# From Injustice at School to Justice in Court: Seeking Litigation Approaches to Challenge Racial Disparities in School Discipline

M. BRAXTON MARCELA[†]

## INTRODUCTION

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone…We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.
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> —*Brown v. Board of Education of Topeka, Shawnee City, Kansas*[1]

Few legal questions have risen to the severity of the moment that Chief Justice Warren faced in the 1954 case of *Brown v. Board of Education*, in which a unanimous court held that racial segregation in public education violated the United States Constitution.[2] The Court would continue to struggle for the next half century, and continues to struggle into the present day, to define the judiciary's role in ensuring equitable school makeup and permissible judicial responses to the enduring problems of race discrimination in public education.[3] Both segregation of public schools and discrimination within public schools, in addition to being regularly addressed by the courts, were addressed by Congress in Titles IV and VI of the Civil Rights Act of 1964.[4] This paper addresses a contemporary educational dilemma that divides students from their peers and limits

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[†] M. Braxton Marcela is a 2017 graduate of the American University Washington College of Law, originally from North Carolina.

[1] Brown v. Board of Education, 347 U.S. 483, at 494–95 (1954).

[2] *See generally id.*

[3] *See generally* Kamina Aliya Pinder, *Reconciling Race-Neutral Strategies and Race-Conscious Objectives: The Potential Resurgence of the Structural Injunction in Education Litigation,* 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 247 (2013).

[4] 42 U.S.C. §§ 2000c-2000d (2012).

educational opportunity, and has done so increasingly along the lines of students' race: student discipline policies and their implementation. While there exists a plethora of legal issues and commentary on student discipline,[5] this paper focuses on strategies to challenge schools' discipline policies in federal courts[6] when these policies encroach on students' civil rights. Specifically, this paper addresses the challenges private plaintiffs face when challenging discrimination in school discipline under Title VI and successful litigation strategies used by the United States Department of Justice, Civil Rights Division, Educational Opportunities Section (hereinafter referred to, in short, as the "DOJ Civil Rights Division") and the Department of Education, Office of Civil Rights (hereinafter referred to as "DOE Office of Civil Rights") under both Title IV and Title VI.[7] Part I of this paper introduces the problem and presents data on student discipline and the constitutional ramifications; Part II outlines the existing civil rights framework and the Departments' interpretation of the framework as applied to school discipline; Part III evaluates public litigation by the Civil Rights Division; Part IV discusses the pathway for private parties to bring civil rights actions against school districts for racially discriminant discipline policies; Part V discusses remedies; and Part VI briefly discusses further research and next steps for parties seeking to challenge school discipline.

[5] *See generally* James C. Hanks, *School Violence: Discipline to Due Process,* 2005 A.B.A. SEC. STATE & LOCAL GOV'T LAW 1.

[6] This paper focuses on federal causes of action under federal civil rights protections, yet it does not address civil rights protections in state laws that go further than federal protections or state courts' precedent that extends protection beyond that federal courts' precedent.

[7] This paper's discussion of private plaintiff suits will focus on Title VI. Title IV provides a private cause of action under 42 U.S.C. § 2000c-8 (2012), which will briefly be discussed, and the Department of Justice, Civil Rights Division has utilized private intervenors in various school desegregation actions. Although it will be briefly discussed, applying Title IV and the school desegregation progeny to school discipline would likely require a separate study. However, the Title VI framework poses a more difficult and intricate quandary for private plaintiffs, which will be the subject of this paper.

## PART I

### *A. Students of Color are Disproportionately Affected by Student Discipline Policies and their Implementation*

According to the Civil Rights Data Collection (CRDC), a project of the DOE Office of Civil Rights under the mandate of Titles IV and VI, students of color are significantly more likely to be disciplined in schools than their white peers.[8] Non-disabled African-American students are roughly three times more likely than non-disabled white students to be suspended or expelled.[9] African-Americans make up 15% of CRDC's sample population, but 35% of students suspended once, 44% of students suspended twice, and 36% of students expelled.[10] American Indian and Native-Alaskan students are also disproportionately suspended and expelled, representing less than 1% of the student population, but 2% of out-of-school suspensions and 3% of expulsions. The CRDC data also shows that of their sampling of students referred to law enforcement for offenses at school, half were either African-American or Hispanic.[11] These disparities exist despite a lack of evidence to suggest that students of color commit more infractions or violations of disciplinary policies.[12] In addition to the data, investigations by the DOJ Civil Rights Division and DOE Office of Civil Rights that schools have enforced their disciplinary policies in an aggressive manner that has most adversely affected students of color, and while not a sole indicator, this gives rise to pervasive concerns about violations of students' rights under Title IV and Title VI.

### *B. School Discipline Policies Adversely Affect Students' Civil Rights and Due Process Interests*

From a civil rights and due process standpoint, school discipline is emerging as a key area of concern. Certain punishments attached to student discipline, particularly exclusionary punishments (suspension and expulsion) and referrals to school resource officers, have long-term consequences for students, such as lost class time and involvement in the

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[8] U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline, at 3–4 (Jan. 8, 2014).

[9] *Id.* at 3; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (Mar. 2014) ("Black students are suspended and expelled at a rate three times greater than white students. On average, 5% of white students are suspended, compared to 16% of black students. American Indian and Native-Alaskan students are also disproportionately suspended and expelled, representing less than 1% of the student population but 2% of out-of- school suspensions and 3% of expulsions.").

[10] U.S. Dep't of Justice, *supra* note 8, at 3.

[11] *Id.* at 3–4.

[12] *Id.* at 4.

juvenile justice system.[13] These severe consequences heighten the need for student discipline polices to be administered in accordance with students' civil rights. Further, because public education is a constitutionally protected property and liberty interest being both mandatory and provided by the government, restricting access or excluding a student from accessing it entirely requires due process protections.[14] Courts have also held that students' due process rights are vital interests because of the potential harm to a student's reputation and difficulties after graduation.[15]

### *C. Department of Justice/Department of Education Joint Guidance*

In 2014, the Department of Justice, Civil Rights Division, Educational Opportunities Section and the Department of Education, Office of Civil Rights, in acknowledging school discipline as a key matter of students' rights, issued "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline."[16] Particularly, the guidance was issued to summarize schools' obligations to avoid and redress racial discrimination in the administration of student discipline and explain the "Departments' investigative process under Title IV and Title VI, including the legal framework within which the Departments consider allegations of racially discriminatory student discipline practices, and examples of school disciplinary policies and practices that may violate civil rights laws."[17] It further outlines the legal civil rights standards and burdens of proof under the Title IV and Title VI framework.[18]

## PART II: CIVIL RIGHTS OVERVIEW

Title IV and Title VI prohibit racial and ethnic discrimination in schools and federally-funded entities.[19] Both the statute and the case law envision two distinct manners of discrimination that, although both impermissible, carry different elements and different pleading standards for plaintiffs asserting discrimination: intentional discrimination and disparate impact. Intentional discrimination occurs most blatantly when a policy includes explicit language that calls for discriminating against a racial, religious,

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[13] U.S. Dep't of Justice, *supra* note 8, at 4–5 ("Studies have suggested a correlation between exclusionary discipline policies and practices and an array of serious educational, economic, and social problems, including school avoidance and diminished educational engagement; decreased academic achievement; increased behavior problems; increased likelihood of dropping out; substance abuse; and involvement with juvenile justice systems.").

[14] Hanks, *supra* note 5, at s.7.A (citing Goss v. Lopez, 419 U.S. 565, 572–74 (1975)).

[15] *Id.* at 7.B (citing C.B. v. Driscoll, 82 F.2d 383 (11th Cir. 1996)).

[16] U.S. Dep't of Justice, *supra* note 8.

[17] *Id.* at 5.

[18] *Id.* at 6.

