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# Inherently Unequal

## THE EFFECT OF STRUCTURAL RACISM AND BIAS ON K-12 SCHOOL DISCIPLINE

*Alicia R. Jackson*<sup>†</sup>

### INTRODUCTION

*“The true character of society is revealed in how it treats its children.”*—Nelson Mandela<sup>1</sup>

Overly harsh and discriminatory school discipline policies and biased decision-making practices have led to the disproportionate punishment of Black<sup>2</sup> children, causing them to be excluded from classroom learning and creating a separate and

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<sup>1</sup> *Nelson Mandela Quotes About Children*, NELSON MANDELA CHILDREN’S FUND (Dec. 28, 2015), <https://www.nelsonmandelachildrensfund.com/news/nelson-mandela-quotes-about-children> [<https://perma.cc/257R-PD3J>]. The first Black president of South Africa, and the first to be elected in a fully participatory democratic process, Nelson Mandela fought to end apartheid in South Africa. *Nelson Mandela*, ENCYC. BRITANNICA (last updated Dec. 2, 2022), <https://www.britannica.com/biography/Nelson-Mandela> [<https://perma.cc/2DSQ-WZ2D>]. He worked to erase the effects of apartheid through South Africa’s Truth and Reconciliation Commission and sought to reduce racial inequalities throughout society. *Id.*

<sup>2</sup> For purposes of this Article, the term “Black” refers to various ethnicities of people of African diaspora. From 1500 to the 1860s, at least twelve million enslaved Africans arrived in the Americas. *The African-American Migration Story*, PBS (2013), <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/on-african-american-migrations/> [<https://perma.cc/NQV2-LDT2>]. It is also important to note that in 2020, the AP Stylebook changed its guide to capitalize the “b” in Black. John Daniszewski, *AP Stylebook Updates Race-Related Terms*, AM. COPY EDS. SOC’Y (Feb. 2, 2021), <https://aceseditors.org/news/2021/ap-stylebook-updates-race-related-terms> [<https://perma.cc/2YNE-M7WB>].

unequal education structure. The disparate impact of these disproportionately applied discipline policies and practices has deprived Black students of their constitutional right to an equal education by pushing them out of the classroom, resulting in millions of days of lost instruction annually.

Discipline is a complex problem and is classified as the third most important legal issue confronting educators.<sup>3</sup> Although it is acknowledged that schools have the right to discipline children, this authority is limited and cannot be used indiscriminately.<sup>4</sup> As such, the focus of this article is not on whether schools have a right to discipline, but rather on *how* they discipline and how those practices have a disparate impact on Black students.

In one of the earliest education cases in the United States, *Meyer v. Nebraska*, the Supreme Court in 1923 opined, “[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”<sup>5</sup> Almost thirty years later, in the 1954 landmark case *Brown v. Board of Education*, the Court held that racial segregation in public schools violated both federal law and the Fourteenth Amendment to the Constitution.<sup>6</sup> Later, in its 1982 decision, *Plyler v. Doe*, the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits any state that has a public school system from denying any child living in that state equal access to schooling.<sup>7</sup> Thus, when Black children in public schools are disproportionately punished and subsequently excluded from educational opportunities based on discriminatory practices and policies, they are victims of the separate but unequal school setting that the Court unanimously rejected in *Brown*.

Increasing educational inequalities, coupled with research suggesting that the disciplinary policies fueling the suspension and expulsion of Black students are ineffective,<sup>8</sup>

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<sup>3</sup> Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071, 1072 (2009–2010) (quoting Susan C. Bon et al., *School Law for Teachers: What Every Preservice Teacher Should Know*, ELA NOTES 18, 18 (2008)).

<sup>4</sup> *Id.* Dating back to the English common law, schools were vested with the authority to discipline students through *loco parentis*, the legal concept “in place of the parent.” *Id.* at 1072–73 (quoting 5 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, 351, 352 (2d ed. 2005)).

<sup>5</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>6</sup> *Brown v. Bd. Of Educ.*, 347 U.S. 483, 495–96 (1954).

<sup>7</sup> *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

<sup>8</sup> See Catherine Winter, *Spare the Rod*, APM REPS. (Aug. 25, 2016), <https://www.apmreports.org/episode/2016/08/25/reforming-school-discipline> [<https://perma.cc/EQX3-2PBR>]; Am. Acad. of Pediatrics Council on Sch. Health, *Out of*

heightens both concern and urgency. According to the American Academy of Pediatrics, expulsion and out-of-school suspension are detrimental to the intended outcomes and should only be used as a last resort in “extreme and dangerous” situations.<sup>9</sup> If they arise, these situations should be evaluated “individual[ly] rather than [with] a blanket policy.”<sup>10</sup> Further research found that educators’ “get-tough” attitude, reflected in the adoption of zero-tolerance policies,<sup>11</sup> is unsuccessful “and lead[s] to disproportionate discipline for students of color.”<sup>12</sup> Over a three year period, “researchers found that 26 [percent] of . . . Black students received at least one suspension for a minor infraction . . . compared with just 2 [percent] of white students.”<sup>13</sup> Minor infractions included violations of dress codes, language policies, or cell phone use during class time.<sup>14</sup>

For decades, countless public and private-sponsored studies have documented major disparities in student discipline rates.<sup>15</sup> “[B]lack K-12 students are 3.8 times as likely . . . to receive one or more out-of-school suspensions” as white students in the same grades, often for the same offenses.<sup>16</sup> But, without a

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*School Suspension and Expulsion*, 131 PEDIATRICS e1000, e1005 (2013), <https://doi.org/10.1542/peds.2012-3932> [<https://perma.cc/LPH3-YCUQ>].

<sup>9</sup> AM. ACAD. OF PEDIATRICS COUNCIL ON SCH. HEALTH, *supra* note 8, at e1005.

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

<sup>11</sup> F. Chris Curran, *Just What Are ‘Zero Tolerance’ Policies—and Are They Still Common in America’s Schools?* UNIV. MD. BALT. CNTY. MAG. (Feb. 14, 2019), <https://umbc.edu/stories/just-what-are-zero-tolerance-policies-and-are-they-still-common-in-americas-schools/> [<https://perma.cc/6Z7T-FZHX>].

Zero tolerance [school discipline] policies require specific and generally serious responses—such as suspension or expulsion—for certain types of student misconduct. The Department of Education’s Office for Civil Rights defines a zero tolerance policy as one that “results in mandatory expulsion of any student who commits one or more specified offenses.” As early as the late 1980s, a handful of states had already adopted such laws for offenses like drugs or assaults. The 1994 passage of the federal Gun-Free Schools Act resulted in the expansion of mandatory expulsion policies for firearm offenses to all states. Wider use of zero tolerance approaches by schools for other offenses, such as tobacco and alcohol, soon followed.

*Id.*

<sup>12</sup> Winter, *supra* note 8.

<sup>13</sup> Lea Winerman, *For Black Students, Unfairly Harsh Discipline Can Lead to Lower Grades*, AM. PSYCH. ASS’N (Oct. 7, 2021), <https://www.apa.org/news/press/releases/2021/10/black-students-harsh-discipline> [<https://perma.cc/SF47-KSU7>].

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

<sup>15</sup> Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS (Jan. 18, 2018), <https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/> [<https://perma.cc/4YCN-8EWA>].

<sup>16</sup> Kirsten Weir, *Inequality at School: What’s Behind the Racial Disparity in our Education*, AM. PSYCH. ASS’N. (Nov. 2016), <https://www.apa.org/monitor/2016/11/cover-inequality-school> [<https://perma.cc/A5XB-KD9W>].



full understanding of the origins and impact of structural racism, some members of society may still struggle to accept that bias and discrimination exist in the school setting. In the education context, structural racism is the formal systems, policies, and processes responsible for perpetuating the disparate impact of discipline policies in US schools. These discriminatory policies and processes, coupled with the bias of discipline decision makers, contribute to the disparities in discipline.

The disproportionate and discriminatory treatment of children in public schools should concern all citizens. This is even more true in today's post-*Brown* context, as education is more segregated, and inequality in education has only increased.<sup>17</sup>

While desegregation, school funding litigation, and federal policy significantly reduced educational inequality during the second half of the twentieth century, that inequality has steadily increased ever since. The percentage of intensely racially segregated nonwhite schools, for instance, has more than tripled over the last twenty-five years.<sup>18</sup>

Existing literature and studies have examined disparity in discipline in the K-12 setting and the resulting impact on Black students.<sup>19</sup> Building on that scholarship, this article uses Critical Race Theory<sup>20</sup> to examine structural racism and bias in the school setting. Structural racism and bias are major contributing factors to disproportionate punishment, which directly impacts students' access to education. This article highlights the relationship between educational inequality and

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<sup>17</sup> Derek Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 738 (2018).

<sup>18</sup> *Id.* (footnotes omitted).

<sup>19</sup> Students with disabilities are also disparately impacted by overly harsh discipline policies and discriminatory practices. Press Release, U.S. Dep't of Educ., New Guidance Helps Schools Support Students with Disabilities and Avoid Discriminatory Use of Discipline (July 19, 2022), <https://www.ed.gov/news/press-releases/new-guidance-helps-schools-support-students-disabilities-and-avoid-discriminatory-use-discipline> [https://perma.cc/6U4C-JSTD]. However, the focus of this paper is the impact on Black students' access to education. Many of the conclusions drawn are true of students with disabilities as well.

<sup>20</sup> See generally KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY : THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (describing how Critical Race Theory is a framework of analysis). Theorists credited coining the term and the CRT movement include Derrick Bell, Alan Freeman, Kimberlé Crenshaw, Richard Delgado, Cheryl Harris, Charles R. Lawrence III, Mari Matsuda, and Patricia J. Williams. The majority of CRT scholarship aims to show not only how racism remains a pervasive factor throughout dominant society but also why this pervasive racism problematically denies people many of the constitutional freedoms that they are otherwise guaranteed in the governing documents of the United States. Mary O'Connell, *Tampa Bay Area Teachers Weigh In on Critical Race Theory Ban in Florida Schools*, ABC ACTION NEWS (last updated June 10, 2021, 6:52 PM), <https://www.abccactionnews.com/news/in-depth/tampa-bay-area-teachers-weigh-in-on-critical-race-theory-ban-in-florida-schools> [https://perma.cc/BD5Q-VL93] (quoting Purdue University Online Writing Lab, link no longer available).

structural racism in the United States and asserts that existing civil rights laws and the Fourteenth Amendment require immediate federal intervention to address school discipline disparities. Ultimately, it stresses that fulfilling *Brown*'s promise of equal education cannot be achieved without a collective commitment from the citizenry, the states, and the federal government.

