations of less than 25,000. “Mid-sized” counties have populations between 25,000 and 50,000. “Large” counties have populations between 50,000 and 800,000. “Very large” counties are the five biggest in Texas – Bexar, Dallas, Harris, Tarrant and Travis.

Figure 6, below, shows the relationship between adult certifications and county population between 2006 and 2008. As one would expect, courts in counties with larger populations tend to grant more adult certifications than counties with smaller populations.

The dark borders indicate which data points are associated with which counties. In Bexar County, for example, adult certifications have increased every year since 2006, whereas in Dallas County, certifications have decreased consistently over that period.

Figure 6.

Adult Certifications by County Population, per Year



Source: Certification data from TJPC. Population estimates from Texas State Data Center.

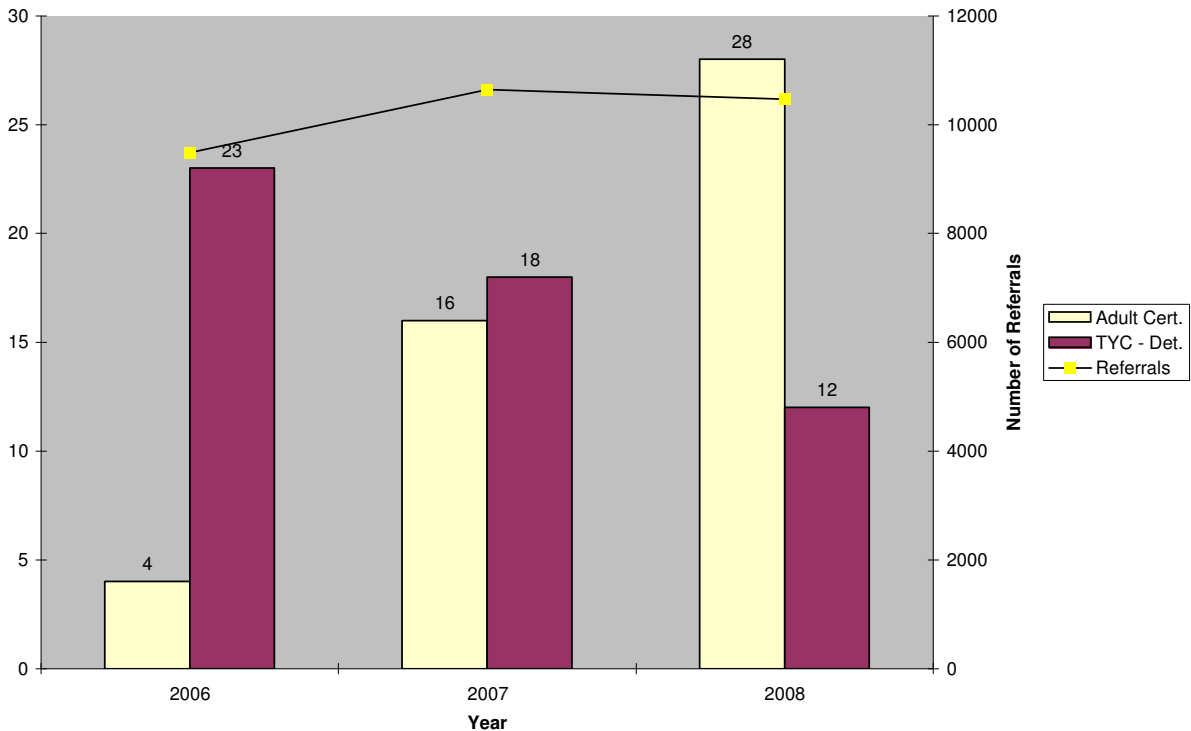
The following sections describe trends in five selected counties in Texas: Bexar, Dallas, Harris, Tarrant, and Travis Counties.

Bexar County

Between 2007 and 2008, adult certifications in Bexar County increased by 75%. Between 2006 and 2008, adult certifications increased by a staggering 600%. In that same two-year time period, referrals only increased by 10.4%. Furthermore, determinate sentences to be served at TYC *decreased* steadily, perhaps indicating that for some offenses in Bexar County, adult certification has become a substitute for the determinate sentence.

Figure 7.