[19] 42 U.S.C. §§ 2000c-2000d.

ethnic, or gender group.[20] Intentional discrimination may also be shown, however, when evidence can establish that a facially neutral policy was intentionally administered in a racially discriminant manner.[21] While a "smoking gun" is not necessary, plaintiffs must show evidence to manifest a purposeful and knowing intent to discriminate against a protected class.[22] In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[23] the Court held that intent could be shown by circumstantial factors.[24] Disparate impact discrimination has a more tenuous legal precedent than intentional discrimination, having first emerged in the 1886 case of *Yick Wo v. Hopkins*,[25] in which the Court held that a San Francisco ordinance prohibiting operating private laundry businesses without permission from the local Board of Supervisors violated Chinese immigrant plaintiffs' rights under the Equal Protection Clause because it had a disproportionate impact on Chinese immigrants.[26] In *Washington v. Davis*, the Court pulled back on *Yick Wo* by holding that disparate impact alone will not make a statute or policy unconstitutional unless there is proof that the disparate impact was deliberate.[27] The Court has a long line of cases holding that agencies' prohibition of disparate impact discrimination is "reasonably related" to the purpose of Title VI and within the scope of agencies' authorities.[28] The Court later upheld this reading in the seminal case of *Guardians Association v. Civil Service Commission of City of New York*.[29] Despite this longstanding precedent, the Court has simultaneously expressed skepticism of disparate impact regulation under Title VI.[30] The Court acted on this skepticism in *Alexander v. Sandoval*,[31] in which it held that private plaintiffs did not have a cause of action under the Civil Rights Act. Although

[20] *Id.*; *see generally* Vill. of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[21] 42 U.S.C. §§ 2000c-2000d.

[22] *Id.*

[23] *Arlington Heights*, 429 U.S. 252.

[24] *Id.* at 265–68 (allowing various factors related to as history and context involving the creation of a policy).

[25] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.").

[26] *Id.*

[27] *See generally Washington*, 426 U.S. 229.

[28] *See generally* Lau v. Nichols, 414 U.S. 563, 571 (1974) (White, J. concurring).

[29] Guardians Assn. v. Civil Svc. Comm'n, 463 U.S. 582, 592 (1983) ("The language of Title VI on its face is ambiguous; the word "discrimination" is inherently so. It is surely subject to the construction given the anti-discrimination proscription of Title VII…at least to the extent of permitting, if not requiring, regulations that reach disparate-impact discrimination.").

[30] Bradford C. Monk, Are Title VI's Disparate Impact Regulations Valid, 71 U. CIN. L. REV 517 (2002).

[31] Alexander v. Sandoval, 532 U.S. 275 (2001).

*Sandoval* did not entirely eliminate disparate impact regulations or public enforcement actions based on disparate impact, it gutted private parties' abilities to vindicate civil rights interests absent a showing of intentional discrimination.[32] While both Justice Scalia, concurring, and Justice Stevens, dissenting, offered dicta presenting opposite views on disparate impact regulations and enforcement, the public cause of action still remains, yet the debate will likely continue.[33]

The framework outlined above presents various challenges and opportunities for civil rights advocates seeking to redress discriminatory school discipline polices. Particularly, because of *Sandoval*, the Department of Justice in an enforcement action is on stronger legal footing than a parent or student private party in a civil rights lawsuit. Particularly, without a "smoking gun" to show discriminatory purpose, intentional discrimination can be a very difficult bar for private plaintiffs to meet. Based on the Department of Justice–Department of Education's recent "Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline" (hereinafter referred to as "Departments' guidance"), however, private parties have a clear framework upon which to build a claim for intentional discrimination. Additionally, the DOJ Civil Rights Division and the DOE Office of Civil Rights can continue an emerging pattern of successful strategies of public litigation to redress such discrimination.

### *A. Civil Rights Framework in School Discipline Under Departments' Guidance*

The student discipline process is often routine. A teacher, guidance counselor, or principal witnesses a student commit a disciplinary violation and then refers the student to the principal's office where the student is told what charge is against him and is given a chance to explain himself. Then, after amount of investigation and discussion, the principal renders a punishment consistent with school policy or practice due process rights attach the minute the offense is observed and throughout the execution of the punishment.[34] 34' guidance adopts the same interpretation regarding students' protections under the Civil Rights Act.'s behavior is referred to administrators based solely on their race, or if administrators base their investigations of students on racial discrimination guidance, in addition to being clear on at what point Title VI attaches to the discipline process, also lays out the definitions of intentional discrimination and disparate impact discrimination and how they relate to school discipline.

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[32] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[33] *Id.*
[34] Hanks, *supra* note 5.

### *B. Disparate Impact in the School Discipline Context Under the Departments' Guidance*

According the Departments' guidance, disparate impact occurs in schools when a school or school district evenhandedly implements a facially neutral policy that has an unjustified effect of discriminating against students based on race, regardless of the intent.[35] In reviewing whether there is a disparate impact resulting from a policy The Departments consider: (a) whether there is an disproportionately adverse impact on students of a particular race; (b) whether the discipline policy is necessary to serve a pedagogical or educational purpose; and (c) whether there are comparably effective policies that can meet the same educational goal with less of a burden or impact on the racially affected group.[36] The Departments cite examples such as mandatory suspension or citation for certain infractions, policies prohibiting students from returning to school after alternative placements or involvement with the juvenile justice system, corporal punishment, and mandatory out-of-school suspensions for truancy.[37] Under the Departments' guidance, upon a showing of disparate impact discrimination, the school district must show that the policy is necessary for a pedagogical interest and that there are no less burdensome policies that can serve that interest.

### *C. Intentional Discrimination in the School Discipline Under the Departments' Guidance*

The Departments' state that intentional discrimination, in the Title VI context, occurs when similarly situated students are treated differently by school administrators.[38] The clearest case of intentional discrimination would be an explicitly stated school policy that proscribes different outcomes for students of different races.[39] Particularly, the Department cites administrators using racial slurs or racial terms in their statements as direct evidence of intentional discrimination,[40] but they also indicate that if two similarly situated students of different racial backgrounds[41] are disciplined differently for the same offense, the Department will infer intentional racial discrimination.[42] The inference of intentional discrimination must then be

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[35] U.S. Dep't of Justice, *supra* note 8, at 11.

[36] *Id.*

[37] *Id.* at 11–13.

[38] *Id.* at 7.

[39] *Id.*

[40] *Id.* at 8.

[41] U.S. Dep't of Justice, *supra* note 8, at 7 ("students are similarly situated when they are comparable, even if not identical, in relevant respects.").

[42] *Id.* ("For example, assume a group of Asian-American and Native-American students, none of whom had ever engaged in or previously been disciplined for misconduct, got into a fight, and the school conducted an investigation. If the school could not determine how the fight began and had no

refuted by a race-neutral explanation that is not pre-textual to race discrimination.[43]

In addition to different treatment of similarly situated students, the Departments further state that a school engages in racial discrimination when it administers a racially-neutral policy in an overly aggressive manner that adversely impacts students of color more than others.[44] Particularly, if administrators, in investigating and enforcing a racially-neutral policy, discipline only black or Latino students for the offense, yet do not discipline white students who commit the same offense, intentional discrimination is likely occurring.[45] The Departments also state that a school may be intentionally discriminating against students when adopting a policy specifically designed to target students of a particular race, even if it is race-neutral and applied in a race-neutral manner.[46] Based on the statistics of students disciplined by a policy and the context surrounding the policy, the Departments will infer a discriminatory intent. [47] The Departments view the totality of the evidence, both direct and circumstantial to determine whether the discipline polices constitute intentional discrimination.[48] Particularly of interest for private parties seeking to sue to redress discrimination, the Departments consider circumstantial evidence, such as the impact of a policy on different racial groups, breakdown of students punished under a policy, a school's history of racial discrimination, context or history surrounding administrators' adoption of a particular policy, and consistency of

information demonstrating that students behaved differently during the fight, *e.g.*, one group used weapons, then the school's decision to discipline the Asian-American students more harshly than the Native-American students would raise an inference of intentional discrimination.").

[43] *Id.* at 9 (stating that in the school discipline context, determining pretext requires asking questions such as whether "the asserted reason does not explain the school's actions; witnesses contradict the school's stated reason for the disparity, exposing such reason as false; students of other races have received different sanctions for similar instances of misbehavior; or the sanctions imposed do not conform to the school's permitted discipline sanctions in its written discipline policy.").