Part I of this article explores international education law and policy, as well as US education policy and regulations by examining Supreme Court cases, federal involvement in education, and the Tenth Amendment of the US Constitution. Part II defines structural racism and examines it as a root cause of education inequality by exploring the pervasive and discriminatory institutional barriers to education for Black children, from slavery until today. Part III covers discipline policies and practices and the impact of decision makers' explicit and implicit bias on school discipline. Part IV examines school discipline rates using data from over 99 percent of US school districts, and the direct impact of discipline disparities on students and society, including poverty, crime, and incarceration rates. Part V provides strategies for addressing school discipline disparities, from cultural competency training and having Black teachers in the classroom to greater oversight and accountability by state lawmakers and the US Department of Education. This article is meant to serve as a tool to minimize the effects of educational inequality and structural racism in the United States while asserting that existing civil rights laws and the Fourteenth Amendment require immediate federal intervention to address school discipline disparities.

## I. THE ORIGINS AND REGULATION OF EDUCATION IN THE UNITED STATES

*"[E]ducation has a fundamental role in maintaining the fabric of our society . . . [and] provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."*—*Plyler v. Doe*<sup>21</sup>

Education is the cornerstone of American society. Dating back to the nation's founding, education has been deemed essential. Over time, state legislatures passed compulsory school laws and established tax-funded public schools, while several

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<sup>21</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

years later the Supreme Court dismantled school segregation.<sup>22</sup> Yet, Black students are disproportionately suspended and expelled compared to their white peers.<sup>23</sup> This trend denies equal access to education in the United States.<sup>24</sup> This Part starts with an overview of international perspectives on education. Next, it explores the history of education in the United States, including the origins of compulsory education laws, challenges to compulsory school laws, and modern compulsory education. It then examines Supreme Court caselaw addressing education and its associated constitutional rights. This Part concludes by examining the Tenth Amendment and the balance between states' regulatory authority over education and the competing role of the federal government in education and the enforcement of federal laws, including civil rights laws.

#### A. *Comparative International Perspectives on Education*

Dating back to ancient Israel and Judea, education has frequently been viewed as essential.<sup>25</sup> Today, it is widely accepted that education is necessary for an ordered and progressive society.<sup>26</sup> Former Secretary-General of the United Nations (UN) Kofi Annan said, "[e]ducation is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy, and sustainable human development."<sup>27</sup>

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<sup>22</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>23</sup> Richard O. Welsh, *Why, Really, Are So Many Black Kids Suspended?*, EDUC. WEEK (Aug. 19, 2021), <https://www.edweek.org/leadership/opinion-why-really-are-so-many-black-kids-suspended/2021/08>. Other historically underserved students, including students with disabilities, are also disproportionately suspended. Meredith Kolodner & Annie Ma, *Kids with Disabilities Face Off-the-Books School Suspensions*, AP NEWS (Oct. 4, 2022), <https://apnews.com/article/school-suspension-special-education-adhd-3cda5e7b0e3080b0416bf879e190e849> [<https://perma.cc/3BGJ-ATPP>].

<sup>24</sup> See Jessica Cardichon & Linda Darling-Hammond, *Protecting Students' Civil Rights: The Federal Role in School Discipline*, LEARNING POL'Y INST. (May 1, 2019), <https://learningpolicyinstitute.org/product/student-civil-rights-school-discipline-report> [<https://perma.cc/Q8XZ-W3XP>].

<sup>25</sup> *Education in Ancient Israel*, AM. BIBLE SOC'Y, <https://bibleresources.americanbible.org/resource/education-in-ancient-israel> [<https://perma.cc/3VYQ-N3TF>].

<sup>26</sup> UNITED NATIONS EDUC., SCI., & CULTURAL ORG., RIGHT TO EDUCATION HANDBOOK 47 (2019), <https://unesdoc.unesco.org/ark:/48223/pf0000366556> [<https://perma.cc/9S9H-36W8>].

<sup>27</sup> Kofi A. Annan, *Forward* to UNITED NATIONS CHILDREN'S FUND, THE STATE OF THE WORLD'S CHILDREN 4, <https://www.unicef.org/media/84771/file/SOWC-1999.pdf> [<https://perma.cc/8AS4-GB25>]; In addition to being a recipient of the Nobel Peace Prize, Kofi Annan served as the United Nations Secretary-General from 1997 to 2006 and was the organization's founding chair. The Kofi Annan Foundation works to galvanize political will to address "threats to peace, development and human rights." *Kofi Annan*, KOFI ANNAN FOUND., <https://www.kofiannanfoundation.org/kofi-annan/> [<https://perma.cc/WC8D-NXSN>]. He was born in 1938 in Kumasi, Ghana. "[He] passed

Since its inception, the UN has been a staunch advocate for children's rights, particularly access to education. In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights.<sup>28</sup> Article 26(1) proclaimed that "[e]veryone has the right to education."<sup>29</sup> The UN acted again by adopting the Universal Declaration of Human Rights<sup>30</sup> and the International Covenant on Economic, Social and Cultural Rights in 1966.<sup>31</sup> Therein, the UN defined education as one of the "basic welfare services and entitlements" provided to citizens.<sup>32</sup> The UN Convention on the Rights of the Child—a human rights treaty that describes the rights to which children are entitled—includes education.<sup>33</sup> The United States is the only member nation that has not ratified the agreement.<sup>34</sup>

The fact that the international community overwhelmingly considers education to be a fundamental right underscores the urgency of ensuring that, at a minimum, all children have equal access to whatever public education is provided in the United States.

#### B. *The Origin of Compulsory Education in the United States*

Since education is generally considered to be a fundamental right, most countries have compulsory school laws that require children to attend school. Compulsory school laws

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away on [August 18,] 2018 after a brief illness in Bern, Switzerland, surrounded by his loved ones." He was eighty at the time of his passing. *Id.*

<sup>28</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [https://perma.cc/8PRM-APCE].

<sup>29</sup> *Id.* art. 26(1); Douglas Charles Hodgson, *The Role and Purposes of Public Schools and Religious Fundamentalism: An International Human Rights Law Perspective*, F. PUB. POL'Y, no. 1, 2012, at 11. <https://files.eric.ed.gov/fulltext/EJ979441.pdf> [https://perma.cc/C9UB-QTDP].

<sup>30</sup> Universal Declaration of Human Rights, *supra* note 28.

<sup>31</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [https://perma.cc/AKP8-PRDR].

<sup>32</sup> Hodgson, *supra* note 29, at 10.

<sup>33</sup> *Id.* at 11. Worldwide, for over sixty-five years or so, society has accepted education as a fundamental human right. The provisions of four significant international human rights instruments, including Article 26(1) of the Universal Declaration of Human Rights (1948), Article 4(a) of the U.N.E.S.C.O. Convention against Discrimination in Education (1960), Articles 13(1) and (2) of the International Covenant on Economic, Social, and Cultural Rights (1966), and Article 28(1) of the Convention on the Rights of the Child (1989), specifically recognize and affirm the right to education. *Id.*

<sup>34</sup> Matthew Lynch, *Why Isn't Education a Constitutional Right?*, EDVOCATE (June 25, 2021), <https://www.theedadvocate.org/why-isnt-education-a-constitutional-right/> [https://perma.cc/JU9E-Z63B] (noting that, as of 2020, all thirty nations that outperform the United States in math and science exam scores are among the 193 nations whose constitutions make reference to "education.").

require children to attend school for a specific amount of time often dictated by the age of the child.<sup>35</sup> Dating back to ancient Judea, parents were required to provide formal education to their children.<sup>36</sup> This effort was driven by Jewish leaders and as a result, rabbis in the region at the time founded schools.<sup>37</sup> Starting as early as the age of six, parents were encouraged to begin sending their children to school.<sup>38</sup> In the 1500s, education reformists like Martin Luther, viewed by many scholars as a radical advocate for education reform, called for mandatory schooling for all at a time when education was reserved for only the children of the wealthy. Luther, a German priest and theologian, worked to achieve his primary goal of ensuring more Christians could read the bible. This call for everyone to be educated led to the concept of compulsory school attendance, which gradually spread to other parts of the world.<sup>39</sup>

Following Martin Luther and other reformers, Massachusetts enacted the first compulsory school law in the United States in 1852.<sup>40</sup> Prior to the Massachusetts statute, education was mostly provided through church-run private schools.<sup>41</sup> Because these schools charged tuition, poorer children were either excluded or received homeschooling.<sup>42</sup> Notably, as immigration increased significantly in the nineteenth and twentieth centuries, education became seen as the key to assimilating immigrant children.<sup>43</sup> Mississippi became the last state to enact a compulsory school law in 1917.<sup>44</sup>

Through their regulatory authority, each state has a statute that defines the lower and upper age limits for compulsory schooling, as well as noncompliance penalties for students and their parents.<sup>45</sup> While compulsory school law age

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<sup>35</sup> *Compulsory Education Laws: Background*, FINDLAW (June 20, 2016), <https://www.findlaw.com/education/education-options/compulsory-education-laws-background.html> [https://perma.cc/49WN-EUKG].

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

<sup>39</sup> Lori Harwood, *Martin Luther Was an Advocate for Education Reform*, UNIV. ARIZ. NEWS (Apr. 4, 2017), <https://news.arizona.edu/story/martin-luther-was-advocate-education-reform> [https://perma.cc/PE3B-FD4S].

