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# SHUTTING DOWN THE SCHOOL-TO-PRISON PIPELINE

MAJA TOSIC\*

## INTRODUCTION

When a student misbehaves, race plays a role in how harshly the student is disciplined. Given the long history of racial discrimination in the United States, as well as prevalent implicit biases, Black and Latino students are disciplined at higher rates with stiffer punishments than their white peers.<sup>1</sup> This higher level of discipline leads to a downward spiral of poor school performance and attendance,<sup>2</sup> involvement in illegal activity, and arrest and imprisonment.<sup>3</sup> Ultimately, Black and Latino students fall victim to a school-to-prison pipeline that many white students are not pushed into despite similar misbehavior.<sup>4</sup> In order to protect students from the pipeline, equalize educational opportunities, and create a safe and welcoming school environment, it is necessary for the federal government to invalidate disciplinary policies that cause an unjustified, disparate impact.

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\* Executive Notes Editor, *Southern California Law Review*, Volume 94; J.D. Candidate 2021, University of Southern California Gould School of Law; B.S. Biopsychology, Cognition, and Neuroscience 2016, University of Michigan. Thank you to my parents, Aleksandar and Jasna, for encouraging me to pursue a law degree and for their constant support. I also would like to thank Professor Dan Simon for his guidance during the drafting of this Note. Lastly, thank you to the editors of the *Southern California Law Review* for their excellent work.

1. Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PROC. NAT'L ACAD. SCI., 8255, 8255 (2019); Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 25, 2018, 11:41 PM), [https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee\\_story.html](https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1f1ee_story.html) [<https://perma.cc/MQQ9-L2B8>].

2. See Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URB. SOC'Y 359, 367 (2006).

3. See Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 73 (1998).

4. Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 959–60 (2016); see also U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 2 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [<https://perma.cc/BMS8-XRG6>].

Under President Obama, a first-ever policy guidance on student discipline was issued, which stated that not only are intentionally discriminatory policies unlawful per Title VI of the Civil Rights Act of 1964, but so too are facially neutral policies that cause an unjustified disparate impact.<sup>5</sup> The Trump Administration rolled back the policy guidance, citing that a disparate impact policy is not a Title VI violation per current precedent<sup>6</sup> and that invalidating disparate impact disciplinary policies makes schools less safe and more prone to shootings.<sup>7</sup> This Note will examine those arguments and will conclude that the disparate impact standard is supported by current precedent, does not increase the rate of school shootings, and ultimately should be reinstated. The disparate impact standard is a necessary safeguard against negative, implicit attitudes and is an important step in eradicating the school-to-prison pipeline.

## I. BACKGROUND

### A. LEGAL BACKGROUND

Title VI of the Civil Rights Act of 1964 establishes that no person on the basis of race, color, or national origin, shall be excluded, denied benefits, or subjected to discrimination under any federally assisted program.<sup>8</sup> Thus, public schools may not discriminatorily discipline students.<sup>9</sup> The purpose of Title VI is “that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.”<sup>10</sup> The Department of Education (“DOE”) and the Department of Justice (“DOJ”) are responsible for enforcing Title VI and implementing its regulations.<sup>11</sup> To ensure that a public school complies with Title VI, the DOJ and DOE may initiate investigations based on

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5. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 5 (2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-residential-facilities-201412.pdf>.

6. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (Dec. 21, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>; *see also* FED. COMM’N ON SCH. SAFETY, FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 70 (Dec. 18, 2018), <https://accentdistributing.com/wp-content/uploads/2020/09/school-safety-report.pdf> (stating that the Obama-Era guidance “lacks foundation in applicable law.”).

7. *See* FED. COMM’N ON SCH. SAFETY, *supra* note 6, at 67.

8. 42 U.S.C. § 2000d.

9. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *supra* note 5, at 3.

10. *Title VI of the Civil Rights Act of 1964*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/TitleVI> [<https://perma.cc/MQQ9-L2B8>]; *see also* *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 609 (1983) (“The legislative history of Title VI is replete with references to the Act’s central purpose of ensuring that taxpayers’ money be spent nondiscriminatorily.”).

11. 42 U.S.C. § 2000d-1.

complaints of racial discrimination.<sup>12</sup>

In order to prove unlawful discrimination under Title VI, either a government actor must have acted with a discriminatory intent or the action must have created a disparate impact.<sup>13</sup> Discriminatory intent under Title VI is analyzed in the same way as intentional discrimination under the Equal Protection Clause of the Fourteenth Amendment.<sup>14</sup> Intentional discrimination occurs when an action is adopted “at least partially because the action would benefit or burden an identifiable group.”<sup>15</sup> However, “bad faith, ill will, or any evil motive” is not necessary to show intentional discrimination.<sup>16</sup> Regardless of the reasoning for an intentional use of race, the use must be “narrowly tailored” to achieve a “compelling” government interest.<sup>17</sup> Intentional discrimination can be proven with direct evidence, including express racial classifications or conduct that show a discriminatory motive.<sup>18</sup> However, “direct evidence of intentional discrimination is hard to come by,”<sup>19</sup> so the use of circumstantial evidence is more common.<sup>20</sup>

In addition, a disparate impact can show discrimination.<sup>21</sup> A disparate impact is proven by the effects of an actor’s practices rather than intent.<sup>22</sup> As the Supreme Court has noted in regards to Title VII, which was enacted at the same time as Title VI, “[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior

12. See *Title VI of the Civil Rights Act of 1964*, *supra* note 10; *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/34TR-GY3V>].