[44] *Id.* at 7 ("[I]ntentional discrimination occurs when a school has a discipline policy that is neutral on its face (meaning the language of the policy does not explicitly differentiate between students based on their race), but the school administers the policy in a discriminatory manner or when a school permits the *ad hoc* and discriminatory discipline of students in areas that its policy does not fully address.").

[45] *Id.* at 7–8 ("The Departments often receive complaints from parents that a teacher only refers students of a particular race outside of the classroom from discipline, even though students of other races in that classroom commit the same infractions. Where this is true, there has been selective enforcement, even if an administrator issues the same consequences for all students referred for discipline.").

[46] *Id.* at 8 ("For example, if school officials believed that students of a particular race were likely to wear a particular style of clothing, and then, as a means of penalizing students of that race (as opposed to as a means of advancing a legitimate school objective), adopted a policy that made wearing that style of clothing a violation of the dress code, the policy would constitute unlawful intentional discrimination." (citing Hunter v. Underwood, 471 U.S. 222, 227, 231–32 (1985)).

[47] U.S. Dep't of Justice, *supra* note 8, at 8 n.18 (citing Hunter v. Underwood, 471 U.S. 222, 227, 231–32 (1985)).

[48] *Id.* at 8.

administrators' enforcement of the policy, in determining whether intentional discrimination can be inferred and the Department will move to eliciting the school's explanation.[49]

The Departments' applications of the civil rights framework offer a model to further federal government litigation related to racially disparate school discipline and, based on its interpretation of intentional discrimination, can offer private parties a strategy to build a claim of intentional discrimination.

## PART III: PUBLIC CAUSE OF ACTION

Before discussing the route that a private plaintiff would follow to challenge school discipline policies, it is instructive to analyze the Department of Justice's successful public litigation and investigations on the issue, especially as the Departments' guidance likely flows from the Departments' litigating experience. The Department of Justice is responsible for enforcing the provisions of the Civil Rights Act, including Title IV and Title VI.[50] The Department of Justice, Educational Opportunities Division actively coordinates their enforcement actions and investigations with the Department of Education, Office of Civil Rights.[51] The Department has used litigation to enforce Title IV, Title VI, and other civil rights legislation related to public education.[52] The Departments investigate, and may file suit, based on parent and student complaints filed with the Office of Civil Rights, as well as public reports and other information the Departments may come across in the course of their monitoring of civil rights issues in schools.[53] The first case that the Department of Justice reports regarding school discipline disparities was settled with a consent order in 2002,[54] and the most recent action being an out-of-court settlement, in lieu of litigation, in 2017.[55] The Department of Justice reports fifteen cases or settlements between 2002 and 2017 on the subject of racial discrimination in school discipline.[56]

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[49] *Id.* at 9 (citing *Arlington Heights*, 429 U.S. at 265–68 (setting out different circumstantial factors to show discrimination)).

[50] *See generally* 42 U.S.C. §§ 2000(c)-(d) *et seq.*; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, ABOUT THE DIVISION: EDUCATIONAL OPPORTUNITIES SECTION, https://www.justice.gov/crt/educational-opportunities-section (last visited Oct. 22, 2017).

[51] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, ABOUT THE DIVISION: EDUCATIONAL OPPORTUNITIES SECTION, https://www.justice.gov/crt/educational-opportunities-section (last visited Oct. 22, 2017).

[52] *Id.*

[53] U.S. Dep't of Justice, *supra* note 8, at 2.

[54] Coppedge v. Franklin Cty. Bd. of Educ., Civil Action No. 1796, (E.D. N.C. 2002), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/franklinor2.pdf.

[55] Settlement Agreement between the United States of America and Covington Independent School Public Schools, available at https://www.justice.gov/crt/case-document/file/928961/download. *Case Summaries*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/case-summaries (last visited Oct. 22, 2017) [hereinafter *Case Summaries*].

### *A. Intersection of School Segregation and School Discipline in DOJ Enforcement Litigation*

As previously discussed, there is a line of precedent supporting the notion that racial disparities in school discipline are a lingering "vestige" of *de jure* segregation in schools.[57] As *Green* and *Brinkman* made clear, a reviewing court must look to all facets of school administration to determine whether an embattled district is complying with its obligations under a desegregation order.[58] Under a school's obligation to desegregate and become a "unitary" district, they bear the burden of showing a plan that can "reasonably work" to achieve "meaningful and immediate progress toward disestablishing state-imposed segregation."[59] As of 2014, there were over three hundred outstanding desegregation orders across the United States.[60] Although many of these orders are now decades old, they have provided the Departments with an avenue for opening an investigation into a school district, and in many cases, have prompted the Department to take legal action and produce new consent decrees or settlement agreements.[61] Many of the investigations stemming from recent follow-ups on decades-old orders, which include talking with parents, teachers, and students, have led investigators specifically to disciplinary disparities, while other investigations have only briefly noted the issue and alluded to it as part of the larger consent order seeking to resolve the desegregation and create a unitary district.[62] In this sense, the Departments have been able to intersect their duties to ensure compliance with desegregation orders and to enforce Title IV and Title VI as it relates to school discipline.

The first case of this nature was the *Coppedge v. Franklin County Board of Education* in 2003, in which the consent decree reached by the parties merely stated that the District would review data to ensure nondiscriminatory applications of school disciplinary procedures.[63] A more robust application of this intersection can be seen in the DOJ, Civil Rights Division, Educational Opportunities Section's litigation in *Barnhardt v. Meridian Municipal School District*, in which the Department, when investigating a Mississippi school district's compliance with a desegregation order entered in 1969, discovered in 2008 that the district had imposed a

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[57] *See generally infra* Part IV.

[58] *See generally infra* Part IV.

[59] *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 439 (1968).

[60] YUE QUI & NIKOLE HANNAH-JONES, PROPUBLICA, A NATIONAL SURVEY OF SCHOOL DESEGREGATION ORDERS (2014), http://projects.propublica.org/graphics/desegregation-orders.

[61] *Case Summaries*, *supra* note 58; *see e.g.* Memorandum of Law in Support of Joint Motion to Approve Proposed Consent Order, *Barnhardt v. Meridian Mun. Sch. Dist.*, Civil Action No. 4:65-cv-01300-HTW-LRA 1300(E) (E.D. Miss. 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/30/meridianconsentdecree.pdf [herinafter *Memorandum*].

[62] *Memorandum*, *supra* note 64, at 2.

[63] Coppedge v. Franklin Cty. Bd. of Ed,, Civil Action No. 1796 (E.D.N.C. June 25, 2002), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/franklinor2.pdf.

very harsh and punitive school discipline policy that resulted in disproportionate suspension, expulsion, and arrest of black students, at a rate much disproportionate to other similarly situated students, largely for minor offenses.[64] The Department continued to investigate through 2012, and in 2013 entered a new consent decree with the district to correct the disparities and bring their discipline framework in accordance with the Departments' vision of Title VI and Title IV.

This particular litigation strategy has been common to the Department's approach to redressing discriminatory discipline policies in schools. Of the fourteen cases or matters that the Department of Justice lists as its prior work on racial disparities in school discipline, ten involved a prior desegregation order or longtime pending case.[65] Some particular cases involved long and drawn out orders in response to the Departments observing racial disparities in school discipline, among other obligations under Title IV,[66] while other cases, especially earlier cases, merely packaged a brief textual obligation to review and correct disciplinary processes.[67]

### *B. Departments' Use of Settlement Agreements to Resolve a Finding of Discrimination Without Litigation*

In addition to the aforementioned cases where the Department has litigated pursuant to a prior desegregation order, the Department has, on occasion, undertaken investigations into districts for discrimination in their discipline policies, and in four cited cases, has reached settlement agreements in lieu of litigation.[68] The Department have a process for

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[64] *Memorandum*, *supra* note 64, at 2–3.

[65] *Case Summaries*, *supra* note 58.