<sup>40</sup> *State Compulsory Education Laws*, FINDLAW (last updated June 20, 2016), <https://www.findlaw.com/education/education-options/current-state-developments-in-compulsory-education.html> [https://perma.cc/2XTE-EL3F].

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

<sup>42</sup> *See id.*

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

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

<sup>45</sup> Cassidy Francies & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (Aug. 19, 2020), <https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements/> [https://perma.cc/ENG3-3FH5]. Students risk truancy penalties, such as

limits vary, they all have substantial penalties for noncompliance.<sup>46</sup> Every state provides public education and uses its police power through compulsory school laws to compel children to attend school.<sup>47</sup>

C. *Decisions Highlighting the Importance of Education*

Although the Declaration of Independence and the US Constitution do not explicitly mention education, the Supreme Court has emphasized the importance of education in a series of notable cases. In these cases, the Court was tasked with balancing the individual interests of students and their parents with that of the state to regulate education and education-related activities, such as freedom of speech and expression, search and seizure, and the exercise of religion.

One of the earliest education cases, *Meyer v. Nebraska*, was decided in 1923. In *Meyer*, the Court noted that “[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”<sup>48</sup> Two years later in 1925, in *Pierce v. Society of Sisters*, the Court once again appeared to acknowledge the importance of education when it upheld Oregon’s compulsory system but allowed private schooling.<sup>49</sup> Although the Court found the statute unconstitutional because it interfered with a parent’s right to make educational choices for their children, it also affirmed a state’s right to exercise regulatory control over education in public and nonpublic school settings.<sup>50</sup>

While *Meyer* and *Pierce* are two of the earliest cases to highlight modern day K-12 education, neither case established that children have a constitutional right to an education. Rather, the cases focused primarily on balancing parents’ right to make educational decisions with states’ power to oversee and regulate education. The next high-profile case to address the constitutionality of access to education and educational equality

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finer, juvenile court proceedings, or even criminal charges for parents if they leave school early or miss too many classes while still subject to their state’s compulsory education rules.; *State Compulsory Education Laws*, *supra* note 40.

<sup>46</sup> *State Compulsory Education Laws*, *supra* note 40. Parents who violate state laws requiring compulsory schooling may be punished with a misdemeanor, which carries a fine or, in the case of extremely egregious infractions, a jail sentence of up to thirty days. *Id.* Many states additionally offer options, such as counseling or community service, for misdemeanor penalties, similar to other misdemeanor sentences. *Id.*

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

<sup>48</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>49</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

<sup>50</sup> *Id.* at 534–36.

was *Brown v. Board of Education*.<sup>51</sup> As one of the most influential cases in US history, *Brown* held that racial segregation in public schools violated the Fourteenth Amendment to the Constitution because “separate but equal” facilities instilled a sense of inferiority that was extremely harmful to Black children’s education and personal growth.<sup>52</sup> *Brown* required schools to end the discriminatory practice of segregating students based on race.<sup>53</sup> The Court highlighted the importance of education to society and the public interest, and consequently opined that the most significant role that state and local governments play today is in the context of education.<sup>54</sup> It also alluded to the fact that the United States has compulsory school laws and spends a considerable amount of financial resources on education because, as a nation, we view education as the cornerstone of a democratic society.<sup>55</sup> Therefore, the Court concluded that it is unlikely that any child who is denied the opportunity to receive an equal education can be expected to succeed in life.<sup>56</sup>

Another significant education case, *Plyler v. Doe*, addressed whether denying undocumented children the right to attend public school constitutes alienage-based discrimination that violates the Equal Protection Clause of the Fourteenth Amendment.<sup>57</sup> In its 1982 decision, the Court concluded that the Texas legislation violated the Equal Protection Clause.<sup>58</sup> The Court explained that “education has a fundamental role in maintaining the fabric of our society” and it gives people the fundamental tools they need to live economically productive lives for the benefit of everyone in society.<sup>59</sup> Further, the Court held that denying a targeted group of students equal access to an education violates the Equal Protection Clause’s mandate to get rid of arbitrary restrictions on people’s ability to rise in life on the basis of their own merit.<sup>60</sup> In his concurrence, Justice Blackmun directly addressed the harm children endure when denied equal access to the education that the state has promised:<sup>61</sup> “[I]t immediately and inevitably creates class

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<sup>51</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 487–88 (1954).

<sup>52</sup> *Id.* at 494–95.

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

<sup>54</sup> *Id.* at 493.

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

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

<sup>57</sup> *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

<sup>58</sup> *Id.* at 230.

<sup>59</sup> *Id.* at 221.

<sup>60</sup> *Id.* at 221–22.

<sup>61</sup> *Id.* at 234 (Blackmun, J., concurring); see *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (emphasizing the importance of education for child development).

distinctions of a type fundamentally inconsistent with [the] purposes . . . of the Equal Protection Clause . . . [because] an uneducated child is denied even the opportunity to achieve.”<sup>62</sup>

In each of these cases, the Supreme Court spoke to the importance of education. In *Brown* it stated that “[t]oday, education is perhaps the most important function of state and local governments.”<sup>63</sup> The Court further reasoned that if a child is denied the opportunity to receive an education, it is unlikely that they may be properly expected to achieve in life.<sup>64</sup> Similarly, in *Plyler*, the Court explained that public schools are a vital civic institution for the maintenance of a democratic form of governance and the main means of disseminating the principles that underlie our society.<sup>65</sup>

In the cases of *Pierce*, *Meyer*, and *Brown*, the Supreme Court’s rulings were based on how it interpreted the Equal Protection and Due Process Clauses, as well as the Fourteenth Amendment’s incorporation of other rights (such as freedom of speech) to the states.<sup>66</sup> The Court in *Brown* relied on the Equal Protection Clause to hold that “‘separate but equal’ has no place.”<sup>67</sup> *Meyer* and *Pierce* illustrate the important role of substantive due process in education.<sup>68</sup> Likewise, the Court has ruled on the significance of procedural due process when addressing school discipline. On student discipline, the Supreme Court in *Goss v. Lopez* ruled that students have a “legitimate entitlement to a public education as a property interest.”<sup>69</sup> Further, the *Lopez* Court opined that the Due Process Clause maintains that the state cannot take away a student’s right to education due to misconduct without following the minimal procedures stipulated by the clause.<sup>70</sup>

Even in cases regarding other issues, education is still mentioned when addressing Equal Protection and the Fourteenth Amendment. For instance, in *Lawrence v. Texas*, the Court held that there is constitutional protection for individual decisions about “marriage, procreation, contraception, family relationships,

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<sup>62</sup> *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring).

<sup>63</sup> *Brown*, 347 U.S. at 493.

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

<sup>65</sup> *Plyler*, 457 U.S. at 221 (internal quotation marks and citations omitted).

<sup>66</sup> Scott F. Johnson, *The 14th Amendment Protects the Right to a Public Education*, CONCORD L. SCH. (Apr. 20, 2017), <https://www.concordlawschool.edu/blog/constitutional-law/14th-amendment-protects-rights-education/> [https://perma.cc/LAK8-5PFB].

<sup>67</sup> *Brown*, 347 U.S. at 495.

<sup>68</sup> Johnson, *supra* note 66.

<sup>69</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

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



child rearing, and education” grounded in our laws and culture.<sup>71</sup> Thus, the Court has repeatedly affirmed that education is important to the individual and society as whole, and that the denial of equal educational access violates the Constitution.

*D. States’ Regulation of Education and Federal Involvement in Education*

The Tenth Amendment provides that the states and the people reserve powers not explicitly given to the federal government by the Constitution.<sup>72</sup> As such, the responsibility for education in the United States rests primarily with the states.<sup>73</sup> Through their regulatory authority, states create schools and higher education institutions, design curricula, and specify admissions and graduation standards.<sup>74</sup> Even though education is guaranteed by the constitutions of all fifty states, some state courts have failed to uphold these rights, leading to federal challenges.<sup>75</sup> Dating back to the 1920s, the Supreme Court has upheld a state’s right to regulate education, even when finding that a state law was unconstitutional.<sup>76</sup> In *Meyer*, the Court acknowledged states’ interest in education and did not prohibit states from exercising regulatory control over education.<sup>77</sup>

Congress undoubtedly has had a role in addressing racial disparities in school discipline. While Congress lacks the jurisdiction to actively regulate education because the Constitution does not grant the federal government the power to control education,<sup>78</sup> this contention is counter to what actually occurs. Throughout American history, the federal government, particularly Congress, has been actively engaged in education. The origins of educational authority and oversight at the federal level date back to the creation of the Department of Education

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<sup>71</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (emphasis omitted).

<sup>72</sup> *Tenth Amendment*, LEGAL INFO. INST., [https://www.law.cornell.edu/constitution/tenth\\_amendment](https://www.law.cornell.edu/constitution/tenth_amendment) [<https://perma.cc/6RYJ-MQZ9>].

<sup>73</sup> *The Federal Role in Education*, U.S. DEP’T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/N9W9-KUEU>].

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

<sup>75</sup> Derek W. Black, *The Constitutional Right to Education Is Long Overdue*, CONVERSATION (Dec. 4, 2017, 11:08 PM), <https://theconversation.com/the-constitutional-right-to-education-is-long-overdue-88445> [<https://perma.cc/CX5R-WT5U>].

<sup>76</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

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

<sup>78</sup> Julie Underwood, *Education as an American Right?*, PHI DELA KAPPAN (Jan. 22, 2018), <https://kappanonline.org/underwood-education-american-right/> [<https://perma.cc/7L5X-2H3E>].