13. *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993) (“While Title VI itself, like the Fourteenth Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI may validly proscribe actions having a disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory.”); see also 28 C.F.R. § 42.104(b)(2) (“A recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . .”); 34 C.F.R. § 100.3(b)(2).

14. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 286–87 (1978); *Washington v. Davis*, 426 U.S. 229, 242 (1976).

15. *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

16. *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

17. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

18. APPLYING TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AM. BAR ASS’N (2016), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-35/november-2016/applying-title-vi-of-the-civil-rights-act-of-1964](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/november-2016/applying-title-vi-of-the-civil-rights-act-of-1964) [<https://perma.cc/LA3P-QMQ4>]; see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (discussing intentional claim under the 14th Amendment).

19. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O’Connor, J., concurring).

20. See *Village of Arlington Heights*, 429 U.S. at 266 (discussing violations under the 14th Amendment and that cases of a clear discriminatory pattern are rare, so the “Court must to look to other evidence”).

21. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 593 (1983).

22. See *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

discriminatory . . . practices.”<sup>23</sup> When it is established that a policy creates a disparate impact, the decisionmaker must articulate a “substantial legitimate justification” for the challenged policy,<sup>24</sup> meaning that it was “necessary to meeting a goal that was legitimate, important, and integral to the institutional mission.”<sup>25</sup> Also, Title VI requires federally-funded recipients to implement a “less discriminatory alternative” if it is allowable and meets legitimate goals.<sup>26</sup> Thus, a disparate impact policy is unlawful if there is no substantial legitimate justification or an alternative exists.<sup>27</sup>

Under current legal precedent, a public-school district violates Title VI by either intentionally discriminating against one race or by implementing an unjustified policy that disproportionately affects students of a given race. Given that much of the racial discrimination that exists today is not born from intentional discrimination, it is imperative that the DOJ and DOE enforce Title VI using the disparate impact standard.

## B. SOCIAL-PSYCHOLOGY RESEARCH

In order for the DOJ and DOE to effectively regulate public schools’ disciplinary actions, it is important to understand the underlying causes of the racial disparity in student discipline and the resulting school-to-prison pipeline. Multiple studies have examined the persistent racial disparities in student discipline rates, and research has revealed a deeply rooted, cyclical pattern of increasing student misbehavior and administered discipline.<sup>28</sup> Thus, to understand the totality of the problem, it is necessary to examine the behavioral and psychological tendencies of teachers, students, and how the two groups interact.<sup>29</sup>

### 1. Social-Psychological Factors of School Staff That Contributes to Disparity

Many teachers enter the profession with a strong teaching mission and as “idealists.”<sup>30</sup> However, as teachers gain more experience, they are more

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23. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

24. *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

25. *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993).

26. *Id.*

27. *Id.* at 1407.

28. See Jason A. Okonofua, Gregory M. Walton & Jennifer L. Eberhardt, *A Vicious Cycle: A Social-Psychological Account of Extreme Racial Disparities in School Discipline*, 11 PERSP. ON PSYCHOL. SCI. 381, 382 (2016).

29. *Id.*

30. See Jean Johnson, Andrew Yarrow, Jonathon Rochkind & Amber Ott, *Teaching for a Living: How Teachers See the Profession Today*, EDUC. DIG., Jan. 2010, at 5.

likely to self-identify as “disheartened,”<sup>31</sup> more likely to cite student-behavior problems as a major drawback,<sup>32</sup> and less likely to believe good teaching can make a difference in one’s learning.<sup>33</sup> Thus, as teachers work towards their teaching mission but encounter student misbehavior, a feeling of hindrance may arise.<sup>34</sup> When paired with exposure to racial stereotypes, teachers can be influenced to discipline minority students more harshly and more frequently.<sup>35</sup>

One specific factor is a teacher’s perception of students as troublemakers and a sense of feeling troubled. In one study, teachers felt more troubled, meaning they perceived heightened infraction severity, hindrance, and irritation, by a Black student’s infraction compared to a white student’s infraction.<sup>36</sup> Also, Black students were more likely than white students to be labeled as troublemakers, which increased how severely teachers felt the student should be disciplined.<sup>37</sup>

In addition, teachers’ racial biases play a role in perpetuating the cycle. As American society has shifted to morally condemn racism and to legally prohibit racial discrimination, racial biases have not disappeared but have become more hidden and implicit. An implicit attitude, as opposed to an explicit attitude, is an “automatic cognitive association” between a group of people and certain beliefs, and people may be “unwilling to endorse [implicit attitudes] as indicative of their beliefs.”<sup>38</sup> Specifically, one study revealed that elementary school teachers had different expectations of students depending on the students’ ethnicity and had implicit, negative attitudes towards students of non-white, non-Western ethnicities.<sup>39</sup> The implicit

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31. 40% of the total teacher population were older teachers with more experience and had categorized themselves as “disheartened.” *Id.* at 6–7.

32. *Id.*; see also Matthew P. Steinberg & Johanna Lacoë, *What Do We Know About School Discipline Reform? Assessing the Alternatives to Suspensions and Expulsions*, 17 EDUC. NEXT 3 (2017) (“[M]ore than one-third of teachers in 2012 reported that student behavior problems and tardiness interfered with their teaching.”).

33. Johnson et al., *supra* note 30, at 7 (50% of the disheartened teachers felt that good teaching can make a difference in a student’s learning, whereas 75% of idealist teachers believed that to be true).