[66] *Id. See, e.g.*, United States v. Bd. of Educ. of Hendry Cty., Case No.70-1069 (S.D. Fla. Jan. 13, 2017), https://www.justice.gov/crt/case-document/file/930941/download; *Memorandum*, *supra* note 64; United States v. Cotton Plant Sch. Dist. #1, Case No. 2:70-CV-00010 BSM (E.D. Ark. Dec. 7, 2016), https://www.justice.gov/crt/case-document/united-states-v-cotton-plant-school-district-1-watson-chapel-school-district24; Thomas v. St. Martin Par. Sch. Dist., Civil Action No. 6:65-cv-11314 (W.D. La. July 3, 2016), https://www.justice.gov/crt/case-document/file/924216/download; Lee v. Macon Cty. Bd. of Educ., Civil Action No. 70-S0251-S (S.D. Ala. Feb. 12, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/04/10/mcalhounconsent.pdf; Hereford v. Huntsville Bd. of Educ., No. 5:63-cv-00109-MHH (N.D. Ala. Apr. 24, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/huntsvilleconsentorder.pdf.

[67] *Case Summaries supra* note 58; *see e.g.*, United States v. Avoyelles Par. Sch. Bd., Civil Action No. 1:65-cv-12721 (W.D. La. May 21, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/avoyellesconsentorder.pdf; United States v. Georgia, Case Number CV 3009 (S.D. Ga. Mar. 25, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/10/25/mcduffiecsd.pdf; United States v. Bd. of Educ. of the City of Chi., 80 C 5124 (N.D. Ill. Mar. 1, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/cpsor1%20%282%29.pdf; Coppedge v. Franklin Cty. Bd. of Educ., Civil Action No. 1796 (E.D. N.C. June 25, 2002), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/franklinor2.pdf.

[68] *Case Summaries supra* note 58; *e.g.* Settlement Agreement Between the United States and Wicomico County Public Schools (Jan. 23, 2017), https://www.justice.gov/crt/case-document/wicomico-county-public-school-district-settlement-agreement; Settlement Agreement between The

submission of civil rights complaints,[69] which may come from students, parents, teachers, and other interested parties. Upon receiving and reviewing these complaints, the Departments will meet with interested parties, including the complainant, students, parents, community members, school administrators, teachers, and others familiar with the issue.[70] The investigations may even be triggered by a school's reaction to certain events and the fallout that ensues.[71] Upon finding that the school district is not in accordance with its duties under the Civil Rights Act, the Department of Justice will give the opportunity for the school to settle or will initiate an enforcement action. School district have been willing to settle claims and work with the Departments to avoid protracted litigation.[72]

This particular strategy offers the Department an opportunity to make significant headway into resolving disciplinary disparities, even without a prior desegregation order or having to initiate enforcement litigation. The settlement agreements that the Department has entered into have been thorough and comprehensive, including securing commitments on revising the language and scope of school discipline codes, hiring new staff to oversee discipline strategies, training and orienting staff on positive behavioral intervention approaches, and collecting and reviewing data on suspensions, expulsions, referrals, etc.[73] In fact, these agreements are very similar to consent decrees and consent orders that the Departments have negotiated and courts have entered in cases that the Departments initiated pursuant to longstanding desegregation cases or outstanding consent

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United States of America and Covington Independent Public Schools (Jan. 18, 2017), https://www.justice.gov/crt/case-document/file/928961/download; Agreement Between The United States of America and The School District of Palm Beach County (Feb. 26, 2013), https://www.justice.gov/iso/opa/resources/442201322616361724384.pdf; Resolution Agreement #05-10-1148 Independent School District #761, Owatonna (Apr. 12, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/02/owatonnasignagree.pdf.

[69] *How to File a Complaint*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/how-file-complaint#three (last visited Nov. 18, 2017); *How to File a Discrimination Complaint with the Office for Civil Rights*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/howto.html (last visited Nov. 18, 2017).

[70] *See generally Case Summaries supra* note 58; *see, e.g.*, United States v. Avoyelles Par. Sch. Bd., Civil Action No. 1:65-cv-12721 (W.D. La. May 21, 2015), https://www.justice.gov/sites/default/files/crt/legacy/2015/07/13/avoyellesconsentorder.pdf; United States v. Georgia, Case Number CV 3009 (S.D. Ga. Mar. 25, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/10/25/mcduffiecsd.pdf; United States v. Bd. of Educ. of the City of Chi., 80 C 5124 (N.D. Ill. Mar. 1, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/cpsor1%20%282%29.pdf; Coppedge v. United States, Civil Action No. 1796 (E.D. N.C. June 25, 200), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/franklinor2.pdf.

[71] *E.g.*, Resolution Agreement #05-10-1148 Independent School District #761, Owatonna, *supra* note 68 (Departments investigated and negotiated a settlement agreement with the district after the fallout from a major on-campus fight between Somali-American students and white students, and discovered that the white students have been disciplined less stringently than the Somali students, which parents and community members said was a common theme to the District's policies).

[72] *See generally supra* note 70.

[73] *See generally id.*

orders.[74] Among the cases cited, none of the actual cases resulted in an investigation solely for discipline disparities outside of the context of an existing desegregation case. However, most of the settlement agreements cited by the Department did originate from the complaint and investigation process.

### *C. The Departments' Experience Pursuing New School Discipline Litigation*

The Departments' experience in litigating and negotiating with districts over discriminatory discipline polices, either as a complaint-initiated investigation or an investigation subsequent to an outstanding desegregation order, provides the Departments a model approach to continuing litigation to blunt the rise of this issue in public education. Using the investigatory abilities under an old desegregation order provide a particularly useful tool for gathering information and access to a school system, as well as providing access to existing court supervision. Further, the claim that the school district's disciplinary disparities are a vestige of segregation is likely to be less tenuous when the district has been under decades-long court supervision for failure to become a unitary district. Additionally, as shown by the volume and depth of the consent decrees that have been secured through this avenue of litigation, school districts under a desegregation order, because of the longstanding and coercive nature of the Department' enforcement authority in the desegregation arena, have agreed to broad and far-reaching changes to their discipline policies and practices.[75]

In addition to continuing to pursue litigation following up on outstanding desegregation orders, the Department of Justice should also begin to investigate, and if necessary, bring enforcement actions against districts for discrimination in school discipline as an independent basis for a claim under Title IV and Title VI. As stated above, the Department still maintains a cause of action for disparate impact under Title VI; therefore, it does not face as high a hurdle as a private party seeking redress for discrimination in school discipline. Particularly, the DOJ can lead on challenging such discipline in districts where its own guidance would not envision an inference of intent, but nonetheless sees wide racial disparities suggesting disparate impact discrimination. The Department has investigated districts for school discipline, independent of other education civil rights issues, on four separate occasions and has negotiated broad and comprehensive settlement agreements in each of these cases. The Departments' approach to this issue evidenced in past litigation and settlements is exactly the approach envisioned and advocated by this study.

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[74] *See generally* Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71; *cf. Memorandum*, *supra* note 64.

[75] *See infra* Part V.

In order to make further substantial and noticeable progress, the Department of Justice should continue to vigorously pursue both avenues of litigation that have yielded success in redressing disciplinary discrimination. Doing so would be both consistent with the Department's prior experience from almost two decades of litigation on the subject, and would be consistent with the Departments' guidance on the issue.