Serious Dispositions and Total Referrals by Year, Bexar County



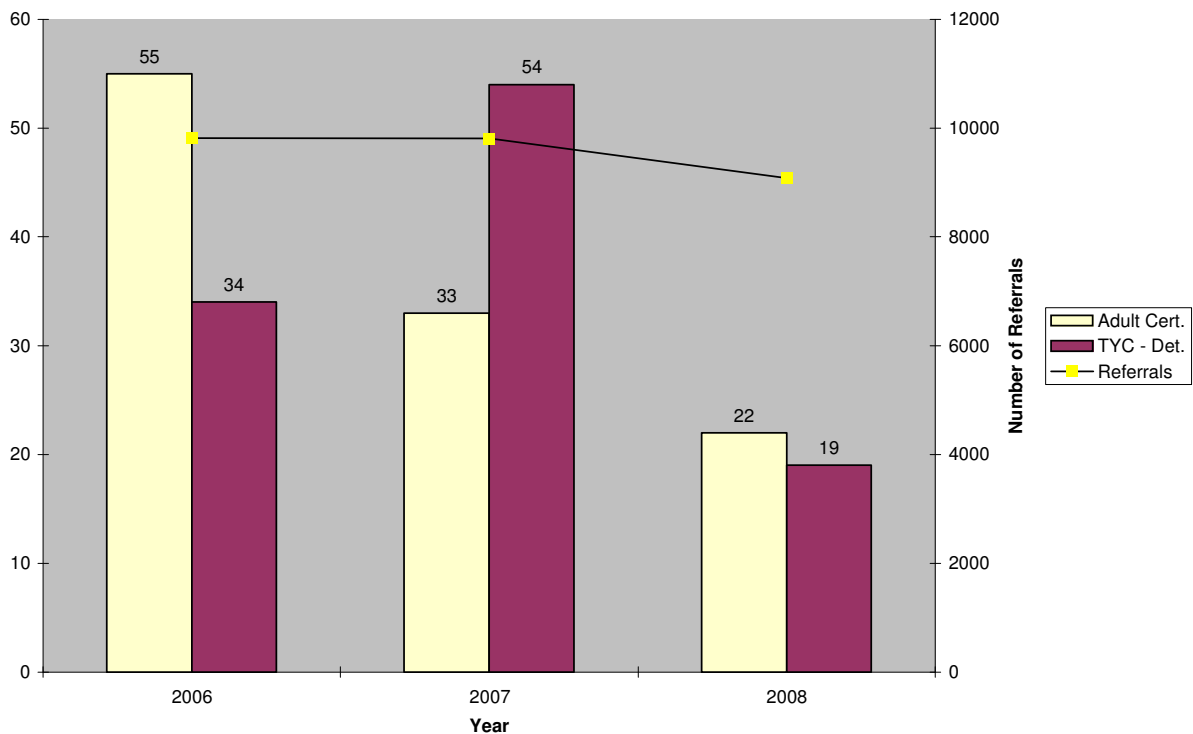
Source: TJPC, records request received November 10, 2008.

Dallas County

Dallas County, like Travis County, is something of an anomaly in Texas because adult certification numbers have actually dramatically *decreased* over the last two years.

Figure 8.

Serious Dispositions and Total Referrals by Year, Dallas County



Source: TJPC, records request received November 10, 2008.

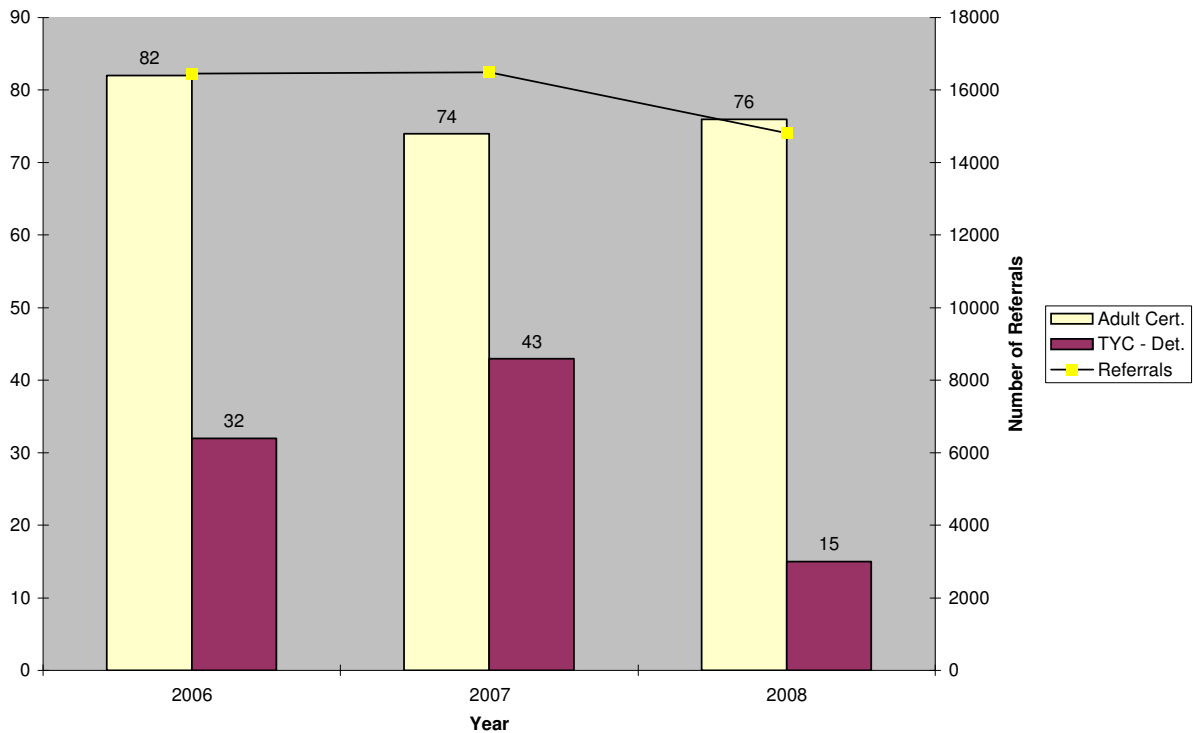
This decrease can likely be attributed to philosophical differences between the judicial and prosecutorial culture of Dallas County and other urban counties in Texas. In general, judges and prosecutors in Dallas County favor diversion and commitment to county facilities over commitment to TYC or adult certification.