(ED) in 1867 by President Andrew Johnson.<sup>79</sup> The ED was created to aid the states in establishing effective school systems by collecting and then sharing information on schools and teaching.<sup>80</sup> Congress's presence in education has had a profound effect on public schools.<sup>81</sup>

Congress predominately exercises its authority in education through its spending power. According to the Constitution, Congress has the authority to impose and collect taxes in order to settle debts, fund the nation's general welfare, and provide for its common defense.<sup>82</sup> Through its use of the spending power, Congress can require states to comply with specific conditions to be eligible for federal funds.<sup>83</sup> In the context of education, while Congress does not have direct oversight, it can offer supplemental funding to states that comply with federal education programs.<sup>84</sup> For example, Title I of the Elementary and Secondary Education Act (ESEA) gives funds to school districts serving a high percentage of low-income students, and the Individuals with Disabilities Education Act (IDEA) provides funding to states based on their population of children with disabilities.<sup>85</sup> Congress has established conditions that require state education officials to comply with specific programmatic conditions and civil rights laws, including the Every Student Succeeds Act, IDEA, and Title IX of the Civil Rights Act (CRA).<sup>86</sup> These specific grant programs illustrate the federal government's engagement in and regulation of education, alongside the states.

#### *E. Balancing Regulation, Roles, and Responsibility of Education*

Through the Tenth Amendment, the states are vested with authority to regulate education policy within their borders and should continue to do so.<sup>87</sup> However, the federal government,

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<sup>79</sup> *The Federal Role in Education*, *supra* note 73; *An Overview of the U.S. Department of Education*, U.S. DEPT OF EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html> [<https://perma.cc/Q7P6-AA4Z>].

<sup>80</sup> *The Federal Role in Education*, *supra* note 73.

<sup>81</sup> *Id.*

<sup>82</sup> *Spending Power*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/spending\\_power](https://www.law.cornell.edu/wex/spending_power) [<https://perma.cc/KL7N-NSJZ>].

<sup>83</sup> *Id.*

<sup>84</sup> Brendan Pelsue, *When It Comes to Education, the Federal Government Is in Charge of . . . Um, What?*, HARV. EDUC. MAG. (2017), <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what> [<https://perma.cc/7EQD-MSPY>].

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

<sup>86</sup> Underwood, *supra* note 78.

<sup>87</sup> U.S. CONST. amend. X.

through Congress, also plays a vital role in education role by assigning special protections for designated students through funding stipulations.<sup>88</sup> For its part, the Supreme Court has sided against the states, finding certain state educational policies and practices are unconstitutional, as noted in *Brown* (separating school facilities based on race),<sup>89</sup> *Meyer* (banning the teaching of German),<sup>90</sup> and *Pierce* (requiring students to attend public school).<sup>91</sup> Still, greater federal intervention is needed by the courts and Congress to address the issue of racial discrimination in education, including the alarmingly disproportionate discipline rates in public K-12 schools. Accountability through the enforcement of civil rights law is a federal responsibility. The federal government's power and responsibility to ensure equal access to education can coexist with the states' Tenth Amendment right to regulate education, as is the case with marriage and other rights interpreted by the Court as fundamental.<sup>92</sup>

In the context of marriage, as a general rule, regulation is left to the states because it is neither delegated to the federal government by the US Constitution nor forbidden by it.<sup>93</sup> However, there are at least two limitations on the states' ability to control marriage. First, with regard "to matters delegated to the United States, such as the regulation of interstate commerce, in the event of any conflict between a federal law regulating interstate commerce and a state's marriage laws . . . the federal law controls;" second, with regard to matters covered by the Bill of Rights, the federal law trumps the regulation of marriage by the states.<sup>94</sup> Education, like marriage, is regulated by the states; however, states' powers are not unlimited. The Supreme Court and Congress should not disavow their power and responsibility for mere political convenience.

It is unacceptable for the courts and Congress to continue to hide behind the Tenth Amendment and leave education, particularly discriminatory discipline issues, in the hands of the states alone. History has shown that some states have failed to do right by the children they are required to protect. The

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<sup>88</sup> See *supra* notes 82–86 and accompanying text.

<sup>89</sup> See *supra* notes 52–54 and accompanying text.

<sup>90</sup> *Meyer v. Nebraska*, 262 U.S. 390, 396–97 (1923); see *supra* note 48 and accompanying text.

<sup>91</sup> See *supra* note 49–50 and accompanying text.

<sup>92</sup> The Court has not held that education is a fundamental right per se, but it has said that if the state undertakes to provide an education it must give all children equal access to that education. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>93</sup> *Marriage Laws by State*, USLEGAL, <https://marriage.uslegal.com/state-marriage-laws/> [https://perma.cc/WB5G-GRVR].

<sup>94</sup> See *id.*

majority of states with the highest disproportionate punishment statistics are southern states;<sup>95</sup> these are, of course, the states that fought against ending slavery and, after the Civil War, enacted Black Codes and Jim Crow laws to ensure that Black people would remain available as a cheap work force by restricting their freedom.<sup>96</sup> Some states still maintain segregation laws on their books, not seeing the importance of repealing them, further disenfranchising Black people. According to the Jim Crow Study Group, in 2004, fifty years after *Brown*, Alabama, Georgia, Louisiana, Mississippi, Missouri, South Carolina, Virginia, and West Virginia had segregation-era laws, including school segregation laws still on the books.<sup>97</sup>

This highlights the concern that states alone, without oversight or intervention by the federal government, cannot provide equal access to a quality education for all children. After the *Brown* decisions in 1954 and 1955, some states still refused to integrate schools, while others allowed Black children into white schools but did nothing as they were bullied and harassed both on their way to school by angry mobs and in school by other children. In order to assure the security of nine Black students integrating Central High School in Little Rock, Arkansas, in 1957, President Eisenhower deployed the Arkansas National Guard.<sup>98</sup> Likewise, in order to safeguard vulnerable Black children today, federal intervention is necessary in the context of school punishment.

## II. STRUCTURAL RACISM AND BARRIERS TO EDUCATION FOR BLACK CHILDREN

*“In a racist society it is not enough to be non-racist, we must be anti-racist.”—Angela Y. Davis<sup>99</sup>*

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<sup>95</sup> EDWARD J. SMITH & SHAUN R. HARPER, UNIV. PENN. GRADUATE SCH. EDUC., DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1 (2015), <https://race.usc.edu/wp-content/uploads/2020/08/Pub-14-Smith-and-Harper.pdf> [<https://perma.cc/S8CV-YJ3Y>].

<sup>96</sup> *Black Codes*, HISTORY.COM (Jan. 26, 2022), <https://www.history.com/topics/black-history/black-codes> [<https://perma.cc/MG26-ULDL>].

<sup>97</sup> Julieta Gonzalez, *Group Calls For Repeal of Segregation-Era Laws Still on the Books*, UNIV. ARIZ. (Feb. 24, 2022), <https://news.arizona.edu/story/group-calls-repeal-segregation-era-laws-still-books>.

<sup>98</sup> Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 498 (2016).

<sup>99</sup> DIVERSITY + INCLUSION + BELONGING TEAM, HARV. L. SCH. LIBR., ANTI-RACIST RESOURCE GUIDE, [https://etseq.law.harvard.edu/wp-content/uploads/2020/06/HLSL-DIB\\_Anti-Racist-Resource-Guide.pdf](https://etseq.law.harvard.edu/wp-content/uploads/2020/06/HLSL-DIB_Anti-Racist-Resource-Guide.pdf) [<https://perma.cc/U8RF-BTXV>]. Educator and activist “Angela Yvonne Davis is best known as a radical African American educator and activist for civil rights and other

From the formal laws prohibiting the education of Black people during slavery, to the formal and informal laws and systems of Jim Crow, and continuing to today, barriers to education for Black children have existed throughout our nation's history. Nonetheless, there is the misconception that once the Emancipation Proclamation was signed and enslaved people were freed, the world was their oyster. The truth, however, is that the implications of slavery continue to impact every facet of the lives of Black people.<sup>100</sup> As much as some Americans want to believe that Black people can do anything in life because they have the opportunity or resources to do so, this is not always the reality due, in part, to the barriers created through formal structural racism rooted in our nation's history.

Lyndon Johnson eloquently explained these barriers and challenges to inequality in one of his most notable speeches.<sup>101</sup> He noted that “[y]ou do not wipe away the scars of centuries” by declaring you are now free.<sup>102</sup> He added that you cannot liberate someone who has been bound by shackles for years, “bring him . . . to the starting line of a race,” and then tell them, “you are free to compete with all the others,” and still feel justified in thinking “that you have been completely fair.”<sup>103</sup> Therefore, simply opening the doors of opportunity is insufficient. Everyone must be able to actually pass through those gates.<sup>104</sup>

In the school discipline context, “[i]t is imperative that we trace modern-day racial disproportionality in school discipline to our nation's history of racial apartheid in public schools.”<sup>105</sup> Many

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social issues.” Angela Davis, HISTORY.COM (Jan. 26, 2021), <https://www.history.com/topics/black-history/angela-davis> [https://perma.cc/BF6S-EE7T]. She was a Distinguished Professor Emerita at the University of California, Santa Cruz. *Id.* Davis is the author of several books, including WOMEN, RACE, AND CLASS (1980), BLUES LEGACIES AND BLACK FEMINISM: GERTRUDE MA RAINEY, BESSIE SMITH, AND BILLIE HOLIDAY (1999), ARE PRISONS OBSOLETE? (2003), ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE (2005), THE MEANING OF FREEDOM: AND OTHER DIFFICULT DIALOGUES (2012) AND FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT (2016). *Id.*

<sup>100</sup> Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/an-american-tragedy-the-legacy-of-slavery-lingers-in-our-cities-ghettos/> [https://perma.cc/LJG9-Z7JF]. “[F]or [Black people] the end of slavery was just the beginning of our quest for democratic equality; another century would pass before the nation came fully to embrace that goal. Even now millions of Americans recognizably of African descent languish in societal backwaters.” *Id.*

<sup>101</sup> See Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights> [https://perma.cc/UTF9-ZZD9].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (internal quotation marks omitted).