34. See Okonofua et al., *supra* note 28, at 384.

35. *Id.*

36. Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617, 619 (2015). Specifically, teachers felt more troubled by a student’s second infraction than by the student’s first infraction when the student was Black compared to white, and second infractions committed by Black students troubled teachers more than second infractions committed by white students. *Id.*

37. *Id.* at 620. Furthermore, teachers more readily envisioned themselves suspending the Black students in the future than the white students and therefore were more likely to use the minor infractions of Black students to predict future suspensions. *Id.* at 621–22.

38. Natasha Warikoo, Stacey Sinclair, Jessica Fei & Drew Jacoby-Senghor, *Examining Racial Bias in Education: A New Approach*, 45 EDUC. RESEARCHER 508, 508 (2016).

39. Linda van den Bergh, Eddie Denessen, Lisette Hornstra, Marinus Voeten & Rob W. Holland,

attitudes correlated with an achievement gap between minority students and white students.<sup>40</sup>

Ultimately, teachers' psychological and emotional responses likely inform their decisions to discipline students of color more frequently and more harshly. In addition, teachers' disciplinary decisions are, at least in part, influenced by a desire to diminish student behavior barriers to achieving their teaching missions.

## 2. Student Social-Psychological Factors That Contribute to the Disparity

In general, students enter school wanting to learn and develop.<sup>41</sup> However, minority students may question whether their abilities and behaviors will be seen in an unbiased light.<sup>42</sup> In turn, these fears and the visible racial disparity in discipline impact minority students' social-psychological tendencies.<sup>43</sup>

One contributing factor to the vicious cycle of increased misbehavior and discipline is students' loss of institutional trust.<sup>44</sup> Adolescents of color, especially Black students, more readily notice teachers and others stereotyping and perceiving them as a threat by the time they enter middle school.<sup>45</sup> This awareness among students of color causes them to lose institutional trust.<sup>46</sup> In one study, institutional trust declined faster for Black and Latino middle school students, creating a "racial trust gap."<sup>47</sup> The trust gap was sustained by a racial disparity in discipline for "judgment call incidents," such as "defiance" and "disobedience," as opposed to objective infractions, such as cheating.<sup>48</sup> This visible difference in discipline may cause minority students to question rules, the fairness of the institution, and teachers' trustworthiness.<sup>49</sup> In addition, a student's level of institutional trust

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*The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 518 (2010). Teachers with negative implicit attitudes were more likely to "evaluate ethnic minority students as being less intelligent and having less promising prospects for their school careers." *Id.*

40. *Id.* Biased attitudes predicted higher achievement of white students and lower achievement of ethnic minority students. *Id.*

41. Okonofua et al., *supra* note 28 at 393.

42. *Id.* at 385. Students of color worry that teachers will adopt negative stereotypes that portray them as less intelligent and more dangerous. *Id.*

43. *Id.*

44. *See id.*

45. David S. Yeager, Valerie Purdie-Vaughns, Sophia Yang Hooper & Geoffrey L. Cohen, *Loss of Institutional Trust Among Racial and Ethnic Minority Adolescents: A Consequence of Procedural Injustice and a Cause of Life-Span Outcomes*, 88 CHILD DEV. 658, 660-61 (2017).

46. *Id.* at 661.

47. *Id.* at 664, 671.

48. *Id.* at 666.

49. *Id.*

is a strong predictor of future misbehavior and educational pursuits.<sup>50</sup>

Stereotype threats can also influence a student's performance and confidence in school. A stereotype threat is a "situational threat of negative stereotypes," which "does not depend on cuing internalized anxiety or expectancy."<sup>51</sup> It is cued by a recognition that a negative stereotype could apply to a person, and its level of threat depends on how closely a person identifies with the stereotyped group.<sup>52</sup> A stereotype threat most impacts people who have great skills and confidence and have not adopted the stereotype to the point of doubting their abilities.<sup>53</sup> Though Black students with activated negative stereotypes valued things related to Black experiences less, their devaluation was more likely a strategic self-presentation to deflect stereotypes than a self-rejection.<sup>54</sup> Stereotype threats may cause students to underperform in schools and may contribute to students' fear of being of stereotyped.

In sum, though most students want to learn in school, minority students face certain challenges that their white peers are not similarly exposed to. The concerns and tendencies of students of color perpetuate the vicious cycle of increased misbehavior and discipline.

### 3. Teacher-Student Interactions That Contribute to the Disparity

Much of the racial disparity in student discipline originates at the level of office referrals issued by teachers and school staff rather than through administrative decisions.<sup>55</sup> In one study, the rates of office referrals of Black versus white students showed "large, statistically significant differences," whereas administrative responses were "almost identical" across race.<sup>56</sup> The racial disparities "remain even after controlling for socioeconomic status"<sup>57</sup> and could not be explained by higher rates or more serious misbehavior of Black students.<sup>58</sup> Instead, a difference in the type of infractions for which

50. *Id.* at 668. A year's level of defiance of institutional policies can be predicted by the student's level of institutional trust the previous year. *Id.* Black students who lost more trust than expected in seventh grade or in the beginning of eighth grade were less likely to enroll in a four-year college. *Id.*

51. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 617 (1997).

52. *Id.*

53. *Id.* at 617, 622.

54. *Id.* at 621–22.

55. Russell J. Skiba, Robert S. Michael, Abra Carroll Nardo & Reece L. Peterson, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 333–34 (2002).

56. *Id.* at 333.

