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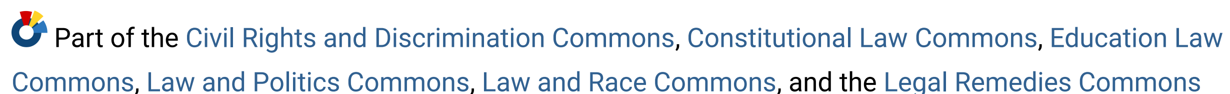
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African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy

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I. INTRODUCTION

Student discipline is one of the more complex problems confronting educators.[1] One recent survey of educators and school law attorneys[2] ranked student discipline as the third most important legal issue confronting educators after special education and student expression.[3] An educator's action on a disciplinary matter is generally found constitutional if the policy is considered to be rationally related to a legitimate government interest.[4] When disciplining students, however, school officials' "power is not unlimited and cannot be arbitrarily exercised."[5]

Controversies surrounding school discipline are thus not about whether school administrators have the right and responsibility to address discipline and school safety, but rather how that is to be accomplished. In response to a widespread perception that school violence was increasing dramatically, the policy of zero tolerance, mandating harsher consequences for both major and minor violations, began to be widely implemented in schools and school districts.[6] Although subsequent data demonstrated that school violence had in fact remained stable over a twenty-year period,[7] the implementation of zero tolerance policies led to substantial increases in the rates of out-of-school suspension and expulsion.[8] Two categories of suspensions and expulsions have caused particular controversy at the local level: those in which students have been suspended or expelled for what seem to be trivial infractions (e.g., making a paper gun) and those where racial disparities in suspension and expulsion are clearly evident.[9]

In the area of school discipline, the United States has absorbed the doctrine of in loco parentis, which literally means "in place of the parent," from English common law.[10] The British established this law to accord certain rights and responsibilities to children's non-parental caregivers.[11] The most common usage of this law was in the

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1. Stephen B. Thomas, Nelda H. Cambron-McCabe & Martha McCarthy, Public School Law: Teachers' and Students' Rights 224 (6th ed. 2009).
2. A school law attorney may represent students or school districts in matters related to school legal issues.
3. Susan Bon et al., *School Law for Teachers: What Every Preservice Teacher Should Know*, ELA Notes, Mar. 2008, at 18.
4. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997).
5. Lee v. Macon County Bd. of Educ., 490 F.2d 458, 460 (5th Cir. 1974).
6. Russell J. Skiba & Reece L. Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 Phi Delta Kappan 372, 372–76, 381–82 (1999).
7. *See generally* Nat'l Ctr. for Educ. Statistics, Indicators of School Crime and Safety: Annual Report (1999).
8. Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, New Directions for Youth Dev. Fall 2003, at 10.
9. Skiba & Peterson, *supra* note 6.
10. 5 West's Encyclopedia of American Law, 351, 352 (2d Ed. 2005), *available at* http://www.answers.com/topic/in-loco-parentis.
11. *Id.*

teacher-student relationship, although it also applies to legal guardianships.[12] In loco parentis is often cited as the basis for school officials' authority to discipline students.[13] These policies permit school officials to reasonably exercise their custodial powers by intervening when students present dangerous situations to themselves and others.

In the history of efforts to curb or respond to undesirable student behaviors, school officials have relied on a variety of disciplinary measures. Through the 1960s, corporal punishment was the most prevalent form of intervention in schools.[14] Eventually, as physical punishments have fallen from favor, suspension, generally considered a removal from school for ten days or less, and expulsion, typically the removal from school for more than ten days, have become more widely used. Today only twenty-two states have laws permitting corporal punishment,[15] while out-of-school suspension has become the most common administrative response to student disciplinary infractions.[16] Available national estimates suggest that one million American students missed at least one day of school due to out-of-school suspension or expulsion in the 1970s.[17] During the 1990s, that number doubled and reached an estimated 3.1 million or approximately 7% of the student population.[18] Both state and local district reports suggest increases in out-of-school suspension rates at the local level.[19]

Although out-of school suspension and expulsion appear to provide a short-term solution to school disciplinary problems by separating disruptive students from the educational environment, in practice, the use of disciplinary exclusion raises thorny questions for schools and administrators. Given that educational research has consistently shown that the strongest predictor of academic achievement is active academic engagement,[20] strategies such as suspension and expulsion pose a dilemma

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12. *Id.*

13. Julie K. Underwood & L. Dean Webb, School Law for Teachers: Concepts and Applications 167 (2005).

14. *See generally* Thomas et al., *supra* note 1, at 240.

15. *Id.* at 170–71.

16. Russell J. Skiba & M. Karega Rausch, *Zero Tolerance, Suspension, and Expulsion: Questions of Equity and Effectiveness*, *in* Handbook of Classroom Management: Research, Practice, and Contemporary Issues 1063, 1066 (Carolyn M. Evertson, & Carol S. Weinstein eds., 2006).

17. Kim Brooks, Vincent Schiraldi & Jason Zeidenberg, School House Hype: Two Years Later (2000), *available at* http://www.cjcj.org/files/schoolhouse.pdf; *see also* U.S. Dep't of Educ., The 2000-2001 Elementary and Secondary School Survey: National and State Projections for Enrollment and Selected Items by Race/Ethnicity and Sex (2000), *available at* http://ocrdata.ed.gov/ocr2000rv30/wdsdata.html; Linda M. Raffaele Mendez & Howard M. Knoff, *Who Gets Suspended from School and Why: A Demographic Analysis of Schools and Disciplinary Infractions in a Large School District*, 26 Educ. & Treatment Child. 30, 31 (2003).

18. *Id.*

19. David Richart, Kim Brooks & Mark Soler, Unintended Consequences: The Impact of "Zero Tolerance" and Other Exclusionary Policies on Kentucky Students (2003), *available at* http://www.buildingblocksforyouth.org/kentucky/kentucky.pdf; Mendez & Knoff, *supra* note 17, at 31.

20. *See generally* Charles R. Greenwood, Betty T. Horton & Cheryl A. Utley, *Academic Engagement: Current Perspectives on Research and Practice*, 31 Sch. Psychol. Rev. 328, 328–49 (2002); Charles W. Fisher et

for administrators by removing students from the opportunity to learn. The use of suspension and expulsion has also raised civil rights concerns due to strong and consistent evidence that students of color are over-represented among those who are so disciplined.[21] A number of authors have argued that the increased use of zero tolerance is directly responsible for increasing racial and ethnic disparities in school discipline.[22]

In this paper, we review both the status of case law and research regarding school discipline in general and racial/ethnic disparities in school discipline in particular. Although there is a clear consensus that schools have a responsibility to use all effective strategies to promote safety and an effective instructional environment, research has consistently failed to find that suspension and expulsion are among those effective strategies. Yet the courts have typically provided wide latitude to schools in disciplinary matters. A similar analysis in the area of racial disparities in discipline shows a distinct gap between the scientific knowledge base regarding racial disparities in discipline and the absence of a legal strategy accepted by the courts to address such disparities. Analysis of case law reveals that this gap appears to be related to the court's adherence to a colorblind interpretation of the Constitution. Then, we examine how the "Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education" might further impact student discipline cases involving students of color. Finally, in order to better understand the context of the court's decision making regarding disciplinary disproportionality cases, we will review the historical development and current status of the doctrine of colorblind constitutionalism.

II. STATUS OF RESEARCH AND CASE LAW WITH RESPECT TO DISCIPLINE

School discipline has been defined as having two main purposes: a) ensuring the safety of those within the school, and b) creating an "environment conducive to learning."[23] Administrators may also be attempting to c) "reduce rates of future misbehavior," and d) "[teach] students needed skills for successful interaction in school and society."[24] In the following sections, we review literature from social science research to explore the extent to which suspension and expulsion achieve those ends. We also review case law concerning the extent to which the courts are willing to limit the use of zero tolerance, suspension, or expulsion as school disciplinary methods.

al., *Teaching Behaviors, Academic Learning Time, and Student Achievement: An Overview*, J. Classroom Interaction, Winter 1981, at 2.

21. The Civil Rights Project, Harvard Univ., Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies vi (2000).

22. *See* Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. Cent. L.J. 147, 149–50 (2007).

23. Joan Gaustad, *School Discipline*, Eric Clearinghouse on Educational Management, 1992, *available at* http://www.ericdigests.org/1992-1/school.htm.

24. Skiba & Rausch, *supra* note 16, at 1064.

A. Scientific Findings: The Efficacy of Zero Tolerance

Clearly, schools have a right and responsibility to use any and all effective means necessary to ensure that students can learn and teachers can teach. Yet the inherent risks involved in school suspension and expulsion make these methods something of a "devil's bargain," since increases in school exclusion decrease student time spent in learning. For principals facing such a dilemma, the question becomes one of cost-benefit: Does the removal of troublesome students from school provide sufficient benefits in terms of reduced disruption and improved school climate to offset the risks to educational opportunity and school bonding inherent in suspension and expulsion? Unfortunately, data on quality of implementation and outcomes raise serious questions about the effectiveness of school exclusion.

1. Quality of Implementation.

One important criterion for the effectiveness of an educational intervention is quality of implementation, often termed "treatment integrity" or "treatment fidelity."[25] That is, the quality of an intervention cannot be guaranteed unless that intervention can be implemented as intended in a variety of settings. For suspension and expulsion, "used as intended" would most likely entail the consistent application of those procedures, based on student behavior, in response to relatively serious threats to school safety or the learning climate.

There appears, however, to be a high rate of inconsistency in the application of school suspension and expulsion across schools and school districts, and that inconsistency appears to be due as much to classroom, school, or principal characteristics as to student behavior.[26] District-wide studies of school discipline have typically found a high degree of inconsistency in the use of suspension and expulsion across schools.[27] Some of this variation in usage of suspension appears to be due to variations in student behavior; it is likely that there are schools whose students engage in higher rates of the disruptive and endangering behaviors that one would expect to lead to increased suspension and expulsion. [28] Yet, school and classroom characteristics also make a strong contribution to the inconsistency of application of suspension and expulsion across schools. In particular, schools whose principals have a disciplinary philosophy favoring the use of school exclusion tend to have higher rates of out-of-school suspension and expulsion, and lower usage of other

25. Kathleen L. Lane et al., *Treatment Integrity: An Essential—but often forgotten—Component of School-Based Interventions*, Preventing Sch. Failure, Spring 2004, at 36, 36–43.

26. Skiba & Rausch, *supra* note 16, at 1066.

27. Mass. Advocacy Ctr., The Way Out: Student Exclusion Practices in Boston Middle Schools (1986); Susan C. Kaeser, *Suspensions in School Discipline*, 11 Educ. & Urb. Soc'y. 465, 465–84 (1979).

28. *See* Jeffrey Fagan & Deanna L. Wilkinson, *Social Contents and Functions of Adolescent Violence*, *in* Delbert S. Elliott, Beatrix A. Hamburg & Kirk R. Williams, Violence in American Schools 55, 58 (1998).

disciplinary alternatives.[29] Shi-Chang Wu and his colleagues, in a multivariate analysis of the predictors of out-of-school suspension, found that school characteristics and non-behavioral student characteristics (e.g., race) made a more significant contribution to predicting school suspension than student behavior and attitude, leading them to conclude:

> One could argue from this finding that if students are interested in reducing their chances of being suspended, they will be better off by transferring to a school with a lower suspension rate than by improving their attitudes or reducing their misbehavior.[30]

Nor is the evidence promising that suspension and expulsion are actually used as intended in school settings.[31] Although it is typically assumed that school suspension is reserved for more serious offenses, data suggest that out-of-school suspension is actually used in response to a wide range of behavior from fighting to insubordination, with only a small percentage of suspensions occurring in response to behavior that threatens the safety or security of schools.[32] Similarly, Donald Stone, in reporting the results of a national survey of school disciplinary practices in thirty-five districts representing over a million students, concludes: "It appears clear that on reviewing the data to determine if the crime fits the punishment, the answer is no."[33]

2. Outcomes of Suspension and Expulsion

As noted, there is little controversy over the right and responsibility of schools to use all effective means in order to ensure the safety of schools, maintain the integrity of the learning environment, and improve student behavior.[34] What is at issue is the means by which this goal is pursued. Advocates of zero tolerance approaches make two presumptions regarding the effects of exclusionary discipline. First, there is a

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29. *See* The Civil Rights Project, *supra* note 21, at vii–viii; Gathogo Mukuria, *Disciplinary Challenges: How Do Principals Address This Dilemma?*, 37 Urban Educ. 432, 448–49 (2002); Russell J. Skiba et al., *Consistent removal: Contributions of school discipline to the school-prison pipeline* 2 (2003) (Paper presented at the Harvard Civil Rights Conference School-to-Prison Pipeline Conference, Cambridge, MA), *available at* http://www.civilrightsproject.ucla.edu/research/pipeline03/Skibbav3.pdf [hereinafter *Contributions of School Discipline*].

30. Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 Urban Rev. 245, 255–56 (1982).

31. *Id.* Since out-of-school suspension by its nature excludes children from schooling, they inherently create some degree of risk for reducing a students' opportunity to learn. Thus, used as intended presumes that these punishments will be used judiciously and sparingly, primarily in response to those behaviors that seriously threaten school safety or the integrity of the learning environment. *Id.*

32. Mendez & Knoff, *supra* note 17, at 30–32.

33. Donald H. Stone, *Crime and Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 J. Am. J. Trial Advoc. 351, 367 (1993–1994).

34. As noted above the four purposes of school discipline noted above can be summarized in as interventions that 1) improve or maintain the quality of the school disciplinary climate through a) increasing in the probability of a safe environment, or b) improving the integrity of the instructional climate; and 2) change student behavior by either c) reducing rates of future misbehavior, or d) teaching students needed skills for successful interaction. Gaustad, *supra* note 23; Skiba & Rausch, *supra* note 16.

belief that severe consequences such as suspension or expulsion serve a deterrent function, either upon those who may witness the punishment or upon the future infractions of the punished student.[35] Second, school exclusion is intended in part to remove troublemakers in order to improve the school climate based on the belief that removing the most persistently disruptive students will lead to substantial improvements in teaching and learning for the remaining students.[36]

Empirical support for these presumptions has yet to be found, however.[37] In terms of deterrence, there is no data showing that out-of-school suspension or expulsion reduces the future likelihood of student disruption. Studies of suspension have consistently found relatively high rates of repeat offending among those who are suspended, suggesting a clear lack of deterrence for those students.[38] If anything, disciplinary removal appears to have *negative* effects on future student behavior; students suspended in elementary school are *more* likely to receive office referrals or suspensions in secondary school,[39] prompting some researchers to conclude that for some students, "suspension functions as a reinforcer . . . rather than as a punisher."[40]

Similarly, there is little evidence supporting the notion that removing troublesome students improves the learning climate for the remaining students. Suspension and expulsion are apparently used to rid schools of students who are perceived to be troublemakers. In the long-term, school suspension has been found to be moderately associated with higher rates of school dropout and has been reported to be used in some schools as a means of encouraging certain students to drop out of school (the so-called *pushout* phenomenon).[41] Yet counter-intuitively, purging the school of such students does not guarantee improvements in school climate. Schools with higher rates of school suspension have been found to have a lower rating on academic quality,

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35. Charles P. Ewing, *Sensible zero tolerance protects students*, Harv. Educ. Letter (Jan.–Feb. 2000) (on file with authors). Ewing argues that zero tolerance "appropriately denounces violent student behavior in no uncertain terms and serves as a deterrent to such behavior in the future by sending a clear message that acts which physically harm or endanger others will not be permitted at school under any circumstances." *Id.*

36. Public Agenda, Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good? (2004), *available at* http://www.publicagenda.org/files/pdf/teaching_interrupted.pdf.

37. *See, e.g.*, Russell J. Skiba et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 Am. Psychol. Ass'n. 852, 854 (2008).

38. Christine Bowditch, *Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts*, 40 Soc. Problems 493, 498–99 (1993); Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. Sch. Psychol. 59, 59–82 (1998); John D. McCarthy & Dean R. Hoge, *The Social Construction of School Punishment: Racial Disadvantage out of a Universalistic Process*, 65 Soc. Forces 1101, 1111–15 (1986–1987).

39. Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, New Directions for Youth Dev., Fall 2003, at 17; Tary Tobin, George Sugai & Geoff Colvin, *Patterns in Middle School Discipline Records*, 4 J. Emotional & Behav. Disorders 82, 82–94 (1996).

40. Tobin, Sugai & Colvin, *supra* note 39, at 91.

41. Ruth B. Ekstrom et al., *Who Drops out of High School and Why? Findings from a National Study*, *in* School Dropouts: Patterns and Policies (Gary Natriello ed., 1986); Bowditch, *supra* note 38.

pay significantly less attention to school climate, and have lower ratings of the quality of school governance.[42] Most importantly, recent data indicate that schools with higher rates of school suspension and expulsion have poorer achievement outcomes on standardized tests of achievement, regardless of the economic level or demographics.[43] It is difficult to argue that disciplinary removals result in improvements to the school learning climate when schools that suspend and expel more students have lower average test scores.

The scientific literature in psychology and education has identified a variety of effective alternative strategies that, singly and in concert, show great promise for reducing school violence and disruption without resorting to high rates of suspension and expulsion. Numerous research studies, as well as a number of government panels, have been highly consistent in identifying a host of interventions and programs that have demonstrated efficacy in promoting school safety and reducing the potential for youth violence.[44] These strategies have been increasingly organized in the literature into a three-level model of primary prevention.[45] Implementation trials that weave such interventions into comprehensive structural reform models of school discipline, such as *Positive Behavioral Supports* or *Safe and Responsive Schools*, have yielded promising results in terms of reductions in office referrals, school suspensions, and expulsions, and improved ratings on measures of school climate.[46]

In response to such data, the American Psychological Association convened a task force to examine the effectiveness of zero tolerance policies and to offer recommendations for reform of such policies. That task force concluded that

42. Frank Bickel & Robert Qualls, *The Impact of School Climate on Suspension Rates in the Jefferson County Public Schools*, 12 Urban Rev. 79, 79–86 (1980); James E. Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High Schools*, 63 J. Negro Educ. 570, 570–87 (1994); Darryl A. Hellman & Susan Beaton, *The Pattern of Violence in Urban Public Schools: The Influence in Urban Public Schools*, 23 J. Res. Crime & Delinq. 102, 102–27 (1986).

43. Skiba & Rausch, *supra* note 16, at 1072.

44. *See, e.g.*, Office of Special Educ. & Rehabilitative Serv. et al., Early Warning, Timely Response: A Guide to Safe Schools (1998), *available at* http://cecp.air.org/guide/guide.pdf; Lawrence W. Sherman et al., Nat'l Inst. of Justice, Preventing Crime: What Works, What Doesn't, What's Promising (1997), *available at* http://www.ncjrs.gov/pdffiles/171676.PDF; Youth Violence: A Report of the Surgeon General (Delbert Elliot et al. eds., 2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/report.html#message; Mark T. Greenberg et al., *Enhancing School-Based Prevention and Youth Development Through Coordinated Social, Emotional, and Academic Learning*, 58 Am. Psychol. Ass'n. 466 (2003); Sharon Mihalic et al., *Blueprints for Violence Prevention*, Juv. Just. Bull., July 2001; Patrick H. Tolan, Nancy G. Guerra & Philip C. Kendall, *Introduction to Special Section: Prediction and Prevention of Antisocial Behavior in Children and Adolescents*, 63 J. Consulting & Clinical Psychol. 515, 515–17 (1995).

45. Am. Psychol. Ass'n., Violence and youth: Psychology's Response (1993); Elliott, *supra* note 28; Hill M. Walker et al., *Integrated Approaches to Preventing Antisocial Behavior Patterns Among School-age Children and Youth*, 4 J. Emotional & Behav. Disorders 194, 194–209 (1996).

46. *See, e.g.*, Russell J. Skiba et al., *The Safe and Responsive Schools Project: A School Reform Model for Implementing Best Practices in Violence Prevention*, *in* The Handbook of School Violence and School Safety (Shane R. Jimerson & Michael J. Furlong eds., 2006); George Sugai & Robert R. Horner, *A Promising Approach for Expanding and Sustaining School Wide Positive Behavior Support*, 35 Sch. Psychol. Rev. 245 (2006).

> An examination of the evidence shows that zero tolerance policies as implemented have failed to achieve the goals of an effective system of school discipline . . . . Zero tolerance has not been shown to improve school climate or school safety. Its application in suspension and expulsion has not proven an effective means of improving student behavior. It has not resolved, and indeed may have exacerbated, minority over-representation in school punishments. Zero tolerance policies as applied appear to run counter to our best knowledge of child development. By changing the relationship of education and juvenile justice, zero tolerance may shift the locus of discipline from relatively inexpensive actions in the school setting to the highly costly processes of arrest and incarceration. In so doing, zero tolerance policies have created unintended consequences for students, families, and communities.[47]

In an era characterized by a focus on educational accountability, it is noteworthy that the disciplinary strategies that are most commonly used in schools today—suspension and expulsion—have not been found to be in any way effective in ensuring the safety of schools or improving the learning climate.

B. Case Law Regarding Zero Tolerance, Suspension, and Expulsion

As noted, discipline is often defined as any intervention that ensures the safety of the school environment or guarantees an environment conducive to learning.[48] Thus, nearly any behavior that endangers the safety of others or disrupts the classroom can be subjected to disciplinary measures (regardless of whether those measures have been shown to be effective in achieving those goals). The measures covered under the umbrella of "school discipline" vary widely, as do the situations in which they can be employed. This wide range occurs, at least partially, because state legislatures pass laws and local school districts write policies outlining school discipline requirements and guidelines. Typically, state statutes permit school authorities to exclude a student from instruction if his or her conduct disrupts school operations. However, because the power to suspend or expel a student from school is based on state law, the use of these punishments varies between jurisdictions.[49] Also, although the state determines the policies, local school districts have discretion to institute more detailed discipline policies than those described by the state. Thus, even within a state, policies may differ from school to school.

While it would seem that inconsistent application of disciplinary measures would prove fertile ground for student lawsuits, students have often been unsuccessful when challenging school disciplinary decisions.[50] One explanation for this lack of success is that the courts have recognized that it is necessary for school officials to have

47. Am. Psychol. Ass'n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 Am. Psychol. 852, 860 (2008).

48. Gaustad, *supra* note 23.

49. Paul M. Bogos, *Expelled. No Excuses. No Exceptions.*, 74 U. Det. Mercy L. Rev. 357, 366 (1997).

50. Thomas, Cambron-McCabe & McCarthy, *supra* note 1.

discretion in disciplinary matters.[51] Therefore, courts tend to defer to school officials when it comes to disciplinary matters.[52] Kevin Brady reports that because courts "have been extremely reluctant to overturn school disciplinary decisions, particularly long-term suspensions and expulsions, on substantive due process grounds,"[53] school districts maintain great control over student disciplinary matters. So long as a disciplinary decision is "justified by a legitimate educational interest," the courts tend to side with school officials in many discipline-related disputes.[54]

State law and school district policies generally document the grounds for suspension and expulsion as well as the required procedures for employing these measures. These policies must align with the Due Process Clause of the Fourteenth Amendment, which protects students in two ways. Under the procedural component of the Due Process Clause, the state must provide fair procedures when a person is deprived of life, liberty, or property.[55] The substantive component requires that the state's actions not be arbitrary or unreasonable.[56] Substantive due process also requires that government actions be reasonably related to a legitimate state purpose.[57]

Thus, when disciplining students, school officials must demonstrate that their policies and actions are related to a legitimate state interest. Here, the interest is in creating a safe environment in which students can learn. In the context of school discipline, then, punishment does not implicate substantive due process unless the action is "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[58] Finally, school administrators must put procedures in place, such as notices and hearings, which allow the student to respond to the allegations made against him or her. Generally, if discipline procedures satisfy due process requirements of the Fourteenth Amendment, courts uphold the actions of educators as long as they are reasonable.[59]

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51. *See* Charles J. Russo, Reutter's the Law of Public Education 750 (2004).

52. Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 Am. U. L. Rev. 1039, 1055 (2001).

53. Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of* Fuller v. Decatur Public School Board of Education School District, 22 BYU Educ. & L.J. 159, 198 (2001); *see also* Enterprise City Bd. of Educ. v. C.P. *ex rel.* J.P. & M.P., 698 So.2d 131, 132–33 (Ala. Civ. App. 1996).

54. Brady, *supra* note 53, at 168–69 (quoting McCarthy, Cambron-McCabe & Thomas, *supra* note 1, at 196).

55. U.S. Const. amend. XIV, § 1; Patrick Pauken & Philip T.K. Daniel, *Race Discrimination & Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Educ. L. Rep. 759, 761 n.15 (2000).

56. Pauken & Daniel, *supra* note 55, at 761 n.15.

57. *See* Smith v. Texas, 550 U.S. 297, 325 (2007).

58. Jefferson *ex rel.* Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305–06 (5th Cir. 1987) (quoting Woodward v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)).

59. *See* Brady, *supra* note 53, at 169.