Harris County

Harris County experienced a modest increase in adult certifications between 2007 and 2008, and a net decrease in the two years between 2006 and 2008. However, between 2007 and 2008, total referrals decreased by 10.2%.

Figure 9.

Serious Dispositions and Total Referrals by Year, Harris County



Source: TJPC, records request received November 10, 2008.

Harris County continues to certify more children to stand trial as adults than any other county in Texas, and moreover, certifies more children than the next five largest counties combined. And despite the multiple paths available to the adult system under determinate sentencing, Harris County grants over five times the number of adult certifications as it does determinate sentences.

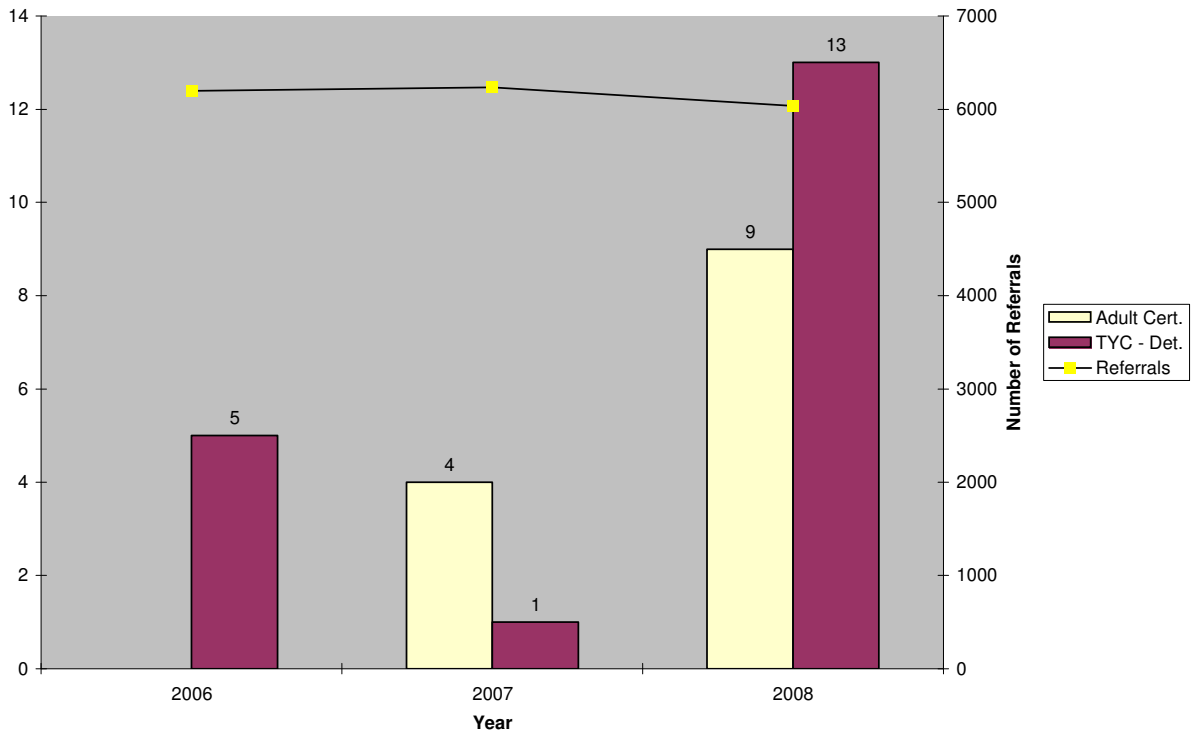
Tarrant County

In Tarrant County, adult certifications more than doubled between 2007 and 2008.

