

2019

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### Recommended Citation

Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 Pub. Interest L. Rptr. 137 (2019).

Available at: <https://lawecommons.luc.edu/pilr/vol24/iss2/4>

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## The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race

Tara Carone

The Great Equalizer. The Passport to the Future. The key to unlocking the door to the American dream. All of these catchphrases are suggestive of a longstanding American belief: that education allows people of all backgrounds to dramatically improve their situation in life.<sup>1</sup> However, today and throughout history, an extraordinary amount of discrimination and inequality in the educational system has created terrible barriers for minority groups to overcome.<sup>2</sup> One of these barriers is a disturbing national trend wherein children, specifically children of color, are funneled out of public schools and into the juvenile and criminal justice systems.<sup>3</sup> The funnel is two-fold: students being placed in juvenile or criminal courts due to a school incident, and students who have dropped out of school or have been kicked out of school, oftentimes ending up in the juvenile or criminal court systems down the road.<sup>4</sup> Together, the phenomena has come to be known as “the school-to-prison pipeline.”<sup>5</sup>

### THE CREATION OF THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline occurs for multiple reasons.<sup>6</sup> Three trends in public schools are primarily responsible: zero-tolerance policies, additional and often mandatory referral of students to the juvenile justice system, and the expanding prevalence of “school resource officers” (SROs) in schools.<sup>7</sup>

Zero-tolerance policies are highly reactionary to violence in schools.<sup>8</sup> A zero-tolerance policy is any law or regulation that mandates predetermined consequences or punishments for specific offenses.<sup>9</sup> In response to highly publicized acts of school violence, many school officials and policymakers imple-

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<sup>1</sup> Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 Wis. L. Rev. 80, 81 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Brian J. Fahey, *A Legal-Conceptual Framework for the School-to-Prison Pipeline: Fewer Opportunities for Rehabilitation for Public School Students*, 94 Neb. L. Rev. 764, 788 (2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

mented strict security measures in order to demonstrate to the public that something was being done to protect students.<sup>10</sup> One such policy was the Gun-Free Schools Act of 1994 (the “1994 Act”), which greatly impacted the proliferation of zero-tolerance policies.<sup>11</sup> Essentially, the 1994 Act required states to enact legislation mandating the expulsion of any student found to have knowingly brought a firearm to school.<sup>12</sup> Otherwise, the school would lose a substantial amount of their public funding.<sup>13</sup> The No Child Left Behind Act of 2001 expanded the 1994 Act by requiring states to mandate expulsion for any student who possessed a firearm at school.<sup>14</sup> As the threat of school shootings haunted the social imagination, zero-tolerance policies brought some comfort.<sup>15</sup> However, school districts and legislatures began enacting zero-tolerance policies for many other transgressions, from non-firearm weapons, to tobacco and alcohol violations, to tardiness or truancy—offenses much less serious than carrying a firearm.<sup>16</sup> These zero-tolerance policies left little room for rehabilitation within school systems and led to more students being removed from classrooms.<sup>17</sup>

Additionally, states now require school districts to refer students to law enforcement for a variety of school policy violations.<sup>18</sup> For example, as a matter of internal policy, some school districts refer students or turn over evidence to state authorities.<sup>19</sup> States, however, usually only require reporting of the commission of a crime.<sup>20</sup> Nonetheless, school districts, possibly out of concern for compliance with state law, will refer students for conduct which does not necessarily rise to that level.<sup>21</sup>

Another response to school shootings was the addition of school resource officers.<sup>22</sup> SROs have similar responsibilities to that of law enforcement officers and also have educational responsibilities as well.<sup>23</sup> These officers patrol school

<sup>10</sup> Nance, *supra* note 1 at 92-94.

<sup>11</sup> Fahey, *supra* note 7 at 788.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 789.

<sup>14</sup> *Id.*

<sup>15</sup> Nance, *supra* note 1 at 94.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Fahey, *supra* note 7 at 790.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 791.