1. *Due Process Rights:* Goss v. Lopez

States and schools have relied upon the Supreme Court decision *Goss v. Lopez* for over thirty years to provide guidance on due process procedures. In *Goss*, a public school principal in Columbus, Ohio suspended nine black high school students after their involvement in a demonstration that included "disruptive" and "disobedient" conduct.[60] The principal did not provide a hearing but instead invited all of the students and their parents to participate in a conference to discuss the students' futures.[61] Under Ohio law at the time of *Goss v. Lopez*, when a student was suspended, the principal was required to notify the student's parents within twenty-four hours, explaining the reason for her or his action.[62] The state law did permit parents to appeal a suspension decision to the Board of Education, but the school district did not have any written procedures for suspension in place.[63] The students in *Goss* challenged the state law and filed a lawsuit arguing that the Ohio law violated the Fourteenth Amendment by permitting public school officials to deprive the students of their rights to an education without a hearing.[64]

Upholding the district court's decision, the U.S. Supreme Court held that the students' Fourteenth Amendment rights were violated.[65] The Court reasoned that education is a property right under state law, stating that "a student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause and which may not be taken away . . . without adherence to the minimum procedures required by that Clause."[66] The Court further noted that "[students have] a strong interest in procedural safeguards that minimize the risk of wrongful punishment . . . ."[67] When school officials fail to adhere to due process requirements they "can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education."[68]

Goss v. Lopez set the standard for the minimal constitutional requirements when a student is suspended for ten days or less. The Court stated that students must be given oral or written notice of the charges; then, if the student denies the charges, school officials must present an explanation of the evidence and offer the student an opportunity to present his or her side of the story.[69] At least one appellate court has further interpreted this to mean that school authorities can fulfill due process

60. Goss v. Lopez, 419 U.S. 565, 568–69 (1975).

61. *Id*. at 570.

62. *Id.* at 567.

63. *Id.* at 567–68.

64. *Id.* at 568–69.

65. *Id.*

66. *Id.* at 574.

67. Ingraham v. Wright, 430 U.S. 651, 676 (1977).

68. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

69. *Goss*, 419 U.S. at 581.

requirements by informally discussing the alleged misconduct with students.[70] Therefore, while students who are expelled or suspended are entitled to some form of procedural due process, school officials merely need to employ fair procedures in order to fulfill the constitutional requirement. Of course, the due process requirements differ with respect to the length of the exclusion from school.

Interestingly, the *Goss* decision did not include guidance for longer suspensions or expulsions. Instead, the decision ambiguously stated that "longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[71] As such, some school administrators look to the Fifth Circuit's *Dixon v. Alabama State Board of Education* decision for further guidance regarding expulsion.[72] In *Dixon*, students attending a state college were expelled without notice of the charges and without a hearing after they participated in a lunch counter sit-in.[73] The court held that the expelled students should be given the names of the witnesses against them and an oral or written report on the acts to which each witness testified.[74] The court also stated that students should be given the opportunity to present their own defense against the charges and to produce either oral testimony or written affidavits of witnesses.[75] Relying on the *Dixon* decision, school officials implement more due process procedures for more serious offenses.[76]

Most states have enacted legislation codifying the principles set forth in the *Goss v. Lopez* decision.[77] The details of the required procedures vary according to different state statutes and school board regulations, which outline the required procedures. Also, procedural requirements may differ depending on the circumstances of the particular situation.[78] Courts have often considered the following factors when determining whether a student received adequate due process in an expulsion: 1) notice of the charges, 2) a hearing before an impartial tribunal, 3) the right to counsel, 4) the right to present witnesses, and 5) the right to cross examine.[79] A school's responsibility to a student after he or she has been suspended or expelled also varies. Once a general education student is expelled, the school district does not need to provide educational services unless such requirements are specified by the school

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70. Smith *ex rel.* Smith v. Severn, 129 F.3d 419 (7th Cir. 1997).

71. *Goss*, 419 U.S. at 584.

72. *See Dixon*, 294 F.2d at 152.

73. *Id.* at 151–54.

74. *Id.* at 159.

75. *Id.*

76. *See* Brady, *supra* note 53, at 173.

77. David Emmert et al., Leading Schools Legally: A Practical Anthology of School Law 136 (2005).

78. *See* Thomas, Cambron-McCabe & McCarthy, *supra* note 1, at 225–34.

79. *See* Underwood & Webb, *supra* note 13, at 173–74; *see also* Thomas, Cambron-McCabe & McCarthy, *supra* note 1, at 230.

board.[80] In contrast, a school district must still provide educational services to students who receive special education services.[81]

2. *Zero Tolerance Policies*

In the late 1980s and early 1990s, public schools began to move away from a rehabilitative model of discipline to a stricter approach.[82] This movement was likely in reaction to the public perception that American schools were becoming more violent. The result was a move by school districts to adopt zero tolerance policies.[83] A zero tolerance school policy generally applies a prescribed, mandatory sanction—typically expulsion or suspension—for an infraction with minimal, if any, consideration given to the circumstances or consequences of the offense.[84]

The rhetoric of zero tolerance created the impression of dramatic increases in school violence, thereby increasing public support for more drastic remedies. Predictably, Congress responded to such pressure by passing the Gun-Free Schools Act of 1994 (the "Act").[85] The Act requires each state that receives federal funds to expel any student who possesses a firearm on school grounds for at least one year.[86] This Act allows the chief administrative officer of the school district to adjust the punishment at his or her discretion on a case-by-case basis.[87] The Act also states that special education students expelled for gun possession may be placed in alternative instructional programs.[88]

As a result of the Act, states have implemented legislation related to guns on school property to various degrees. In fact, soon after the Act was passed, all fifty states and the District of Columbia enacted zero tolerance policies.[89] Many school administrators expanded the scope of legitimate school expulsion under the Act. Specifically, schools began to apply zero tolerance policies for violations other than firearms possession, including the use of drugs or behaviors that fall loosely under the category of school disruption, such as fist fighting and verbal abuse. For example,

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80. *See* Thomas, Cambron-McCabe & McCarthy, *supra* note 1, at 213.

81. *Id.*

82. Insley, *supra* note 52, at 1045.

83. Lawrence F. Rossow & Jacqueline A. Stefkovich, Education Law: Cases and Materials 497 (2005).

84. *See generally* Zero Tolerance Task Force, *supra* note 47, at 852.

85. Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (2000) (repealed 2002).

86. *Id.*

87. *See id.* § 8921(b)(1). The exception states: "State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis." *Id.*

88. *See Id.* § 8921. The No Child Left Behind Act of 2003 ("NCLB") included similar language regarding zero tolerance policies involving weapons and drugs in schools. *See also* Gun Free Schools Act, 20 U.S.C. § 7151 (2006).

89. *See* Insley, *supra* note 52, at 1047 n.46.

under Colorado's zero tolerance law, students can be expelled for willful disobedience, persistent defiance of authority, or the destruction or defacement of school property.[90]

Some observers contend that these zero tolerance policies result in the expulsion of students for non-violent acts that may typically be considered relatively minor violations.[91] For example, an honor roll student was expelled for accidentally bringing her mother's lunch to school, which contained a paring knife.[92] Accordingly, zero tolerance policies have been opposed by professional associations such as the American Bar Association, which approved a resolution opposing zero tolerance policies in schools,[93] and the American Psychological Association.

Courts in a few instances have also struck down zero tolerance policies. For example, the U.S. Court of Appeals for the Sixth Circuit struck down one school district's zero tolerance policy, reasoning that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon" would violate substantive due process.[94] In this case, the student found a friend's knife in the glove compartment of the student's car while the car was parked on school property.[95] The student asserted that he had no knowledge about the knife.[96] The court reasoned that:

> [T]he Board may not absolve itself of its obligation legal and moral, to determine whether students intentionally committed the acts for which their expulsions are sought by hiding behind a zero tolerance policy that purports to make the student's knowledge a non-issue.[97]

Generally, however, courts rarely strike down zero tolerance policies.[98]

3. *Discipline and Off-Campus Activities*

Some states and cities have imposed discipline upon students for criminal activity that occurs off-campus and the courts have generally allowed such policies. For example, under a Texas statute, if a student has been convicted of a felony, has received deferred prosecution for committing a felony, or if the superintendent has reason to believe the student committed a felony, the student can be placed in an

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90. *See* Colo. Rev. Stat. § 22-33-106 (2000).

91. *See* Insley, *supra* note 52, at 1051; *see also* Solari & Balshaw, *supra* note 22, at 149.

92. *See* Insley, *supra* note 52, at 1040.

93. Ralph C. Martin, II, Am. Bar Assoc., Zero Tolerance Policy 3 (2001), *available at* http://www.abanet.org/crimjust/juvjus/zerotolreport.html.

94. Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000).

95. *Id.* at 571.

96. *Id.* at 572.

97. *Id.* at 581.

98. *But see* Ratner *ex rel.* Haney v. Loudoun County Pub. Sch., 16 Fed. App'x. 140, 142 (4th Cir. 2001) (stating that "federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place . . . .").

alternative education placement.[99] Similarly, Chicago has adopted a public school policy calling for the expulsion of students who commit violent acts on weekends off of school property.[100] Although courts have permitted school officials to discipline students for off-campus behavior,[101] officials generally may not do so unless they can prove that the off-campus activity has created a substantial disruption in the school.[102]

The courts have begun to address whether discipline for off-campus activities is legal. The Eighth Circuit, in *Stephenson v. Davenport Community School District*, reasoned that if a school district wants to discipline students for outside gang-related activity, "the District must 'define with some care' the 'gang related activities' it wishes students to avoid."[103] In *Stephenson*, a student alleged that she was unconstitutionally required to remove a tattoo as was required under the school district's policy prohibiting gang symbols.[104] The student claimed that the tattoo was not gang-related.[105] She also argued that the policy as it referred to "gang" was vague, and the court agreed.[106] The Superior Court of Delaware, in *Howard v. Colonial School District*, upheld a school district's policy on off-campus crime, finding permissible the expulsion of a student for selling drugs off-campus.[107] The student in *Howard* had sold cocaine to an undercover police officer during the summer.[108] The court did not find that the board's decision to expel the student was without "authority or justification."[109] It has been noted, however, that not all off-campus, non-school activity conduct would subject a student to the threat of expulsion.[110] The conduct occurring off-campus and after school hours must directly affect the order of the school.[111] It should also be noted that the discipline for students for off-campus crime varies by state.

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99. Tex. Educ. Code Ann. § 37.006 (Vernon 1999).

100. Jacquelyn Heard, *Off-Campus Crime Spells Expulsion from School*, Chi. Trib., Mar. 11, 1997, at S1.

101. *See* J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 847 (Pa. 2002).

102. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599 (W.D. Pa. 2007); Mahaffey v. Aldrich, 236 F. Supp. 2d 779, 785 (E.D. Mich. 2002); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

103. Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1310 (8th Cir. 1997).

104. *Id.* at 1304–06.

105. *Id.* at 1304.

106. *Id.* at 1308–11

107. *See* Howard v. Colonial Sch. Dist., 621 A.2d 362, 366 (Del. Super. Ct. 1992).

108. *Id.* at 363.

109. *Id.* at 366.

110. *See* Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 563–64 (Iowa 1972).

111. *Id.*

III. STATUS OF RESEARCH AND CASE LAW WITH RESPECT TO RACIAL DISPROPORTIONALITY IN DISCIPLINE

One criticism of zero tolerance policies is that they disproportionately impact students of color. Those opposed to zero tolerance for this reason argue that zero tolerance policies: 1) do not effectively balance safety with educational opportunity for all, and 2) "create a 'schoolhouse-to-jailhouse' pathway" for minority students.[112] Likewise, the Justice Policy Institute and the Children's Law Center assert that these policies are creating "funnels for the juvenile justice system."[113]

Studies have demonstrated that a disproportionate number of students who are expelled from school are from low-income families or are students of color.[114] For example, Donald Stone reported that black students were either suspended or expelled at a rate 250% higher than the rate at which white students are expelled.[115] In this empirical study, Stone surveyed thirty-five school divisions representing a population of 1,382,562 students about information relating to school suspensions. Within this population, 46% of the student body was white, 44% was black, and 10% was made up of other races. Even though the black and white population was almost equal, the study found that when examining suspension rates, 71.5% of the suspended students were black and 28.5% were white.[116] The study did not note if the offenses were different or more severe between the different racial groups, but it did indicate that the most common offenses included fighting, cursing, weapons on campus, and skipping class.[117] Similarly, Wu found that when socioeconomic indicators are held constant, black students were still disciplined at higher rates than white students.[118] Students of color are also disproportionately represented in discipline related to off-campus crimes.[119]

The right not to be discriminated against on the basis of race, color, or national origin is protected by the Equal Protection Clause of the Fourteenth Amendment[120] and explicitly guaranteed by Title VI of the Civil Rights Act of 1964.[121] Specifically, section 601 of Title VI "prohibits discrimination based on race, color, or national origin in covered programs and activities."[122] Section 602 of Title VI authorizes

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112. *See* Solari & Balshaw, *supra* note 22, at 149–50.