<sup>104</sup> *Id.*

<sup>105</sup> George, *supra* note 98, at 497.

of our current discriminatory disciplinary practices date back to “the institutionalized and systemic racism that deemed [Black] students and other students of color intellectually inferior” and undeserving of high quality educational opportunities, in addition to the practice of physical segregation.<sup>106</sup>

#### A. *The Origins of Structural Racism in the United States*

Structural racism includes power implications born of racially unequal opportunities and outcomes that are intrinsic to the operation of society’s structures.<sup>107</sup> These structures include “institutional structures (practices, policies, climate), social structures (state/federal programs, laws, culture), individual mental structures (e.g., learning, memory, attitudes, beliefs, values), and everyday interaction patterns (norms, scripts, habits).”<sup>108</sup> As a result, systemic racism is plainly present throughout levels of our cultural structures; further, it functions both overtly and discretely, intentionally and unconsciously.<sup>109</sup> Systemic racism is powerful in large part *because* it is integrated throughout the systems “that create[], govern[], and adjudicate[] opportunities and outcomes across generations.”<sup>110</sup>

Formal institutions impacted by structural racism include health, housing, and education.<sup>111</sup> In housing, for

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

<sup>107</sup> The terms structural racism, systemic racism, and institutional racism are often used interchangeably. Structural racism has been defined as “a set of processes that may generate disparities or depress life outcomes without any racist actors.” John A. Powell, *Deepening Our Understanding of Structural Marginalization*, POVERTY & RACE, Sept./Oct. 2013, at 4, <https://belonging.berkeley.edu/sites/default/files/Sept-Oct%202013%20PRRAC%20Disparities%20Article.pdf> [https://perma.cc/Y67M-6VCV]. As noted by the Urban Institute, “[t]he deep racial and ethnic inequities that exist today are a direct result of structural racism: the historical and contemporary policies, practices, and norms that create and maintain white supremacy.” *Structural Racism: About*, URBAN INST., <https://www.urban.org/tags/structural-racism#about> (last visited Jan. 13, 2023). Structural racism is “a system in which public policies, institutional practices, cultural representations, and other norms work in various, often reinforcing ways to perpetuate racial group inequity.” ASPEN INST. ROUNDTABLE ON CMTY. CHANGE, STRUCTURAL RACISM AND CMTY. BLDG. 11 (2004), [https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/aspen\\_structural\\_racism2.pdf](https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/aspen_structural_racism2.pdf) [https://perma.cc/9FKL-36C3]. It focuses on how society operates, rather than one-on-one interactions. In defining structural racism, the Aspen Institute highlighted norms that serve to perpetuate racial inequality and also expanded further by surmising, “[structural racism] has come about as a result of the way that historically accumulated white privilege, national values, and contemporary culture have interacted so as to preserve the gaps between white Americans and Americans of color.” *Id.* at 12.

<sup>108</sup> Mahzarin R. Banaji et al., *Systemic Racism: Individuals and Interactions, Institutions and Society*, COGNITIVE RSCH.: PRINCIPLES AND IMPLICATIONS 2 (2021) (internal lettering omitted).

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

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

<sup>111</sup> *Id.* This is not an exhaustive list of areas impacted by structural racism. *Id.*

example, the system of “redlining”<sup>112</sup> has adversely impacted wealth, health, and educational opportunities for Black people.<sup>113</sup> Banks engaged in redlining by outlining neighborhoods that were primarily inhabited by people of color in red ink.<sup>114</sup> Homes inside the red lines were deemed too risky to warrant a home loan.<sup>115</sup> Although “[t]he practice was banned in 1968, [its] impact lives on.”<sup>116</sup> Because of redlining, Black families were not able to amass the same assets as white families on the other side of the red line, leading to disparities in generational wealth.<sup>117</sup> In analyzing the wealth gaps between white families and Black families in 2020, the Federal Reserve noted that, “the net worth of a typical white family is \$171,000, which is 10 times greater than that of a [B]lack family.”<sup>118</sup>

The institutions of structural racism are also interrelated. Redlining practices in housing decreased the overall value of homes in Black neighborhoods, which in turn generated fewer tax dollars for public schools in those areas given that property taxes are the most prevalent local revenue source and account for around half of school funding.<sup>119</sup> Even at lower tax rates, higher property prices can result in higher “property tax revenue per student.”<sup>120</sup> Specifically, “less tax dollars for schools, means fewer kindergarten classes, fewer qualified teachers, fewer AP classes.”<sup>121</sup> These disparate public school resources have led to lower high school and college graduation rates for Black students.<sup>122</sup> Likewise, racially segregated housing, created in part by redlining, brought about racial isolation, which led to “disproportionate costs to Black Americans’ opportunities, networks, education, wealth, health, and legal treatment.”<sup>123</sup> These practices have been commonplace for some time now, and have evolved in some ways to preserve systemic racism in spite of purportedly antiracist rulings.

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<sup>112</sup> Julian Glover & Ken Miguel, *What Are Structural, Institutional and Systemic Racism?*, ABC 7 NEWS (July 9, 2020), <https://abc7news.com/systemic-racism-definition-structural-institutionalized-what-is/6292530/> [<https://perma.cc/23H6-XSBB>].

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

<sup>114</sup> *Id.*

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

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.*

<sup>119</sup> Jess Gartner, *How Are Public Schools Funded?*, ALLOVUE, <https://blog.allovue.com/how-are-public-schools-funded> [<https://perma.cc/R2CB-NBQM>].

<sup>120</sup> *Id.*

<sup>121</sup> Glover & Miguel, *supra* note 111.

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

<sup>123</sup> Banaji et al., *supra* note 108, at 1.

Several key Supreme Court decisions legally sanctioned and helped infuse the US legal system with structural racism in the pre-Civil Rights era. The oppression caused by systemic racism rooted in formal laws and informal systems ultimately fueled their fight for freedom and equality in the United States. As such, Black Americans' fight for civil rights in the United States began long before the formalized Civil Rights movement of the 1950s. The landmark case *Dred Scott v. John F.A. Sandford* is considered by historians as the spark that lit the flame of the Civil War in the United States.<sup>124</sup> Regarded as "the worst decision ever rendered by the Supreme Court,"<sup>125</sup> the case was about Dred Scott, a then-slave, and his decade-long fight for freedom.<sup>126</sup> The Court held on March 6, 1867, "that a slave . . . who had resided in a free state and territory (where slavery was prohibited) was not thereby entitled to his freedom; [and] that African Americans were not and could never be citizens of the United States."<sup>127</sup>

The next notable case in Blacks' fight for civil rights was *Plessy v. Ferguson*, where a Black train passenger, Homer Plessy, refused to sit in the car designated for Black passengers.<sup>128</sup> Mr. Plessy alleged that racial segregation under the "separate but equal" doctrine violated his constitutional rights.<sup>129</sup> Conversely, the Supreme Court upheld state-imposed segregation and concluded that the practice did not violate the Fourteenth Amendment. The Court reasoned that a law that "implies merely a legal distinction between the white and [Black] races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."<sup>130</sup> The decision legitimized white supremacy and led to the birth of Jim Crow laws, which are noted as some of the most injurious legally sanctioned discrimination in US history.

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<sup>124</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1856); Sarah Bell, *Civil War on the Western Border: The Missouri-Kansas Conflict 1854-1865*, KAN. CITY PUB. LIBR., <https://civilwaronthewesternborder.org/encyclopedia/dred-scott-v-sandford-1857> [<https://perma.cc/A5L7-V8W8>].

<sup>125</sup> Melvin I. Urofsky, *Dred Scott, American Enslaved Person*, BRITANNICA (Jan. 1, 2022), <https://www.britannica.com/biography/Dred-Scott> [<https://perma.cc/5SVL-Y26L>].

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

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

<sup>128</sup> *Plessy v. Ferguson*, 163 U.S. 537, 537–38 (1896).

<sup>129</sup> *Id.* at 539.

<sup>130</sup> *Id.* at 543.



## B. *Barriers to Education for Black Children*

Barriers to education have long existed for Black children. Tracing these barriers back—to the prohibition on educating enslaved people, into the Jim Crow era that prevented Black children from receiving an equal education, to the resistance to integrating schools in accordance with the *Brown* decision—shows how historically the United States has widened and cemented the education gap between Black and white students.

### 1. Structural Racism in Education: Slavery

A true understanding of the complex educational inequalities that persist for Black people starts with slavery. Examining the “built-in systems” that undermine life opportunities and outcomes based on racial category, the authors of *Systemic Racism: Individuals and Interactions, Institutions and Society* note that “[f]rom American colonial history, explicit practices and policies reinforced disadvantage across all domains of life, beginning with slavery, and continuing with vastly subordinated status.”<sup>131</sup> It is estimated that over 12.5 million Africans were enslaved between 1525 and 1866, with 10.7 million surviving the dreaded Middle Passage, and about 388,000 disembarking in North America.<sup>132</sup> Dating back to the enslavement of Africans in the United States, educational inequality has been a source of pain and hurt for Black people. Africans brought to the United States as slave labor were excluded from education. Slave codes, state laws designed to enforce social control over enslaved people, outlined numerous restrictions on the behavior of enslaved people.<sup>133</sup> One of the many restrictions prohibited enslaved people from learning to read and write.<sup>134</sup> If it was discovered that they could do so, enslaved people were punished by “whipping, branding, and imprisonment.”<sup>135</sup>

Through the art of storytelling, Alex Haley’s 1976 novel *Roots: The Saga of An American Family* brought the slave-era codes and the horrifying treatment of enslaved people to view in vivid color. Haley’s novel, labeled as nonfiction by The New York

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<sup>131</sup> Banaji et al., *supra* note 108, at 1.

<sup>132</sup> Henry Louis Gates, Jr., *How Many Slaves Landed in the U.S.?*, PUB. BROAD. SERV. (2013), <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/how-many-slaves-landed-in-the-us/> [https://perma.cc/2P9Z-8PHY].

<sup>133</sup> *Slave Code*, BRITANNICA (June 18, 2021), <https://www.britannica.com/topic/slave-code> [https://perma.cc/HK8L-M438].