<sup>23</sup> *Id.*

premises, investigate criminal complaints, handle students who violate school rules or laws, and respond to student disruptions occurring both during the school day and during after-school activities.<sup>24</sup> SROs tend to have an extensive impact on the disciplinary practices of schools.<sup>25</sup> According to the U.S. Department of Justice, the number of school resource officers rose 38 percent between 1997 and 2007.<sup>26</sup> This surge has helped criminalize many students and fill the pipeline.<sup>27</sup> In fact, a 2005 study found that children are far more likely to be arrested at school than they were a generation ago, mostly for nonviolent offenses.<sup>28</sup> A recent U.S. Department of Education study found that more than 70 percent of students arrested in school-related incidents or referred to law enforcement are black or Hispanic.<sup>29</sup>

For example, Jamie Schulte with LAF (previously the Legal Assistance Foundation) in Chicago, shared a story of a boy who was arrested for writing on his desk.<sup>30</sup> The writings were thought to be related to gang-activity.<sup>31</sup> She worked on his case and, fortunately, the charges against this young boy were dropped.<sup>32</sup> Nevertheless, the boy missed a substantial amount of school due to the unwarranted arrest and, more importantly, as a result of the charges, now has an arrest record.<sup>33</sup>

Police presence in schools is intended to serve the best interests of students and communities.<sup>34</sup> Certain situations, such as what took place at Sandy Hook and Columbine, as well as fears of rising school violence in recent decades, necessitate security in American schools; however, it does not follow from the necessity of school security officers that elementary schoolchildren need to be placed into a criminal law system in which they are treated with a lack of sensitivity as if they are hardened criminals.<sup>35</sup> The presence of police in schools has had the effect of ‘criminalizing’ behaviors—such as minor scuffles, thefts,

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Marilyn Elias, *The School to Prison Pipeline: Policies and Practices that Favor Incarceration Over Education Do Us All a Grave Injustice*, TEACHING TOLERANCE 43, 2 (2013).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> In Person Interview with Jamie Schulte, Skadden Fellow and Staff Attorney, LAF (Apr. 5, 2019).

<sup>31</sup> (*short cite*)

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Hawker v. Sandy City Corp.*, 774 F. 3d 1243, 1243 (2014).

<sup>35</sup> *Id.*

and ‘disruptions of school assembly’—that would otherwise be handled by school officials.<sup>36</sup> Children are often unaware of some of the more nuanced aspects of the law, or the extent of an officer’s discretion, which can result in charges for less overt wrongdoing or passive participation leading to joint venture charges, disorderly conduct, simple assault, and resisting arrest.<sup>37</sup>

#### DISCRIMINATORY IMPACT

Though these policies were enacted without a racially discriminatory intent, they disproportionately impact racial minorities and children with disabilities.<sup>38</sup> The U.S. Department of Education’s Office of Civil Rights (“OCR”) surveyed over 72,000 schools around the United States, which serve approximately 85 percent of the nation’s public school students.<sup>39</sup> These surveys showed that minority students are disciplined more often and more severely, have less access to complex, higher-level courses, and more often are assigned teachers that are less experienced and lower paid.<sup>40</sup> Additional analysis of the data showed that one out of every six black students enrolled in K-12 public schools has been suspended at least once, while only one out of every twenty white students has faced suspension.<sup>41</sup>

Students with disabilities are also unfairly effected.<sup>42</sup> While only 8.6 percent of public school children have been identified as having disabilities, which effect their ability to learn, disabled children make up 32 percent of youth in juvenile detention centers.<sup>43</sup> Black students with disabilities are even worse off.<sup>44</sup> Daniel J. Losen, director of the Center for Civil Rights Remedies of the Civil Rights Project at UCLA, analyzed the OCR study and found that one out of every four black disabled children were suspended during the 2009-2010 school year, versus one of eleven white children.<sup>45</sup>

Studies have shown that black students face disproportional punishment in comparison to white students for violating school rules.<sup>46</sup> For example, one

<sup>36</sup> Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. Sch. L. Rev. 977, 981 (2009/2010).

<sup>37</sup> *Id.* at 985.

<sup>38</sup> Elias, *supra* note 26 at 2.

<sup>39</sup> Nance, *supra* note 1 at 85-87.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Elias, *supra* note 26 at 2.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Nance, *supra* note 1 at 85-87.

study conducted by Kelly Welch and Allison Ann Payne found that schools with higher percentages of black and low-income students were less likely to rely on softer forms of punishment, including oral reprimands, referrals to visit with school counselors, community service, or restorative justice initiatives.<sup>47</sup> These racial disparities in discipline have widened since the early 1970s and cannot be linked to more serious misbehavior by students of color.<sup>48</sup> A 2010 study of 21 schools found that, even when controlling for teacher ratings of student misbehavior, black students were more likely than others to be sent to the office for disciplinary reasons.<sup>49</sup> In fact, one study found that when controlling for poverty and other factors, higher percentages of white students were disciplined on more serious nondiscretionary grounds, such as possessing drugs or carrying a weapon.<sup>50</sup> A 2011 study from North Carolina was conducted on first-time offenders.<sup>51</sup> This study found that most students who broke discretionary school rules, such as using a cell phone, violating the dress code, being disruptive, or displaying affection, were not suspended for the first infraction.<sup>52</sup> Black first-time offenders, however, were far more likely than white first-time offenders to be suspended.<sup>53</sup>