113. *See* Insley, *supra* note 52, at 1070.

114. *See* Brady, *supra* note 53, at 167–68; *see also* Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 Cornell J.L. & Pub. Pol'y 327, 333–35 (2005).

115. Donald H. Stone, *Crime and Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 Am. J. Trial Advoc. 351, 366 (1993).

116. *Id.*

117. *Id.*

118. Wu, *supra* note 30.

119. *See* Solari & Balshaw, *supra* note 22, at 171.

120. U.S. Const. amend. XIV, § 1.

121. Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

122. Alexander v. Sandoval, 532 U.S. 275, 275 (2001).

federal agencies to effectuate section 601 through the issuance of regulations.[123] In the following sections, we examine the scientific research and case law regarding racial and ethnic disparities in school discipline. Within the demands that educational interventions are non-discriminatory, to what extent can it be demonstrated that school discipline is fair or unfair? What response have courts had to claims of discrimination in school discipline?

A. Scientific Research on Racial/Ethnic Disproportionality in School Discipline

For over thirty years, in national, state, district, and building level data, the documentation of disciplinary overrepresentation for African American students has been highly consistent.[124] Recent analyses have found rates of out-of school suspensions between two to three times greater for African American elementary school students than white students,[125] although findings of Latino disparities have been somewhat less consistent.[126]

Over-exposure to exclusionary school discipline places racially and ethnically diverse students at increased risk for a range of negative outcomes. Given the strong and robust finding that the amount of time engaged in academic settings is among the strongest predictors of achievement,[127] disproportionate exclusion of students of color increases their risk of lower academic success. Disproportionate representation in exclusionary discipline is also troubling given the generally negative outcomes that have been found to be associated with the use of out-of-school suspension and expulsion. The data indicate that minority students are being disproportionately exposed to interventions that increase disciplinary recidivism,[128] negatively predict

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123. *Id.*

124. *See* Wash. Research Project, Children's Def. Fund, School Suspensions: Are they Helping Children? (1975); McCarthy & Hoge, *supra* note 38, at 1101–20; Russell J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 Urban Rev. 317, 317–42 (2002) [hereinafter *The Color of Discipline*]; Wu, *supra* note 30, at 245–303; Janice L. Streitmatter, *Ethnic/Racial and Gender Equity in School Suspensions*, 68 High Sch. J. 139, 139–43 (1985–1986).

125. Linda M. Raffaele Mendez, Howard M. Knoff & John M. Ferron, *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 Psychol. Sch. 259, 261 (2002); Skiba & Rausch, *supra* note 16, at 1073.

126. Rebecca Gordon, Libero Della Piana & Terry Keleher, Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools (2000).

127. Jere E. Brophy, *Research Linking Teacher Behavior to Student Achievement: Potential Implications for Instruction of Chapter 1 Students*, 23 Educ. Psychol. 235, 235–86 (1988); Margaret C. Wang, Geneva D. Haertel & Herbert J. Walberg, *Learning Influences*, *in* Psychology and Educational Practice 199, 199–211 (Herbert J. Walberg & Geneva D. Haertel eds., 1997).

128. Tary Tobin, George Sugai & Geoff Colvin, *Patterns in Middle School Discipline Records*, 4 J. Emotional & Behav. Disorders 82, 82–94 (1996).

school achievement,[129] and in the long-term, are associated with higher rates of school dropout[130] and increased contact with the juvenile justice system.[131]

1. Socioeconomic Status.

Race and socioeconomic status ("SES") are unfortunately highly connected in American society.[132] This connection suggests that apparent racial disproportionality in school discipline could be simply a by-product of disproportionality associated with SES. Statistical analyses have indeed found low SES to be a risk factor for school suspension.[133] Yet multivariate statistical models have also shown that nonwhite students still report and experience significantly higher suspension rates than white students, even after statistically controlling for poverty.[134] Thus, although economic disadvantage may contribute to disproportionate rates of discipline for students of color, it cannot completely explain racial and ethnic disparities in school suspension and expulsion.

2. Disparate Rates of Disruption.

Implicit in the poverty hypothesis is the assumption that African American students may engage in higher rates of disruptive behavior than other students. Yet investigations of student behavior, race, and discipline have yielded no evidence that African American over-representation in school suspension is due to higher rates of misbehavior, regardless of whether the data are self-reported,[135] or based on analysis of disciplinary records.[136] If anything, studies have shown that African American students are punished more severely for less serious or more subjective infractions. Ann McFadden and her colleagues reported that black pupils in a Florida school district were more likely than white students to receive severe punishments (e.g., corporal punishment, school suspension) and less likely to receive milder consequences

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129. Skiba & Rausch, *supra* note 16.

130. *See* Ekstrom, *supra* note 41, at 53.

131. Wald & Losen, *supra* note 8.

132. *See generally* Vonnie C. McLoyd, *Socioeconomic Disadvantage and Child Development*, 53 Am. Psychol. 185, 185–204 (1998); Nat'l Ass'n of Secondary Sch. Principals, *Statement on civil rights implications of zero tolerance programs* (Feb. 2000) (Testimony presented to the United States Commission on Civil Rights, Washington, D.C.).

133. Ellen Brantlinger, *Social Class Distinctions in Adolescents' Reports of Problems and Punishment in School*, 17 Behav. Disorders 36 (1991).

134. *Contributions of School Discipline*, *supra* note 29, at 7; 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 (2008); Wu, *supra* note 30.

135. *See* Rachel Dinkes, et al., Indicators of School Crime and Safety: 2007 (2007), *available at* http://nces.ed.gov/pubs2008/2008021.pdf.

136. *The Color of Discipline*, *supra* note 124.

(e.g., in-school suspension).[137] These results are consistent with findings that African American students are referred for corporal punishment for less serious behavior than are other students.[138]

Some evidence suggests that the over-representation of African American students in school exclusion begins with racial disparities in rates of office referrals from classroom teachers.[139] In a study specifically devoted to African American disproportionality in school discipline, Russell Skiba and his colleagues found that white students were referred to the office significantly more frequently for offenses that appear more capable of objective documentation: *smoking*, *vandalism*, *leaving without permission*, and *obscene language*.[140] In contrast, African American students were referred more often for *disrespect*, *excessive noise*, *threat*, and *loitering*, behaviors that would seem to require more subjective judgment.[141] In short, there is no evidence that racial disparities in school discipline can be explained through higher rates of disruption among African American students. Although much more investigation is necessary to better understand all the factors that contribute to racial disparities in school discipline, the evidence suggests that these disparities are caused at least in part by cultural mismatch or insufficient training in culturally responsive classroom management practices.[142]

B. Case Law Regarding Racial/Ethnic Disparities in Discipline

The courts have become involved in school cases concerning racially disproportionate discipline actions in a few instances. Before examining individual cases, this section will first explain the legal avenues that students rely upon when filing such claims against school districts.

One avenue for students of color who assert such claims is the Equal Protection Clause of the Fourteenth Amendment.[143] The Equal Protection Clause states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[144] Under this Clause, courts apply different tests depending on school officials' motivation for taking action. If school officials are motivated by legitimate educational considerations, then the court will apply a rational basis test, asking

137. Anne C. McFadden & George E. Marsh, *A Study of Race and Gender Bias in the Punishment of School Children*, 15 Educ. & Treatment Child. 140, 140–47 (1992).

138. Steven R. Shaw & Jeffery P. Braden, *Race and Gender Bias in the Administration of Corporal Punishment*, 19 Sch. Psychol. Rev. 378, 380 (1990).

139. *See* Frances Vavrus & KimMarie Cole, *"I Didn't Do Nothin':" The Discursive Construction of School Suspension*, 34 Urban Rev. 87, 87, 111 (2002).

140. *The Color of Discipline*, *supra* note 124.

141. *Id.*

142. Ann Arnett Ferguson, Bad Boys: Public Schools and the Making of Black Masculinity 2 (2001); Brenda L. Townsend, *Disproportionate Discipline of African American Learners: Reducing School Suspension and Expulsions*, 66 Exceptional Child. 381 (2000).

143. *See* U.S. Const. amend. XIV, § 1.

144. *Id.*

whether the school officials' actions are reasonably related to these legitimate educational reasons.[145] This test is generally considered deferential to school administrators.[146] It is born out of a notion that government officials are the experts in how best to conduct their business.[147] Therefore, courts should not seek to impose their own judgments on the decisions of governmental actors, as long as there is a reasonable basis for the decision. If, however, school officials are motivated by racial animus, then courts will apply strict scrutiny.[148] Under this test, school officials must supply a compelling justification for their actions and those actions must be narrowly tailored to advancing the compelling justifications.[149] This heightened scrutiny, however, does not apply, for example, if non-racially motivated actions produce a disparate impact on the educational opportunities of black students.[150] If black students are disciplined at much higher rates than white students, but these disparities are shown to be based on racially neutral decision making by school officials, then the disparity is not considered unconstitutional racial discrimination. Instead, it is simply the unfortunate result of the application of legitimate decision making by educational officials.[151]

Another claim that students assert in school disciplinary cases involving racial discrimination comes under Title VI of the Civil Rights Act of 1964.[152] Title VI prohibits discrimination on the basis of "race, color, or national origin . . . under any programs or activity receiving Federal financial assistance."[153] When plaintiffs use Title VI they may assert that school disciplinary practices result in disparate treatment of students of color. Disparate treatment requires the student to demonstrate that school officials acted intentionally in creating the inequitable environment.[154] The

145. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–40 (1973).

146. *See id.*

147. The Court has long recognized that local school boards have broad discretion in the management of school affairs. *See*, *e.g.*, Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) ("We are therefore in full agreement with petitioners that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'") (citations omitted); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("[P]ublic education in our Nation is committed to the control of state and local authorities," and federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems."); Meyer v. Nebraska, 292 U.S. 390, 402 (1923); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (we have "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.").

148. Valeria v. Davis, 307 F.3d 1036, 1042 (9th Cir. 2002).

149. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

150. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

151. Pauken & Daniel, *supra* note 55, at 759–64.

152. Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (2006).

153. *Id.*

154. Pauken & Daniel, *supra* note 55, at 759.

Supreme Court has held that disparate treatment under Title VI is, therefore, similar to racial discrimination recognized under the Equal Protection Clause in that the student must demonstrate that the school officials acted with discriminatory intent.[155] In order to prove intent, the plaintiff must demonstrate that a "challenged action was motivated by an intent to discriminate,"[156] and plaintiffs may present evidence of intent that is direct or circumstantial.[157] As a result of the intent requirement, it is difficult for students to bring successful Title VI actions. The Harvard Civil Rights Project and the Advancement Project contend that Title VI has been "ineffective and [is] rarely enforced" in discipline cases.[158]

In the past, the Title VI regulations provided some assistance to students alleging racial discrimination in school discipline cases under a disparate impact claim. Disparate impact occurs when students demonstrate that a facially neutral policy has a negative impact on a protected class of students.[159] Specifically, while a successful argument under Title VI requires intentional discrimination, its accompanying regulations permitted a broader interpretation of the law, allowing plaintiffs to argue disparate impact.[160] In earlier cases, the U.S. Supreme Court also found that these regulations may prohibit discrimination that has a disparate impact on protected groups—even if there was no evidence of intentional discrimination.[161] As will be discussed, however, private rights of actions under Title VI regulations were foreclosed by the 2001 U.S. Supreme Court case *Alexander v. Sandoval*.[162]

Other students claiming that school disciplinary actions are racially discriminatory have relied on section 1981 of the Civil Rights Act of 1866.[163] In the past, students have also included a section 1983 claim in discipline cases involving discrimination.[164] Both section 1981 and section 1983 were passed following the Civil War in order to eliminate racial discriminatory policies. Enacted as part of the Civil Rights Act of 1866, section 1981 prohibits discrimination on the basis of race in both the right to engage in certain legal action and the right to contract.[165] Additionally, it enables the

155. *See* Guardians Ass'n v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 610–12, 642 (1983).

156. Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir. 1993).

157. U.S. Dep't of Justice, Title VI Legal Manual (1998), *available at* http://www.usdoj.gov/crt/grants_statutes/legalman.php.

158. The Civil Rights Project, *supra* note 21, at vi.

159. *See* Kevin Welner, Alexander v. Sandoval: *A Setback for Civil Rights*, 9 Educ. Pol'y Analysis Archives 24 (2001), *available at* http://epaa.asu.edu/epaa/v9n24.html.