57. *Id.*

58. *Id.* at 334. In fact, white students were referred more frequently for behaviors such as "smoking, leaving without permission, obscene language, and vandalism," while Black students were

white students and Black students were referred contributed to the racial disparity.<sup>59</sup> White students are more frequently referred for objective infractions and behavior, while Black students are referred more for infractions requiring subjective assessments.<sup>60</sup>

In addition, race effects weakened as students moved through the disciplinary system.<sup>61</sup> A student's expulsion was most tied to the seriousness of an offense, the reasons for an initial office referral, and the student's gender.<sup>62</sup> The lower risk of differential treatment on the basis of race at the expulsion level may be indicative of the checks and balances in place for expulsions, such as formal hearings mediated by an independent officer.<sup>63</sup> In contrast, on- and off-campus suspension referrals are mostly issued for "defiance of adult authority,"<sup>64</sup> all while Black students are disproportionately referred for such behavior.<sup>65</sup> This supports the finding that discipline of subjective behavior contributes to the racial disparity.

Overall, the problem stems from daily interactions between students and school staff, which lead to racialized perceptions, more office referrals, and a racial disparity in discipline. Ultimately, because students of color face higher rates of discipline, they are also more likely to be pushed into the school-to-prison pipeline.

### C. BACKGROUND ON THE SCHOOL-TO-PRISON PIPELINE

The school-to-prison pipeline is a process by which students are pushed out of school systems and into the criminal justice system.<sup>66</sup> The pipeline is

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referred more often for "disrespect, excessive noise, threat, and loitering." *Id.*; see also Yolanda Anyon, Jeffrey M. Jenson, Inna Altschul, Jordan Farrar, Jeanette McQueen, Eldridge Greer, Barbara Downing & John Simmons, *The Persistent Effect of Race and the Promise of Alternatives to Suspension in School Discipline Outcomes*, 44 CHILD. & YOUTH SERVICES REV. 379, 383 (2014) (explaining that higher rates of suspension and law enforcement referrals among Black and Latino students in the Denver public school system were not solely the result of higher rates of misbehavior, poverty, or special education eligibility).

59. Skiba et al., *supra* note 55, at 333–34

60. *Id.*

61. Anyon et al., *supra* note 58, at 383.

62. *Id.*

63. *Id.*

64. Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 461 (2008); see also Steinberg & Lacoë, *supra* note 32, at 9 ("[I]nsubordination has accounted for an increasing share of all serious disciplinary actions . . . [while] serious disciplinary actions for more serious student misconduct . . . declined from 50 to 22 percent.")

65. Gregory & Weinstein, *supra* note 64. Specifically, though Black comprised 30% of the student population, they comprised 58% of the defiance referred, compared to white students, who comprised 37% of school enrollment and only 5% of those referred for defiance. *Id.* In addition, "almost 70% of all Black student referrals were issued for defiance compared to 55% of referrals for white students." *Id.*

66. Scully, *supra* note 4, at 959.

created by removing students from school by placing them “on out-of-school suspension, transferring them to alternative schools, expelling them, and/or having them arrested for minor offenses.”<sup>67</sup> When students are no longer regularly in school, they are more susceptible to end up in trouble, detention, or jail.<sup>68</sup>

As schools have adopted society’s tendency towards criminalization and incarceration, they have also adopted “zero tolerance policies.”<sup>69</sup> Generally, such policies implement a harsh predefined mandatory consequence without an examination of the “seriousness of the behavior, mitigating circumstances, or the situational context.”<sup>70</sup> Also, schools have increased “police and security presence at school, metal detectors, security cameras, locker and person searches, and all the accoutrements of formal legal control.”<sup>71</sup> School districts with a disproportionate amount of poor and minority students are more likely to use police officers in schools. These officers exacerbate the school-to-prison pipeline by criminalizing school-based, minor offenses.<sup>72</sup>

While zero-tolerance policies were originally intended to punish serious and dangerous infractions, the punishments have applied frequently to nonviolent violations.<sup>73</sup> Thus, the rates of suspensions and expulsions have escalated since the adoption of zero-tolerance policies in the mid-1990s.<sup>74</sup> However, there is no evidence that exclusionary policies like suspension or expulsion reduce school violence.<sup>75</sup>

Zero-tolerance policies have increasingly removed students from schools and have made students more vulnerable to engage in unsupervised activities.<sup>76</sup> An adolescent student is more than twice as likely to get arrested

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67. *Id.* at 960.

68. *Id.*

69. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, 9 F. ON PUB. POL’Y 1, 2, 8 (2009).

70. *Id.* at 8.

71. *Id.*

72. Christopher A. Mallett, *The School-to-Prison Pipeline: A Critical Review of the Punitive Paradigm Shift*, 33 CHILD ADOLESCENT SOC. WORK J. 15, 20 (2016).

73. Heitzeg, *supra* note 69, at 9.

74. *Id.* at 13. For example, in 2011–2012, 3.45 million students were suspended out of school, and 130,000 students were expelled. *School Climate and Discipline: Know the Data*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/data.html> [https://perma.cc/J6YM-79G3]. The 2011–2012 rates are nearly double the rates in 1974. *Id.*

75. Am. Psychological Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOLOGIST 852, 852–862 (2008).

76. Kathryn C. Monahan, Susan VanDerhei, Jordan Bechtold & Elizabeth Cauffman, *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. YOUTH ADOLESCENCE 1110, 1118 (2014).

in a month when the student is suspended or expelled from school than in the months when the student is in school.<sup>77</sup> Thus, as students are punished and excluded from school, many are ultimately thrown into the hands of law enforcement. Meanwhile, the consequences of arrest exist for students of all races and “appear to be universal.”<sup>78</sup>