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

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

Times, also addresses education in the era of slavery.<sup>136</sup> In the book, Haley tells the story of Kizzy, the daughter of Kunta Kinte,<sup>137</sup> and how she learned to read and write from her owner's niece while "playing school."<sup>138</sup> At the time, it was unbeknown to both small children the danger and ultimate savagery this would cause Kizzy and her family.<sup>139</sup> Kizzy's father once advised her against not to tell anyone because it should cause trouble for Kizzy.<sup>140</sup> As a teenager, Kizzy helped a fellow slave escape the plantation by forging a slave traveling pass.<sup>141</sup> When it was discovered that the documents were forged and Kizzy was responsible, she was separated from her parents and sold to a new slave owner at age sixteen.<sup>142</sup> Her new owner brutally raped and later impregnated Kizzy, and she was never to see her parents again.<sup>143</sup>

Haley's novel, later turned miniseries,<sup>144</sup> was one of the first graphic accounts of the brutal nature of slavery and the impact on generations of Black families post the Emancipation Proclamation. It also highlighted the horrific price paid by Black people for seeking an education, including the separation of

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<sup>136</sup> ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY* (30th anniversary ed. 2007); Dwight Garner, *Review: In 'Alex Haley: And the Books that Changed a Nation,' a Reputation Made and Lost*, N.Y. TIMES (Dec. 8, 2015), <https://www.nytimes.com/2015/12/09/books/review-in-alex-haley-and-the-books-that-changed-a-nation-a-reputation-made-and-lost.html>. Haley writes in the final chapter of the book: "To the best of my knowledge and of my effort, every lineage statement within *Roots* is from either my African or American families' carefully preserved oral history, much of which I have been able conventionally to corroborate with documents. Those documents, along with the myriad textural details of what were contemporary indigenous lifestyles, cultural history, and such that give *Roots* flesh have come from years of intensive research in fifty-odd libraries, archives, and other repositories on three continents." HALEY, *supra* at 884.

<sup>137</sup> *Id.* at 441–42.

<sup>138</sup> *Id.* at 523–24.

<sup>139</sup> *Id.* at 544–47, 551.

<sup>140</sup> *Id.* at 493–94.

<sup>141</sup> *Id.* at 543–44; Gaila Sims, *Slave Passes*, GUARDS & PICKETS (Apr. 8, 2018), <https://passesandpatrols.wordpress.com/2018/04/08/slave-passes/> [<https://perma.cc/VP95-MN93>]. "Slave passes were an early form of racialized surveillance . . . . Slave passes were provided by slave owners and were used if enslaved people were sent to run errands, to labor on other plantations . . . . Passes generally included the name or description of the enslaved person, the date and sometimes time, the intended destination, and the signature of the slaveowner. Most passes were handwritten on small pieces of paper, though some were printed from a template and included only the pertinent information by hand." *Id.*

<sup>142</sup> HALEY, *supra* note 136, at 544–47, 551.

<sup>143</sup> *Id.* at 548–49, 556.

<sup>144</sup> *Roots (TV Mini Series 1977)*, IMDB, <https://www.imdb.com/title/tt0075572/> [<https://perma.cc/3Q84-Q23U>].

families,<sup>145</sup> imprisonment,<sup>146</sup> and the ultimate punishment of death that loomed constantly.

## 2. Structural Racism: From Reconstruction to Jim Crow

President Abraham Lincoln signed the Emancipation Proclamation on January 1, 1863.<sup>147</sup> The Proclamation “declare[d] that all persons held as slaves within” the southern states that held stubbornly to slavery “are, and henceforward shall be free.”<sup>148</sup> During the Reconstruction period between 1865 and 1877, Black people pursued opportunities in education and other areas.<sup>149</sup> Although free to learn, the newly emancipated Black people quickly realized that education was not free; they faced significant challenges in their efforts to secure an education, from lack of funding and qualified teachers to legally sanctioned prohibitions on educating Black people.<sup>150</sup> Moreover, many white people in the South did not support educating the newly freed Black people.<sup>151</sup> In fact, many of the advancements made during Reconstruction, including those in education, “were lost after 1877, when the federal government pulled troops out of the South.”<sup>152</sup> As a result, there was widespread backlash.<sup>153</sup> Black people’s constitutional rights were taken away by racist lawmakers via “laws mandating segregation and restricting voting.”<sup>154</sup> Black people quickly faced renewed hostility, marking the end of the Reconstruction era and paving the way for the Jim Crow caste system between 1877 and the mid-1960s.<sup>155</sup>

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<sup>145</sup> HALEY, *supra* note 136, at 544–47.

<sup>146</sup> Gelsey G. Beaubrun, *Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs*, 10 COLUM. J. RACE & L. 196, 205, 205 n.44 (2020).

<sup>147</sup> *The Emancipation Proclamation*, NAT’L ARCHIVES (Jan. 28, 2022), <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation> [<https://perma.cc/28B2-ZE63>].

<sup>148</sup> *Id.*

<sup>149</sup> Avis Thomas-Lester, *Forgotten in the Classroom: The Reconstruction Era*, WASH. POST (Jan. 14, 2018, 4:26 PM), [https://www.washingtonpost.com/local/education/forgotten-in-the-classroom-the-reconstruction-era/2018/01/14/f39c5814-d2d8-11e7-b62d-d9345ced896d\\_story.html](https://www.washingtonpost.com/local/education/forgotten-in-the-classroom-the-reconstruction-era/2018/01/14/f39c5814-d2d8-11e7-b62d-d9345ced896d_story.html) [<https://perma.cc/9GQJ-2LHC>].

<sup>150</sup> *African Americans and Education During Reconstruction: The Tolson’s Chapel Schools*, NAT’L PARK SERV., <https://www.nps.gov/articles/african-americans-and-education-during-reconstruction-the-tolson-s-chapel-schools.htm> [<https://perma.cc/DK4F-97J6>].

<sup>151</sup> Christopher Span, *From Cotton Field to Schoolhouse*, UNIV. N.C. PRESS, <https://uncpress.org/book/9781469622217/from-cotton-field-to-schoolhouse/> [<https://perma.cc/TQ68-R9XK>] (noting that “many white Mississippians objected to any educational opportunities for the former slaves”).

<sup>152</sup> Thomas-Lester, *supra* note 149.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Plessy v. Ferguson: Separate Isn’t Equal*, FERRIS STATE UNIV. JIM CROW MUSEUM, <https://www.ferris.edu/HTMLS/news/jimcrow/links/misclink/plessy.htm>

An illustration of the Jim Crow caste system directly impacting education can be seen in the 1899 Supreme Court case *Cumming v. Richmond County Board of Education*.<sup>156</sup> This case was one of the first to challenge racial inequality in education.<sup>157</sup> In *Cumming*, Black residents of Richmond County, Georgia sued the local school board for using Black taxpayers' dollars to support a white high school, while simultaneously closing the segregated high school for Black students.<sup>158</sup> The board's action went a step further than "separate but equal" by eliminating the only high school for Black children.<sup>159</sup> The Court upheld the school board's right to close the only Black high school, reasoning that the federal government should not interfere with state regulation of schools absent "a clear and unmistakable disregard of rights secured by the supreme law of the land."<sup>160</sup> *Cumming* was another step toward keeping Black people from accessing education in the United States.

### 3. Structural Racism in Education: The Civil Rights Movement and the Road to *Brown*

The unyielding desire for an education was at the heart of the Civil Rights movement.<sup>161</sup> That very desire for educational equality set the wheels in motion, some sixty years after Reconstruction, for the landmark 1954 case *Brown v. Board of Education*.<sup>162</sup> Beginning in the 1930s, the National Association for the Advancement of Colored People (NAACP), through its Legal Defense and Education Fund (LDEF), began working extensively in the courts to challenge segregation laws that

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[<https://perma.cc/J2WE-UXCM>]; *What Was Jim Crow*, FERRIS STATE UNIV. JIM CROW MUSEUM, <HTTPS://WWW.FERRIS.EDU/JIMCROW/WHAT.HTM> [<https://perma.cc/RVL6-ZF9H>].

<sup>156</sup> *Cumming v. Cnty. Bd. of Educ.*, 175 U.S. 528, 529 (1899) (deciding three years after *Plessy v. Ferguson* established that state statutes providing "separate but equal" services were constitutional).

<sup>157</sup> J. Morgan Kousser, *Cumming v. Richmond County Board of Education: Overview*, OXFORD REF., <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095653161;jsessionid=C37B94421B7B387C5FA06FEA86B9CAC8> [<https://perma.cc/X9WN-96AB>].

<sup>158</sup> *Cumming*, 175 U.S. at 542–43.

<sup>159</sup> *Id.* at 532.

<sup>160</sup> *Id.* at 545. Apparently, the Court did not consider Black students' lack of access to schooling to be "a clear and unmistakable disregard of [their] rights." *Id.*

<sup>161</sup> *Education and Civil Rights*, HISTORY LEARNING (2015), <https://historylearning.com/civil-rights-america/civil-rights-education/> [<https://perma.cc/P4QG-TELG>] ("The relationship between education and civil rights was pivotal—the right to an equal education was a fundamental right, and one which was at the heart of the Civil Rights Movement.").

<sup>162</sup> *Brown v. Board of Education*, HISTORY.COM (last updated Jan. 11, 2022), <https://www.history.com/topics/black-history/brown-v-board-of-education-of-topeka> [<https://perma.cc/ELX3-BRWY>].

ostentatiously sanctioned legal separation.<sup>163</sup> “The first general counsel [and head of the LDEF], Charles Houston exposed the hollowness of the ‘separate but equal’ doctrine and paved the way for the Supreme Court ruling outlawing school segregation,” and was credited for the success in *Brown*, along with his mentee Thurgood Marshall.<sup>164</sup> Houston hired Thurgood Marshall as the LDEF’s first Director-Counsel.<sup>165</sup> Marshall developed a plan to combat Jim Crow laws by attacking them where they would be most vulnerable: in the area of education.<sup>166</sup> The driving force for the LDEF’s attack on education was the *Brown* case.<sup>167</sup>

In 1951, with the assistance of the LDEF, “Oliver Brown filed a class action suit against the Board of Education of Topeka, Kansas.”<sup>168</sup> The LDEF argued that segregation violated the Equal Protection Clause of the Fourteenth Amendment, which holds that no state can “deny to any person within its jurisdiction the equal protection of the laws,” because Black

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<sup>163</sup> *National Association for the Advancement of Colored People*, ENCYC. BRITANNICA (Nov. 5, 2019), <https://www.britannica.com/topic/National-Association-for-the-Advancement-of-Colored-People> [<https://perma.cc/AV4R-KRNV>].

