

Disparate Impact under Title VI and the School-to-Prison Pipeline¹

Presented by Accountability Project of the
Children's Rights Litigation Committee,
ABA Section of Litigation²

I. Introduction.

This memorandum is intended to provide a general practice guide on the disparate impact doctrine under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d, et seq.³ This overview focuses on how traditional public school and public charter school discipline policies and programs disproportionately impact students of color, a pattern known as the “school-to-prison pipeline” (“STPP”).⁴

As discussed in detail below, Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Thus, programs and activities that receive Federal financial assistance from the United States Department of Education are covered by Title VI. These programs include all state education agencies, public K12 schools, public colleges and universities, and vocational, proprietary, and rehabilitation schools or agencies, as well as public charter schools receiving Federal financial

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² This is a project of the Children's Rights Litigation Committee, of the American Bar Association's Section of Litigation. In 2009, the ABA passed a resolution on the right of all children to remain in school, to limit exclusion from educational programs in response to disciplinary problems, and to ensure that no group of students is disparately subjected to school discipline or exclusion. *See* 2009 ABA Resolution on Youth Rights to Remain in School, *available at* http://www.americanbar.org/groups/youth_at_risk/commission_policyresolutions/youth_rights_to_remain_in_school.html. This memo was written to advance the goals of the Resolution, however the views expressed in the memo have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

³ Although several additional statutes and Executive Orders exist prohibiting discrimination in various contexts, those topics are not addressed in detail in this memorandum. For example, Title IX of the Education Amendments of 1972 prohibits discrimination in education programs prohibited on the basis of sex, Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability, and Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, national origin and religion. Except to the extent these laws impact the disparate impact analysis related to discriminatory effects on people of color in the education context, they are not discussed here.

⁴ This memorandum is only intended as a practice guide and should not be cited or relied on as legal authority.

assistance. Title VI also covers libraries and museums receiving federal funding from the Department of Education.

In pertinent part, Section 601 of Title VI provides that no person “shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵ Section 602 of Title VI authorizes federal agencies that provide financial assistance to programs and activities to “effectuate the provisions of [Title VI] . . . by issuing rules, regulations or orders of general applicability”⁶ Title VI does not expressly include a disparate impact provision.

The Office for Civil Rights of the U.S. Department of Education is the law enforcement agency charged with enforcing Title VI. Accordingly, the Department of Education issued the following disparate impact prohibition via a regulation promulgated pursuant to Section 602: “utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin, or have the *effect* of defeating or substantially impairing accomplishments of the objectives of the program as respect individuals of a particular race, color, or national origin,” thus reserving the authority to use disparate-impact theory.⁷ Although infrequently invoked, Section 602 was for some time considered a viable option for bringing a private cause of action in Court for disparate impact claims against schools.

The vitality of the disparate impact doctrine seemed questionable, however, following the landmark decision of *Alexander v. Sandoval*, 532 U.S. 275 (2001), in which the Supreme Court held that there is no private right of action to enforce Title VI disparate impact regulations. Nevertheless, over a decade since *Sandoval*, the doctrine of disparate impact indeed remains a viable source of relief through administrative enforcement. Specifically, despite holding Congress did not create a private cause of action for disparate impact under Title VI, the *Sandoval* Court also held that the funding agency issuing the disparate impact regulation has the authority to challenge a recipient’s actions under this theory of discrimination.⁸ “Therefore, the agencies’ disparate impact regulations continue to be a vital administrative enforcement mechanism.”⁹

⁵ 42 U.S.C. § 2000d.

⁶ *Id.* at § 2000d-1.

⁷ 34 C.F.R. § 100.3(b)(2) (emphasis added).

⁸ *Id.* at 279-293.

⁹ See U.S. Department of Justice, Civil Rights Division, Title VI Legal Manual, Editor’s Note Jan. 1, 2011, available at <http://www.justice.gov/crt/about/cor/coord/vimannual.php> (discussing vitality of disparate impact

II. Basic Legal Framework for Disparate Impact Claims.

A. *Disparate Impact in Courts Post-Sandoval.*

In *Sandoval*, the Supreme Court in a 5-4 decision held that there is no private right of action to enforce disparate-impact regulations under Title VI. In *Sandoval*, a driver's license applicant challenged Alabama's policy of only giving driver's license exams in English as violating disparate-impact regulations promulgated under Title VI. A Department of Justice regulation similar to the one issued by the Department of Education prohibited funding recipients from "utiliz[ing] criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin" ¹⁰ *Sandoval* assumed, without deciding, that disparate-impact regulations were authorized by Section 602, but held that there was no private cause of action to enforce them. ¹¹

To that end, Justice Scalia wrote for the majority that for purposes of that case, three aspects of Title VI "must be taken as a given."¹² First, Section 601 created a private cause of action for individuals to sue and obtain both injunctive relief and damages. *Id.* at 279-280. Second, it is "beyond dispute . . . that § 601 prohibits only intentional discrimination." *Id.* at 280 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); *Alexander v. Choate*, 469 U.S. 287 (1985)). The dissent disagreed that Section 601 prohibits only intentional discrimination. *See, e.g., Sandoval*, 532 U.S. at 281 n.1. And third, the Court would assume without deciding that Section 602 "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *Sandoval*, 532 U.S. at 281.

Because Section 601 prohibits only intentional discrimination and permits facially neutral policies that have a disparate effect, a regulation issued pursuant to it cannot prohibit facially

regulations in light of *Sandoval*). The usefulness of DOJ's Legal Manual on Title VI cases cannot be overstated in preparing to file a disparate impact complaint. A copy of the Manual is *available at* <http://www.justice.gov/crt/about/cor/coord/vimannual.php>.

¹⁰ 28 C.F.R. § 42.104(b)(2) (emphasis added).

¹¹ *Sandoval*, 532 U.S. at 279.

¹² *Id.* at 279.

neutral policies.¹³ A private right of action to enforce the disparate-impact regulation therefore “must come, if at all, from the independent force of § 602.”¹⁴ The Court, however, found no congressional intent in Section 602 to create any rights other than those conferred in Section 601.¹⁵ As such, the Court held that Section 602 thus does not create a new private right of action to sue under a disparate-impact theory.¹⁶

The majority in *Sandoval* suggested that it would invalidate a regulation purporting to effectuate a statute that prohibits only intentional discrimination and permits facially neutral policies that have a disparate impact, when the regulation prohibits those very same policies: “We cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably intertwined with’ § 601, . . . when § 601 permits the very behavior that the regulations forbid.”¹⁷

Justices Kennedy and Thomas joined Justice Scalia’s majority opinion in *Sandoval*, which strongly signaled that such regulations went beyond the statute and were invalid, and the addition of Chief Justice Roberts and Justice Alito to the Court strengthens the likelihood that the majority would strike down such regulations now.¹⁸

Stemming from Justice Scalia’s statement in *Sandoval* that if the matter was squarely before him he would find the Title VI disparate impact regulations unconstitutional, the federal government is very wary of proceeding with a Title VI claim that could find its way through the courts and to the Supreme Court. Consequently, the most viable option post-*Sandoval* for relief for disparate impact violations is an OCR complaint, as discussed below. However, the legal framework for disparate impact litigation in court is included herein for reference.

¹³ *Id.* at 285 (“It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.”).

¹⁴ *Id.* at 276.

¹⁵ *Id.* at 288-289.

¹⁶ *See Id.* at 291.