#### INEFFECTIVE RESULTS

Not only are these school policies creating the school-to-prison pipeline discriminatory, they do not resolve the issues they were meant to address.<sup>54</sup> The justifications for out-of-school suspensions include things such as producing a better learning environment, deterring future misbehavior, or stimulating effective parental involvement.<sup>55</sup> From 2009 through 2010, it was estimated that over three million children lost instructional school time through school suspensions, oftentimes with no guarantee of adult supervision while being out of school.<sup>56</sup> Many proponents of suspension often suggest that educators have no alternative choice and that suspending fewer students will lead to chaos in

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion From School*, THE CIVIL RIGHTS PROJECT, 32 (2012).

<sup>50</sup> *Id.* at 32.

<sup>51</sup> *Id.* at 33.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 34.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 10.

the classroom.<sup>57</sup> Since the 1970s, suspension has been used more frequently as a disciplinary tool even though research shows removing children from school does not improve their behavior.<sup>58</sup> Instead, it greatly increases the likelihood that they will drop out and end up behind bars.<sup>59</sup>

Researchers find that the frequent use of suspension is not beneficial when it comes to test scores or graduation rates.<sup>60</sup> In fact, a relatively lower use of out-of-school suspensions, after controlling for race and poverty, correlates with higher test scores.<sup>61</sup> An Indiana statewide study was conducted on principals' attitudes.<sup>62</sup> After controlling for race and poverty, the study showed a positive correlation between high-suspending principals and lower student achievement.<sup>63</sup> Suspension, often times, is argued to be a deterrent of future wrongdoing.<sup>64</sup> However, in studies conducted by the Civil Rights Project, many students were suspended two or more times, suggesting the suspensions were not a deterrent.<sup>65</sup>

Research also shows that alternatives to disciplinary exclusion policies can be successfully implemented in schools and districts with a history of high suspension rates.<sup>66</sup> For example, Baltimore public schools have had a long history of relying heavily on suspensions as a disciplinary tactic.<sup>67</sup> When Dr. Andres Alonso became superintendent, he strongly opposed these practices.<sup>68</sup> He implemented new policies leading to suspensions falling from 26,000 to 10,000.<sup>69</sup> During this time, graduation rates in Baltimore rose, once again showing that suspensions do not in fact lead to the positive outcomes that many people argue they do.<sup>70</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Elias, *supra* note 26 at 3.

<sup>59</sup> *Id.*

<sup>60</sup> Losen & Gillespie, *supra* note 49 at 7.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 34.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 14.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

## STUDENTS' CONSTITUTIONAL RIGHTS

After being accused of committing an offense at school, a student's case is heard in one of three different venues: within the school itself, through a juvenile court proceeding, or in an adult criminal court.<sup>71</sup> As the school-to-prison pipeline title suggests, students are being transferred from school disciplinary proceedings to adult criminal court proceedings.<sup>72</sup> A student's constitutional rights, and what sanctions can be imposed, is dependent upon the venue in which the student's case is being tried.<sup>73</sup> Specifically, the school discipline model is rather undefined regarding what rights students are afforded.<sup>74</sup>

Certain constitutional protections are only offered to people within the criminal justice system.<sup>75</sup> For example, the Eighth Amendment's ban on cruel and unusual punishment does not apply to government-imposed treatment for mental illness.<sup>76</sup> The Fifth Amendment's guarantee against self-incrimination and double jeopardy, and the Sixth Amendment's right to a jury trial and the right to counsel, do not apply within the educational discipline setting.<sup>77</sup>

Though the juvenile justice court originally began with a rehabilitative mindset, it has become more retributive since the 1960s.<sup>78</sup> Along with the retributive sentences came more constitutional protections.<sup>79</sup> *In Re Gault* set the precedent for providing constitutional protections to juvenile offenders.<sup>80</sup> The this case, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment grants juveniles the right to receive notice of charges and the ability to confront, cross-examine, and call witnesses.<sup>81</sup> The Court also found that juveniles have a Fifth Amendment right to counsel.<sup>82</sup> In *McKeiver v. Pennsylvania*, however, the Court limited juveniles' rights by holding that juvenile proceedings do not constitutionally require a trial by jury.<sup>83</sup>

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<sup>71</sup> Fahey, *supra* note 7 at 765.