160. *See id.* Title VI permits federal agencies to create regulations and rules to achieve Title VI's objectives. Title VI Legal Manual, *supra* note 157. In promulgating these regulations, the U.S. Department of Justice, in addition to prohibiting intentional discrimination, also banned unintentional disparate impact discrimination. *Id.*

161. *See* Welner, *supra* note 159.

162. 532 U.S. 275 (2001).

163. 42 U.S.C. § 1981 (2006).

164. *Id.* § 1983.

165. *Id.* § 1981.

person experiencing the discrimination to sue both public and private parties[166] and it provides that people within the United States' jurisdiction are accountable to all laws and regulations.[167] Only five years later, in the Civil Rights Act of 1871, Congress passed section 1983, which provided civil remedies, including the collection of monetary damages, for civil rights violations.[168] Section 1983 is now used to collect money damages when a government actor violates a statutory or constitutional provision, including, but not limited to, Equal Protection, the First Amendment, and the Due Process Clause.[169]

The cases below illustrate how these four claims have played out in courts across the nation. In most cases, the courts have given great discretion to school officials in matters of discipline. Additionally, statistical evidence of disproportionate discipline of minority students has rarely been sufficient in and of itself to result in findings in favor of the plaintiffs. It is important to note that several of the earlier cases presented below would have been decided differently if heard today, due to the impact of the *Washington v. Davis*[170] and *Alexander v. Sandoval*[171] decisions, discussed below.

1. *Deference to School Officials*

Although black student plaintiffs were successful in an early case challenging a school district's disciplinary practice,[172] a Texas federal district court specifically noted in *Hawkins v. Coleman* that it had no intention of interfering with school officials' discretion in disciplinary actions.[173] In *Hawkins*, the court found that black students were being suspended more often than white students, which was a result of "institutional racism" within the school.[174] Expert witnesses presented statistical evidence that black students were suspended at a significantly higher frequency when white administrators controlled the school district.[175] Relying on this expert

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166. *See id.*

167. Ronald D. Rotunda & John E. Nowak, 4 Treatise on Constitutional Law: Substance and Procedure § 19.10 (4th ed. 2008); *see also* 42 U.S.C. § 1981.

168. 42 U.S.C. § 1983.

169. Rotunda & Nowak, *supra* note 167, §§ 19.13–19.17; *see also* 42 U.S.C. § 1983.

170. 426 U.S. 229 (1976).

171. 532 U.S. 275 (2001).

172. Hawkins v. Coleman, 376 F. Supp. 1330, 1337 (N.D. Tex. 1974).

173. *Id.* at 1338.

174. *Id.* at 1334; *see also* Tasby v. Estes, 643 F.2d 1103 (5th Cir. 1981); Parker v. Trinity High Sch., 823 F. Supp. 511 (N.D. Ill. 1993).

175. *See Hawkins*, 376 F. Supp. at 1336. The expert witness testified that:

> [The Dallas Independent School District] is a "white controlled institution" with "institutional racism" existing in the operation of its discipline procedures. A "white controlled institution" occurs . . . when a large majority of the decisions about resource distribution is made by white administrators. "Institutional racism" exists . . . when the standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group. This is distinguished from

testimony, the judge ordered the school district to create a program that addressed the issue of disproportionality in the school district.[176] While the court stated that "there must be a real effort on the part of everyone involved" to eliminate the negative effects of "white institutional racism," it also reasoned that it "has no intention of taking from the School Board or the Superintendent and other officials the running of the schools."[177] Thus, even though the court agreed that school disciplinary practices were racially discriminatory, the court did not wish to interfere with school officials' discretion to discipline students, stating that "No court can decree a change in attitude. That is something within the individual. Put briefly, there must be a real effort on the part of everyone involved to accentuate the positive while at the same time eliminating the negative effects of 'white institutional racism.'"[178]

One year later in *Sweet v. Childs*, a group of black students sued school administrators, the school board, and various state officials under sections 1981 and 1983, and the Equal Protection Clause, claiming that school officials engaged in racial discrimination when disciplining them.[179] The district court granted the school district's motion for summary judgment.[180] On appeal, the black students argued that school officials violated the Equal Protection Clause because more black students had been disciplined than white students.[181] The Fifth Circuit Court of Appeals affirmed, finding that there was no evidence of "arbitrary suspensions," or that black students were disciplined more frequently than white students.[182] The allegations against the state officials were also dismissed since any failure to act was not proximately related to the alleged discrimination in this case.[183] Unlike the decision in *Hawkins*, the court did not find evidence of discrimination in this case, but similar to that decision, the court reasoned that disciplinary matters are for local school authorities to decide.[184] Together, these decisions demonstrate the reluctance of courts to interfere with school disciplinary matters.

> "personal racism" which exists within a given individual and do not become involved in the administration of an institution's normal operations.

Id. at 1336.

176. *Id.* at 1337–38.

177. *Id.* at 1338.

178. *Id.*

179. 507 F.2d 675, 677–78 (5th Cir. 1975).

180. *Id.* at 680.

181. *Id.* at 680–81.

182. *Id.* at 681.

183. *Id.* at 680.

184. *Id.*

2. *Statistical Evidence as Proof of Intention to Discriminate*

Although the U.S. Supreme Court decision in *Washington v. Davis* does not involve a school disciplinary matter, it is sometimes cited in school discipline cases, as it highlights the difficulty of demonstrating school officials' intention to discriminate.[185] In *Davis*, the plaintiffs used statistical evidence to document the racial disparities that existed in a job-related test used for prospective police recruits.[186] Specifically, plaintiffs argued that the tests excluded a disproportionate number of black applicants: white applicants passed the employment test in much greater numbers than did black applicants.[187] The Court did not find the test in practice to violate the law because the test was not motivated by a discriminatory purpose, explaining that a test is not unconstitutional merely because it produces a disproportionately adverse effect on a racial group.[188] The Court held that "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[189] Although, as a result of *Washington*, some courts have required that students use statistical data when trying to prove that school officials intended to discriminate, this decision and others[190] demonstrate that statistical evidence showing that black students are disciplined more harshly or frequently than white students does not necessarily result in a verdict for the plaintiffs.[191]

3. *Statistical Evidence as Insufficient Proof of Discrimination*

One early application of the *Washington v. Davis* decision occurred in a 1981 discipline case. In *Tasby v. Estes*, parents of black students sought injunctive relief from the school district's discipline practices, arguing that black students were punished more harshly than white students.[192] The plaintiffs relied on the experts' testimony that black students were disciplined more frequently than white and Mexican American students, statistical evidence demonstrating that black students received the most extreme forms of punishment as compared to other student populations in the school, and data linking such disciplinary disparity with an imbalance between the race of school personnel and the race of the students.[193]

185. *See Washington*, 426 U.S. at 229.

186. *Id.* at 260.

187. *See id.* at 245.

188. *See id.* at 242.

189. *Id.*

190. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

191. *Tasby*, 643 F.2d at 1108. The recent U.S. Supreme Court case, *Ricci v. Destefano*, may also reinforce this trend. 129 S. Ct. 2658, 2674–75 (2009) (holding that a city may not reject "test results solely because the higher scoring candidates were white.").

192. *Tasby*, 643 F.2d at 1104–07.

193. *Id.* at 1107.

The district court dismissed the case because the parents did not present evidence that such statistical disparities constituted racial discrimination.[194] On appeal, the Fifth Circuit Court of Appeals affirmed, holding that the parents failed to demonstrate that school officials were motivated by a discriminatory purpose when they disciplined the black students.[195] Citing the *Sweet* and *Davis* decisions, the court did not find that the statistically disproportionate punishment was a result of the requisite discriminatory intent.[196]

Although the court found the plaintiffs' evidence reflected a significant racial disparity, it did not agree that the data demonstrated that black students received harsher punishment than white students for the offenses, all factors being equal.[197] The court noted that evidence demonstrating a disparate impact was an "important starting point" but that this evidence has "limited probative value."[198] Specifically the court reasoned that:

> [T]he statistics offered are based upon a breakdown of offenses far too general to prove disproportionate severity in punishment. The statistical list of offenses includes cutting class, disobedience, profanity, fighting, and throwing objects. But these categories do not sufficiently permit comparison of the severity of any particular instance of misconduct with that of any other . . . the statistics do not reflect other relevant circumstances surrounding each individual case of punishment for these general infractions.[199]

The *Tasby* case thus demonstrates the need for plaintiffs to offer more specific and measurable evidence to support the claim that students of color are being treated differently than white students.

In other cases, courts have found in favor of school districts even though there was evidence that the black students received harsher treatment because the student could not demonstrate that the school district's actions were based on racially discriminatory motives. In the 1983 case *Coleman v. Franklin Parish School Board*, black parents alleged violations of the Equal Protection Clause, section 1981, and section 1983 for racial discrimination after a teacher struck their child.[200] The parents noted that the white student involved in horseplay with their son was not disciplined and argued that the defendants intended to discriminate.[201] However, the parents failed to present statistical evidence demonstrating that the school district's discipline policies had a disparate impact on black students.[202] The court held that "the equal

194. *Id.* at 1105–06.

195. *Id.* at 1108.

196. *Id.*

197. *Id.* at 1107 n.1.

198. *Id.* at 1108.

199. *Id.* at 1107 n.1.

200. Coleman *ex rel.* Coleman v. Franklin Parish Sch. Bd., 702 F.2d 74 (5th Cir. 1983).

201. *Id.* at 75.

202. *Id.* at 75–77.

protection clause is not violated solely because an action has a racially disproportionate impact if it is not motivated by a racially discriminatory purpose."[203] The Equal Protection issue was remanded.[204]

Similarly, in *Parker v. Trinity High School*, a mother on behalf of two black students alleged that a private school unfairly expelled the students for fighting when white students who engaged in the same offense, or more serious offenses, were not expelled.[205] The students brought their lawsuit under section 1981(a), which requires students to demonstrate intentional and purposeful discrimination to prevail.[206] Although the court noted that discriminatory intent could be inferred from statistical evidence, the plaintiffs failed to introduce this evidence.[207] As a result, the court did not find evidence of racial motivation.[208]

4. *Evidence of Both Individual and Statistical Discrepancies*

On the contrary, in *Sherpell v. Humnoke School District*, the court found that a school district's assertive discipline program was intentionally discriminatory without relying on statistical evidence.[209] In this case, the plaintiffs alleged that racial discrimination existed in the school's discipline policy.[210] The federal district court in Arkansas found that the school's disciplinary practices were harsher for black students than for white students.[211] The court did not elaborate on the different infractions that were involved, but it did focus its criticism on the way school officials had implemented the assertive discipline program.[212] For example, it found that school officials did not establish any uniform standards to help the teachers administer discipline in an objective way: Where one teacher might discipline a student in one class for an infraction, in another class the behavior might be deemed acceptable.[213] Thus, the subjective manner in which the policy was implemented "provides a protective cover" for "unconstitutional conduct."[214] As a result, the court found that black students were punished for offenses that white students were not, and it ordered

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203. *Id.* at 77.

204. *Id.*

205. *Parker*, 823 F. Supp. at 512.

206. *Id.* at 519.

207. *Id.*

208. *Id.* at 520.

209. 619 F. Supp. 670, 677 (E.D. Ark. 1985). Assertive discipline programs are programs intended to maintain classroom order by setting up consistent classroom disciplinary procedures across a school. *Id.* at 675.

210. *Id.*

211. *See id.* at 677.

212. *See id.*

213. *Id.*

214. *Id.*

a bi-racial committee to address the problems with the school district's discipline policies.[215]

One explanation for the different outcome of this case than other cases that lack statistical evidence relates to the historical context of this particular school district. Prior to 1968, the school district "operated under a separate, but equal concept,"[216] and this intense racially discriminatory atmosphere permeated the district. As a result, in addition to the discipline policy, several other aspects of the school operated in a discriminatory way.[217] Thus, the court may have been more easily persuaded by the plaintiffs' arguments, even though it did not rely on specific statistical evidence.

In a more recent case, a federal district court rejected the students' use of statistics to prove discriminatory intent.[218] In *Fuller v. Board of Education School District*, six black high school students were expelled for two years for fighting at a high school football game.[219] The fight injured seven other people in the stands.[220] The students argued that their expulsion was racially motivated.[221] The students also argued that the district expels a disparate number of black students.[222] A summary introduced to the court indicated that whereas 82% of the students expelled between 1996 and 1999 were black, black students comprise about 46–48% of the student body population.[223]

A district court upheld the school board's two-year expulsion, which did not provide for an alternative education placement setting.[224] Regarding the students' Equal Protection and Title VI claim, the students presented statistics related to their claim of racial discrimination.[225] The court did note that the statistics presented could lead a "reasonable person to speculate that the School Board's expulsion action was based upon the race of the students."[226] However, the court further reasoned that "none of the Caucasian students who were expelled for physical confrontations or fighting can be considered 'similarly situated' to the students involved in this case" because of the

215. *Id.*

216. *Id.* at 672.