On the surface, zero-tolerance policies are neutral and applied evenhandedly, but race and ethnicity are strong predictors of student discipline.<sup>79</sup> Black boys are suspended and expelled at three times the rate of white boys, and Black girls are suspended at six times the rate of white girls.<sup>80</sup> As a result, the school-to-prison pipeline disproportionately affects students of color.<sup>81</sup>

#### D. POLICY BACKGROUND

##### 1. Obama-Era Policy Guidance

On January 8, 2014, the U.S. DOE and the DOJ under the Obama Administration released a first-ever policy guidance on school discipline and school climate to ensure public school districts comply with federal law, namely Title IV and Title VI of the Civil Rights Act of 1964.<sup>82</sup> The objective of the policy guidance was to help schools create “safe, inclusive and positive learning environments” by improving school climates and implementing “fair, non-discriminatory” responses to misbehavior.<sup>83</sup> The guidance was inspired by data from the Office of Civil Rights (“OCR”), which revealed that minority students are disciplined at higher rates and more harshly, are at a higher risk of entering the school-to-prison pipeline,<sup>84</sup> and that racial discrimination has caused this racial disparity.<sup>85</sup> In order to

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77. *Id.* at 1116.

78. *Id.* at 1119.

79. Scully, *supra* note 4, at 961.

80. U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 4.

81. Scully, *supra* note 4, at 959–60; *see also* U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 4.

82. *U.S. Departments of Education and Justice Release School Discipline Guidance Package to Enhance School Climate and Improve School Discipline Policies/Practices*, U.S. DEP’T OF EDUC., (Jan. 8, 2014), <https://www.ed.gov/news/press-releases/us-departments-education-and-justice-release-school-discipline-guidance-package>; *see also* CHERYL STAATS, *IMPLICIT RACIAL BIAS AND SCHOOL DISCIPLINE DISPARITIES: EXPLORING THE CONNECTION* (2014).

83. *U.S. Departments of Education and Justice Release School Discipline Guidance Package*, *supra* note 82.

84. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., *supra* note 5, at 3; *see also*, U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, *supra* note 4; THE LEADERSHIP CONFERENCE EDUC. FUND, *SCHOOL DISCIPLINE GUIDANCE AND STUDENTS’ CIVIL RIGHTS 1* (Mar. 2018), <http://civilrightsdocs.info/pdf/education/School-Discipline-Policy-Brief.pdf> [<https://perma.cc/F2G4-7EKB>].

85. U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST., *supra* note 5, at 3–4.

achieve its goals, the Obama Administration sought to enforce federal laws to eliminate unlawful racial discrimination in student discipline.<sup>86</sup> Specifically, the DOE and DOJ were to investigate complaints, proactively initiate compliance reviews, and provide assistance to schools as they adopt new antidiscriminatory disciplinary policies.<sup>87</sup>

Most notably, the guidance expanded the standard under which a school's conduct is considered discriminatory by adding "disparate impact" to the established intentional discriminatory prohibition.<sup>88</sup> First, a policy is intentionally discriminatory and unlawful if a student is subjected to "different treatment" based on the student's race.<sup>89</sup> Such a policy can be either facially discriminatory by having explicit discriminatory language, or it can be facially neutral but administered in a discriminatory manner, such as when an administrator exhibits racially charged behavior while disciplining a student.<sup>90</sup> Second, if a neutral policy is applied evenhandedly but has a disparate and unjustified impact on students of a certain race, it may be unlawful.<sup>91</sup> A policy that has an adverse impact on students of a particular race is unlawful if it is either not necessary to meet an important educational goal or is necessary but there is a comparable, effective alternative that causes less of a burden or impact.<sup>92</sup> For example, if Black students are excessively and more frequently punished for using electronic devices and there is no evidence of explicit racial bias, the policy is unlawful because of the adverse impact and lack of justification to meet an important educational goal.<sup>93</sup>

In sum, the DOE and DOJ, under President Obama, created a guidance to eliminate the racial disparity in student discipline and believed that invalidating both intentionally discriminatory and disparate impact policies was the best solution.

## 2. Effects of the Obama-Era Policy Guidance

Though the Obama-Era policy was in place for only four years, the School Superintendents Association found that some school districts were impacted by the Obama-Era policy guidance.<sup>94</sup> Even though schools were

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86. *Id.* at 2–3.

87. *Id.* at 16.

88. *Id.* at 8.

89. *Id.* at 5.

90. *Id.* at 5–6.

91. *Id.* at 8.

92. *Id.* at 9.

93. *Id.* at 13.

94. SCH. SUPERINTENDENTS ASS'N, 2018 AASA DISCIPLINE SURVEY: AN ANALYSIS OF HOW THE

not required to adopt any particular action, 16% of the 950 school district leaders in forty-seven states stated that their district had modified discipline policies in response to the guidance.<sup>95</sup> Some school districts had already implemented the guidance on their own and did not need to change policies.<sup>96</sup> However, the greatest impact of the guidance was that it communicated to public-school administrators that the DOE and DOJ will investigate and correct civil rights violations.<sup>97</sup>

Of the school leaders that did modify their policies, only 4.5% stated the discipline guidance had a negative effect, while 44% indicated a positive effect.<sup>98</sup> Some of the school leaders who cited a negative impact felt that the guidance forced school staff to be more lenient towards minority students in order to avoid an accusation of racism and felt frustrated by the extra steps.<sup>99</sup> In addition, some school leaders noted that a lack of funding, resources, and staff made it difficult for schools to manage students that were kept in school instead of given an out-of-school suspension.<sup>100</sup> In contrast, some of the respondents who indicated a positive outcome felt that the guidance influenced school staff to “use more forethought, consideration, and find alternatives,” “address bias and prejudice,” and “increase their awareness and understanding.”<sup>101</sup> In addition, the survey revealed that “urban and large districts were more likely to adopt new discipline policies and practices because of the 2014 discipline guidance.”<sup>102</sup>