<sup>164</sup> Charles Hamilton Houston, NAACP, <https://naacp.org/find-resources/history-explained/civil-rights-leaders/charles-hamilton-houston> [<https://perma.cc/CL33-ES4V>] (“Houston’s experience in the racially segregated U.S. Army, where he served as a First Lieutenant in World War I in France, made him determined to study law and use his time ‘fighting for men who could not strike back’ . . . Houston returned to the U.S. in 1919 and entered Harvard Law School, becoming the first Black student to be elected to the editorial board of the *Harvard Law Review*. After graduating from Harvard with a Doctor of Laws degree in 1923 and studying at the University of Madrid in 1924, Houston was admitted to the District of Columbia bar and joined forces with his father in practicing law. Later, as dean of the Howard University Law School, Houston expanded the part-time program into a full-time curriculum. He also mentored a generation of young Black lawyers, including Thurgood Marshall, who would go on to become a United States Supreme Court justice.”) Though his efforts are highly regarded, and he is credited for *Brown*, Charles Houston’s did not live to see the results. *Id.* He died in 1950 from a heart attack, before the landmark decision was announced in 1954. *Id.*

<sup>165</sup> *Who Was Thurgood Marshall?*, NAACP LEGAL DEF. & EDUC. FUND, <https://www.naacpldf.org/about-us/history/thurgood-marshall/> [<https://perma.cc/7BS3-5LZ9>] (“Thurgood Marshall was an influential leader of the civil rights movement whose tremendous legacy lives on in the pursuit of racial justice. Marshall founded LDF in 1940 and served as its first Director-Counsel. He was the architect of the legal strategy that ended the country’s official policy of segregation and was the first African American to serve on the Supreme Court. He served as Associate Justice from 1967–1991 after being nominated by President Johnson. Marshall retired from the bench in 1991 and passed away on January 24, 1993, in Washington D.C. at the age of 84. Civil rights and social change came about through meticulous and persistent litigation efforts, at the forefront of which stood Thurgood Marshall and the Legal Defense Fund.”).

<sup>166</sup> *Brown v. Board of Education*, *supra* note 162.

<sup>167</sup> *Id.*; Sherrilyn Ifill, *How Thurgood Marshall Paved the Road to ‘Brown v. Board of Education,’* SMITHSONIAN MAG. (Mar. 10, 2021), <https://www.smithsonianmag.com/history/how-thurgood-marshall-paved-road-brown-v-board-education-180977197/> [<https://perma.cc/S33Q-ZA7M>].

<sup>168</sup> *Brown v. Board of Education*, *supra* note 162.

children's schools were not equal to white schools.<sup>169</sup> In the unanimous decision, Justice Warren wrote "that in the field of public education the doctrine of 'separate but equal' has no place," as segregated schools "are inherently unequal" and thus, the plaintiffs were being "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."<sup>170</sup>

The LDEF strategy to dismantle government-sanctioned discrimination was accomplished, or was at least well on its way, as *Brown* overturned the Court's prior 1896 decision in *Plessy*.<sup>171</sup> "[T]he Court's decision in [*Brown*] set the legal precedent that would be used to overturn laws enforcing segregation in other public facilities."<sup>172</sup> *Brown* fueled the Civil Rights Movement and soon led to other high-profile cases and federal legislation intended to desegregate public services in the United States.<sup>173</sup>

#### 4. Structural Racism in Education: Post-*Brown*

Post-*Brown*, the courts continued to address educational inequalities. While *Brown* was seen as an initial victory for Black children, there were still school districts that had not integrated, some refusing to do so in compliance with the ruling.<sup>174</sup> As a result, the NAACP returned to the Supreme Court in 1955 in *Brown II*, arguing that segregation should proceed immediately or at least by a set deadline.<sup>175</sup> In their decision, instead of implementing a deadline for compliance with the desegregation of schools, the court established the standard of "all deliberate speed."<sup>176</sup> The vagueness of the standard gave segregationists the chance to organize resistance.<sup>177</sup> Thurgood Marshall, the civil rights lawyer that successfully argued *Brown*

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<sup>169</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 n.5 (1954).

<sup>170</sup> *Id.* at 495.

<sup>171</sup> *Brown v. Board of Education*, *supra* note 162; *see also supra* note 53 and accompanying text.

<sup>172</sup> *Brown v. Board of Education*, *supra* note 162.

<sup>173</sup> *Id.* (discussing the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, as examples of federal legislation aimed at desegregating public services).

<sup>174</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 301. (Chief Justice Earl Warren said, "[T]here were so many blocks preventing an immediate solution of the thing in reality, that the best we could look for would be a progression of action."); Earl Warren, *The Talk of Chief Justices Past and Present*, N.Y. TIMES (Dec. 20, 1972), <https://www.nytimes.com/1972/12/20/archives/article-4-no-title.html>.

<sup>177</sup> *With All Deliberate Speed*, SMITHSONIAN NAT'L MUSEUM OF AM. HIST., <https://americanhistory.si.edu/brown/history/6-legacy/deliberate-speed.html> [<https://perma.cc/969V-S4TK>].

before the Supreme Court, frequently said after the decision that “with all deliberate speed” meant S-L-O-W.<sup>178</sup>

After *Brown II*, while physical integration became a reality, it proved far more difficult to erase the deeply ingrained notions of racial hierarchy and stratification that positioned Black children at the bottom of the attainment and opportunity ladder.<sup>179</sup> While the decision alone fell short of fulfilling its primary goal of integrating the country’s public schools, it still served to “fuel[] the . . . civil rights movement in the United States.”<sup>180</sup>

The *Brown* ruling also established the legal standard that would be used to challenge future cases asserting similarities to the plaintiff’s arguments in *Brown*. In a 2020 Sixth Circuit case, *Gary B. v. Whitmer*, sixty-six years after the *Brown* decision, a group of students in Detroit sued the state of Michigan over deplorable conditions in their public schools.<sup>181</sup> The students argued that the state failed to correct the poor conditions, poor staffing, “and inadequate books and materials” that were the root cause of low literacy rates in Detroit.<sup>182</sup> The divided panel in *Gary B.* agreed, finding that education that provides access to literacy is a fundamental right, which the state must deliver to its school-aged citizens.<sup>183</sup> The *Gary B.* decision stands for the idea that unequal access to education has real and unacceptable consequences for students. The facts of *Gary B.* also illustrate that Black children still experience barriers in education today.

### III. BIAS IN SCHOOL DISCIPLINE PRACTICES AND POLICIES

*“Prejudice is a burden that confuses the past, threatens the future, and renders the present inaccessible.”—Maya Angelou<sup>184</sup>*

Part II examined structural racism as the root cause of the issue and the resulting barriers to education for Black children,

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<sup>178</sup> Charles J. Ogletree, *All Deliberate Speed*, CTR. FOR AM. PROGRESS (Apr. 12, 2004), <https://www.americanprogress.org/article/all-deliberate-speed/> [https://perma.cc/M9JY-Z3NM].

<sup>179</sup> Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 499 (2016).

<sup>180</sup> *Brown v. Board of Education*, *supra* note 162. The ruling also established the legal standard that would be used to challenge legislation that enforced segregation in other public facilities by invalidating the “separate but equal” doctrine. *Id.*

<sup>181</sup> *Gary B. v. Whitmer*, 957 F.3d 616, 620–21 (6th Cir. 2020), *reh’g en banc granted, vacated as moot*, 958 F.3d 1216 (6th Cir. 2020).

<sup>182</sup> *Gary B.*, 957 F.3d at 620.

<sup>183</sup> *Id.* at 648–49. While the Sixth Circuit agreed to rehear the case en banc, the state addressed the problems, and the issue became moot. *Gary B.*, 958 F.3d at 1216.

<sup>184</sup> MAYA ANGELOU, *THE COLLECTED AUTOBIOGRAPHIES OF MAYA ANGELOU* 1009 (2004).

including legalized prohibitions to education from slavery to segregation. This Part picks up where Part II left off by exploring modern-day barriers to education for Black children and scrutinizing the actions of decision-makers that facilitate the continued system of structural racism through disproportionate discipline practices in schools. As such, Part III explores school discipline policies and practices and their disparate impact on Black children. Because the initial decision of “who” should be punished rests with teachers and administrators, this Part examines how decision makers are impacted by bias.<sup>185</sup> Given that their discretion starts the discipline cycle, it is important to determine why a teacher or administrator selects a given student for punishment, regardless of the discipline matrix or policy that prescribes that punishment.

This Part also examines school-based policies that result in suspensions based on “eye-of-the-beholder” offenses like dress code violations, hairstyles deemed inappropriate, and similar offenses.<sup>186</sup> Eye-of-the-beholder offenses are fertile ground for biased decision-making. These policies and practices have resulted in students being suspended, resulting in the loss of millions of instructional days annually.<sup>187</sup>

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<sup>185</sup> This article does not assert that all teachers are inherently racist, especially since the author is proudly married to a high school administrator who is a former teacher that has committed his entire career to public education. The author also credits her professional success and growth to many of her K-12 teachers, whom she fondly remembers and is honored and humbled to be taught and nurtured by them. On the contrary, the author, like the overwhelming majority of teachers who have committed their lives and professional careers to teaching our nation’s children, cares about protecting vulnerable children and supporting the goals and potential of preschool through K-12 education.