<sup>72</sup> *Id.* at 766.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 768.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 772.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *In re Gault*, 387 U.S. 1, 12-48 (1967).

<sup>82</sup> *Id.*

<sup>83</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

School disciplinary proceedings provide much less guidance and legal framework than juvenile or criminal courts.<sup>84</sup> For much of history, courts have shown a strong aversion to defining the rights of students in public schools.<sup>85</sup> Partly, this is meant to demonstrate deference to the legislative branch of state governments, as school districts and their legal authority exist as grants of state power and are manifestations of a state's right to educate its citizens.<sup>86</sup>

*Tinker v. Des Moines*, in 1969, was arguably the first case to signal a willingness by the Court to forego the deference to the legislative branch.<sup>87</sup> The Court decided public students were entitled to certain First Amendment rights while in school.<sup>88</sup> In *New Jersey v. T.L.O.*, the Court subsequently found that students are entitled to limited Fourth Amendment protections while in school.<sup>89</sup> Both of the cases held that, for constitutional purposes, school officials were state actors.<sup>90</sup> However, the Court has struggled to define the constitutional rights of students with regard to school-imposed sanctions.<sup>91</sup> Two cases in particular express this difficulty: *Goss v. Lopez* and *Ingraham v. Wright*.<sup>92</sup>

The Supreme Court in *Goss v. Lopez* set forth the minimum due process requirements for students facing a short-term suspension.<sup>93</sup> Students facing a temporary suspension have interests qualifying for protection under the Due Process Clause.<sup>94</sup> Due process requires, in connection with a suspension of ten days or less, that the student be given oral or written notice of the charges against him and, if he denies the charges, an explanation of the evidence the authorities have and an opportunity to present his side of the story.<sup>95</sup> A longer suspension, on the other hand, may require more formal procedures.<sup>96</sup>

The Court in *Ingraham* looked at corporal punishment and whether students' Eighth Amendment Rights or Fifth Amendments Rights were vio-

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<sup>84</sup> Fahey, *supra* note 7 at 778.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 765.

<sup>87</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

<sup>88</sup> *Id.*

<sup>89</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985).

<sup>90</sup> Fahey, *supra* note 7 at 778.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 584.

lated.<sup>97</sup> The Court rejected the argument that corporal punishment, as administered in this case, constituted cruel and unusual punishment under the Eighth Amendment.<sup>98</sup> The Court said that the drafters meant for the Eighth Amendment to only apply to criminal punishment.<sup>99</sup> Regarding students' due process rights, the Court held that, since corporal punishment did not constitute a substantial deprivation, as suspension did in *Goss*, property interests were not implicated and due process did not apply.<sup>100</sup>

These two cases show the Court's extreme aversion to interfering with school discipline.<sup>101</sup> In *Goss*, the Court mandated minimal procedures that were almost certainly already in effect, while in *Ingraham*, the Court avoided any insertion of judicial authority into school discipline, despite the somewhat gruesome nature of the injuries.<sup>102</sup> Essentially, courts have provided students with very little protections or rights in the face of the school-to-prison pipeline.<sup>103</sup>

#### LEGISLATIVE RESPONSES TO THE PIPELINE

Many legislative responses have come about since the school-to-prison pipeline was first introduced.<sup>104</sup> The Supportive School Discipline Initiative (the "Initiative") was announced in 2011 by former U.S. Secretary of Education Arne Duncan as a response to the school-to-prison pipeline.<sup>105</sup> The Initiative is a collaborative project between the Departments of Education and Justice to support the use of school discipline practices that foster safe, supportive, and productive learning environments, while also keeping students in school.<sup>106</sup>

The announcement followed the release of the Council of State Government's groundbreaking study of nearly one million Texas students regarding school discipline practices.<sup>107</sup> The study found that nearly six in ten public school students were suspended or expelled at least once between seventh and

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<sup>97</sup> *Ingraham v. Wright*, 430 U.S. 651, 653 (1977).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Fahey, *supra* note 7 at 779.