Total referrals during the same period decreased by 3.2%.

Figure 10.

Serious Dispositions and Total Referrals by Year, Tarrant County



Source: TJPC, records request received November 10, 2008.

Like Travis County (below), Tarrant County still certifies a relatively small number of children; therefore, this sample size is probably too small to produce statistically significant results. However, Riley Shaw, Juvenile Court Prosecutor in Tarrant County, told us that several children for whom he sought certification

may have proved appropriate candidates for TYC, but for the age restriction provision in SB 103 (See Part III below).⁴²

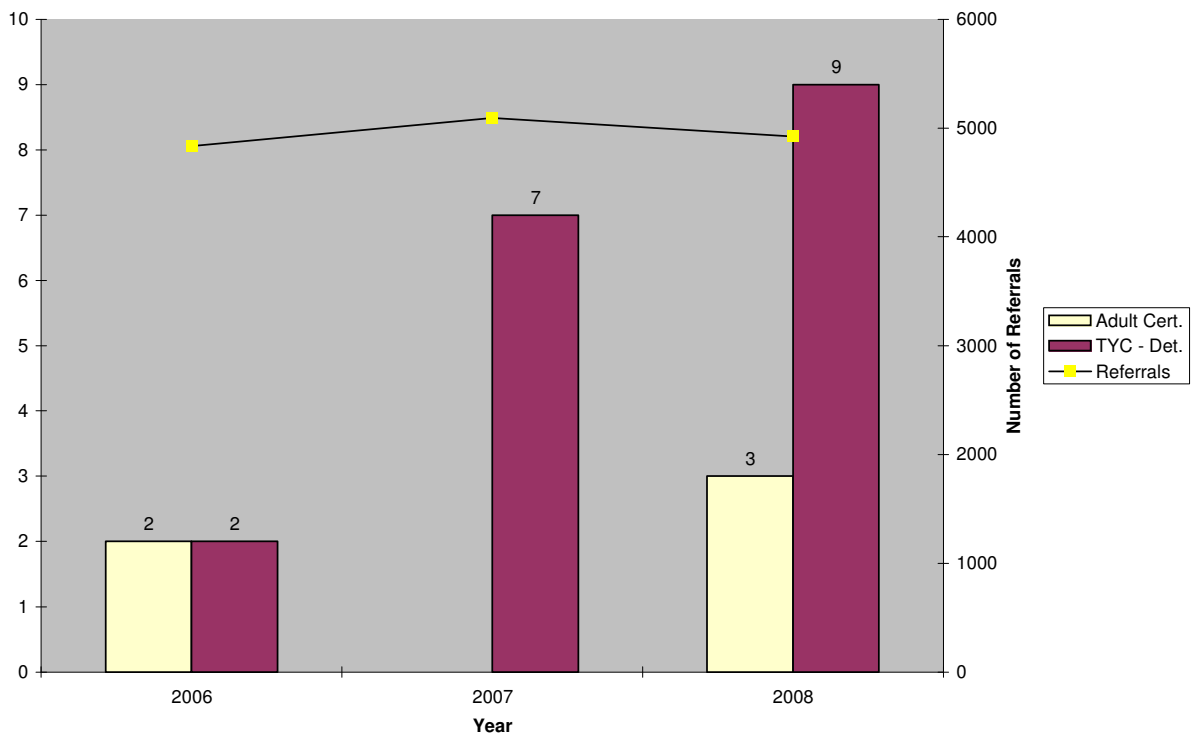
⁴² Telephone Interview with Riley Shaw, County Prosecutor, Tarrant County, Texas (October 27, 2008).

Travis County

Travis County's rates of adult certification are probably too low to generate statistically significant trends, although 2008 did witness an increase in adult certifications over 2007. Historically, judges and prosecutors in Travis County have disfavored adult certification and TYC commitment, choosing instead to divert youth into local facilities and programs, such as the Residential Services program at the Gardner-Betts Juvenile Justice Center.

Figure 11.

Serious Dispositions and Total Referrals by Year, Travis County



Source: TJPC, records request received November 10, 2008.

Not all certifications are of children. Travis County Juvenile Court Judge Jeanne Meurer indicated that Travis County courts granted one of the three

certifications in 2008 for an adult who had committed his crime as a child, but who was not prosecuted until this year.⁴³

⁴³ Interview by Rex Baker with Judge Jeanne Meurer, Travis County, Texas (November 24, 2008).

PART III: Juvenile Justice Practitioners Weigh In

Juvenile justice practitioners in Texas recognize the need to protect younger TYC residents from abuse, including abuse from older residents. However, many of those same practitioners feel as though TYC's loss of jurisdiction over 19-21-year-olds has reduced the options available in dealing with juvenile offenders. In general, the judges and prosecutors with whom we spoke agree that, for many children in their courts, an extra two years of TYC rehabilitation would mean the difference between adult certification and a determinate sentence.