¹⁷ *Id.* at 286 n.6 (citing *Guardians Ass’n v. Civil Serv. Comm’n of New York City*, 463 U.S. 582, 613 (1983) (O’Connor, J., concurring in judgment)).

¹⁸ *See* John R. Martin, *School Discipline and Disparate Impact*, available at <http://www.fed-soc.org/publications/detail/school-discipline-and-disparate-impact> (citing John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 Colum. L. Rev. 1613 (Oct. 2002)).

B. *Prima Facie* Case.

Courts analyze disparate impact claims under the Title VI regulations pursuant to the three-step burden-shifting framework used in Title VII employment cases.¹⁹ Title VII of the Civil Rights Act of 1964 prohibits, among other things, discrimination on the basis of race, color, and national origin.²⁰ Title VII recognizes two types of claims: disparate treatment and disparate impact.²¹ Aside from certain exempted policies or practices, like seniority systems, the disparate impact approach applies to all types of employment criteria, including recruitment practices, hiring or promotion criteria, layoff or termination criteria, appearance or grooming standards, education requirements, experience requirements, and employment tests.

In the Title VII employment context, claims of disparate impact “involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity.”²² “Proof of a discriminatory motive ... is not required under a disparate impact theory.”²³ By contrast, differential treatment claims, also known as disparate treatment claims, require plaintiffs to prove discriminatory motive or intent.²⁴ The premise behind this approach “is that some employment

¹⁹ See, e.g., *N.Y. Urban League, Inc. v. N.Y.*, 71 F.3d 1031, 1036 (2d Cir. 1995); see also *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); see also *Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995); see also *Ga. State Conference of Branches v. NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985).

²⁰ See 42 U.S.C. § 2000e-2(a).

²¹ *Carpenter v. The Boeing Co.*, 456 F.3d 1183, 1186 (10th Cir. 2006); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 763 (1976) (“Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination [prohibited by Title VII] . . . and ordained that its policy of outlawing such discrimination should have the highest priority.”) (citations omitted).

²² *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432, (1971) (noting discrimination claims based on disparate impact involve challenges to practices that are “fair in form, but discriminatory in operation” in that they operate as “built-in headwinds for [a protected class] and are unrelated to measuring job capability.”).

²³ *Int’l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

²⁴ See *Id.* at 335-36.

practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”²⁵

Accordingly, a plaintiff first must show by a preponderance of the evidence that a facially neutral policy has a disproportionately adverse effect on a protected class.²⁶ Under Title VII, statistical analyses are often heavily relied upon to demonstrate the adverse discriminatory effect on a particular class.²⁷ Notwithstanding the emphasis on statistical evidence in the employment context, there is a belief in the education context that more than sheer statistical evidence is needed in the initial filing by the plaintiff with the DOJ and DOE.²⁸ While not necessary to the claim, the OCR may give additional weight if the complainant provides anecdotal evidence or stories of students that were actually impacted by the exposure to discriminatory policies.

In addition to statistical evidence of a disproportionate impact of a school program, policy, or activity on students of color, if there is also evidence of *different treatment*, those arguments can and should also be raised. One main goal is to prompt OCR to investigate what is going on at the district level. If an attorney has any examples of similarly situated students treated differently, these examples should be included in the complaint because OCR investigations can and will look at evidence of discrimination of both different treatment and disparate impact, and both issues may be present. Evidence of both these problems will inform the depth and breadth of the remedies that may be sought. For example, training on countering implicit bias or a lack of multicultural sensitivity is more directly a remedy for the possibility that a district is engaged in different treatment, even where the different treatment is not intentional. It is important to note, however, there is no need to assert different treatment or provide evidence of different treatment to raise a disparate impact claim.²⁹

²⁵ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

²⁶ *See Ga. State Conference of Branches.*, 775 F.2d at 1417.

²⁷ *See Watson*, 487 U.S. at 991-993.

²⁸ *Cf. Adira Siman, Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 Cornell J.L. & Pub. Pol’y 327, 344 (2005), (“Since there is clear evidence that zero tolerance policies disproportionately affect minorities, as long as sufficient data on school discipline practices is available, it is likely that a zero tolerance challenge will meet the initial burden. Moreover, a court may give additional weight to evidence that the implementation of a zero tolerance policy resulted in increased disparities or a significant growth in the numbers of minority students disciplined.”) (citations omitted).

²⁹ *See* 2014 Joint Dear Colleague Letter, *found at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>. In particular, see examples six and seven as illustrative of how the Departments of Education and Justice would apply the disparate impact analysis.

C. Business/Educational Necessity Defense.

1. Business Necessity Defense under Title VII.

Under Title VII, once a policy or practice has been proven to cause a significant impact, the employer has the burden of demonstrating that the policy or practice is “job related for the position in question and consistent with business necessity.”³⁰ The Fourth Circuit has accordingly described the business necessity prong as follows:

Collectively these cases establish that the applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.³¹

Generally, employers may not take advantage of the business necessity defense unless the relevant policy or practice, such as job-related standards or education requirements, do not exceed what is needed to perform the job. For example, although the case did not use the phrase “business necessity,” in the seminal decision of *Griggs v. Duke Power Co.*, the Supreme Court held that an employer’s requirements of high school education and satisfactory score on aptitude test that disproportionately disqualified black applicants were not related to job performance and constituted racial discrimination in violation of Title VII, even in the absence of discriminatory intent.³² In *Griggs*, the Court stated: “History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.”³³

³⁰ 42 U.S.C. § 2000e-2(k)(1)(A); *Griggs v. Duke Power Co.*, 401 U.S. 424, at 431 (1973).

³¹ See *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798-99 (4th Cir. 1971) (rejecting argument that “maintenance of the status quo,” “conformance to precedent,” or “[a]voidance of union pressure” could “constitute a legitimate business purpose which can override the adverse racial impact of an otherwise lawful employment practice.”) (citations omitted).

³² See *Griggs*, 401 U.S. at 424.

³³ *Id.* at 433.

In that regard, the Eighth Circuit granted the EEOC’s request for an injunction against a pizza delivery restaurant that had an inflexible no-beard policy that did not grant an exception for black men with pseudofolliculitis barbae (“PFB”), an inflammatory skin condition that occurs primarily in Black men and that is caused by shaving. The severity of the condition varies, but many of those who suffer from PFB effectively cannot shave at all. Ultimately, the Court held the restaurant “failed to prove a compelling need for the strict no-beard policy as applied to those afflicted with PFB and has failed to present any evidence suggesting that the current policy is without workable alternatives or that it has a manifest relationship to the employment in question.”³⁴

The EEOC points out that this scenario may be legal in a different context. “For example, a no-beard policy could be legal in a situation in which beards were shown to interfere with safely using a respirator and no viable alternative existed under the circumstances.”³⁵

Similarly, “Title VII’s business necessity defense would typically require an employer that gave a physical fitness test that disproportionately excluded women to produce a validation study in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, showing that the test accurately measures safe and efficient job performance.”³⁶

Another context in which disparate impact claims have been litigated under Title VII relates to employer hiring or firing practices with conviction or arrest criteria.³⁷ The EEOC has

³⁴ See *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 797, 799 (8th Cir. 1993).