## PART IV: THE CHALLENGE FOR PRIVATE PLAINTIFFS AND GETTING INTO COURT

A basic private claim involving school discipline would be an aggrieved parent of a suspended student suing the school or the school system to challenge a suspension that she alleges was the product of racial discrimination. If a parent has direct proof of intentional discrimination, this case would be routine and unquestioned.[76] However, as the Departments state, this is often not the case and most discrimination occurs with policies that are race-neutral.[77] In such cases, racial intent can be hard to prove, especially if intent is not inferred. Under the traditional civil rights framework, it is foreseeable that a race-neutral school discipline policy with stark racial disparities in punishments could support a disparate impact claim. However, the Court's holding in *Sandoval* leaves a hypothetical aggrieved parent without a cause of action under Title VI; therefore, the courtroom door is closed absent a showing of intentional discrimination.[78]

### *A. The Departments' Interpretation Clarifies Plaintiffs' Ability to Show Intentional Discrimination in the Context of School Discipline*

The difficulty of showing intentional discrimination will limit options that parents have to redress racial discrimination in discipline policies. Courts have stated generally that racially discriminatory intent has to be particularly and specifically proven under the Civil Rights Act.[79] In fact, many advocates have claimed that Title VI post-*Sandoval* will continually offer private plaintiffs an ineffective remedy for school discipline discrimination because of the unavailability of disparate impact claims and the difficult burden of showing intentional discrimination.[80] However, the

[76] U.S. Dep't of Justice, *supra* note 8, at 7 ("The clearest case of intentional discrimination would be a policy that was discriminatory on its face: one that included explicit language requiring that students of one race be disciplined differently from students of another race, or that only students of a particular race be subject to disciplinary action.").

[77] *Id.*

[78] *See* discussion and cases *supra* Part II.

[79] *See generally* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (7th Cir. 1977); Washington v. Davis, 426 U.S. 229 (1976).

[80] *See generally* Russell J. Skiba et. al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54. N.Y.L. SCH. L. REV. 1071 (2010).

Departments' guidance does not make such concession. Rather, the guidance applies *Arlington Heights* to specifically state circumstantial factors in the school discipline context that would support an inference of intentional discrimination sufficient to assert a private cause of action under Title VI.[81] This interpretation would be particularly helpful to private parties challenging holistic and historical racial disparities in school discipline, yet simultaneously lacking any direct indicia of an administrators' racial intent. This interpretation will be helpful to private parties, as courts have expressed some skepticism to private parties applying the circumstantial evidentiary factors to school discipline.[82]

Because the Departments interpret *Arlington Heights* to allow statistics on racial impact of a policy to form an inference of intent, when coupled with historical factors on a school and its administration, it expands the scope of intentional discrimination to encompass claims courts have normally viewed as disparate impact. Under the Departments' interpretation, a parent seeking to sue a school under Title VI could convert an ordinarily disparate impact claim into an intentional discrimination claim by inferring the discriminatory intent based on the *Arlington Heights* framework as specifically applied to school discipline in the guidance. This litigation strategy will enhance the parent's litigating position because courts have been generally skeptical of statistics-based claims in past litigation.[83] Some courts have even declined to find intentional discrimination when confronted even with claims of similarly situated students being treated differently for the same violations of a disciplinary code.[84] However, under the Departments' guidance, a court would be bound to find intentional discrimination in a case of differential treatment.[85] Further, the guidance's application of the *Arlington Heights* framework will be especially helpful in challenging policies in districts with long histories of racial discrimination and segregation, as such histories have not generally moved courts to find intentional discrimination in past cases.[86] A binding interpretation of Title

[81] U.S. Dep't of Justice, *supra* note 8, at 9 ([T]he Departments may also consider other circumstantial evidence to determine whether there was discriminatory intent underlying a school's administration if discipline. Such circumstance evidence may include, but is not limited to, whether the impact of a disciplinary policy or practice weighs more heavily on students of a particular race; whether there is a history of discriminatory conduct toward members of a student's race, the administrative history behind a disciplinary policer decision; and whether there had been inconsistent application of disciplinary policies and practices to students of different racial backgrounds." (citing *Arlington Heights*, 429 U.S. at 265–68 (1977)).

[82] Skiba, *supra* note 83, at 1092 ("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.")

[83] *Id.*

[84] *Id.*

[85] *See* U.S. Dep't of Justice, *supra* note 8, at 7.

[86] *See supra* Part III.

VI stating that such evidence creates an inference of intent would aid a private party in advancing past the pleading stage, in which circumstantial and statistics-based cases have often been dismissed. Aiding private parties in meeting the intentional discrimination hurdle could lead to more cases addressing the merits of Title VI school discipline discrimination claims and leading courts to weigh school districts' asserted justifications for the disparities.

### *B. The Departments' Guidance is a Binding Administrative Interpretation of Title VI and Title IV*

A private plaintiff's success under this approach relies on a reviewing court upholding the Departments' guidance as a valid interpretation under Title VI. Particularly, plaintiffs will have to show that the Departments' application of *Arlington Heights* to school discipline is entitled to judicial deference under the administrative law framework.[87] Particularly, private parties would have to show that: (a) the Departments' guidance was an administrative finding or regulation entitled to deference; (b) that the interpretation of Title VI therein was not plainly erroneous or inconsistent with the statute; (c) that the interpretation is "fair and considered judgment," meaning that the interpretation was not offered to provide a convenient litigating position or a post hoc realization.[88]

The first prong of the administrative law analysis hinges on whether the Departments' guidance is sufficiently a regulation or an interpretation that carries the force of judicial deference. The Fourth Circuit had occasion to review a "Dear Colleague" guidance and determine this question in the education and civil rights context in the case of *Grimm v. Gloucester County School Board*,[89] in which a transgender male high school student challenged a local school board regulation prohibiting him from using the boys' restroom at his high school, basing his claim on guidance issued by the Department of Justice's Civil Rights Division and Department of Education's Office of Civil Rights stating that Title IV's use of the term "sex" referred to the gender that a student identifies with, not their biological or chromosomal makeup, and that it was therefore impermissible to prohibit transgender students from using the bathroom of their identity.[90] The court based its opinion on a similar guidance issued by the Departments on Title IX, accepting it as a clarification or interpretation of the statute and holding it a binding interpretation of policy related to a statute.[91] The court held that,

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[87] *See generally* Auer v. Robbins, 519 U.S. 452 (1997); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[88] *Auer*, 519 U.S. at 461–62.

[89] Grimm v. Gloucester County Sch. Bd., 822 F.3d 709 (4th Cir. 2016).

[90] *See generally id.*

[91] *Id.* at 718 ("We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded

as an interpretation of the statute, it would be entitled to judicial deference if the plaintiff could establish that it met the factors under *Auers*.[92] The court began by holding that Title IX was ambiguous as to the definition of the term "sex" and its application to transgender persons; therefore, the prong for interpretation of ambiguous text was met.[93] The court then determined that the interpretation was not clearly erroneous or contrary to the purpose of the Title IX.[94] The court then analyzed whether the guidance was a "fair and considered judgment," meaning that it was not merely issued to provide a convenient litigating position or was an ad hoc realization, and held in the affirmative.[95] Particularly, the court held an interpretation is not unreasonable under the statute just by virtue of novelty and that it is acceptable for an agency to respond to a new problem with a previously unconsidered interpretation.[96] The court held the Department's Title IX guidance to be reasonable.[97] The court additionally held that the guidance did not constitute a convenient litigating position because the Department of Education and Department of Justice had litigated and enforced the position that sex under Title IX was based on gender identity in preceding litigation,[98] and further held that it was not a post hoc realization because it was similar to other prior guidances and interpretations by other agencies.[99] The

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controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns—fundamentally questions of policy—is a task committed to the agency, not to the courts.- his, where there no constitutional ch; *cf. id* at 731–32 (The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges." (Niemeyer, J. dissenting)).

[92] *Id.* at 719.

[93] *Id.* at 720–21 (Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity.).

[94] *Grimm*, 822 F.3d at 720–21 (The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities" included in the term "sex.").

[95] *Id.* at 722–24 (Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice.).

[96] *Id.*

[97] *Id.*

[98] *Id.* ("Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014.").

[99] *Grimm*, 822 F.3d at 722–24 ("Finally, this interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidance and regulations of a number of federal agencies–all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.").

Supreme Court granted certiorari in *Grimm*, in part to address the question of "[i]f Auer is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?"[100] However, after the Department of Justice revoked the guidance subject to review in the case,[101] the Court vacated and remanded to the Fourth Circuit,[102] which subsequently vacated their prior holding.[103] It is foreseeable that the Supreme Court will review the issue of whether such guidances are entitled to administrate deference in the future, yet until such time, the Fourth Circuit's holding in *Grimm* can provide persuasive authority on the matter.