Less Flexibility, More Pressure on Judges and Prosecutors

Judges and prosecutors, mindful of their responsibility to keep their communities safe, must assess in advance the probability that a youth will be able to safely reintegrate into the community following his or her term at TYC. Many prosecutors and judges in Texas have indicated that several children for whom they sought and granted adult certification would have been ideal candidates for TYC rehabilitation, but for TYC's inability to retain these offenders past their 19th birthdays.

Riley Shaw, the juvenile prosecutor with the Tarrant County District Attorney's office, made the following remarks about the impact of the age reduction:

When it comes down to it, when you have a year and change to work with these kids [at TYC], and a child has committed an offense serious enough to qualify him for a determinate sentence, that's just not enough time to work with him. Either they go home [after their release from TYC] and they're not ready, or they're going to [prison or state jail], and that means they've been transferred by

the people at TYC and we've lost them anyway. The kids who most need the intervention aren't getting it as a result of [the age reduction].⁴⁴

Mr. Shaw illustrates this position with an example of a child for whom TYC commitment would have been ideal, but because of the child's age, he and the judge agreed that the child should be certified.

In 2006 and 2007, Mr. Shaw tells us, several children in Tarrant County had coerced another child into prostitution and were prosecuted for this crime in 2008, after SB 103 took effect. Compelling prostitution is a second degree felony in Texas, making it an offense eligible for adult certification, but it is not a qualifying offense for a determinate sentence at TYC. Mr. Shaw explained that he and his colleagues had a choice: Either send these children to TYC, where the oldest would only be able to stay for just over a year, or seek certification. He tells us that:

Had this offense occurred and been disposed of under the old law..., we would have been much less likely to request that the juvenile court waive its jurisdiction as to these four youth, since TYC would have had at least three and a half years to work with them (both in custody and on parole) in an effort to rehabilitate them so that they could return home, be safe for those around them, and lead productive lives.

However, since there was so little time left during which TYC would have the opportunity to work with these youth, the decision was made to seek certification.... After extensive testimony, the Court retained jurisdiction as to three of the youth, but waived its jurisdiction as to the fourth [i.e., certified him as an adult]. The downside is this: as to the one certified, he is now a convicted adult felon who will not be receiving the benefits of the programming available to youth in the TYC system; as to the three over whom the Court retained jurisdiction, their chances of success have potentially been reduced because there may not be enough time ... for them to receive the full benefit of the [TYC] programming....

All of this leads me to a question: Is the purpose of having a separate juvenile system ... fulfilled if the three who dodged the short-term bullet of certification are nevertheless unable to dodge the long-term bullet of the adult criminal system and end up as felons themselves later in life – all because we didn't have enough time to work with them while they were young? Sadly, no – we lose on both

⁴⁴ Telephone interview by Rex Baker with Riley Shaw, September 25, 2008.

counts – under those circumstances our youth have less of a chance for success, and our communities are less safe.⁴⁵

Jill Mata is Juvenile Court Prosecutor in Bexar County. We asked Ms. Mata what effect the age reduction has had in her jurisdiction. She tells us:

The biggest impact I've seen is that I've taken more kids and sought transfer [to the adult system]. I've taken kids that I would have sent to TYC [before SB 103] – because they would have a longer time in TYC – and had them certified.... There is a general idea that prosecution is in favor of criminalizing these kids. I don't think that's true.... We believe [that juveniles constitute] the group that is most amenable to rehabilitation.... To reduce the age limit hurt that rehabilitative effort.⁴⁶

Ms. Mata described how TYC retains the children who are amenable to rehabilitation and often transfers those who are not to the adult system:

[Before SB 103], you had the ability to send children off [to the adult system]. If you had an incorrigible kid, you didn't have to keep working with him. The older children in TYC are the ones who have made the cut. If they engage in antisocial behavior, TYC takes them back to court and sends them to prison.⁴⁷

Ms. Mata's statement raises an interesting point. Under our current determinate sentencing regime, TYC students face multiple paths to the adult system (See Part I). Unlike adult certification, however, TYC may request transfer after having an opportunity to make an intense assessment and providing a student a chance to participate in programming.

Lowered Incentives to Progress through Rehabilitation, Less Time to Assess Progress

The new law diminishes the leverage available to TYC staff in rehabilitating residents, especially those who cannot complete their MPC before their 19th birthdays. Furthermore, the age reduction limits the amount of time

⁴⁵ Email to Rex Baker from Riley Shaw (November 3, 2008).

⁴⁶ Telephone interview by Rex Baker with Jill Mata, County Prosecutor, Bexar County, Texas (October 7, 2008).