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2014 DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE IS IMPACTING DISTRICT POLICIES AND PRACTICES, 1 (2018), [https://aasa.org/uploadedFiles/AASA\\_Blog\(1\)/AASASurveyDisciplineGuidance2014.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/AASASurveyDisciplineGuidance2014.pdf) [<https://perma.cc/6KEC-FS7M>]; see also Evie Blad, *Here's What the End of Obama-Era Discipline Guidance Means for Schools*, EDUC. WEEK (Dec. 18, 2018), [https://www.edweek.org/leadership/heres-what-the-end-of-obama-era-discipline-guidance-means-for-schools/2018/12?s\\_kwid=AL%216416%213%21266402628866%21b%21%21g%21%21&cmp=pc-goog-ew-dynamic%20ads%20recent%20articles&ccid=dynamic%20ads%20recent%20articles&ccag=recent%20articles%20dynamic&cckw=&cccv=dynamic%20ad&gclid=EAIaIQobChMI4ryli8jV6wI Vh8DACH3w3QP-EAAYASAAEgK\\_OvD\\_BwE](https://www.edweek.org/leadership/heres-what-the-end-of-obama-era-discipline-guidance-means-for-schools/2018/12?s_kwid=AL%216416%213%21266402628866%21b%21%21g%21%21&cmp=pc-goog-ew-dynamic%20ads%20recent%20articles&ccid=dynamic%20ads%20recent%20articles&ccag=recent%20articles%20dynamic&cckw=&cccv=dynamic%20ad&gclid=EAIaIQobChMI4ryli8jV6wI Vh8DACH3w3QP-EAAYASAAEgK_OvD_BwE) [<https://perma.cc/W9SE-MJKS>].

95. SCH. SUPERINTENDENTS ASS'N, *supra* note 94.

96. *Id.* at 7. A 2013 survey found that 56% of the 450 school leaders interviewed had recently revised their student code of conduct. *Id.*; see also, Steinberg & Laco, *supra* note 32, at 44 (stating that in an April 2014 survey of 500 school superintendents, 84% stated that their districts had updated their code of conduct within the three previous years).

97. See *Letter to ED and DOJ: Opposition to Rescission of Joint School Discipline Guidance Package*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Jan. 1, 2019), <https://civilrights.org/resource/letter-to-ed-and-doj-opposition-to-rescission-of-joint-school-discipline-guidance-package> [<https://perma.cc/5YSW-4JJB>] (a coalition of 75 national and 45 state organizations signed a letter to the Education Secretary and Attorney General stating that the “2014 Dear Colleague letter clarifies that ED and DOJ expect schools and districts to treat all children fairly . . .”).

98. SCH. SUPERINTENDENTS ASS'N, *supra* note 94, at 1–2.

99. *Id.* at 2.

100. *Id.* at 4–5.

101. *Id.* at 2.

102. *Id.* at 4.

Despite the frustrations felt by some school staff, the positive impact of the Obama-Era guidance outweighed the negative: ten times as many school districts noted a positive effect than noted a negative one. The guidance caused some schools to address racial biases and to find alternative actions that kept students in school, especially for minor offenses.

### 3. Trump Administration’s Rescission of the Obama-Era Guidance

The Federal Commission on School Safety, created by President Trump after the Parkland shooting, investigated school gun violence and issued a report with recommended policies.<sup>103</sup> Specifically, the Commission noted that the 2014 guidance caused some schools to become “fearful of potential [federal] investigations”; and thus, some schools “ignored or covered up – rather than disciplined – student misconduct in order to avoid any purported racial disparity in discipline numbers than might catch the eye of the federal government.”<sup>104</sup> In response, the Commission recommended that the DOJ and DOE rescind the 2014 guidance.<sup>105</sup>

On December 21, 2018, following the release of the report, the DOJ and DOE issued a Dear Colleague Letter, in which the Obama-Era policy guidance was rolled back.<sup>106</sup> It notes that the previous guidance advanced “policy preferences and positions not required or contemplated by Title IV or Title VI.”<sup>107</sup> Despite the rescission, the DOJ and DOE were to remain “firmly committed to vigorously enforcing civil rights protections on behalf of all students.”<sup>108</sup>

In a “Questions & Answers” document that was released along with the 2018 Letter, the OCR provided further details on a public school’s legal obligations and its future regulatory involvement.<sup>109</sup> Specifically, the OCR explained it will only investigate a complaint that alleges a student of a certain race was being treated differently or if a racially neutral policy was adopted with the intent to target students of a particular race.<sup>110</sup> Thus, the disparate impact standard was revoked by the Trump Administration.

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103. FED. COMM’N ON SCH. SAFETY, *supra* note 6, at 1.

104. *Id.* at 67–68.

105. *Id.* at 72.

106. U.S. DEP’T JUSTICE & U.S. DEP’T OF EDUC., *supra* note 6, at 1.

107. *Id.*

108. *Id.*

109. U.S. DEP’T. OF EDUC. OFFICE CIVIL RIGHTS, QUESTIONS & ANSWERS ON RACIAL DISCRIMINATION AND SCHOOL DISCIPLINE (2018).

110. *Id.* at 1–2.