Applying the *Auers* factors to Departments' guidance on discipline supports a conclusion that it is a binding interpretation of Title VI and is entitled to administrative deference. Enforcing discipline policies in schools, while carrying implications for due process and equal protection, are largely policy determinations. While courts will intervene if fundamental liberty and property interests are infringed upon, school discipline policies and infractions are largely the work of school boards and principals. As was the case with Title IX regulations in *Grimm*, the particulars of Title VI and Title IV regulations are interpreted and enforced by the DOJ Civil Rights Division and applied to schools in coordination with the DOE Office of Civil Rights. Interpreting Title VI and Title IV as related to school discipline is clearly then within the administrative purview of the Departments, as required by the first prong of *Auers*. Proceeding to the second prong of the analysis, the Departments' guidance on discipline is not clearly inconsistent with the purpose of the Civil Rights Act, as it merely applies and extends its principles to an issue of escalating legal prevalence and importance. Particularly, Title VI and Title IV both envision schools free of different treatment of students based on their race, and while discipline policies may not have been envisioned or contemplated in the plain text, preventing emerging racial disparities and gaps in educational opportunity for minority students was an explicit purpose of the Act. Further, the fact that the guidance presents a novel approach to an issue within the scope of the Act, as explained by the *Grimm* court, does not undermine its reasonable basis under the statute. To meet the final prong of the *Auers* analysis, a party would have to show that the Departments' guidance was not a convenient litigating position or a post hoc realization.

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[100] Gloucesther Cty. Sch. Bd. v. Grimm, 137 S.Ct. 369 (2016) (granting Petition for Writ of Certiorari regarding the second and third questions presented by the Petition).

[101] *See* U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download.

[102] Gloucesther Cty. Sch. Bd. v. Grimm, 137 S.Ct. 1239 (2017).

[103] Grimm v. Gloucesther Cty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017).

The DOJ Civil Rights Division and the DOE Office of Civil Rights have recognized, through litigation and investigations, racial disparities in schools' discipline policies as a substantial civil rights concern since 2003.[104] Although most litigation on the matter is novel, the Departments' guidance follows from prior litigation from many years preceding the guidance. While the guidance may enhance their litigating position, as it would for private parties, the guidance was not issued merely for such a purpose. Based on the factors of *Auers,* the Departments' guidance should be afforded deference by courts and be a binding interpretation under Title IX.

Because the Departments' guidance is likely a binding interpretation under Title VI and Title IV, private parties would likely be able to bring suit under Title VI claiming an inference for intentional discrimination using the guidance's framework and then proceeding to the merits.

### *C. Private Cause of Action Under Title IV and School Discipline*

In addition to the Title VI cause of action, a private party seeking suit over racial discrimination in school discipline could also utilize the private cause of action under Title IV.[105] Particularly, the Court in *Green v. County School Board of New Kent County*,[106] held that whether a school district was complying with its obligation to integrate required a reviewing court to analyze all facets of school administration and orientation to determine whether a school district had rejected desegregation and all of its vestiges.[107] The Court has emphasized that *Brown* sought an end to *de jure* segregation and all of its "vestiges."[108] The Court has also held that determining whether a district has met its obligation to end *de jure* segregation under Title IV requires viewing the efficacy of a district's program, not merely the intent of its plans and actions.[109] While determining if a district's disciplinary policy reflects a vestige of *de jure* segregation would be a district-specific determination in a particular case, the Departments have previously litigated

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[104] *See supra* Part III.

[105] 42 U.S.C. § 2000c-8.

[106] Green v. Cty. Sch. Bd. of Kent Cty., 391 U.S. 430 (1968).

[107] *Id.* ("We charged the district courts in their review of particular situations to consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.").

[108] *See generally id.*

[109] *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537–39 (6th Cir. 1979) ("Part of the affirmative duty imposed by our cases . . . is the obligation not to take any action that would impede the process of disestablishing the dual system and its effects (citation omitted) . . . . [T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.").

this position in their prior cases on school discipline.[110] If a district has a history of segregation coupled with contemporary racial disparities in school discipline, it would likely support a parent seeking redress of a school's discipline policy to state a cause of action under Title IV, in addition to a claim of inferred intentional discrimination under Title VI.

### *D. Building a Claim Under the Departments' Guidance*

The Departments' guidance gives private party, presumably a parent of a suspended student, an enhanced position in court under Title VI, as well as Title IV, on a claim of inferred intentional discrimination, albeit the path would be tenuous. The litigation strategy would begin with the parent showing that the Departments' guidance is binding under *Auers.* After meeting this burden, the parent would then be required to lay a foundation for inferred intentional discrimination on either the grounds that her child was treated differently than other similarly situated students, or that the race-neutral policy was deliberately enforced against students of her child's particular racial or ethnic class, including citing statistics from the district on other students punished by the policy, the district's history of racial discrimination and segregation in schools, and other contextual factors that suggest racially discriminatory intent. Further, if the district has a history of *de jure* segregation, the parent can interchangeably plead a cause of action under Title IV. The Departments have successfully litigated the position that racial discrimination in discipline is a "vestige" of past *de jure* segregation.[111] Upon laying such foundations, the reviewing court could proceed to hearing the merits of the case, notably the school's articulated purpose for the discrimination and whether it meets the standard of not being racially discriminatory or pre-textual for discrimination.

## PART V: REMEDIES

After getting into court and litigating the merits, the seminal question of any matter of litigation is the remedy that the parties are seeking. In the school desegregation context, equal educational opportunity has been the long-held goal of litigants and advocates, yet the legal path has been fairly tenuous and burdensome. School discipline discrimination, posing a new question to the school desegregation and education civil rights legal framework, provides yet another question for courts and litigants.

### *A. Individual Relief in Discipline Discrimination under the Departments' Guidance*

Additionally, as stated in the Departments' guidance, if a students'

[110] *See infra* Part III.
[111] *Id.*

suspension was the result of racial discrimination, a proper corrective remedy is that the student's suspension should be retroactively removed from a students' record and the school district must allow affected students to make up the time and assignments.[112] A court could include this remedy with a broader structural injunction, which is also envisioned in the Departments' guidance.[113]

### *B. The Structural Injunction in Education Civil Rights Law*

The structural injunction, most notably applied in the education context to implement *Brown*, is a court order issued to reconfigure a social or political institution to bring it into compliance with the law's demands.[114] The structural injunction is a remedy at equity that often requires an ordering court to take an active policy, administrative, and even legislative role in an institution in order to redress a deprivation of constitutional rights.[115] The most notable example of this is the Court's order in *Brown II* for schools to be desegregated with "all deliberate speed."[116] Particularly, because various school districts were either hesitant or obstinate in creating effective plans to integrate, the Court ordered a remedy that would actively involve district courts in supervising a district until it had complied with the mandate of *Brown.*[117] The Court continued to expand this remedy through its desegregation progeny, upholding broad structural injunctions in both *Swann* and *Green.*[118] The Court began to back off of the structural injunction in *Milliken I*, *Milliken II*, *Dowell*, and *Pitts*, as the Court began to express a view that the breadth and depth of courts' involvement exceeded the role the judiciary needed to play in supervising school districts.[119]

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[112] U.S. Dep't of Justice, *supra* note 8, at 14–15.

[113] *Id.* at 15 ("Departments could also require systemic relief, such as training of decision makers and changing disciplinary procedures to prevent different treatment in the future.")

[114] *See* Pinder, *supra* note 3, at 250–51.

[115] *Id.* at 261 ("While there may not be a definitive answer, public litigation appears to demand a more activist judicial response. One of the purposes of equitable relief in public law litigation is to address injuries that are not compensable solely through legal damages. The structural injunction allows courts to use their broad equitable powers to remedy inequities in educational access. While courts are not competent to create their own educational standards, they are capable of applying a standard set by the legislative and executive branches.").

[116] *Id.* at 251–53.

[117] *Id.*

[118] *Id.*

[119] Pinder, *supra* note 3, at 253 ("The court sought to reconcile public and private interests by encouraging experimentation, flexibility, and resource allocation as opposed to more prescriptive edicts. This shift was consistent with the growing equity wave of state school finance litigation discussed infra in which courts increasingly issued relief that targeted funding instead of structural reform.