⁴⁷ *Id.*

available to TYC staff to accurately assess a resident's progress in rehabilitative programs. Judge Edward Johnson in Bell County describes how his court perceives this change:

My primary perception is that this is nothing more than a progressive hardening of the juvenile justice system, in that the legislature has now reduced the time ... with which we can work with these kids by two years. It makes it a lot tougher to rehabilitate them.

One of the most effective programs we have is the Capital Offender Group [at the Giddings State School].⁴⁸ Let's take, for example, a sixteen-year-old who killed his parent. And let's just say he had a sorry, no-good, abusive, neglectful parent, and the judge handles it as a juvenile case. In order to even get into the Capital Offender Group at Giddings, he has to be there for [several] months and follow the rules. So that makes him potentially seventeen-and-a-half by the time he gets into the program. The Capital Offender Group has lasted up to a year in times past, so by the time this child successfully completes that program, he's already eighteen-and-a-half. TYC is then put in a position to make a recommendation, based on the best available data, as to whether the kid is going to pose a danger to his community once he's released on parole. That's just not enough time.⁴⁹

Stan DeGerolami, the Superintendent at TYC's Giddings State School, recalled a story that he said may have provided some of the impetus for retaining TYC students until their 21st birthdays. In the early 1980s, a 14-year-old boy in El Paso stabbed his mother and bludgeoned his father to death. By the time the boy's psychological evaluation had been completed, the child was 15-and-a-half. In the early 1980s, however, TYC could only retain control and supervision of children until their 18th birthdays, and even then, blended sentencing was not available. "He spent two-and-a-half years at Giddings," Mr. DeGerolami said, "and then he was discharged, after killing both of his parents." During that time,

⁴⁸ The Capital Offender Group, now called the Capital and Serious Violent Offender Program, is a program reserved for the most violent offenders at the TYC-run Giddings State School. Among graduates of the Capital Offender Group released in 2004, the 3-year recidivism rate was 10%; remarkably, the 1-year rate was only 3%. John Hubner, *Last Chance in Texas*, (New York: Random House, 2005), p. xxiii.

⁴⁹ Telephone interview by Rex Baker with Judge Edward Johnson, Bell County, Texas (September 25, 2008).

release was mandatory, and the State did not require any follow-up services for discharged youth.

Mr. DeGerolami notes that after that case, the Legislature realized that Texas needed to retain TYC students for a longer period of time, so they increased the maximum age to 21, where the limit stayed for almost 25 years. He tells us, “There needs to be a way to keep kids longer. We saw an immediate decrease in adult certification after that change because we could rehabilitate and monitor students for a longer period. With the passage of the first determinate sentence regime, there was even more of a decrease in adult certifications.”⁵⁰

⁵⁰ Telephone interview by Rex Baker with Stan DeGerolami, Superintendent, Giddings State School, Giddings, Texas (November 7, 2008). Unfortunately, we were unable to locate any data on adult certification prior to 1988.

Older Students and Safety

We also asked Mr. DeGerolami whether he felt that older students can set a positive example for the younger students, and whether he felt they posed a danger to the younger residents. He told us, “Well, they don’t have a positive influence. Otherwise they wouldn’t be here! But no, this is not a population that preys upon younger kids. You may find kids who are resistant to treatment, or who are a bit slow. But this is not a situation where you find predation.”⁵¹

TYC Students Discuss SB 103

In preparing this report, we had the opportunity to interview several older students who may represent the “last generation” of 19- and 20-year-olds in TYC. Several of them had only days or weeks remaining before their release from TYC custody. We asked them how they perceived their role vis-à-vis the younger students, and whether in their younger years they had found good examples to follow among the older students.

One student, T., recalled arriving at a TYC facility when he was 18. Before his commitment to TYC, T. had spent time in county jail with much older prisoners. “When I got to TYC,” he told us, “I decided to make it my house. I grew up in a pretty messed up family. My mom’s visited a couple of times, but my dad was in the pen before I was born, then again when I was born, and he’s still there today. I don’t know my family. TYC is my home.”⁵² After T. arrived, he told us about a 20-year-old student he met in his automotive collision repair class

⁵¹ *Id.*

⁵² Interview by Rex Baker with T., TYC Facility at Mart II, Mart, Texas (November 7, 2008).

at Giddings. “We were talking about some of the group therapy stuff, and he told me, ‘Some stuff is hard. But stick with it and it’ll be worth it.’ And I like to think that I took his place after he left.” Now, as an older student himself, T. tells us, “I saw a lot of these kids as my little brothers. They have a lot of questions when they come in. And I never had a little brother.”⁵³