## II. ANALYSIS

### A. ANALYSIS OF TRUMP-ERA POLICY GUIDANCE

The Trump Administration's decision to roll back the Obama-Era guidance was misguided. While the Obama Administration understood the path to safer schools as protecting students' civil rights and providing alternatives to exclusionary discipline,<sup>111</sup> the Trump Administration had taken a different approach. The Trump Administration believed that public schools may become safer if school administrators have more discretion and freedom to apply disciplinary actions,<sup>112</sup> even if the actions result in a racially disparate impact. However, greater discretion and greater racialized discipline will not make schools safer, especially not against school shootings. Overall, the Trump Administration was incorrect to rescind the disparate impact standard given current legal precedent and social-psychological research, and it cannot "vigorously enforce civil rights protections on behalf of all students"<sup>113</sup> under the current policy.

#### 1. Current Legal Precedent Supports Disparate Impact Standard

The Federal Commission on School Safety incorrectly held that a public school policy does not violate Title VI when it creates a racialized disparate impact despite lacking a discriminatory intent. Specifically, the Commission stated that the validity of the 2014 guidance "cannot be squared away with the Supreme Court's holdings."<sup>114</sup> However, the Supreme Court has never held that a federal agency cannot regulate a disparate impact policy. Rather, the Supreme Court held in *Lau v. Nichols* that section 601 of Title VI bars a practice that has a discriminatory effect on protected groups, even if the practice is not purposefully discriminatory.<sup>115</sup> Also, Justice Stewart, in his concurrence, held that section 602 allows agencies to enact rules that broadly furthered the purpose of deterring discrimination.<sup>116</sup> In *Lau*, a school district that did not provide supplemental language courses to a majority of non-English speaking students violated Title VI because the lack of instruction had a discriminatory effect even though no purposeful discriminatory design

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111. *U.S. Departments of Education and Justice Release School Discipline Guidance Package*, *supra* note 82 (quoting former Attorney General Eric Holder, "By ensuring federal civil rights protections, offering alternatives to exclusionary discipline and providing useful information to school resource officers, we can keep America's young people safe and on the right path").

112. FED. COMM'N ON SCH. SAFETY, *supra* note 6, at 67.

113. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 6, at 2.

114. FED. COMM'N ON SCH. SAFETY, *supra* note 6 at 71.

115. *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

116. *Id.* at 571 (Stewart, J., concurring) (noting that a policy under section 602 will be upheld "so long as it reasonably related to the purposes of the enabling legislation").

was present.<sup>117</sup> Though the Court later limited *Lau* by asserting that section 601 only outlaws intentional discrimination,<sup>118</sup> it has never addressed whether federal agencies may regulate disparate impact policies,<sup>119</sup> and so the expansive regulatory view of Title VI in *Lau* has never been explicitly rejected. The Federal Commission does not cite a holding for its position but rather relies on dicta and footnotes to further its argument that a federal agency can only prohibit intentional discrimination.<sup>120</sup> Based on current precedent, two possible interpretations of section 602 exist: (1) agencies may issue “broad prophylactic rules”<sup>121</sup> reaching policies beyond intentional discrimination; and (2) agencies are limited to regulating only intentional discrimination.<sup>122</sup> Thus, unlike the Federal Commission’s proposition, there is no Supreme Court precedent that squarely holds a federal agency cannot regulate disparate impact policies. Though the Trump Administration has discretion, it is incorrect to remove the disparate impact standard on the grounds of current legal precedent and to state that the Obama-Era guidance was against precedent.

## 2. A Disparate Impact Standard Does Not Increase School Shootings

First, school shootings are not caused or impacted by an attempt to lower racial disparity in student discipline. Since 2010, total incidents of school shootings have steadily been increasing despite different policies being in place since that time.<sup>123</sup> Between 2010 and 2014, prior to the Obama-Era policy guidance, there were 150 total incidents of school shootings, or an average of thirty per year.<sup>124</sup> From 2015 to 2018, there were 261 incidents an average of sixty-five per year.<sup>125</sup> In 2019, after the rescission of the guidance, there were 118 incidents.<sup>126</sup> This steady increase suggests that incidents of school shootings are not correlated with the policies issued by the DOE and DOJ.

117. *Id.* at 564, 568 (majority opinion).

118. *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001) (“[W]e have since rejected *Lau*’s interpretation of §601 as reaching beyond intentional discrimination.”)

119. *Cf. Id.* at 308 (Stevens, J., dissenting) (noting that “the question whether §601 applies to disparate impact claims has never been analyzed by this Court on the merits”).

120. FED. COMM’N ON SCH. SAFETY, *supra* note 6, at 71. The Federal Commission cites to *Sandoval* to support its arguments, but the Court in *Sandoval* did not reach the issue of whether section 602 grants federal agencies the ability to regulate disparate impact policies. *Sandoval*, 532 U.S. at 281–82.

121. *Sandoval*, 532 U.S. at 305 (Stevens, J., dissenting)

122. JD S. HSIN, CONG. RESEARCH SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 10–11 (2019).

123. *K-12 School Shooting Database*, CTR. FOR HOMELAND DEF. & SECURITY, <https://www.chds.us/ssdb/view-chart/?chartid=8> [<https://perma.cc/2SZY-VLUX>].

124. *Id.*

125. *Id.*

126. *Id.*

Second, school shooters are predominately white students,<sup>127</sup> and the Obama-Era guidance was structured to tackle the over-discipline of primarily minority students. The negative impact cited by some school administrators mostly pertained to disciplining students of color.<sup>128</sup> In fact, the Parkland shooter's ability to buy, own, or possess a firearm had not been impacted by his involvement in a program that complied with the 2014 guidance.<sup>129</sup>

Thus, rescinding the 2014 guidance will not confront most students who turn to gun violence.