217. *Id.* at 680–81.

218. Fuller v. Decatur Pub. Sch. Bd. of Educ., 78 F. Supp. 2d 812, 815 (C.D. Ill. 2000).

219. *Id.* at 816–19.

220. *Id.* at 814.

221. *Id.* at 814, 824–25. This case received extensive media coverage, commentary by the Reverend Jesse Jackson and Illinois Governor George Ryan who both criticized the school district's handling of the matter, and a march in the community protesting the expulsions that received national attention. Reverend Jackson was allowed to address the school board about the length of the expulsions. *Id.* at 818–19.

222. *Id.* at 823.

223. *Id.* at 824.

224. *Id.* at 814.

225. *See id.* at 815.

226. *Id.* at 824.

magnitude of this particular fight.[227] Thus, the court did not find that the evidence established that the black students were treated differently than white students.

The judge found that statistics and anecdotal evidence alone do not prove racial discrimination and that the court cannot make a decision based on "statistical speculation."[228] The court also emphasized that the statistics that were presented at trial were never presented to the school board during the expulsion hearings and were only created as a result of a court order.[229] It further reasoned that the law is clear in that statistics alone cannot prove racial discrimination and a violation of Equal Protection; the plaintiffs needed to show that similarly situated students were not expelled for the same conduct.[230] After this ruling, however, the school board reduced the expulsions to one year with an option for the students to attend an alternative school.[231]

5. *The Impact of Sandoval on Disparate Impact Cases*

A 2001 U.S. Supreme Court decision made it even more difficult for students of color to successfully prove discrimination in school discipline policies.[232] *Alexander v. Sandoval* was not a school discipline case, but it has had an impact on school discipline cases that is worth noting. *Sandoval* involved an amendment to Alabama's State Constitution, which made English the official language of the state.[233] The Alabama Department of Public Safety (the "Department") created an English-only driver's license test.[234] Sandoval did not speak English. Relying on Title VI regulations, she sued the Department and others, arguing that the driver's license test had a disparate impact on those people born outside the U.S.[235] Sandoval argued that the English-only policy discriminated against those who did not speak English because of its disparate impact.[236] The Court found that there is no private implied cause of action to enforce disparate-impact regulations of Title VI.[237] The Supreme Court held that the regulations are "in considerable tension" with Title VI which requires proof of intentional discrimination.[238] This case is significant because before the *Sandoval* decision, plaintiffs could file disparate impact lawsuits under the regulations of Title

227. *Id.* at 825.

228. *Id.* at 824.

229. *Id.*

230. *Id.* at 825.

231. *Id.* at 819.

232. *See Sandoval*, 532 U.S. at 275.

233. *Id.*

234. *Id.* at 278–80.

235. *Id.*

236. *Id.*

237. *Id.* at 291–93.

238. *Id.* at 282.

VI instead of demonstrating discriminatory intent as required by the substantive provisions of Title VI. Without a private right of action, enforcement of Title VI regulations is now left solely to the federal government.[239]

Justice Stevens's dissent in *Sandoval* argued that litigants could rely on section 1983 to enforce the Title VI regulations against state actors.[240] In 2002, however, the U.S. Supreme Court's decision in *Gonzaga University v. Doe* cast serious doubt on the section 1983 strategy.[241] Further, three federal appellate courts since the *Sandoval* decision have held that no private cause of action is available under section 1983 to enforce Title VI's disparate impact regulations.[242]

6. Conclusion

Review of the case law reveals that in order to successfully challenge racial/ethnic disparities in discipline policies and practices of schools under existing federal law, students must generally prove that school officials were motivated by discriminatory intent when they adopted or implemented them. Under the Equal Protection Clause, heightened scrutiny only applies to governmental actions motivated by intentional racial decision making.[243] Thus, disparate impact alone in a public school's disciplinary practices is insufficient to generate strict scrutiny.[244] Federal courts generally determine the constitutionality of racially neutral policies and practices that generate a disparate impact by the deferential rational basis test.[245] The determination of illegal race/ethnic discrimination under Title VI mirrors the Equal Protection Clause. As a result, to demonstrate race discrimination by a public school's disciplinary policies and practices under Title VI also requires that challengers prove that the adoption and implementation of the polices were motivated by racial animus.[246] The implementing regulations under Title VI, as opposed to Title VI, do allow for the establishment of racial/ethnic discrimination by proving disparate impact, even in the absence of discriminatory intent.[247] However, the Supreme Court has noted that the disparate impact regulations under Title VI are in considerable tension with Title VI.[248] In addition, the Supreme Court in its 2001 decision in *Sandoval* concluded that private rights of action to enforce the implementing regulations of Title VI do

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239. *See* Christopher Dunn, *Time to Fix the Race-Racial Discrimination Protections of the Civil Rights Act of 1964*, N.Y.L. J. (2009), *available at* www.nyclu.org/node/2256.

240. *See Sandoval*, 532 U.S. at 301 (Stevens, J., dissenting).

241. 536 U.S. 273, 285–86 (2002).

242. *See id.* at 278, 318 n.2.

243. *See Valeria*, 307 F.3d at 1042.

244. *See Washington*, 426 U.S. at 242.

245. *See San Antonio Indep. Sch. Dist.*, 411 U.S. at 37–40.

246. *See* Pauken & Daniel, *supra* note 55, at 759.

247. *See Guardians Ass'n*, 463 U.S. at 610–12, 642.

248. *See Sandoval*, 532 U.S. at 282.

not exist.[249] As a result, the federal government is the only entity that can enforce the disparate impact regulations of Title VI.[250] It also appears that private entities and individuals cannot enforce the disparate impact regulations of Title VI through 1983 actions.[251] Finally, when challenging a public or private school's disciplinary practices under section 1981, students must also demonstrate intentional discrimination.[252]

C. *Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education*

Recently, the U.S. Department of Education issued the "Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education" (hereinafter Guidance), which may further complicate issues in recognizing and addressing the disproportionate representation of African American students in school discipline.[253] The final implementation date for reporting data under the Guidance will take place during the 2010–11 school year.[254] This marks the first time that the federal government has dictated the procedures for collecting and reporting data on the race and ethnicity of students of educational institutions.

The Guidance requires student data collection using a two-question format. The Guidance will require that educational institutions raise an initial question about the individuals' ethnicity that requires them to respond to whether they are Hispanic/Latino.[255] Then educational institutions are required to allow students to "mark one or more" categories of the following racial groups that applies to them: 1) American Indian or Alaska Native, 2) Asian, 3) Black or African American, 4) Native Hawaiian or Other Pacific Islander, and 5) White.[256] The Guidance makes the Hispanic/Latino

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249. *Id.* at 291–93.

250. *See* Dunn, *supra* note 239.

251. *See Gonzaga*, 536 U.S. at 285–86.

252. *See Parker*, 823 F. Supp. at 512.

253. Dep't of Educ., Final Guidance on Maintaining, Collecting and Reporting Racial and Ethnic Data to the Department of Education, 72 Fed. Reg. 202, 59,266 (Oct. 19, 2007), *available at* http://dpi.wi.gov/lbstat/pdf/dataraceguidance.pdf [hereinafter Guidance].

254. *Id.* at 59,267.

255. The definition of Hispanic or Latino is "a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race." *Id.* at 59,274. The authors further want to note that both the words "Hispanic" and Latino" are used in this paper as English language words. "Latino" has its translation in the Spanish language and is masculine in gender and the feminine gender translation is "Latina." English language nouns, however, do not have gender. Thus, for the English language Latino refers to both males and females while Spanish language data collection should use the masculine ("Latino") and feminine ("Latina") nomenclature, such as "Latino/a."

256. The definitions in the Guidance are as follows:

> (1) American Indian or Alaska Native- A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment; (2) Asian American-A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the

ethnic category trump over all the racial categories. Thus, educational programs must report to the Department of Education as Hispanic/Latino individuals who checked "yes" to the Hispanic/Latino question, regardless of what racial groups they designate.[257] The Guidance requires that educational institutions report students who checked "no" to the Hispanic/Latino ethnic question, but checked more than one racial category as "Two or More Races."[258] The Guidance also requires educational institutions to report Black/White, Black/Asian, and Black/American Indian students as "Two or More Races"—we refer to these students as "Black Multiracials." Therefore, educational institutions must now report some students formerly classified as black as either Hispanic/Latino or Two or More Races. The Two or More Races category, however, will include all of those non-Hispanic/Latinos who checked more than one race box.

Research on racial disparities in school discipline has established that the race of the individual student and socioeconomic status of the student's family impact racial disparity.[259] Each of these factors works independently, with blacks disproportionately subjected to more disciplinary proceedings than whites and low socioeconomic students disciplined at higher rates than their peers from higher socioeconomic families.[260] Census Bureau statistics indicate that the socioeconomic status of Black Hispanic students is similar to that of other African American students.[261] However, Black Multiracial students are more likely to live with both parents, live in families with higher incomes, live with families that own their own home, and have parents with more education than other blacks.[262]

The implications of the Guidance for monitoring and addressing racial and ethnic disparities in school discipline are at this point difficult to predict. On the one hand, removal of Black Hispanic students from the Black or African American category may not have much of an effect on disproportionate outcomes in the latter category in some geographical areas. On the other hand, removal of Black Multiracial students, a group that appears to be more economically advantaged on average than

> Philippine Islands, Thailand, and Vietnam; (3) Black or African American- A person having origins in any of the black racial groups of Africa; (4) Native Hawaiian or Other Pacific Islander- A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands; and (5) White. A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Id. (citing Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,789 (Oct. 30, 1977)).

257. *Id.* at 59,267.

258. *See id.*

259. *See generally The Color of Discipline*, *supra* note 124, at 23; Wu, *supra* note 30, at 7.

260. *See* discussion *supra* Part III.A1–2.

261. *See* John R. Logan, How Race Counts for Hispanic Americans 3–4 (2003), *available at* http://mumford.albany.edu/census/BlackLatinoReport/BlackLatinoReport.pdf.

262. Simon Cheng & Seena Mostafavipour, The Differences and Similarities Between Biracial and Monoracial Couples: A Sociodemographic Sketch Based on the Census 2000 6 (2005), *available at* http://www.allacademic.com//meta/p_mla_apa_research_citation/0/2/2/1/9/pages22192/p22192-1.php.

those remaining in the Black/African American category, may increase the disproportionality of those remaining in the Black/African American category. Thus, it remains to be seen whether and how the change in data collection under the Guidance will affect the measurement of disproportionality in school discipline and other key educational indicators. Nor is it clear, if there are substantial discontinuities between the old and new methods of reporting, whether the new racial/ethnic breakdowns will make it easier or harder for students of color to demonstrate statistical discrepancies in school discipline. Finally, it is impossible to predict the response of the courts should there be a discontinuity in the data as a result of the adoption of the Guidelines. Will the court see discontinuities as the inevitable result of changes in measurement methodology, or will any changes in findings as a result of the Guidance be viewed with suspicion—a sign that findings of racial and ethnic disparity are statistically unstable?

IV. HISTORY AND STATUS OF THE MOVEMENT TOWARDS COLORBLIND CONSTITUTIONALISM

In order to understand why racial disproportionality in school disciplinary actions does not generally trigger successful legal claims, it is important to understand the Supreme Court's concept of race discrimination, in particular how the Court has been consistently moving towards a view of the constitution as colorblind with regard to issues of race and ethnic discrimination. A majority of the justices on the Court have not yet embraced a colorblind interpretation of the constitution. For example, selective colleges and universities are still able to use racial classifications in an individualized admissions process to obtain a critical mass of underrepresented minorities with a history of discrimination.[263] In addition, the government can still employ racial classifications in an effort to remedy identified acts of discrimination.[264] Finally, in the summer of 2007, Justice Kennedy wrote the deciding opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[265] Except in limited circumstances, Kennedy rejected the ability of public schools to use individual racial classifications in order to pursue integrated schools.[266] However, he states that school officials are free to devise various race-conscious measures that don't employ individual racial classifications in order to pursue integrated schools.[267]

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263. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan.").

264. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

265. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring in part and concurring in judgment).

266. For a discussion of Justice Kennedy's opinion see Kevin Brown, *Reflections on Justice Kennedy's Opinion in* Parents Involved: *Why Fifty Years Of Experience Shows Kennedy is Right*, 59 S.C. L. Rev. 735, 740–52 (2008).