When we spoke to another older student, M., he was serving a determinate sentence at Giddings for murder (he has since been released on parole). He told us that in his experience, the older students possessed a level of maturity that made them more amenable to treatment.⁵⁴ Another student at Giddings that day, T.R., echoed M.’s sentiment, and specifically mentioned the former Youth Ombudsman at Giddings as having had a very positive influence on him and on other students.⁵⁵

Apprehension Towards Committing Children to TYC

Some practitioners with whom we spoke voiced concern about the propriety of sending children to TYC. This concern stems primarily from the allegations of physical and sexual abuse at the agency. We have found that various jurisdictions may address this concern in one of two ways. Some jurisdictions choose to certify and convict children as adults, where many of them become eligible to participate in the YOPs. Other jurisdictions, however, such as

⁵³ *Id.*

⁵⁴ Interview by Rex Baker with M., Giddings State School, Giddings, Texas (October 21, 2008).

⁵⁵ Interview by Rex Baker with T.R., Giddings State School, Giddings, Texas (October 21, 2008).

Travis County, choose to divert children from both TYC commitment and adult certification, retaining them in county facilities and programs.

Harris County certifies more children to stand trial as adults than the next five largest counties combined.⁵⁶ Harvey Hetzel, the Chief Juvenile Probation Officer for Harris County, says that this year, “Anecdotally, we are seeing more certifications, [although] in just about every category but murder and arson, our numbers [referrals] are down, so the certifiable type of offenses are down substantially as well.”⁵⁷ Although Mr. Hetzel believes that there is a relationship between the age reduction and increased certifications, he also places some of the responsibility for higher adult certification rates with the TYC itself. In reference to some of the agency’s troubles of the past two years, he says, “There is potentially some apprehension about the quality of TYC’s programs.”⁵⁸

PART IV: Policy Recommendations

The foregoing data and analysis show that limiting the maximum age of TYC jurisdiction to 19 has *substantially increased* the rate of adult certification in Texas, particularly among older children. In order to restore adult certification rates to an appropriate level, we recommend that the Texas Legislature return TYC supervision and control over sentenced offenders aged 19-to-21. We are confident that, through existing safeguards like separate housing or separate facilities for older residents, TYC will continue to ensure the safety of younger

⁵⁶ Data from TJPC, request received October 28, 2008.

⁵⁷ Telephone interview by Rex Baker with Harvey Hetzel, Chief Juvenile Probation Officer, Harris County, Texas (November 4, 2008).

⁵⁸ *Id.*

residents while providing opportunities for rehabilitation to young people otherwise destined for adult incarceration.

Criticism of Adult Certification

Recent research calls into question the propriety and efficacy of sending children to complete their sentences in the adult system. Children who commit crimes are widely regarded as a vulnerable group with special needs of their own. Several studies show that “juvenile delinquents have lower IQs..., a higher prevalence of learning disabilities and mental illness [than their non-offending counterparts]..., often have poor social problem-solving skills..., and may not fully understand their legal rights.”⁵⁹ In one study of juveniles in adult prison, young offenders reported that “much of their time was spent learning criminal behavior from the inmates and proving how tough they were.”⁶⁰ Another study found that juveniles serving time in adult prisons have eight times the suicide risk, five times the sexual victimization risk, and nearly twice the risk of being assaulted with a weapon or beaten by corrections officers as juveniles serving time in juvenile facilities.⁶¹

In 2007, TDCJ commissioned a study by researchers at Sam Houston State University to determine levels of emotional distress or behavioral problems

⁵⁹ Kirk Heilbrun, Naomi E. Sevin Goldstein & Richard E. Redding, *Juvenile Delinquency*, (Oxford University Press: New York, 2005), p. 248. Internal citations omitted.

⁶⁰ Richard E. Redding, “Juvenile Transfer Laws: An Effective Deterrent to Delinquency?” in *Juvenile Justice Bulletin*, (Office of Juvenile Justice Policy: August, 2006), available at <http://www.ojp.usdoj.gov/ojjdp>.

⁶¹ M. Beyer, “Experts for juveniles at risk of adult sentences,” in *More than meets the eye: Rethinking assessment, competency and sentencing for a harsher era of juvenile justice*, P. Puritz, A. Capozello & W. Shang (Eds.), (American Bar Assn: Washington, D.C., 1997), pp. 1-22.

among youthful offenders⁶² in Texas.⁶³ Two instruments were used in administering this study.⁶⁴ On the MAYSI-2 instrument, youthful offenders registered higher results than their normative counterparts on every component of the survey, including levels of depression, suicidal thoughts, and traumatic experiences. On the POSIT, youthful offenders also scored higher than the normative group in every category.⁶⁵

Adult Certification Increases Recidivism Risk

Because certification increases the risk of recidivism, we highly discourage the practice and recommend that it only be used for serious, violent offenses and when the certified child presents a grave risk of harm to students he would encounter at a TYC facility.