³⁵ EEOC Compliance Manual, Office of Legal Counsel, Title VII/ADEA/EPA Division (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html#IVA> (citing 29 C.F.R. § 1910.134(g)(1)(i) (OSHA respirator standard); Interpretation Letter from John L. Henshaw, Assistant Secretary of Labor for OSHA, to Senator Carl Levin (Mar. 7, 2003) (while employers “cannot permit respirators with tight-fitting facepieces to be worn by employees who have facial hair that comes between the sealing surface of the facepiece and the face, or that interferes with valve function,” the problem sometimes can be solved by trimming the beard, and “[s]ome types of respirators do not require a face seal and can usually be worn by bearded employees. . . . All respirators must be selected based on the respiratory hazard to which the worker is exposed. The employer must also consider user factors that affect performance and reliability.”), available at <http://www.osha.gov/>).

³⁶ See EEOC, *Questions and Answers on EEOC Final Rule on Disparate Impact and “Reasonable Factors Other Than Age” Under the Age Discrimination in Employment Act of 1967*, available at http://www.eeoc.gov/laws/regulations/adea_rfoa_qa_final_rule.cfm (comparing the ADEA’s RFOA defense to the business necessity defense available to employers under Title VII).

³⁷ See *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1293-99 (8th Cir. 1975) (applying Title VII disparate impact principles to employer’s “no convictions” hiring policy); *Caston v. Methodist Medical Ctr. of Ill.*, 215 F. Supp. 2d

instructed that “with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.”³⁸ “A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity.”³⁹

2. Educational Necessity Defense under Title VI.

Assuming the Plaintiff states a prima facie case of discriminatory adverse impact, the burden shifts to the school or other federally funded institution to demonstrate “educational necessity,” which means that the policy or practice is necessary to achieve an important educational goal.⁴⁰ Although the standard is not “essential” or “indispensable,” the school must legitimately justify its rationale.⁴¹

Furthermore, the policy must actually correspond to the school’s educational goal. “School officials will probably argue that zero tolerance policies are necessary to create and maintain a safe learning environment and that any disparities that appear are due to a higher level of severity of initial or repeat offen[s]es by students of color. The problem of school violence, combined with the courts’ general deference to educators, makes it unlikely the school’s justification will be considered illegitimate or unreasonable. Studies have shown, however, that zero tolerance policies may be ineffective at curbing violence and ensuring safety. Therefore, an argument might be made that, while the school may have a legitimate goal, a zero tolerance policy has a tenuous relationship to that objective.”⁴²

D. Less Discriminatory Alternatives.

1. Title VII.

1002, 1008 (C.D. Ill. 2002) (race-based disparate impact claim challenging employer’s policy of not hiring former felons was cognizable under Title VII and thus survived motion to dismiss).

³⁸ See generally EEOC’s *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>.

³⁹ See EEOC Compliance Manual (citing *Green*, 523 F.2d at 1298-99 (striking down employer’s absolute bar of anyone ever convicted of a crime other than a minor traffic offense).

⁴⁰ See *Elston v. Talladega Cnty Bd. of Educ.*, 997 F.2d 1394, 1412-1413 (11th Cir. 1993).

⁴¹ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989).

⁴² Siman, *supra* note 26, at 345 (citations omitted).

If the employer satisfies this requirement, the burden shifts back to the plaintiff to show that an equally valid and less discriminatory practice was available that the employer refused to use.⁴³ “In examining the alternatives, the risk and cost to the employer are relevant.”⁴⁴

2. Title VI.

Even if the school demonstrates educational necessity, a Plaintiff who can demonstrate a less discriminatory but equally effective method of achieving the school’s goals may still prevail on her disparate impact claim.⁴⁵ In the context of school to prison push-out, “[o]ne can argue that there are comparably effective practices that will result in less disproportionate results. Experts have suggested a variety of alternative disciplinary practices that could achieve school goals without disproportionately burdening minority students.”⁴⁶ “For example, many zero tolerance policies impose mandatory out-of-school suspensions for a variety of infractions. If such a policy has a disparate impact, it could be replaced by an in-school suspension policy that would result in less adverse effect on minorities while still allowing disciplined students to be separated from the student body.”⁴⁷

There are several other viable alternatives to exclusionary discipline,⁴⁸ including:

- **Positive Behavior Support.**

Of the over 170,000 youth in America being held in short or long-term juvenile detention or correctional facilities, many lack basic academic, social, and problem-solving skills, and have

⁴³ *Adams v. City of Chicago*, 469 F.3d 609, 613; 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) & (k)(1)(C).

⁴⁴ *United States v. S.C.*, 445 F. Supp. 1094, 1115-16 (D.S.C. 1978) (“Plaintiffs contend that mere graduation from an approved program should be sufficient and would have a lesser impact on blacks. We cannot find this alternative will achieve the State’s purpose in certifying minimally competent persons equally well as the use of a content-validated standardized test.”).

⁴⁵ *See Elston*, 997 F.2d at 1407.

⁴⁶ Siman, *supra* note 26, at 345 (citations omitted).

⁴⁷ *Id.* (citing omitted).

⁴⁸ *See* Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School*, The Center for Civil Rights Remedies at The Civil Rights Project at UCLA (August 7, 2012), available at <http://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf>

histories of physical, sexual, and substance abuse.⁴⁹ The School-to-Prison Reform Project, sponsored by the Southern Poverty Law Center, is focused on mitigating the risk of these negative outcomes resulting from deficiencies in student academic, social and problem solving competencies by promoting positive behavioral interventions and support in schools.⁵⁰ Another initiative is Tools for Promoting Educational Success and Reducing Delinquency, a project sponsored by the National Association of State Directors of Special Education and the National Disability Rights Network.⁵¹

Positive Behavioral Intervention and Supports (“PBIS”) also has been successfully implemented in a variety of alternative education and day treatment programs. While PBIS does not in itself eliminate or even, in some cases, reduce racial disparity in school discipline, it is an evidence-based, tiered support strategy that has been effective in reducing overall disciplinary interventions in schools.⁵² These supports are also operated by educational, mental health, or juvenile justice agencies in a variety of programs not found in most public schools.⁵³ For instance, various secure care facilities offer positive behavior support as an alternative to traditional disciplinary practices, with the same beneficial effects that have been observed in public schools.⁵⁴ Teaching youth what behaviors are expected and acknowledging them for displaying these is proving to be an effective alternative to traditional approaches to discipline in these facilities.⁵⁵

⁴⁹ See *Positive Behavior Support Youth At-Risk and Involved in Juvenile Corrections*, Positive Behavioral Interventions & Support, available at http://www.pbis.org/community/juvenile_justice/default.aspx; see also Remarks of U.S. Secretary of Educ. Arne Duncan at the Release of the Joint DOJ-ED School Discipline Guidance Package, Jan. 8, 2014 (“So often acting-out behavior is a symptom of underlying issues children are dealing with at school, at home, or in the community. We must get beyond the surface issue and get to the heart of the problem. Schools should be training staff, engaging families and community partners, and deploying real resources to help students develop the resolution skills they need to avoid or de-escalate problems. As Frederick Douglass famously said, ‘It is easier to build strong children than to repair broken men.’ Grit, resilience, conflict resolution skills—these are all skills that can be taught and learned, and are as important to long-term success as reading, writing, and math.”) available at <http://www.ed.gov/news/speeches/rethinking-school-discipline>.

⁵⁰ *Positive Behavior Support Youth At-Risk and Involved in Juvenile Corrections*, *supra*. note 46.

⁵¹ *Id.*

⁵² Department of Education Guiding Principles: A Resource Guide for Improving School Climate and Discipline, issued January 2014, page 7.