Third, the school districts that adopted the Obama-Era guidance did not alter the way they treated violent and serious infractions.<sup>130</sup> Rather, school districts, regardless of the policy guidance, investigated and dealt with such infractions and violent students in a serious manner, regardless of race. The greatest impact the guidance had was upon smaller infractions and altered how schools responded particularly to Black and Latino students.<sup>131</sup>

Overall, school safety is a complex issue, but the 2014 guidance to minimize racial disparity in student discipline does not conflict with the goal of eliminating school shootings.<sup>132</sup> A school's compliance with the guidance would help improve school climate and increase school safety. To truly "vigorously enforce civil rights protections on behalf of all students,"<sup>133</sup> a disparate impact standard should be reinforced.

## B. PREDICTED FUTURE IMPACT OF TRUMP-ERA POLICY GUIDANCE

The decision to rescind the Obama-Era guidance will not create the

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127. Tiffany Xie, *Mass Shooters Have a Gender and a Race: A Closer Look at White Male Privilege*, POL. RES. ASSOCIATES (June 19, 2014), <https://www.politicalresearch.org/2014/06/19/mass-shooters-have-a-gender-and-a-race> [<https://perma.cc/8WD3-WUNT>].

128. See SCH. SUPERINTENDENTS ASS'N, *supra* note 94, at 2. For example, one district leader noted "minority students have received more lenient consequences than non-minority students in order to prevent minority students from accusing the school of racism." *Id.*

129. MARJORY STONEMAN DOUGLAS HIGH SCH. PUB. SAFETY COMM'N, INITIAL REPORT 278 (2019).

130. See ACLU, *Key Tool Issued to Help End School-to-Prison Pipeline* (Jan. 8, 2014), <https://www.aclu.org/press-releases/aclu-comment-groundbreaking-federal-school-discipline-guidance> (explaining that the guidance did not eliminate law enforcement officers in schools but mostly provided a clear delineation of roles for handling minor discipline).

131. See RJ Vogt, *Will A Policy Rollback Swell the School-to-Prison Pipeline*, LAW360 (Jan. 13, 2019, 8:02 PM), <https://www.law360.com/articles/1118007> [<https://perma.cc/99LJ-66E7>].

132. Jon Valant & Michael Hansen, *School Safety Commission's Report Uses Tenuous Logic to Walk Guidance on School Discipline*, BROOKINGS (Dec. 21, 2018), <https://www.brookings.edu/blog/brown-center-chalkboard/2018/12/21/school-safety-commissions-report-uses-tenuous-logic-to-walk-back-guidance-on-school-discipline> [<https://perma.cc/L7XA-CHJZ>].

133. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 6, at 2.

intended result of decreasing school homicides and will negatively impact students of color, particularly Black and Latino students. Policies generated from negative, implicit biases are immune to challenges when only an intentionally discriminatory standard is applied. Therefore, without the disparate impact standard, school staff may let their racial biases and disciplinary actions go unexamined and will refer Black and Latino students more readily for subjective infractions. Ultimately, more students of color will be pushed out of schools and into the school-to-prison pipeline.

Aside from the increases in the disparate impact and the strengthening of the school-to-prison pipeline, students will also lose more institutional trust and perform poorly. The Trump Administration's decision tells students that civil rights violations will not be taken seriously. Instead, this decision treats student discipline as justified, no matter how unfair it is. Students of color will have less reason to believe school staff will not be biased against and discriminate against such students. As young students lose institutional trust, their level of misbehavior will increase, and their prospects for future education beyond secondary education will decrease. Thus, students may more easily fall into the belief that their success, expected performance, and treatment will be impacted by racial stereotypes.

### III. PROPOSED RECOMMENDATIONS

Policies issued by the DOE and DOJ must go further than the current guidance to address the underlying causes of the school-to-prison pipeline. It is not enough to only investigate policies that are facially discriminatory because almost none are. Instead, discrimination results from implicit biases and subjective judgments by teachers and administrators. Furthermore, current legal precedent supports the invalidation of disparate impact policies under Title VI.<sup>134</sup> Therefore, the DOE and DOJ ought to ensure that unjustified disparate impact policies and practices are invalidated and altered.

Also, given the roll back of the Obama-Era guidance, states and local school districts should examine their disciplinary actions and create alternatives. The DOE and DOJ recognized that “[s]tates and local districts play the primary role in establishing educational policy, including how to handle specific instances of student misconduct.”<sup>135</sup> Therefore, public school districts are not limited to the new guidance and can mitigate the predicted

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134. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983) (“[I]t must be concluded that Title VI reaches unintentional, disparate impact discrimination as well as deliberate racial discrimination.”).

135. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 6, at 2.

effects by doing more than the federal government to protect students' civil rights.

Ultimately, a comprehensive solution involving the DOE, DOJ, states, and local governments will best challenge the underlying issues sustaining the school-to-prison pipeline.

### CONCLUSION

In order to challenge the racial disparity in student discipline and to eliminate the school-to-prison pipeline, the disparate impact standard should be restored. Racial disparity is not only the result of intentional discrimination but is more so created by policies with unintentional, disparate impacts. The disparate impact standard is supported by current legal precedent and is a necessary tool to confront the social-psychological factors bolstering the racial disparity. Restoring the disparate impact standard is a needed step in increasing students' institutional trust, challenging school staff's implicit attitudes, and repairing student-teacher relationships. Ultimately, the standard is a safeguard against discriminatory decisions and is necessary to eliminate the existing school-to-prison pipeline.