On average and particularly for violent offenders, adult certification *substantially increases* the risk of recidivism. As of August 2008, six large-scale studies of different sample sizes, jurisdictions, methodologies and covering different legal regimes have all reached this conclusion.⁶⁶ In fact, one study showed that violent juvenile offenders transferred to adult courts were 100% more likely to be re-arrested than non-certified children.⁶⁷

⁶² “Youthful offenders,” as defined by TDCJ, are inmates between the ages of 14 and 17, inclusive.

⁶³ D. Murrie & C. Henderson. *Symptoms of mental health and substance abuse problems among youthful offenders*, commissioned by the Texas Department of Criminal Justice, Sam Houston State University, Department of Psychology (Huntsville, 2007).

⁶⁴ These were the Massachusetts Youth Screening Instrument-2 (“MAYSI-2”) and the Problem Oriented Screening Instrument for Teenagers (“POSIT”).

⁶⁵ Schuster, pp. 10-11.

⁶⁶ Redding.

⁶⁷ J. Fagan, A. Kupchik & A. Liberman, *Be careful what you wish for: The comparative impacts of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders*, Public Law Research Paper No. 03-61, (Columbia Univ. Law School: New York, 2003).

Moreover, a recent meta-study published in the federal Center for Disease Control's Morbidity and Mortality Weekly Report found that "transfer to the adult criminal justice system typically increases rather than decreases rates of violence among transferred youth."⁶⁸ In very clear language, the study recommends against the transfer of children to the adult criminal justice system.

Not only do certified youth pose a higher crime risk to the community than non-certified children, but they end up costing Texas taxpayers more money, as well. Adult convictions carry burdensome consequences, such as denial of educational loans and housing, obstacles to employment associated with felony convictions, and life-long registration requirements for sex offenders, to name but a few. These collateral consequences for children transferred to the adult system translate to losses in tax revenue for the State, as well as the higher costs of keeping them locked away even longer as adult recidivists.

⁶⁸ Angela McGowan, et al. "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services," *American Journal of Preventive Medicine* (2007), pp. S7-S21, Available at: <http://www.thecommunityguide.org/violence/mcgowanarticle4.pdf>

TDCJ's Youthful Offender Program: Disorganized and Inadequately Staffed

The Youthful Offender Program ("YOP") at the Clemens Unit in Brazoria, Texas is TDCJ's version of the TYC. The YOPs were intended to provide sheltered housing with a therapeutic programming component to inmates between the ages of 14 and 17, inclusive. Based on several findings in an unpublished 2008 report describing the YOPs as "disorganized," "inadequately staffed," and failing "to provide youthful offenders with adequate sheltered housing, education, and therapeutic programming, in accordance with their special needs," we do not recommend that any county view the YOPs as a suitable alternative to TYC's rehabilitative programs.⁶⁹

As of April 2008, 29.5% of eligible inmates (i.e., children in TDCJ-ID, aged 14-17) had not been placed in the YOPs.⁷⁰ Furthermore, as of that time, 32% of the inmates at the Clemens Unit YOP were not receiving any therapeutic programming. Even worse, the Hilltop Unit YOP (the facility reserved for female inmates) only housed two inmates, and provided no therapeutic programming. The director of that facility claimed that she did not "have the numbers to justify services."⁷¹ The YOPs fare no better when it comes to educating their inmates, as required under Texas law. Again, in April of 2008, just 38% of the inmates in the Clemens unit were attending classes, as compared with 96% of the students at TYC.⁷²

⁶⁹ Schuster, p. 11.

⁷⁰ TDCJ Executive Services, April 7, 2008. Quoted from Schuster, p. 12.

⁷¹ Telephone interview by Terry Schuster with Faye Lovorn, Director, Hilltop Unit YOP (April 1, 2008). Quoted from Schuster, p. 18.

⁷² TDCJ Executive Services, April 7, 2008, TYC Research & Data Department, May 6, 2008. Quoted from Schuster, p. 27.

CONCLUSION

In closing, we recommend that in its 81st Regular Session, the Texas State Legislature revisit the reforms passed in SB 103 and restore TYC control and supervision over 19- and 20-year-old youths serving determinate sentences. Doing so would likely return substantially increased adult certification levels in Texas to their pre-SB 103 levels, providing an important last chance for many troubled children. While we appreciate the current law's intent toward keeping younger students safe, we are confident that the multiple supervision and oversight measures put in place since 2007 will continue to safeguard TYC students from abuse at the hands of staff members and other students. Sending children to the adult system for their crimes carries risks of its own, including an increased risk of recidivism and victimization. Furthermore, once in the adult system, children in Texas do not receive the same level of therapeutic and educational programming as their counterparts in TYC.