Once *Milliken I* curtailed structural injunctive relief, plaintiff success in desegregation litigation of the 1960s and 1970s declined until it reached its end in the 1990s, most notably through the *Board of Education v. Dowell, Freeman v. Pitts,* and *Missouri v. Jenkins* decisions. These cases severely restricted the scope of the district courts' remedial options and relieved local school districts both of the

Although the Court pulled back on the use of the structural injunction, the advent of the No Child Left Behind Act (NCLB), which enacted far-reaching education reforms and education civil rights priorities, notably including using Title VI funds to enforce school accountability rules, may allow for a resurgence of structural equitable relief in education law.[120] In recent years, the DOE Office of Civil Rights has applied the letter of NCLB to take an aggressive approach to investigating and enforcing civil rights issues in schools.[121] The OCR's investigatory and enforcement activism, as well as using Title VI funds to enforcing school accountability, offers support for the notion that broad structural inequalities in schools are within the scope of civil rights law and remedies.[122] This suggests a return of the structural injunction as a remedy to racial disparities in education and educational achievement.[123]

The structural injunction would be a useful tool for parties seeking to challenge discrimination in schools' student discipline policies. Such discrimination is a nationally trending and ongoing dilemma beginning from the base level of classrooms, extending through the principals' offices and even through the district boardroom,[124] and a court reviewing a challenge by such party would be justified under the post-NCLB approach to order broad structural reform. Discipline is an educational structure issue that would be well-suited for a structural injunction. Since *Brown* and *Green*, the Court has offered modern courts various examples of the supervision and direction required of a court issuing a structural injunction to remedy disparities in educational opportunity. Particularly, the court would order the district to alter its policies, set a clear standard which the district would have to meet to be in compliance, and then allow parties to request review upon accomplishment of the court's directives or noncompliance with the order.

One can envision a parent (or class action group of parents) challenging a policy under Title IV and Title VI being well-positioned to argue that the court mandate far-reaching structural changes in the school's administration, especially if the parties prove an inference of discriminatory intent. Further, consent decrees and settlement agreements that the Department of Justice

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burden of supervision and their duty to desegregate. Hence, even now district courts tend to defer to defendants in school desegregation lawsuits beyond that dictated by Supreme Court precedent.").

[120] *Id.* at 270–71. ("Where NCLB race-specific remedies and Title VI have by themselves been ineffective, together the two federal statutes may be key to fulfilling Brown's promise of equal educational opportunity. NCLB aims to close the racial achievement gap, but its language and interventions are race neutral . . . . Now, as the Department uses Title VI to enforce NCLB accountability provisions, it opens the door to structural injunctive relief in education litigation that supports rather than usurps the authority of the other branches, and may again give courts a central role in achieving structural reform in the realm of education.")

[121] *Id.* at 270.

[122] *Id.* at 270–71.

[123] *Id.* at 270.

[124] *See supra* notes 9–15.

has negotiated with embattled districts provides the reviewing court and the parties examples of specific reforms that can be ordered to ensure compliance with a structural injunction.

### *C. Consent Decrees and Settlements in Public Litigation*

Consent decrees and settlement agreements have been a long-held preferred method of resolving civil rights disputes, and can provide a model for the type of structural remedies that parties challenging a school's discipline policy should seek.

The Department of Justice has regularly used consent decrees in order to resolve civil rights disputes, notably they are a staple of the Department's investigations and enforcement action against police departments for their violations of civil rights.[125] The Department has utilized consent decrees as a manner of resolving community-wide structural civil rights abuses incorporating a wide array of community input and engaging all stakeholders to create a lasting solutions.[126] These agreements have secured mutual obligations from both the Department and the agencies they have investigated, and those obligations are enforced under the jurisdiction of the court that enters the consent decree.[127] Similar to police "pattern and practice" investigations, the Department has adopted the consent decree as a preferred remedy for school discrimination cases.[128] Consent decrees in school discipline cases have brought together parent groups, teachers, administrators, and community members in coordination with the Department to fashion a solution to the civil rights abuses of a discipline system.[129] Settlement agreements in lieu of litigation have had a similar effect.[130]

### *D. Reforms in the Departments' Past Agreements*

Agreements that the Department has entered into often cover a wide range of reforms and solutions that the Department works with the districts to fund, develop, implement, and enforce. As an example, this paper will specifically examine the consent decree in *Barnhardt*[131] and the settlement agreement in Wicomico County.[132]

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[125] CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 17–18, 35–36 (Jan. 2017), https://www.justice.gov/crt/file/922421/download.

[126] *Id.*

[127] *Id.*

[128] *See generally Case Summaries*, *supra* note 58.

[129] *See supra* notes 57–58.

[130] *See supra* notes 57–58.

[131] *Memorandum*, *supra* note 64, at 2–3.

[132] Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71.

The first reform that the Department often encourages is implementation and staffing of a Positive Behavior Intervention and Supports (PBIS) system, which explores alternatives to exclusionary punishments (out-of-school suspensions, in-school suspensions, expulsions), often requiring the District to bring in consultants and new staff to develop a district-wide implementation plan.[133] In *Barnhardt* and the Wicomico County agreement, the Department negotiated that the school district would seek a qualified consultant to develop a plan to implement a district-wide disciplinary reforms, as well as hire a PBIS Director to be placed in the central office to periodically review data on discipline and conduct staff trainings on behavioral supports and non-discriminatory methods of discipline.[134] In addition to a consultant and PBIS Director, the Department and the district in *Barnhardt* agreed that the District would create a "Discipline Advisory Committee" to review data and advise the school's policies. The consultant and the new PBIS staff ordered by the agreement aid the district in improving classroom management and racially nondiscriminatory responses to discipline. The Department, in these cases, emphasizes the importance of a supportive school environment, beginning at the classroom level.[135] Both agreements also emphasize the importance of non-exclusionary punishments, particularly a system of positive behavioral interventions the Department refers to as "Response to Interventions" (RTI), in which a school sets clear goals for a student and tracks the student's progress on their behavior.[136] The Department is actively involved with every one of these decisions, including approving the selection of consultants, approving hires of PBIS staff, reviewing of PBIS and RTI implementation plans, and advisory committee members.[137] The Department particularly seeks these administrative and personnel additions to catalyze long-term training and professional development for teachers, staff, and administrators in a school district.[138]

The next major element of the consent decrees and settlement agreements that the Department has negotiated in past cases is a revision of the school's discipline policies themselves, changing both punishable

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[133] *Memorandum*, *supra* note 64, at 9–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.A.

[134] *Memorandum*, *supra* note 64, at 9–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.A.

[135] *See generally Memorandum*, *supra* note 64, at 16–27; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV. B., C., D.iii.

[136] *See generally Memorandum*, *supra* note 64, at 16–27; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV. B., C., D.iii.

[137] *See generally Memorandum*, *supra* note 64, at 16–27; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV. B., C., D.iii.

[138] *Memorandum*, *supra* note 64, at 36–38; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 7, sec. I.

infractions and changing the punishments.[139] The agreements require schools to adopt a new code of infractions and offenses that must be approved by the Department of Justice before implementation.[140] Specifically, the Department has required new codes to create a tiered system of infractions, with each tier corresponding to a different punishment or intervention.[141] The Department also requires all infractions to be very clearly defined and clear in what specific conduct is encompassed in a particular infraction. Within the revised policies, the Department has emphasized that exclusionary punishment is reserved for a last resort when all other interventions have not worked, and that exclusionary punishments not be unduly punitive or excessively long.[142] The agreements have rejected mandatory exclusionary punishments, especially for minor offenses such as dress code violations, truancy, or tardiness.[143] Additionally, the agreements emphasize allowing students to transition smoothly back to school after an exclusionary punishment or an alternative school placement, including allowing kids the opportunity to make up work and absences without further punishment.[144] Additionally in regard to exclusionary punishments, the Department has asked districts to require school board approval for longer punishments.[145] Agreements have also called for school districts to set clear policies regarding the involvement of law enforcement at schools, limiting law enforcement referrals to emergency situations regarding an immediate threat to others' safety, mandatory use of de-escalation techniques prior to an arrest, only allowing principals to call for a school resource officer, immediate parental notification if the police are called to respond to a student, and limits on permissible uses of force by police officers.[146] The agreements also prohibit schools from sharing student records with law enforcement unless ordered to do so by a court.[147]

In addition to revising policies, the Department has insisted in its

[139] *See generally Memorandum*, *supra* note 64, at 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.i.