<sup>103</sup> *Id.*

<sup>104</sup> *Supportive School Discipline Initiative*, U.S. Department of Education 1, 1 (2014).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

twelfth grade; students involved in the school disciplinary system averaged eight suspensions and/or expulsions during their middle or high school years, while fifteen percent of involved students were disciplined eleven or more separate times; students who were suspended or expelled for a discretionary violation were nearly three times as likely to be in contact with the juvenile justice system the following year; black students had a 31 percent higher likelihood of a school discretionary discipline action, compared to white and Hispanic students, and nearly three-quarters of the students who qualified for special education services were suspended or expelled at least once.<sup>108</sup>

The Initiative released joint legal guidance, titled “Rethink Discipline,” to assist public schools and districts in administering student discipline to meet their legal obligations under Title IV and Title VI of the Civil Rights Act of 1964.<sup>109</sup> These provisions of the Civil Rights Act prohibit discrimination on the grounds of race, color, or national origin by schools, law enforcement agencies, and other recipients of federal financial assistance.<sup>110</sup> The Initiative has invested in research and data collection. In January 2014, the Department of Education (“ED”) released a resource guide to state, district, and school officials outlining “principles” for improving school climate and discipline practice.<sup>111</sup> The department released a short Family Educational Rights and Privacy Act of 1974 myth-buster to clarify the circumstances under which schools may share education records with juvenile justice agencies.<sup>112</sup> The Department of Justice has provided financial assistance to the National Council of Juvenile and Family Court Judges to replicate successful school-court partnerships working to reduce referrals to the courts of students for non-serious behavior.<sup>113</sup>

The Civil Rights Project makes several suggestions for federal and state policymakers.<sup>114</sup> These include the following: (1) require states and school districts to annually and publicly report disaggregated data (including unduplicated numbers of students, incident numbers, reasons for out of-school suspensions, and days of lost instruction); (2) include school discipline disparities among school and district accountability measures and step up federal civil rights enforcement to address the large disparities in high-suspending districts;

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Losen & Gillespie, *supra* note 49 at 38.

(3) provide greater support for research on evidence-based and promising interventions and target more funds for the implementation of systemic improvements, as well as for teacher training in classroom management; (4) consider replicating the actions taken to reduce suspensions in several states, such as Maryland; and (5) include classroom-management skills as part of teacher evaluations.<sup>115</sup>

#### DISPARATE IMPACT IN SCHOOLS AND EXECUTIVE GUIDANCE

On January 8, 2014, the Obama Administration issued guidance via a “Dear Colleague” letter to school districts nationwide.<sup>116</sup> This letter spelled out a school discipline policy motivated by a disparate impact theory.<sup>117</sup> For civil rights laws, the test is “different treatment,” meaning that people intentionally discriminated against a particular group.<sup>118</sup> Kenneth L. Marcus headed the Education Department’s civil rights office in 2003 and 2004.<sup>119</sup> He stated that most education cases were brought by the agency under the “different-treatment” rather than “disparate impact” course of action.<sup>120</sup> The Obama Administration’s Dear Colleague letter changed this policy.<sup>121</sup> It warned administrators that they could be subject to a federal civil rights investigation if their data showed significant racial disparities in the use of suspensions or expulsions, and, additionally, they could be found guilty of discrimination even if they had race-neutral discipline policies that were being applied evenhandedly.<sup>122</sup>

Under the disparate impact analysis, three core questions are typically used to determine whether a school’s discipline policy or practice has violated anti-discrimination law because of its disparate impact: (1) Does the policy or practice or method of administration have an adverse and disparate effect on students along the lines of race, disability status, or gender?; (2) Is there a legitimate, nondiscriminatory, need for the policy?; and (3) If so, are there

<sup>115</sup> *Id.*

<sup>116</sup> *Dear Colleague Letter*, U.S. Department of Justice & U.S. Department of Education (January 8, 2014).

<sup>117</sup> *Id.*

<sup>118</sup> Mary Ann Zehr, *Obama Administration Targets ‘Disparate Impact’ of Discipline*, EDUCATION WEEK, 1, 1 (2010).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1, 2.

<sup>121</sup> Michael J. Petrilli, *Why Disparate Impact Theory is a Bad Fit for School Discipline*, EDUCATION NEXT (2018).