⁵³ *Positive Behavior Support Youth At-Risk and Involved in Juvenile Corrections*, *supra*. note 46.

⁵⁴ *Id.*

⁵⁵ *Id.*

- **Restorative justice.**

The principle of restorative justice focuses on creating safe school environments through facilitating a culture and community of respect, accountability, and taking responsibility. It focuses on non-punitive justice for the harm done to people and relationships. The key is an open dialogue that involves conflict resolution skills and active listening to empower students to take ownership of their problems. Restorative interventions may include conferences, mediations, and other types of group discussions. The goal of restorative justice is to teach students empathy, empowerment, and problem solving skills to address harms committed in a healthy way that lessens the risk of poor behaviors in the future without using exclusionary discipline. Some state reporting indicates that restorative justice has been shown to decrease suspension rates anywhere from between 40-80%, as well as to result in a nearly 50% drop in absenteeism and a 60% decrease in tardiness.⁵⁶

- **Social and Emotional Learning.**

Social and emotional learning (“SEL”) is a research-based process through which children and educators receive critical instruction in order to become competent in five core areas: self-awareness, self-management and goal setting, social awareness, relationship skills and responsible decision making.⁵⁷ Empirical evidence from hundreds of studies has shown that students who have received SEL instruction are less disruptive in the classroom and are less likely to be suspended than students in control groups.⁵⁸ Effective SEL instruction methods are interactive and engaging and can include teaching social-emotional competencies through modeling how to express feelings or show empathy, using conflict-resolution protocols in real time situations, involving students in rule-making, using sports and games to teach cooperation, and allowing students to practice active listening with a partner.⁵⁹ The Collaborative for

⁵⁶ See Restorative Justice Colorado, <http://www.rjcolorado.org/restorative-justice-in-schools.html>, (last visited October 5, 2015). “Restorative Justice has the potential to offer negative leaders reason enough and structure enough to step into positive leadership roles inside and outside of the classroom.” *Id.*; see also <http://www.fixschooldiscipline.org/toolkit/educators/restorative/>; see also <http://www.icjia.state.il.us/public/pdf/BARJ/SCHOOL%20BARJ%20GUIDEBOOOK.pdf>; see also <http://healthyschoolsandcommunities.org/Docs/Restorative-Justice-Paper.pdf>.

⁵⁷ Collaborative for Academic, Social, and Emotional Learning, *Frequently Asked Questions about Social and Emotional Learning (SEL)*, <http://www.casel.org/social-and-emotional-learning/frequently-asked-questions/> (last visited October 5, 2015).

⁵⁸ *Id.*

⁵⁹ *Id.*

Academic, Social and Emotional Learning (CASEL) has established an online guide that identifies and rates evidence-based SEL programs for use by schools and advises schools how to select and implement such programs.⁶⁰

Federal policy makers have endorsed SEL as an effective option to exclusionary discipline. DOE has highlighted SEL instruction in schools as one of several action steps that schools could take to promote a positive school climate.⁶¹ Also, two bills supporting SEL have been introduced in the U.S. House of Representatives during the 113th congressional session. H.R. 1875 was sponsored by Rep. Tim Ryan and was introduced on May 8, 2013. It would make SEL instruction eligible for teacher professional development funds under Title II of the Elementary and Secondary Education Act.⁶² H.R. 4509, which was introduced on April 29, 2014 by Rep. Susan Davis, would amend the Higher Education Act to ensure that pre-service teachers learn about SEL in their teacher preparation courses.⁶³

III. Application of Disparate Impact Theory to the School-to-Prison Pipeline.

A. Overview of School-to-Prison Pipeline in Traditional Public Schools.

Far too many school discipline policies—such as zero tolerance policies, suspensions, expulsions and school-based arrests—exact a devastating and disproportionate impact on low-income students of color and disabled students.⁶⁴ A federal education study collecting civil rights data for the 2011-2012 school year demonstrates that racial disparities in school discipline

⁶⁰ *Id.*

⁶¹ Department of Education Guiding Principles: A Resource Guide for Improving School Climate and Discipline, *supra* note 49, at 2.

⁶² H.R. 1875, 113th Cong. (2013).

⁶³ H.R. 4509, 113th Cong. (2014).

⁶⁴ See American Civil Liberties Union, <https://www.aclu.org/racial-justice/what-school-prison-pipeline>, (last visited October 5, 2015), (“The ‘school-to-prison pipeline’ refers to the policies and practices that push our nation’s schoolchildren, especially our most at-risk children, out of classrooms and into the juvenile and criminal justice systems.”); see also Molly Knefel, *The School to Prison Pipeline, a Nationwide Problem for Equal Rights*, Rolling Stone Magazine, (Nov. 7, 2013) <http://www.rollingstone.com/music/news/the-school-to-prison-pipeline-a-nationwide-problem-for-equal-rights-20131107> (“‘The school-to-prison pipeline refers to interlocking sets of relationships at the institutional/structural and the individual levels,’ . . . All of these forces work together to push youth of color, especially, out of schools and into unemployment and the criminal legal system.”) (quoting Mariame Kaba, founding director at Project NIA, an advocacy group in Chicago fighting youth incarceration).

is a real issue. Specifically, for the first time since 2000, the U.S. Department of Education’s Office for Civil Rights (OCR) recently compiled civil rights data from all 97,000 of the nation’s public schools and its 16,500 school districts—representing 49 million students.⁶⁵ This Civil Rights Data Collection (“CRDC”) information is now accessible to the public in a searchable online database at crdc.ed.gov.⁶⁶

The CRDC showed that in American schools, black students without disabilities were more than three times as likely as whites to be expelled or suspended. Although black students made up 15 percent of students in the data collection, they made up more than one third of students suspended once, 44 percent of those suspended more than once and more than one third of students expelled.⁶⁷ More than half of students involved in school-related arrests or referred to law enforcement were Hispanic or black, according to the data.⁶⁸

Research suggests the racial disparities in how students are disciplined are not explained by more frequent or more serious misbehavior by students of color, according to a letter sent to schools with the recommendations by the departments.⁶⁹ “For example, in our investigations, we have found cases where African-American students were disciplined more harshly and more frequently because of their race than similarly situated white students,” the letter said. “In short, racial discrimination in school discipline is a real problem.”

To that end, the OCR data further “shows that racial disparities in school discipline policies are not only well-documented among older students, but actually begin during

⁶⁵ See *Expansive Survey of America’s Public Schools Reveals Troubling Racial Disparities, Lack of Access to Pre-School, Greater Suspensions Cited*, U.S. Department of Education Office for Civil Rights, available at <http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities> (March 21, 2014).

⁶⁶ *Id.*

⁶⁷ See *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, U.S. Department of Education Office for Civil Rights and U.S. Department of Justice Civil Rights Division (January 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>; see also *Expansive Survey of America’s Public Schools Reveals Troubling Racial Disparities, Lack of Access to Pre-School, Greater Suspensions Cited*, *supra* note 62.

⁶⁸ *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, *supra* note 64.