267. *See Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part, concurring in judgment). These race-conscious measures include "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.*

Despite these exceptions to the general rule, however, the Supreme Court over the past four decades has been marching towards a colorblind interpretation of race discrimination under the Constitution. This evolution has drastically limited avenues for challenging educational practices resulting in disparate outcomes and has ushered in race-neutral practices in public schools that could arguably impact student discipline involving racial discrimination.

A. History of Colorblind Constitutionalism

In response to the majority decision in *Plessy v. Ferguson* that "separate but equal" treatment was constitutional, Justice John Marshall Harlan of the Supreme Court noted in an oft-quoted dissent:

> Our Constitution is colorblind and neither knows nor tolerates classes among citizens. With respect to civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[268]

It is important to recognize that Justice Harlan was not, in this dissent, signaling his status as an advocate for oppressed African Americans. He went on only three years later to write the opinion in *Cumming v. Richmond County Board of Education*.[269] In *Cumming* the Supreme Court unanimously upheld the right of a Georgia school board to close its only black high school while allowing the board to continue to provide for high school education for white students, thus seemingly ignoring its own separate but equal doctrine.[270] Indeed, Harlan seemed to believe that colorblindness would vindicate the superiority of the white race:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[271]

The unanimous ruling in *Brown v. Board of Education* decisively overturned the doctrine of separate but equal.[272] The landmark ruling ushered in a fifteen-year period in which all three branches of government contributed to addressing racial inequality in education, employment, housing, and voting rights.[273] In its decision in *Brown*, the Court noted that "to separate [black students] from others of similar age

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268. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

269. 175 U.S. 528 (1899) (cited in Albert L. Samuels, Is Separate Unequal: Black Colleges and the Challenge to Desegregation 31 (2004)).

270. *Id.*

271. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

272. Brown v Bd. of Educ., 347 U.S. 483, 494 (1954).

273. *See* Gary Orfield & Susan E. Eaton, Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education (1996).

and qualification" generates harm to black students and the impact of that harm is greater when it has the sanction of law.[274] Although the actual perspective of the *Brown* decision with respect to race consciousness is difficult to determine, it is clear that much of the civil rights progress that occurred through the 1960s and early 1970s was predicated upon a special concern about assisting blacks to overcome the impact of historical discrimination. In his landmark speech at Howard University in June, 1965, President Lyndon Johnson stated:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders as you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.[275]

By the early 1970s however, as the effect of more conservative Nixon era appointees began to be felt, the courts started to limit or roll back many of the principles that had guided post-*Brown* civil rights reform. In *Keyes v. School District No. 1*, the Court backed away from the implication that the racial separation of blacks was the basis of the constitutional violation of segregated schools. [276] The Court found that determining whether the racial and ethnic separation in public schools violated the Constitution depended upon the cause of the separation, and therefore distinguished between de facto and de jure segregation. Unlike de facto segregation, which could be established by showing a racial concentration of black students in the various public schools of a given school district, the Court defined de jure segregation as a "current condition of segregation resulting from intentional state action directed specifically to [segregated schools]."[277] De jure, not de facto, segregation violated the Constitution.[278] Thus, if racially separate schools were not the result of racially motivated decision making, then such separation did not meet the definition of unconstitutional segregation.

B. Effects of a Colorblind Perspective

The Supreme Court's current Equal Protection jurisprudence treats government as if it were an individual, presuming that the actions of government are motivated by its intentions. Whether racial discrimination by government violates the Equal Protection Clause is determined by focusing principally on the motivations of the governmental actors, not the effects of their actions.[279] Government actions not

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274. *Brown*, 347 U.S. at 494.

275. President Lyndon B. Johnson, Commencement Address at Howard University, *To Fulfill These Rights*, June 4, 1965.

276. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

277. *Id.* at 205–06.

278. *Id.*

279. *See* discussion *supra* Part III.B.

intended to be racial in nature may have a discriminatory effect on members of certain racial or ethnic groups, including blacks. Yet the individuals whose interest is harmed by actions motivated by non-racial concerns are not viewed as victims of racial discrimination, since it is not the *consequences* of government's actions that determine racial discrimination, but the *intent* that motivated the actions. That is, government actions are presumed to be colorblind unless it can be shown that there was an *intent* to discriminate based on race.

This judicial philosophy has made it increasingly difficult for African American plaintiffs seeking to challenge the impact of a variety of educational practices as discriminatory.[280] Early challenges to educational tracking, such as *Hobson v. Hansen*, succeeded by arguing that separate tracks failed to remediate the educational disadvantage of black schoolchildren.[281] More recently, however, the Seventh Circuit, in its 1997 decision in *People Who Care v. Rockford Board of Education School District,* accepted tracking as a legitimate educational strategy.[282] In *Rockford*, the Seventh Circuit effectively viewed the disparate placement of Black and Latino students in lower ability tracks as simply the unfortunate result of race neutral academic judgments that therefore did not produce any Equal Protection violations.[283] Federal

280. For a discussion of the change in judicial philosophy that evidences a special concern for the educational rights of black children to one that is based more on racially neutral decision making and colorblindness see Kevin Brown, Race, Law And Education In The Post-Desegregatrion Era, 199–270 (2005).

281. *See* Hobson v. Hansen, 269 F. Supp. 401, 469–70 (D.D.C. 1967). Until 1981, the Fifth Circuit covered the following former states of the Old Confederacy: Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. Thus, before 1981, the applicable constitutional law for a large number of southern school districts came from the Fifth Circuit. Two years after *Hobson*, the Fifth Circuit, sitting en banc in *Singleton v. Jackson Municipal Separate School District*, rejected a plan to desegregate two school districts after the district court approved plans to assign students to schools on the basis of achievement test scores. 419 F.2d 1211 (5th Cir. 1969). "We pretermit a discussion of the validity per se of a plan based on testing except to hold that testing cannot be employed in any event until unitary school systems have been established." *Id.* at 1219. Two years later, the Fifth Circuit addressed an appeal from an order of a district court approving a school board plan to desegregate its schools by assigning students to one of two schools based on their scores on the *California Achievement Test. Lemon v. Bossier Parish Sch. Bd.*, 444 F.2d 1400 (5th Cir. 1971). Again rejecting a plan to assign students to different schools based on their academic abilities, the Fifth Circuit stated that "regardless of the innate validity of testing, it could not be used until a school district had been established as a unitary system. We think at a minimum this means that the district in question most [sic] have for several years operated as a unitary system." *Id.* at 1401.

282. People Who Care v. Rockford Bd. of Educ. Sch. Dist., 111 F.3d 528 (7th Cir. 1997), *aff'g in part and rev'g in part*, People Who Care v. Rockford Bd. of Educ. Sch. Dist., No. 89 C 20168, 1996 WL 364802 (N.D. Ill. June 7, 1996) (containing comprehensive remedial order), *aff'g in part and rev'g in part*, People Who Care v. Rockford Bd. of Educ. Sch. Dist., 851 F. Supp. 905 (N.D. Ill. 1994) (containing findings of liability).

283. As Judge Posner, writing for the Court, concluded:

> Tracking is a controversial educational policy . . . . Lawyers and judges are not competent to resolve the controversy. The conceit that they are belongs to a myth of the legal profession's omnicompetence that was exploded long ago. To abolish tracking is to say to bright kids, whether white or black, that they have to go at a slower pace than they're capable of; it is to say to the parents of the brighter kids that their children don't really belong in the public school system; and it is to say to the slower kids, of whatever race, that they may have difficulty keeping up, because the brighter kids may force the pace of the class . . . . The well-known correlation between race and academic performance

courts have replicated this march towards colorblindness across civil rights challenges to a number of educational practices, including high-stakes testing, curriculum, and minority teacher hiring.[284]

This shift in perspective has important implications for challenges to racial and ethnic disparities in discipline. As long as the movement towards colorblindness continues to dominate the Supreme Court's perspective about race discrimination, African Americans will not be able to turn racial disparities generated by educational policies and practices into successful legal arguments, because discrimination is only recognized when it is the result of discriminatory intent. Since educational policies and practices (e.g., suspension and expulsion) can usually be justified on legitimate educational concerns (e.g., school safety), it will be difficult to prove that those policies and practices were primarily motivated by racial considerations. Regardless of the extent of the negative disparate impact of school discipline policies and practices upon African American students, federal courts will view such outcomes as the unfortunate result of racially neutral decision making that does not violate the Equal Protection Clause.

C. Critiques of Colorblind Constitutionalism

Numerous criticisms of colorblind constitutionalism exist. These include: a) the logical impossibility of philosophical colorblindness, b) the contradiction between the colorblind theory and the lived reality of race in America, and c) the limited effectiveness of race-neutral alternatives.

In his critique of colorblind constitutionalism, Neil Gotanda points out that the non-recognition required by colorblind alternatives in hiring or admissions inevitably yields a logical contradiction.[285] He distinguishes between medical colorblindness, in which failure to see an object is clearly a physical/perceptual deficit, and racial colorblindness, in which race is supposedly noticed but not considered.[286] The extent to which race consciousness is present in all of us makes such purposeful non-recognition an impossibility:

> To argue that one did not *really* consider the race of an African-American is to concede that there was an identification of Blackness. Suppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised.[287]

It is an inescapable reality that race is in no way neutral in twenty-first century American society and American education. Despite the determination of our nation's

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> makes tracking, even when implemented in accordance with strictly objective criteria, a pretty effective segregator.

People Who Care, 111 F.3d at 536.

284. For a description of this, see Brown, *supra* note 280, at 237–69.

285. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 Stan. L. Rev. 1, 16 (1991).

286. *Id.* at 18–19.

287. *Id.* at 19.

first black President not to highlight the issue of race, controversies about the topic have continued to figure prominently in the national dialogue on a range of issues.[288] Racial and ethnic disparities remain widespread in education, from the minority-white achievement gap,[289] to disproportionality in special education,[290] to dropout and graduation rates,[291] to eligibility for gifted/talented programs.[292] Current theories in sociology, anthropology, and education strongly indicate that the most prevalent issues of racial discrimination today tend not to result from intentional or blatant racism.[293] Rather, disparate outcomes appear to be shaped by individuals within institutions, participating in habitual patterns of action.[294] These patterns may be largely unconscious, but if left unchecked, contribute to discriminatory outcomes that reproduce inequity and reduce educational opportunity for certain groups. It seems almost certain that most educators today do not consciously *intend* to refer or suspend a greater proportion of black students. Yet, when the primary reasons for black disciplinary over-referral are not serious, safety-threatening behaviors, but rather more subjective and interactional behaviors such as non-compliance, disrespect, and loitering,[295] it is hard to imagine that the school system is not making some contribution to disparate outcomes in school discipline.

Finally, scholars have reported that race-neutral policies are not as effective as race-conscious policies in creating a more diverse student body. A report published by the National Academy of Education in 2007 examined the research cited in the

288. *See, e.g.*, Jeff Zeleny & Jim Rutenberg, *As Race Debate Grows, Obama Steers Clear of It*, N.Y. Times, Sept. 16, 2009, *available at* http://www.nytimes.com/2009/09/17/us/politics/17obama.html?scp=7&sq=obama%20 race&st=cse (commenting on a string of race-based controversies that have dogged the Obama Administration from Rev. Jeremiah Wright to the health care debate, the *New York Times* noted in a front page commentary: "President Obama has long suggested that he would like to move beyond race. The question now is whether the country will let him.").

289. Gloria Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U. S. Schools*, 35 Educ. Researcher 3, 3 (2006).

290. Comm. on Minority Representation in Special Educ., Minority Students in Special and Gifted Education (M. Suzanne Donovan & Christopher T. Cross eds., 2002).

291. Johanna Wald & Daniel J.Losen, *Out of Sight: The Journey Through the School-to-Prison Pipeline*, *in* Invisible Children in the Society and its Schools 23–27 (Sue Books ed., 3d ed. 2007).

292. H. Richard Milner & Donna Y. Ford, *Cultural Considerations in the Underrepresentation of Culturally Diverse Elementary Students in Gifted Education*, 29 Roeper Rev. 166 (2007).

293. *See, e.g.*, Sonia Nieto, Affirming Diversity: The Sociopolitical Context of Multicultural Education (Pearson Education, Inc./Allyn & Bacon 2008) (1992).

294. Developed as an explanation of the perpetuation of social class hierarchies, the theoretical framework of *cultural reproduction* has been utilized by equity researchers to demonstrate how institutional and individual actions maintain a hierarchical status quo at the expense of less-privileged groups. Cultural reproduction implies that individuals can become a part of institutional patterns through *constitutive actions* that can reproduce the status quo without being consciously aware of their contribution to inequity. *See, e.g.*, Hugh Mehan, *Understanding Inequality in Schools: The Contribution of Interpretive Studies*, 65 Soc. of Educ. 1, (1992); Jeannie Oakes, *The Reproduction of Inequity: The Content of Secondary School Tracking*, 14 Urban Rev. 107 (1982).