<sup>122</sup> *Id.*

equally effective alternatives available that would have a less discriminatory impact?<sup>123</sup>

Disparate impact liability has greatly advanced civil rights in many areas by focusing on consequences, not just motives.<sup>124</sup> As Justice Kennedy remarked in the U.S. Supreme Court case *Texas DHCA v. Inclusive Communities*: “It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment. In this way disparate-impact liability may prevent [discrimination] that might otherwise result from covert and illicit stereotyping.”<sup>125</sup> With our country’s extremely long history of racial discrimination, perpetuating inequality can occur due to implicit bias.<sup>126</sup> Essentially, this is what has occurred in school discipline practices.<sup>127</sup> Disparate impact liability theory is one of the best judicial and legislative tools to combat inequality and racial discrimination.<sup>128</sup> The stated needs for school discipline policies—such as school safety and learning environment—have statistically been shown to be unaffected by the policies.<sup>129</sup> Hence, they would not be allowed to stand under the disparate impact theory.<sup>130</sup>

The 2014 Dear Colleague letter spelled out another example of a school policy that assigned discipline consequences for truancy.<sup>131</sup> The example looked at the disparate impact Asian-American students face in regards to truancy.<sup>132</sup> It was found that Asian-American students tend to live farther away and are dependent on public transit, oftentimes resulting in arriving late to school.<sup>133</sup> The school, in its defense, asserts a legitimate goal of encouraging good attendance.<sup>134</sup>

Under a disparate impact analysis, the investigation into the truancy policies would then consider whether the policy was reasonably likely to achieve the goal of reducing tardiness and whether there are available alternatives, such as aligning class and bus schedules or excusing tardiness due to bus delays, that

<sup>123</sup> Losen & Gillespie, *supra* note 49 at 34-35.

<sup>124</sup> Sarah Hinger, *Why Trump’s Effort to Eliminate Disparate Impact Rules is a Terrible Idea*, ACLU (January 9, 2019).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

would further good attendance without producing a disparate impact.<sup>135</sup> In scenarios such as this, removing unfair and unnecessary barriers to education furthers equal opportunity.<sup>136</sup> Ignoring them creates an unequal playing field for some schoolchildren.<sup>137</sup> To the detriment of our nation's schoolchildren, however, the Education Department will no longer be doing these types of analyses.<sup>138</sup>

The policy the Department of Education has followed since 2014 to combat the school-to-prison pipeline has recently been rescinded by the Trump Administration.<sup>139</sup> Following a mass shooting in Parkland, Florida, the Trump Administration established the Federal Commission on School Safety.<sup>140</sup> The commission issued recommendations reversing federal guidelines intended to address the racial disparities in school discipline.<sup>141</sup> This could be extremely detrimental to any progress that has been made surrounding the school-to-prison pipeline in the recent past.<sup>142</sup>

#### CONCLUSION

Dialogue surrounding the statistics and the true effects of discriminatory discipline practices in schools needs to continue in order to inform the public.<sup>143</sup> Legislative and executive support for fixing the school-to-prison pipeline may or may not continue. It is time for the judiciary to step in and protect the civil rights of students within our schools, before they are removed from schools and sent into the juvenile or criminal justice system.<sup>144</sup> Justice Lucero's concurrence in *Hawker v. Sandy City Corp.*, a 2014 Tenth Circuit Court of Appeals case, sets forth the change the judiciary needs to take in changing the effects of the school-to-prison pipeline.<sup>145</sup> He states, "The criminal punishment of young schoolchildren leaves permanent scars and unresolved anger, and its far-reaching impact on the abilities of these children to lead future prosperous and productive lives should be a matter of grave concern for us

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1244 (10th Cir. 2014).

<sup>145</sup> *Id.*

all.”<sup>146</sup> Justice Lucero recognizes that the legislature and early and positive intervention by family and educators will best realign an elementary school child’s errant behavior and most likely lead to a productive life.<sup>147</sup> However, Justice Lucero also notes that present jurisprudence is sending the wrong message to schools, making it far too easy for educators to delegate and shift the disciplinary responsibility from them to the police and courts.<sup>148</sup> As *Brown v. Board of Education* stated sixty-five years ago, and which still rings true today, “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>149</sup> As *Brown* taught us, the judiciary can be an essential tool in ameliorating the barriers to education for our children and grandchildren.<sup>150</sup>

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<sup>146</sup> *Id.* at 1243

<sup>147</sup> *Id.*

<sup>148</sup> Hawker *supra* note 147 at 1243.

<sup>149</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>150</sup> *Id.*