⁶⁹ *Id.*

preschool,” said Attorney General Eric Holder.⁷⁰ While African American kids make up about 18% of preschoolers, they account for 42% of preschoolers who get suspended⁷¹. And that early discipline can lead to much bigger problems.⁷² The 2011-2012 release shows that access to preschool programs is not a reality for much of the country. In addition, students of color are suspended more often than white students, and black and Latino students are significantly more likely to have teachers with less experience who aren’t paid as much as their colleagues in other schools.⁷³ Native-Hawaiian/Pacific Islander kindergarten students are held back a year at nearly twice the rate of white kindergarten students.⁷⁴ The study also revealed that out of all public schools in America, about 40% of public school districts do not offer preschool, and where it is available, it is mostly part-day only.⁷⁵ Of the school districts that operate public preschool programs, barely half are available to all students within the district.⁷⁶

Young men and boys at color are at particular risk for derailment by school disciplinary policies. OCR found these groups “are disproportionately affected by suspensions and zero-tolerance policies in schools.”⁷⁷ The problem is that as the civil rights data shows, “[s]uspended students are less likely to graduate on time and more likely to be suspended again. They are also more likely to repeat a grade, drop out, and become involved in the juvenile justice system.” *Id.*

Attorney General Eric Holder has said the problem is frequently the result of well-intentioned “zero-tolerance” policies that too often inject the criminal-justice system into the resolution of problems. Zero-tolerance policies, which became popular in the 1990s, often spell out uniform and swift punishment for offenses such as truancy, smoking or carrying a weapon. Violators can lose classroom time or become saddled with a criminal record for these and other

⁷⁰ See U.S. Department of Education Office for Civil Rights, *Civil Rights Data*, (March 28, 2014), available at <http://www2.ed.gov/news/newsletters/edreview/2014/0328.html>

⁷¹ *Id.*

⁷² *Id.*

⁷³ Expansive Survey of America’s Public Schools Reveals Troubling Racial Disparities, Lack of Access to Pre-School, Greater Suspensions Cited, *supra* note 62.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

offenses. “Ordinary troublemaking can sometimes provoke responses that are overly severe, including out of school suspensions, expulsions and even referral to law enforcement and then you end up with kids that end up in police precincts instead of the principal’s office,” Holder said in a statement.

The CRDC data also show that an increasing number of students are losing important instructional time due to exclusionary discipline. The increasing use of disciplinary sanctions such as in-school and out-of-school suspensions, expulsions, or referrals to law enforcement authorities creates the potential for significant, negative educational and long-term outcomes, and can contribute to what has been termed the school to prison pipeline. 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.⁷⁸

B. Recent Scrutiny of School Discipline Practices in Public Charter Schools.

Though researchers, advocates and the Federal government have focused on the impact of exclusionary discipline on students of color who attend public schools generally, exclusionary discipline administered specifically in public charter schools has received significant scrutiny recently. Charter schools are public schools that operate independently from the public school system, and are a growing part of the public education system around the country. Charter schools generally operate pursuant to a performance contract or charter petition with a state or local educational agency or other authorizing organization that calls out the schools’ obligations. To provide a unique and focused educational experience, charter schools may have stated educational missions or objectives that differ significantly from the standard curriculum or course content of traditional local public schools. Although regular public schools are subject to the governance of an elected school board, charter schools are different in terms of how they are governed and how they comply with different laws. For instance, while in the traditional public school context disciplinary issues may be handled at a different structure than the school itself, charter schools generally administer all of their own disciplinary protocols and processes onsite. Moreover, although it varies by state and local jurisdiction, charter schools are often exempt from many state and local rules that apply to other public schools, such as personnel, operational, and curricular laws that might apply to other public schools in that state. Several practitioners have observed that this lack of oversight and exemption from standards applicable to traditional public schools only exacerbates the school-to-prison pipeline problem for charter school students.

⁷⁸ See DOE & DOJ Dear Colleague Letter, January 8, 2014, (*available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.)

As one example, the Dignity in Schools Campaign, a coalition of more than eighty organizations across the United States opposing overly punitive and harmful school discipline practices, recently published Accountability Guidelines (“DSC Guidelines”) on School Pushout and Charter Schools to address the lack of oversight and accountability that contributes to school pushout in charter schools.⁷⁹ The DSC Guidelines caution that “[w]hile charters receive public funding, they are not required to meet the same standards for public oversight as traditional public schools or to provide the same protections for the rights of students, parents and teachers.”⁸⁰ The DSC Guidelines provide that “[w]ithout this oversight, students, parents and teachers in charter schools do not have the same pathways to seek recourse or demand change when students are pushed out of the school as they would in a publicly accountable system.”⁸¹ According to the DSC Guidelines, “[t]his lack of oversight contributes to inequities in our education system and to the larger school pushout crisis in our nation, resulting in lost learning time and an increased likelihood of involvement with the juvenile justice system among students.”⁸²

Research related to expulsions at charter schools supports the DSC Guidelines’ proposition that the lack of oversight at charter schools as opposed to traditional public schools contributes to the school-to-prison pipeline. Charter schools in Washington, D.C. and in Chicago, for example, have expelled students at substantially higher rates than their traditional public school counterparts which serve students in the same district.⁸³ Charter school critics and student advocates have charged that charter schools expel students for failure to wear uniforms, skipping class, repeated minor infractions, or behavior categorized as “defiant” by school

⁷⁹ See *Accountability Guidelines on School Pushout and Charter Schools*, Dignity in Schools Campaign (2014), available at http://www.dignityinschools.org/sites/default/files/DSC_Charter_Accountability_Guidelines.pdf.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See, Noreen S. Ahmed,-Ullah and Alex Richmonds, *Expulsion rate higher at charter schools*, Chicago Tribune (February 26, 2014), http://articles.chicagotribune.com/2014-02-26/news/ct-chicago-schools-discipline-met-20140226_1_charter-schools-andrew-broy-district-run-schools. (which reported that Chicago public schools released data showing that in the 2012-2013 school year, charter schools expelled 307 out of 50,000 students, for a rate of 61/10,000, while traditional public schools expelled 182 of 353,000 students, for a rate of 5/10,000. See also, Emma Brown, *D.C. charter schools expel students at far higher rates than traditional public schools*, Washington Post, January 5, 2013, https://www.washingtonpost.com/local/education/dc-charter-schools-expel-students-at-far-higher-rates-than-traditional-public-schools/2013/01/05/e155e4bc-44a9-11e2-8061-253bccfc7532_story.html. (which reported that DC charter schools expelled 676 students in the past three years for a rate of 72/10,000 while traditional public schools expelled 24 students during the same period, for a rate of less than 1/10,000.)

teachers and administrators who use wide discretion and subjective standards afforded them in school discipline policies.⁸⁴ They also say that expulsion data does not capture students with behavior struggles who are persuaded or “counseled” out by charter school administrators who offer them a choice of expulsion or voluntary withdrawal.⁸⁵

C. DOJ and DOE Initiatives to Address STPP Issues.

The Department of Justice and Department of Education have recently introduced initiatives to address school discipline policies that disproportionately send children of color and students with disabilities into the juvenile justice system.⁸⁶ Specifically, as part of his budget request, President Obama proposed a new initiative called Race to the Top-Equity and Opportunity (“RTT-Opportunity”), which would create incentives for states and school districts to drive comprehensive change in how states and districts identify and close opportunity and achievement gaps.⁸⁷ Grantees would enhance data systems to sharpen the focus on the greatest disparities and invest in strong teachers and leaders in high-need schools.⁸⁸

⁸⁴ See Brown and Ahmed, *supra* note 80.