295. Anne Gregory & Rhona S. Weinstein, *A Window on the Discipline Gap: Defiance or Cooperation in the High School Classroom*, 46 J. Sch. Psychol. 455 (2009).

amicus briefs of the *Parents Involved*[296] case to determine whether race-neutral plans are as effective as race-conscious plans in creating a more diverse student body.[297] Highlighting the experiences of school districts that adopted race-neutral student assignment plans in San Francisco, California; LaCrosse, Wisconsin; and Wake County, North Carolina, the authors concluded that "although assignments made on the basis of socioeconomic status are likely to marginally reduce racial isolation and may have other benefits—none of the proposed alternatives is as effective as race-conscious policies for achieving racial diversity."[298] These findings are consistent with other scholars' conclusions. Reardon, Yun and Kurlaender report that race-neutral policies based on socioeconomic status are unlikely to "substantially reduce segregation."[299] Finally, Mickelson suggests that research indicates that racial segregation increased when Charlotte, North Carolina adopted a more race-neutral approach after the court declared the district unitary.[300]

D. Current Status of Colorblind Constitutionalism

It could be argued that the march towards colorblind constitutionalism, and its incorporation into decisions supporting primarily race-neutral solutions, have today become the dominant perspective of the courts. In 2007, the U.S. Supreme Court held in the *Parents Involved* case that racial classifications in student assignment plans in Louisville and Seattle violated the constitution.[301] In a plurality decision, Chief Justice John Roberts, asserted that racial classification to balance student populations was unconstitutional,[302] stating that: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[303] While Justice Roberts and three other justices seemed to accept the concept of a colorblind Constitution, the idea did not win over a majority of the Court. Despite concurring with the majority, Justice Kennedy also wrote a separate opinion that rejects the colorblind approach, stating:

> [t]he statement by Justice Harlan that "[o]ur Constitution is color-blind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson* . . . . And . . . [the] axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principal.[304]

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296. *Parents Involved*, 551 U.S. at 820–23.

297. Nat'l Acad. of Educ., Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases 23–24 (Robert L. Linn & Kevin G. Welner eds., 2007).

298. *Id.* at 3, 42.

299. Sean Reardon, John Yun, & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 Educ. Eval. & Pol'y 1 (2006).

300. Rosalyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513, 1558 (2003).s

301. *Parents Involved*, 551 U.S. at 701.

302. Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 Cornell L. Rev. 203 (2008).

303. *Parents Involved*, 551 U.S. at 787.

304. *Id.* at 787–88 (Kennedy, J., concurring in part and concurring in the judgment).

He noted that "[f]ifty years of experience since *Brown v. Board of Education*, should teach us that the problem before us defies so easy a solution."[305] In addition, Justice Breyer's opinion for the four dissenting justices was part of a long line of constitutional thought that has viewed the Equal Protection Clause as a means to protect the rights of disadvantaged minorities as opposed to individuals.[306]

Clearly not all members of the Roberts's Court agree with the Court's colorblind interpretation of the Constitution with regard to race discrimination. Justice Ginsburg, in her dissenting opinion in *Gratz v. Bollinger* argued that when a racial classification "denies a benefit, causes harm or imposes a burden," then "in that sense the Constitution is colorblind."[307] She further reasoned, however, that "the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination."[308]

Regardless of the lack of a clear majority in *Parents Involved*, the plurality's interpretation of a colorblind constitution prompted the Bush Administration to promote race neutral policies in the public schools. After the *Parents Involved* decision, the U.S. Department of Education's Office for Civil Rights responded to the decision with a letter stating that "[t]he Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools."[309] The Bush administration went on record in favor of race-neutral policies in both higher education and K–12 education.[310]

In summary, understanding the Court's perspective on colorblind constitutionalism helps clarify the reasons for the gulf between research-based evidence and case law regarding disciplinary disproportionality. The requirement that governmental actions that create racial disparities can be found discriminatory only if intent can be proven creates a nearly insurmountable barrier for African American students seeking to challenge those practices. The exceedingly narrow interpretation of discrimination under colorblind individualism also places the Court at significant variance from the

305. *Id.* at 788.

306. The four dissenters in *Parents Involved* rejected the colorblind interpretation. They based their decision on a notion of a group orientation of society. For them, what the school districts sought to do was to take account of race—not to exclude, but to include individuals. The dissent's criticism of the decision rejected the current interpretation of a colorblind constitution. The dissent noted that "[t]he histories also indicate the complexity of the tasks and the practical difficulties that local school boards face when they seek to achieve greater racial integration," and reasoned that "[a] longstanding and unbroken line of legal authority tells us that the *Equal Protection Clause* permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it." *Id.* at 822–23 (Breyer, J., dissenting).

307. 539 U.S. 244, 302 (2003) (Souter, J., dissenting).

308. *Id.*

309. Guidance letter from Stephanie J. Monroe, Assistant Sec'y for Civil Rights, Office for Civil Rights of the U.S. Dep't of Educ., The Use Of Race in Assigning Students to Elementary and Secondary Schools (Aug. 28, 2008), *available at* http://www.ed.gov/about/offices/list/ocr/letters/raceassign mentese.html.

310. *See* U.S. Dep't of Educ., Office for Civil Rights, Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity (2003), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html.

common understanding of racial disparities. As Nicholas Katzenbach, U.S. Attorney General during the Johnson Administration, states in his critique of the colorblind perspective in affirmative action cases:

> It is very nearly as if this court has simply mandated that what is the country's historic struggle against racial oppression and racial prejudice cannot be acted upon in a race-conscious way—that the law must view racial problems observable by all as if oppression and prejudice did not exist and had never existed. The court's majority, in other words, has come very close to saying . . . that courts cannot be permitted to see what is plain to everybody else.[311]

V. SUMMARY AND CONCLUSIONS

The courts have, despite opportunities, refused to provide access for relief to students of color in school disciplinary cases. Courts have taken a hands-off approach for the following three reasons: 1) the courts continue to grant deference to school officials (ignoring the existing research base on school discipline), 2) the courts have narrowed the legal claims available for students claiming racial discrimination in school disciplinary matters, and 3) the Supreme Court has moved towards embracing a colorblind approach to racial discrimination in schools.

The courts' deference to school administrators in school disciplinary matters is problematic for students bringing these types of claims. Courts have consistently refused to second-guess school officials in disciplinary matters. Oftentimes, the lower courts cite language from the *Goss v. Lopez* decision to demonstrate the extreme deference given to school officials in disciplinary matters.[312] The courts' application of in loco parentis thus appears to give school officials extensive leeway in school disciplinary matters. Specifically, the importance of maintaining safe schools and a climate free of disruption leads courts to hesitate to interfere in school disciplinary matters. This leads to a profound paradox in the application of school discipline. The courts tend to permit schools officials to use almost any tool if it is intended to improve school safety or reduce disruption. Yet research has consistently demonstrated that the most common of these tools—suspension and expulsion—are ineffective in achieving those ends. Thus, by giving schools wide latitude to implement any disciplinary options that are *intended* to guarantee safety or reduce disruption, the courts may have contributed to retarding the growth of an effective technology of

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311. Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, *in* Sex, Race, and Merit: Debating Affirmative Action in Education and Employment 48, 55 (Faye J. Crosby & Cheryl VanDeVeer eds., 2000).

312. As the U.S. Supreme Court articulated in *Goss*, "[b]y and large, public education in our Nation is committed to the control of state and local authorities." 419 U.S. at 578 (quoting *Epperson*, 393 U.S. at 104). The Supreme Court also asserted in 1968 that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Epperson*, 393 U.S. at 104. Nevertheless, "it is not the role of the federal courts to set aside the decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." Wood v. Strickland, 420 U.S. 308, 326 (1975).

school discipline by supporting schools in the use of measures that have not been shown to be effective.

These cases demonstrate the difficulty students of color may have when asserting a claim of racial discrimination in school disciplinary practices. Courts have generally concluded that private entities challenging school disciplinary policies or practices under the Equal Protection Clause, Title VI and section 1981, must prove that their adoption or administration is motivated by discriminatory intent. In rare cases, courts could infer discriminatory intent from statistical evidence. However, the use of the statistical evidence is for establishing discriminatory intent. Disparate impact of disciplinary policies and practices alone does not trigger a finding of discrimination.

Before the Supreme Court's 2001 opinion in *Sandoval*, it was possible for private parties to assert discrimination under the disparate impact regulations of Title VI. The Supreme Court, however, foreclosed that possibility with its conclusion in *Sandoval* that there is no private right of action to enforce the disparate impact regulations of Title VI. Federal courts have also rejected efforts to get around the *Sandoval* decision by rejecting arguments that the disparate impact regulations of Title VI can be enforced through a section 1983 action. Now, the federal government is the only entity that can enforce the disparate impact regulations of Title VI.[313]

Together, these analyses beg the question of whether courts could ever find evidence of discrimination in school discipline cases. Since educators usually have an educational justification for any particular disciplinary action that they take, it is difficult to prove that educators who took those actions were motivated by discriminatory intent. Although the courts note that intent to discriminate could be demonstrated by statistical evidence, even when substantial evidence is presented, the courts are not typically swayed. Since *Sandoval* removed the private right of action in challenging disparate outcomes, it is unclear whether even the strongest combination of individual and statistical evidence would be sufficient to bring a successful challenge to racial disparities in discipline. Finally, the adoption of new Guidelines for describing racial/ethnic categories most likely adds an additional element of uncertainty to measuring and addressing disproportionality in discipline, since it is, at this time, unclear whether those new guidelines will impact data on racial and ethnic disparities and how the court might interpret such measurement-based changes.

The discretion given to school officials combined with the limitations placed on actions under Title VI and section 1983 constitute a clear setback for students of color. Several advocacy groups are lobbying Congress and the current administration to propose and sign legislation that would clarify that "Title VI applies to all discrimination, intentional or otherwise."[314] In June 2009, a resolution was introduced at the New York City Council "urging Congress to reintroduce and subsequently pass legislation that would restore a private right of action to individuals seeking to

313. The Supreme Court noted in *Sandoval* that the disparate impact regulations of Title VI stand "in considerable tension" with Title VI. Thus, the Court may be signaling a willingness to reject the disparate impact regulations of Title VI when the Court has the opportunity to do so. *See Sandoval*, 532 U.S. at 275.

314. *Id.*

challenge violations of civil rights under federal regulations implementing Title VI of the Civil Rights Act of 1964."[315]

Bills to restore the protections against race discrimination that were negated in *Sandoval* were introduced in both the House and Senate in April 2009. The bills seek to amend section 601 of Title VI that prohibits intentional discrimination, to add a new subsection that prohibits any practice "that causes a disparate impact on the basis of race, color, or national origin."[316] It would also amend section 602 of Title VI to allow private individuals to bring lawsuits to remedy Title VI violations.[317] Although the bills expired, they will likely be reintroduced in a subsequent congressional session.[318] If the regulations were restored to their pre-*Sandoval* status, students would have a private right of action under Title VI to initiate a lawsuit under a disparate impact claim. As such, it is possible that disparate impact claims, which would not require students to demonstrate intent, may become possible again in the future.

For the foreseeable future, the most fruitful remedies for those seeking to challenge racial/ethnic discrimination in school discipline may well be extra-judicial. One approach that could be used to address the lack of legal remedies in this area would be for advocacy groups interested in disciplinary reform to lobby Congress to pass previously proposed amendments to Title VI. In addition, the continued dissemination of evidence-based practices in school discipline and school violence prevention, especially to school administrators, is important in order to increase understanding of the impact of expulsion and suspension, especially on students of color.

It is somewhat startling to realize that, fifty years after *Brown v. Board of Education*,[319] there exists no sure legal remedy that would allow African American students to challenge even those practices that create the most disparate negative outcomes. The unanimous *Brown* decision led to a relatively brief period of activism and optimism that viewed the law as an affirmative tool to address the effects of historical and current discrimination. Yet since the mid-1970s, the courts have increasingly retreated into a narrow interpretation of discrimination that is at variance with both logic and evidence, effectively closing off challenges to the racial impact of educational practices. On May 17, 1954, African Americans were finally granted the right to send their children to a public school of their choosing. It remains to be seen when children of color will be guaranteed the right to be treated equally once they arrive at school.

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315. N.Y. City Council Res. 2059-2009, *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=452752&GUID=7B44C88E-2207-4465-948D-BF2A7EBB0262&Search=&Options=.

316. Dunn, *supra* note 239.

317. *Id.*

318. *Id.*

319. 347 U.S. 483 (1954).