[140] *Memorandum*, *supra* note 64, at 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.i.

[141] *Memorandum*, *supra* note 64, 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.i.

[142] *Memorandum*, *supra* note 64, at 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV.D. iii., E.

[143] *See generally Memorandum*, *supra* note 64, at 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.iii., E.

[144] *See generally Memorandum*, *supra* note 64, 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.iii., E.

[145] *See generally Memorandum*, *supra* note 64, at 16–22; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.D.iii., E.

[146] *Memorandum*, *supra* note 64, at 31–36; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV.E., F.iii.

[147] *See generally Memorandum*, *supra* note 64, at 31–36; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, secs. IV.E., F.iii.

agreements on continual involvement and input from parents in the district.[148] Agreements have required districts to hold two or more informational assemblies each year to outline the district's discipline policies, procedures and expectations, as well as ensuring parents the opportunity to ask questions.[149] The agreements have also required the district to provide parents copies of the discipline code and notify them of any changes to the code.[150] Districts are also required to create a complaint system for parents who believe their child has been treated unfairly or in a discriminatory manner to file complaints with the district that can properly be reviewed and addressed.[151]

The final key aspect of each agreement or consent decree that the Department has entered into with a district over disciplinary procedures has been the collection and annual review of data, broken down by students' race, offenses committed, and punishments levied, including disciplinary referrals and exclusionary punishments.[152] The Department requires that these data be regularly kept and made available to parents and community members.[153] Additionally, the Department has required districts to submit such data to the Department so that it can periodically review the district's progress and its compliance with the agreement or consent decree.[154] The Department has emphasized, through its agreements with districts, that continual review of data is instrumental to addressing ongoing civil rights issues with discipline policies.

In addition to highlighting the scope of reforms that have been secured via public litigation on school discipline, the consent decrees and settlement agreements provide public and private parties seeking a resolution to discriminatory discipline policies and practices with a model for reform and redesign of districts' approaches to school discipline that the Department of Justice, in the past, has viewed as necessary to achieve compliance with Title IV and Title VI. As stated above, they also provide courts a framework for reforms that could form the basis of a structural injunction.

Despite their value, the practice of consent decrees, although widely used by the Civil Rights Division in the past, is not entirely without criticism.

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[148] *See generally Memorandum*, *supra* note 64, at 14–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.

[149] *See generally Memorandum*, *supra* note 64, at 14–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.J.

[150] *See generally Memorandum*, *supra* note 64, at 14–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.J.

[151] *See generally Memorandum*, *supra* note 64, at 14–16; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.J.

[152] *See generally Memorandum*, *supra* note 64, at 38–40; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.K.

[153] *See generally Memorandum*, *supra* note 64, at 38–40; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.K.

[154] *See generally Memorandum*, *supra* note 64, at 38–40; Settlement Agreement Between the United States and Wicomico County Public Schools, *supra* note 71, sec. IV.K.

Attorney General Jefferson Beauregard Sessions III has previously criticized them as both "one of the most dangerous, and rarely discussed exercises of raw power" and "an end run around the democratic process."[155] He has particularly attacked consent decrees the Civil Rights Division has negotiated to promulgate structural reforms in police departments following "pattern or practice investigations."[156] However, they have been widely used and fairly effective over the Department's nearly three decades of experience.[157] The Department of Justice has pointed out that forming a consent decree is a collaborative process, engaging the community and bringing key stakeholders to the table to reach a constructive resolution.[158] The burden of complying with a consent decree also does not fall squarely on the local agency, as the Department often pledges ongoing resources, assistance, and guidance to a local agency in order to facilitate structural change.[159] The Department has also noted that the decree is supervised and enforced, and also terminated or continued, by the reviewing court rather than the Department of Justice.[160] In considering the deliberative and collaborative nature of consent decrees, Attorney General Sessions's critique does not pass muster. Consent decrees are a valuable tool for the Department of Justice to collaborate and with local agencies, be they school districts or police departments to correct structural civil rights abuses. They also ensure a legal process for directing and supervising structural change that is not as tenuous on a reviewing court as a broad structural injunction. The consent decree would be an ideal tool for the Department to utilize in continuing investigations and enforcement litigation against school districts that violate Title IV and Title VI through their discipline policies.

## PART VI: NEXT STEPS AND REMAINING QUESTIONS

The next steps in this study involves further researching private parties' claims under Title IV. This paper, as well as the Departments' guidance, focused largely on the Title VI discrimination framework and the hurdles to private parties asserting a claim under Title VI. However, as the Department of Justice has recognized through its own litigation, there is a clear intersection between the history of desegregation and the present of school discipline disparities under Title IV as well. The link between the two is less clear in districts without prior desegregation orders or without a tenuous

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[155] Mark Berman, *Sessions Wants a Review of Consent Decrees, Which Have Been Used for Decades to Force Reforms*, WASH. POST (April 4, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/04/04/sessions-wants-a-review-of-consent-decrees-which-have-been-used-for-decades-to-force-reforms/?utm_term=.3d8a95b86388.

[156] *Id.*

[157] *Id.*; *see also* CIVIL RIGHTS DIV., *supra* note 128.

[158] CIVIL RIGHTS DIV., *supra* note 128.

[159] *Id.*

[160] *Id.*

history of desegregation litigation. On the public litigation side, the *Sandoval* court in dicta expressed skepticism of a continuing public cause of action for disparate impact under Title VI. Whether the Court maintains the *Guardians Association* precedent affirming the government's right to enforce disparate impact or chooses to expand *Sandoval* to prohibit government from enforcing disparate impact under Title VI remains to be seen. Additionally, it will be important to see whether the Court addresses whether Dear Colleague guidance is entitled to administrative deference. From a non-legal perspective, given the viewpoints that Attorney General Sessions has espoused on civil rights and consent decrees, advocacy and public attention to civil rights issues in school discipline and how the Department's public litigation has positively resolved these issues will be very important, particularly as Attorney General Sessions espouses a hostile and recalcitrant approach to civil rights enforcement. This study also sought to develop a litigation strategy for private plaintiffs, one that has admittedly not been used or tested; therefore, the final step in affirming this study would be for a private party to file a claim against a school district under Title VI and Title IV, claiming inferred discrimination consistent with the Departments' guidance and arguing the validity of that guidance is binding under *Auers.*

## CONCLUSION

This paper, much like the federal judiciary's venture to order equal educational opportunities, began with *Brown*'s fundamental declaration that students separated by from their peers at school on account of their race are irreparably harmed in a manner unacceptable under the Constitution, which was reinforced a decade later by the Civil Rights Act. The decades-long search to achieve the Court's dream in *Brown* has been tenuous and, at times, lethargic. While much progress has been achieved, much progress remains to be seen. School discipline policies, and the disparities that manifest, have emerged as the latest chapter of this ongoing legal history. Both the Department of Justice, Civil Rights Division, Educational Opportunities and the Department of Education, Office of Civil Rights have recognized this in recent years, through both their guidance and their litigation. The Departments have acknowledged the important implications that discipline has for students' civil rights interests. The Departments, as well as the courts, have also recognized both the government's and private parties' interests in preventing discrimination in schools. While the road to remedying the injustices that still manifest in schools will continue to be burdensome and laden with hurdles even sixty-three years after *Brown*, it has always began with the courtroom doors. Going forward, it is vital that both private and public actors continue to seek opportunity and strategies to bring this issue through those doors, and by doing so, open them to

revitalizing *Brown*'s fundamental dream—an equally assured promise of education to all students.