⁸⁵ See *Charter Schools and Students with Disabilities: Preliminary Analyses of the Legal Issues and Areas of Concern*, Council of Parent Attorneys and Advocates, Council of Parent Attorneys and Advocates (COPAA), 2012, at 31; Kylah Torre, *Charter Schools and the Process of ‘Counseling Out’*, Graduate Center, The City University of New York, available at <https://traue.commons.gc.cuny.edu/issue-2-fall-2013/torre/>; see advocatesforchildren.org/litigation/class-actions/trilogy; see also Eduardo Ferrer, *District Discipline: The Overuse of Suspension & Expulsion in the District of Columbia*, DC Lawyers for Youth (June 20, 2013), available at http://www.dclj.org/district_discipline (reporting data on suspensions from the District of Columbia Public Schools and the Public Charter School Board, discussing that recent research has demonstrated that being suspended causes students to be less likely to advance in school and more likely to become involved in the juvenile justice system, and recommending ways for the District to reduce its suspension rate); see also Tony Fabelo et al., *Breaking Schools’ Rules: A Statewide Study of How School Discipline Relates to Students’ Success and Juvenile Justice Involvement*, Justice Center, The Council of State Governments, & Public Policy Research Institute (July 2011), available at <http://csgjusticecenter.org/youth/breaking-schools-rules-report/> (providing a statewide study of nearly 1 million Texas public secondary school students followed for at least 6 years showing that the majority of students were suspended or expelled between seventh to twelfth grade); see also Losen and Gillespie, *supra* note 45 (discussing national study of suspensions of students in K-12 in 2009-2010 showing that many school districts are frequently resorting to suspension for violations of even minor school rules, resulting in loss of classroom time, increased drop-out rates, and increased risk of future incarceration).

⁸⁶ See *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, *supra* note 64.

⁸⁷ See *Race to the Top-Equity and Opportunity: Support to Close the Achievement and Opportunity Gaps*, U.S. Department of Education (January 8, 2014), available at <http://www2.ed.gov/documents/budget/2015/rtt-equity-opportunity-2015.pdf>

⁸⁸ *Id.*

The associated guidelines, issued by the Justice and Education departments, provide the following nonbinding recommendations:

- Additional staff training in classroom management, conflict resolution, and ways to de-escalate classroom disruption and misconduct;
- Draw clear distinctions about the responsibilities of school security personnel;
- Ensure school officials and teachers understand their obligations under civil rights laws;
- Establish procedures and train school personnel and school volunteers on how to distinguish between disciplinary infractions appropriately handled by school officials versus major threats to school safety or serious school-based criminal conduct that cannot be safely and appropriately handled by the school’s disciplinary procedures, and how to contact law enforcement when warranted;
- Regularly meet with school resource officers and other security or law enforcement personnel who work in the school to ensure that they receive training to work effectively and appropriately with elementary and secondary students. Such training may include instruction in bias-free policing, including instruction on implicit bias and cultural competence; child and adolescent development and age appropriate responses; practices demonstrated to improve school climate; restorative justice techniques; mentoring; classroom presentation skills; conflict resolution;
- Engage families;
- Educate students on conflict resolution skills;
- Provide opportunities for school security officers to develop relationships with students and parent; and
- Collect and monitor data that security or police officers take to ensure nondiscrimination.⁸⁹

These recommendations are applicable to public charter schools as well. In May 14, 2014, DOE issued a Dear Colleague Letter to remind charter schools “that the Federal civil rights laws, regulations, and guidance that apply to charter schools are the same as those that apply to

⁸⁹ *Id. at 75.*

other public schools.”⁹⁰ These same Federal civil rights standards apply to public charter schools “regardless of whether they receive federal funds under the Department’s Charter Schools Program.”⁹¹ In the Letter, DOE addressed several issues it observed arising in the charter and traditional public school context, such as discrimination in the administration of discipline⁹² and admissions.⁹³ DOE further explains that the *Guidance on the Nondiscriminatory Administration of School Discipline* “offers detailed assistance on how to identify, avoid, and remedy discriminatory discipline[,]” with a focus on racial discrimination.⁹⁴ The Letter further advises that OCR is also available to provide technical assistance to students, parents/guardians, community-based organizations, and other stakeholders who are interested in learning more about the Federal civil rights laws of students and parents and the responsibilities of charter schools.⁹⁵

The May 2014 Dear Colleague Letter further reminds State Education Agencies (“SEAs”) and charter school authorizers that “they have an important role in assisting charter schools with civil rights compliance.”⁹⁶ Specifically, “[e]very SEA or charter authorizer that

⁹⁰ See *Dear Colleague Letter: Charter Schools*, U.S. Department of Education (May 14, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

⁹¹ *Id.* at 2.

⁹² *Id.* at 6.

⁹³ *Id.* at 6. Note that the Obama administration, through public advocacy and the DOE’s Race To the Top initiative (“RTTP”), has promoted the expansion of charter schools, as well as other school choice programs like vouchers. However, research in several states and in other countries that was completed prior to and following the announcement of RTTP has shown a strong correlation between charter school expansion and increased racial, ethnic and economic isolation of students. See Iris. C. Rothberg, *Charter Schools and the Risk of Increased Segregation*, Education Week and Phi Delta Kappa International (March 27, 2014), available at http://www.edweek.org/ew/articles/2014/02/01/kappan_rotberg.html.

(Charter schools that recruit students of specific racial groups, that are run by charter management organizations and that select students based on achievement levels tend to exacerbate racial isolation in public schools. Also, charter schools that exclude students because parents fail to meet demanding parental involvement requirements or expel students who fail to meet academic or behavior standards also increase isolation in public schools. Rothberg noted that notwithstanding the voluminous evidence showing that charter expansion and other school choice policies have resulted in increased isolation, DOE, through RTTP, has encouraged charter expansion. According to Rothberg, the increased racial, ethnic and economic isolation in public schools in the wake of charter expansion stands in an odd juxtaposition to the DOE’s May 14, 2014 Dear Colleague letter which reminds charters of their obligations to comply with civil rights laws, including laws prohibiting discrimination in admissions.)

⁹⁴ *Dear Colleague Letter: Charter Schools*, *supra* note 87, at 6.

⁹⁵ *Id.* at 6.

⁹⁶ *Id.* at 7.

receives Federal financial assistance has, as a matter of Federal law, an obligation to ensure that any charter school to which it provides a charter, money (regardless of whether they are Federal or State Funds), or other significant assistance, is not discriminating.”⁹⁷ The Letter encourages States to designate agencies to take, investigate, and resolve complaints of discrimination by charter schools as well.⁹⁸

D. Title VI Enforcement by the Federal Government.

Because a private right of action is not available under Title VI for disparate impact claims (only disparate treatment claims), see *Sandoval*, discussed *infra*, a claimant’s most viable avenue for relief is generally an administrative complaint.

1. Legal Framework in Disparate Impact Cases.

The DOJ and DOE’s recent Dear Colleague Letter states that “[s]chools also violate Federal law when they evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race. The resulting discriminatory effect is commonly referred to as ‘disparate impact.’”⁹⁹

The agencies state that “[i]n determining whether a facially neutral policy has an unlawful disparate impact on the basis of race, the Departments will engage in the following three-part inquiry (see also Illustration 2, page 13)[:]”

(1) Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races? For example, depending on the facts of a particular case, an adverse impact may include, but is not limited to, instances where students of a particular race, as compared to students of other races, are disproportionately: sanctioned at higher rates; disciplined for specific offenses; subjected to longer sanctions or more severe penalties; removed from the regular school setting to an alternative school setting; or excluded from one or more educational programs or activities. If there were no adverse impact, then, under this inquiry, the Departments would not find

⁹⁷ *Id.* at 7. (citing 34 C.F.R. §§ 100.3(b)(1), 100.3(b)(2), 100.4(b) (Title VI).

⁹⁸ *Id.*

⁹⁹ See *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, *supra* note 64, at 11.

sufficient evidence to determine that the school had engaged in discrimination. If there were an adverse impact, then:

(2) Is the discipline policy necessary to meet an important educational goal?

In conducting the second step of this inquiry, the Departments will consider both the importance of the goal that the school articulates and the tightness of the fit between the stated goal and the means employed to achieve it. If the policy is not necessary to meet an important educational goal, then the Departments would find that the school had engaged in discrimination. If the policy is necessary to meet an important educational goal, then the Departments would ask:

(3) Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school's proffered justification a pretext for discrimination? If the answer is yes to either question, then the Departments would find that the school has engaged in discrimination. If no, then the Departments would likely not find sufficient evidence to determine that the school had engaged in discrimination.¹⁰⁰

The Departments also list a host of school policies that can raise disparate impact concerns:

- Policies that impose mandatory suspension, expulsion, or citation (e.g., ticketing or other fines or summonses) upon any student who commits a specified offense – such as being tardy to class, being in possession of a cellular phone, being found insubordinate, acting out, or not wearing the proper school uniform;
- Corporal punishment policies that allow schools to paddle, spank, or otherwise physically punish students;
- Discipline policies that prevent youth returning from involvement in the justice system from re-enrolling in school; and
- Policies that impose out-of-school suspensions or expulsions for truancy also raise concerns because a school would likely have difficulty demonstrating that excluding a student from attending school in response to the student's efforts to avoid school was necessary to meet an important educational goal.¹⁰¹

¹⁰⁰ *Id* at 11-12. (emphasis added).

¹⁰¹ *Id.* at 12.

2. Unique Issues Pertaining to Charter Schools.

An attorney evaluating a disparate impact claim against a charter school must understand and acknowledge the key differences between public charter schools and traditional public schools.¹⁰² For example, the attorney must consider:

- What local and state rules and procedures the charter school is subject to. Charter schools are not automatically subject to state or community laws applicable to traditional public schools. Counsel must educate his or herself on the relevant legal standards in order to determine whether and to what extent the charter school is or is not complying with them;
- The educational mission or objectives of the charter school. Charter schools are often founded to offer innovative, unique, focused learning that is not otherwise available in the local public school. Counsel should understand what the charter school's stated purpose is;
- What the charter school's contract with the authorizing agency or organization provides. Often, charter schools have contracts called performance contracts or charter petitions that spell out the charter school's obligations, including provisions on special education, discipline, and what state assessments the charter school is subject to; and
- That the school district or local or state educational agency authorizing the charter school may provide some guidance and oversight of the charter school, but it does not exercise control over the charter school. Attorneys preparing disparate impact complaints should steer clear of trying to use traditional public school systems as standards for charter schools.

3. Examples of Enforcement of Title VI Regulations.

Unfortunately, voluntary agreements between school systems and OCR are available to the public only through request under the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(A) (2001). As a result, it is often difficult to assess these agreements to determine how OCR typically resolves cases involving school discipline.¹⁰³ Nevertheless, we discuss several case examples here in an effort to shed light on OCR's processes and findings.

¹⁰² For an excellent overview of the differences between public charter schools and traditional public schools, see <http://apps.americanbar.org/cle/programs/nosearch/faculty/ce1411fss.html>.

¹⁰³ See The Advancement Project, <http://safequalityschools.org/resources/P40>.

For example, speaker Soto provided the following case example at the School Discipline briefing:

Now, I would like to provide an example of a case where OCR found a violation of Title VI in the administration of student discipline. Because the case remains in the monitoring phase, I cannot provide identifying details. In this case, the complaint, filed by a teacher, alleged that a district discriminated against seventh- and eighth-grade African-American students by disciplining those students more harshly (*i.e.* differently) than white students. An analysis revealed that a statistically significant difference among the races existed in the school's application of its discipline policy, with African-American students receiving greater disciplinary sanctions for all four categories of misconduct examined. The District was unable to provide a legitimate, nondiscriminatory, non-pretexual explanation for this difference in treatment based on race. Through interviews and extensive document reviews, OCR confirmed that African-American students were punished more harshly than their white counterparts for the same or similar conduct. For example, OCR's review of teacher slips referring students for disciplinary actions revealed that the slips on white students also included positive teacher comments such as "wonderful student;" while no similar comments were included for African-American students. OCR also learned that most white students were allowed to exhaust informal and less harsh disciplinary sanctions before being referred for formal discipline, whereas similarly situated African-American students were not allowed to exhaust informal disciplinary sanctions.

Under such circumstances, an OCR agreement would normally include remedies such as: revising existing disciplinary policies and procedures to ensure uniform application of disciplinary consequences; training staff on the application of disciplinary policies and procedures; and prospective monitoring of disciplinary sanctions.¹⁰⁴

In addition, DOJ and DOE offer several examples of where they might find disparate impact violations in the January 2014 Dear Colleague Letter. In Example 4, the Departments consider the following:

A school district established a district-wide alternative high school to which it assigns students with extensive disciplinary records. Although only 12 percent of the district's students are African-American, 90 percent of students assigned involuntarily to the alternative high school are African-American. The evidence

¹⁰⁴ *School Discipline and Disparate Impact, Briefing Report 2011*, US Commission on Civil Rights (*found at* http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.)

shows that when white and African-American students commit similar offenses in their regular high schools, the offenses committed by the white students have not been reflected as often in school records. The evidence also shows that some white students are not assigned to the alternative high school, despite having disciplinary records as extensive (in terms of number of and severity of offenses) as some of the African-American students who have been involuntarily assigned there. Based on these facts and circumstances, if the school district could not provide a legitimate, nondiscriminatory reason for the different treatment or the reason provided were pretextual, the Departments would find that the school district had violated Titles IV and VI.¹⁰⁵

Example 6 deals with disciplinary sanctions for “use of electronic devices:”

A school district adopted an elaborate set of rules governing the sanctions for various disciplinary offenses. For one particular offense, labeled “use of electronic devices,” the maximum sanction is a one-day in-school suspension where the student is separated from his regular classroom but still is provided some educational services. The investigation reveals that school officials, however, regularly impose a greater, unauthorized punishment – out-of-school suspension – for use of electronic devices. The investigation also shows that African-American students are engaging in the use of electronic devices at a higher rate than students of other races. Coupled with the school’s regular imposition of greater, unauthorized punishment – out of school suspension – for use of electronic devices, therefore, African-American students are receiving excessive punishments more frequently than students of other races. In other words, African-American students are substantially more likely than students of other races to receive a punishment in excess of that authorized under the school’s own rules.

There is no evidence that the disproportionate discipline results from racial bias or reflects racial stereotypes. Rather, further investigation shows that this excessive punishment is the result of poor training of school officials on the school rules that apply to use of electronic devices.

Under these circumstances, the Departments could find a violation of Title VI. Although there is no finding of intentional discrimination, the misapplication of the discipline rules by school officials results in an adverse impact (disproportionate exclusion from education services) on African-American students as compared with other students. Because this practice has an adverse racial impact, the school must demonstrate that the practice is necessary to meet

¹⁰⁵ See *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, *supra* note 64.

an important educational goal. The school cannot do so, however, because there is no justification for school officials to disregard their own rules and impose a punishment not authorized by those rules.

Additional training for school officials, clarification of the rules, and the immediate collection and review of incident data to prevent unauthorized punishments might be required to eliminate the disparate impact going forward. Among the individual remedies that might be required are revision of student's school records and compensatory educational services to remedy missed class time.¹⁰⁶

Similarly, Example 7 concerns a school's zero tolerance policy for tardiness:

A middle school has a "zero tolerance" tardiness policy. Students who are more than five minutes tardy to class are always referred to the principal's office at a particular school, where they are required to remain for the rest of the class period regardless of their reason for being tardy. The school also imposes an automatic one-day suspension when a student is recorded as being tardy five times in the same semester. Additional tardiness results in longer suspensions and a meeting with a truancy officer.

The evidence shows Asian-American students are disproportionately losing instruction time under the school's "zero tolerance" tardiness policy, a result of both office referrals and suspensions for repeated tardiness.

An investigation further reveals that white and Hispanic students are more likely to live within walking distance of the school, while Asian-American students are more likely to live farther away and in an area cut off by an interstate highway that prevents them from walking to school. The majority of Asian-American students are thus required to take public transportation. These students take the first public bus traveling in the direction of their school every morning. Even though they arrive at the bus stop in time to take the first bus available in the morning, they often are not dropped off at school until after school has begun.

As justification for the "zero tolerance" tardiness policy, the school articulates the goals of reducing disruption caused by tardiness, encouraging good attendance, and promoting a climate where school rules are respected, all of which the Departments accept as important educational goals. The Departments would then assess the fit between the stated goals and the means employed by the school –

¹⁰⁶ See *id.* at 18.

including whether the policy is reasonably likely to reduce tardiness for these students under these circumstances. Assuming there was such a fit, the Departments would then probe further to determine the availability of alternatives that would also achieve the important educational goals while reducing the adverse effect on Asian-American students (e.g., aligning class schedules and bus schedules, or excusing students whose tardiness is the result of bus delays). If the Departments determine that a school's articulated goal can be met through alternative policies that eliminate or have less of an adverse racial impact, the Departments would find the school in violation of Title VI and require that the school implement those alternatives.¹⁰⁷

4. OCR Complaint and Compliance Review 101.

OCR investigates and resolves discrimination complaints filed by anyone on behalf of those covered under its civil rights acts. OCR may also initiate compliance reviews involving more than one school if OCR finds problems that are particularly acute or widespread.¹⁰⁸ OCR also issues policy guidance and technical assistance to schools to promote voluntary compliance.¹⁰⁹ OCR has a headquarters office and twelve regional offices around the country with approximately 600 lawyers, investigators, and other staff working on investigating and resolving Title VI complaints and compliance reviews involving allegations of discrimination in the administration of student discipline.¹¹⁰

If an individual wishes to file a complaint with OCR, it must be filed within 180 days from the date of the discriminatory conduct, though OCR can extend the deadline.¹¹¹ Upon receiving a timely-filed complaint, OCR will promptly investigate the complaint.¹¹²

¹⁰⁷ *See id.* at 19.

¹⁰⁸ *See School Discipline and Disparate Impact, A Briefing Before The United States Commission on Civil Rights*, United States Commission on Civil Rights (March 2012).

¹⁰⁹ *Id.* at 54.

¹¹⁰ *Id.* at 54.

¹¹¹ 30 C.F.R. § 100.7(b).

¹¹² 48 Fed. Reg. 15,509, 15,511 (April 11, 1983) (the Department of Education will notify the complainant within 15 days of receipt of a complaint and must make a determination within 105 days).

There are certain instances in which OCR is not obliged to investigate a complaint. For example, the OCR is not required to proceed if any of the following facts are present: (1) the complaint involves the same allegations as previously filed complaints where OCR has determined no violation occurred; (2) OCR has recently addressed the issues in the complaint in a compliant or compliance review; (3) previous court or administrative decisions bar the allegations; (4) litigation has been filed with the same allegations; (5) the same complaint has been filed with another agency or institution; (6) the complaint is moot; (7) the complaint does not provide sufficient detail; (8) the victim’s refusal to cooperate impairs OCR’s ability to complete its investigation; (9) OCR refers the complaint to another agency; (10) the complainant dies; or (11) OCR determines that a compliance review is a more effective means of addressing multiple complaints.¹¹³

Mr. Soto explained how OCR conducts its individual case investigations versus compliance reviews of multiple school districts, and whether compliance reviews encompass more than just discipline as follows: “... compliance reviews do not just encompass one issue, and may be brought pursuant to many of the statutes that OCR enforces, such as Title VI, Title IX, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.”¹¹⁴ “Typically, OCR’s field offices will look at data that is publicly available, including state websites, and also at OCR’s civil rights data collection that is refreshed every two years.”¹¹⁵ “Then OCR looks at county-wide or school district databases to determine if there is a concern about the programs and policies of a particular school.”¹¹⁶ During the briefing, Mr. Soto also confirmed that if OCR found something worth investigating after looking at the data it would decide at that point to open a compliance review.¹¹⁷ Subsequently, “the findings are reviewed in OCR headquarters in Washington, often leading to requests for more information that include the visibility of the issue in the community.”¹¹⁸ “Once that information is received, headquarters officials make a decision, and the regional office then takes charge of the investigation.”¹¹⁹ Ultimately, compliance reviews can take from several months to years.¹²⁰

¹¹³ *U.S. Department of Education Office for Civil Rights Case Processing Manual*, Office for Civil Rights, available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html> (last visited October 9, 2015).

¹¹⁴ *School Discipline and Disparate Impact*, *supra* note 105 at 21.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Although OCR uses both disparate treatment and disparate impact theories in its investigations under Title VI, most cases appear to involve disparate treatment.¹²¹ Accordingly, the OCR process focuses on negotiations and soliciting voluntary compliance. However, if the funded entity will not voluntarily comply or negotiations break down, OCR must make a finding of noncompliance and initiate formal enforcement action.¹²² Title VI provides that an agency can compel compliance by “the termination of or refusal to grant or to continue assistance.”¹²³ The Secretary of Education may accordingly suspend, terminate, or refuse to grant funding only if an administrative hearing concludes that the school system has violated Title VI, however.¹²⁴ In addition, limiting or revoking funding is restricted to the relevant program at issue.¹²⁵ The decision to pull or limit funding is also subject to judicial review.¹²⁶ OCR may also refer noncompliant federally-funded entities to the Department of Justice, which can initiate court proceedings.¹²⁷

¹²⁰ *Id.* at 21-22 (“For example, when Assistant Secretary Ali came to OCR in May 2009 there were several reviews still open from 2007-2008.”).

¹²¹ *Id.* at 21; *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline*, The Advancement Project and The Civil Rights Project, Harvard University (June 15, 2000). Pursuant to Title VI, “no . . . action shall be taken until the department or agency concerned . . . has determined that compliance cannot be secured by voluntary means.” 42 U.S.C. § 2000d-1; *Ala. NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 351 (D.C. Ala. 1967).

¹²² 48 Fed. Reg. 15,509, 15,511 (April 11, 1983) (voluntary compliance must occur within 195 days of receipt of a complaint, or commencement of a formal action must occur within 225 days of receipt of the complete complaint).

¹²³ 42 U.S.C. § 2000d-1.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ 42 U.S.C. § 2000d-2; 34 C.F.R. §100.11.

¹²⁷ see *U.S. Department of Education Office for Civil Rights Case Processing Manual*, *supra* note 110.