<sup>186</sup> See Kalyn Belsha, *States and Cities Are Banning Hair Discrimination. Here’s How That’s Affecting Schools.*, CHALKBEAT (Jan. 16, 2020, 5:02 PM), <https://www.chalkbeat.org/2020/1/16/21121830/states-and-cities-are-banning-hair-discrimination-here-s-how-that-s-affecting-schools> [https://perma.cc/XSB9-ML57] (“In 2018, a referee in New Jersey forced a 16-year-old mixed-race wrestler to cut his dreadlocks or forfeit his match. And in 2019, a public elementary school in suburban Atlanta displayed several photos of [B]lack children, including girls with braids, to illustrate ‘inappropriate’ haircuts. Now, a wave of new laws means millions of students have new protections against discrimination if they wear their hair in styles like these.”); see also *Leadership*, FREETHETHAIR, <https://freethehair.com/leadership> [https://perma.cc/7HQ4-FTWP] (Professor Wendy Greene is a pioneer who produces “scholarly activism . . . combat[ing] ‘grooming codes discrimination’ and more specifically, the systematic discrimination African descendants suffer when donning natural hairstyles like afros, twists, braids, and locs. Between serving as a legal advisor and expert for civil rights cases challenging natural hair discrimination, co-drafting federal and state C.R.O.W.N. Acts, testifying in support of this legislation throughout the country, and publishing seminal legal scholarship used by lawyers and lawmakers, Professor Greene’s work has informed, to date, every legal pronouncement in the U.S.—on municipal, state, and federal levels—that natural hair discrimination is unlawful race discrimination.”).

<sup>187</sup> Brenda Álvarez, *School Suspensions Lead to Stark Losses in Instructional Time*, NAT’L EDUC. ASSOC. (Nov. 19, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/school-suspensions-lead-stark-losses-instructional-time>



Bias against Black students exhibited by teachers creates a pattern of racial discrimination.<sup>188</sup> As Yale University Professor Walter Gilliam noted over ten years ago, “the three best predictors of preschool expulsion were the three B’s: ‘big, Black or boy.’”<sup>189</sup> Preschool children who fall into one or more of these categories are more likely to be suspended or expelled, making Black boys among the most vulnerable to interruptions in their early learning.<sup>190</sup>

Bias against Black children is rooted in stereotypes and has resulted in structural racism that permeates institutions in this country, including education. When discussing why southern states were resistant to integrate public schools following the *Brown v. Board of Education* ruling, President Eisenhower stated, “[Southern whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes.”<sup>191</sup> He went on to add, “[i]t is difficult through law and through force to change a man’s heart.”<sup>192</sup> Big, overgrown, negroes were the terms used to describe Black children in the school setting (compared to sweet little girls used to describe white children). Now, sixty years post-*Brown*, the Yale study found similarly that ‘big, Black or boy’ are the best predictors to preschool expulsion.<sup>193</sup>

#### A. *Defining Bias*

Bias is defined as “prejudice in favor of or against one thing, person, or group compared with another usually in a way that’s considered to be unfair.”<sup>194</sup> A person, community, or institution may harbor biases, which can have either beneficial or harmful effects.<sup>195</sup> Bias is deeply rooted in our individual psyche and is a characteristic of humans, given our propensity to categorize others in order to digest information rapidly and

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[<https://perma.cc/VYZ5-KN4W>] (stating that elementary aged children are subject to school suspensions).

<sup>188</sup> Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. FOR AM. PROGRESS (Nov. 6, 2017), <https://www.americanprogress.org/article/new-data-reveal-250-preschoolers-suspended-expelled-every-day/> [<https://perma.cc/52WL-7C5R>].

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Ogletree, *supra* note 178 (alteration in original).

<sup>192</sup> *Id.*

<sup>193</sup> Malik, *supra* note 188.

<sup>194</sup> *Unconscious Bias Training*, UNIV. CAL. S.F., <https://diversity.ucsf.edu/programs-resources/training/unconscious-bias-training> [<https://perma.cc/9NPA-J73G>].

<sup>195</sup> *Id.*

make sense of the environment.<sup>196</sup> There are two types of bias: implicit or unconscious bias, and explicit or conscious bias.

Implicit, “[u]nconscious bias is far more prevalent than conscious prejudice and [is] often incompatible with one’s conscious values.”<sup>197</sup> Everyone is believed to harbor unconscious ideas, which may show up in a variety of ways, such as how we judge and criticize others or how we behave toward members of certain groups.<sup>198</sup> Because implicit bias is often contrary to one’s intentional values, an individual could “harbor unconscious biases against, for example, white women or people of color, even when that person consciously believes that sexism and racism are wrong.”<sup>199</sup> Implicit biases are rooted in social stereotypes about certain groups.<sup>200</sup> These biases begin to appear at an early age, often “during middle childhood and appear to develop across childhood.”<sup>201</sup> They can “have real world effects on behavior,” but they “are malleable—one can take steps to minimize the impact.”<sup>202</sup>

Unlike the subconscious perceptions individuals develop as a result of their prior influences and imprints, explicit bias is conscious, and often intentional.<sup>203</sup> The standard definition of explicit bias is prejudice. People who have explicit bias are conscious of their views and prejudices toward particular groups.<sup>204</sup> Examples of explicit biases include overt racism and racist remarks.

In the 1967 book *Black Power*, Ture and Hamilton assert that “[r]acism is both overt and covert.”<sup>205</sup> Overtly racist acts by individuals are often condemned by society, as they are seen to cause injury, death, or destruction of property.<sup>206</sup> In contrast, covert racism “is less overt, far more subtle, less identifiable in

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<sup>196</sup> U.S. DEPT OF JUST., UNDERSTANDING BIAS: A RESOURCE GUIDE 1, <https://www.justice.gov/file/1437326/download> [<https://perma.cc/D8W7-5H2W>].

<sup>197</sup> *Unconscious Bias Training*, *supra* note 194.

<sup>198</sup> See Karen Steinhauser, *Everyone Is a Little Bit Biased*, A.B.A. (Mar. 16, 2020), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/04/everyone-is-biased/](https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/) [<https://perma.cc/9KMR-N538>].

<sup>199</sup> *What Is Unconscious Bias?*, UNCONSCIOUS BIAS PROJECT, <https://www.unconsciousbiasproject.org/resources/explain-unconscious-bias> (last visited Jan. 13, 2023).

<sup>200</sup> *Unconscious Bias Training*, *supra* note 194.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Kimberly Pappilon, *Two Types of Bias*, <https://nccc.georgetown.edu/bias/module-3/1.php> [<https://perma.cc/T8SH-LS44>].

<sup>204</sup> U.S. DEPT. OF JUST., *supra* note 196, at 2.

<sup>205</sup> KWAME TURE & CHARLES HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* 20 (1967). Ture (formerly known as Stokely Carmichael) and Hamilton have been credited with introducing the term “institutional racism.” *Stokely Carmichael—Founder, Black Power Movement*, ONEUNITED BANK, <https://www.oneunited.com/stokely-carmichael-founder-black-power-movement/> [<https://perma.cc/K6HP-5XU3>].

<sup>206</sup> *Id.*

terms of *specific* individuals committing the acts.”<sup>207</sup> However, covert racism is no less destructive of human life, as it “originates in the operation of established and respected forces in the society, and thus receives far less public condemnation” than covert racism.<sup>208</sup>

### B. *Bias and Black Children*

On February 26, 2012, Trayvon Martin—a seventeen-year-old high school student, was killed by a self-appointed neighborhood watchman turned vigilante—simply for being Black.<sup>209</sup> The Trayvon Martin tragedy distinctly details how human beings make value judgments about others based on physical characteristics, including race. The confrontation was *started* by Zimmerman when he confronted Trayvon and *ended* by Zimmerman when he shot and killed the seventeen-year-old.<sup>210</sup> Before approaching the teen, Zimmerman called the nonemergency line of the Sanford police and was advised not to approach the teen.<sup>211</sup> However, by then, Zimmerman made value judgements about Trayvon based on racial bias. Without speaking even one word to the teen, Zimmerman decided Trayvon’s worth and, ultimately, his fate, as evidenced by Zimmerman’s exchange with the operator during the 911 recorded call.<sup>212</sup> Zimmerman can be heard saying, “This guy looks like he’s up to no good, or he’s on drugs or something. . . . These assholes, they always get away.”<sup>213</sup> That night, Zimmerman became Trayvon’s jury and executioner.

The incident sparked protest and national outcry for justice for Trayvon, a Black child who lost his life while walking down a public street in a place where he had a legal right to be, fueling the social justice movements of recent times.<sup>214</sup> Trayvon’s murder cast a national spotlight on the tragic results of profiling Black children based on racial bias.<sup>215</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *Florida Teen Trayvon Martin Is Shot and Killed*, HISTORY (Feb. 24, 2021), <https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-is-shot-and-killed> [https://perma.cc/RQY4-PXPW].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See *id.*

<sup>213</sup> Louis Peitzman, *Shooter of Unarmed Teen Trayvon Martin: “This Guy Looks Like He’s Up to No Good,”* GAWKER (Mar. 17, 2012, 11:10 AM), <https://www.gawker.com/5894178/shooter-of-unarmed-teen-trayvon-martin-this-guy-looks-like-hes-up-to-no-good> [https://perma.cc/Q4RZ-Y5YG].

<sup>214</sup> *Id.*

<sup>215</sup> Reis Thebault, *Trayvon Martin’s Death Set Off a Movement that Shaped a Decade’s Defining Moments*, WASH. POST (Feb. 25, 2022),

So, what happens when negative bias and discrimination seep into public schools? Unmistakably, there are people in society who share Zimmerman's mindset and bias. Some work in public service—including judges, police officers, prosecutors, lawmakers, and even teachers. Our beliefs and value systems are shaped by our upbringing, environment, and even professional training. As such, "[w]e all have biases."<sup>216</sup> But, not all biases are harmful or negative, and having one does not always make one a bad person.<sup>217</sup> Making poor decisions in business, life, and relationships is often the result of failing to recognize biases.<sup>218</sup>

### C. *How Educators and Administrators Exhibit Racial Bias*

Racial animus and bias do not always make headlines, but their daily impact can be terribly pernicious. It is important to study how racial bias and animus—including implicit bias and animus—directly affect school decision makers. Teachers start the student discipline cycle, as they have the discretion and

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<https://www.washingtonpost.com/nation/2022/02/25/trayvon-martins-death-set-off-movement-that-shaped-decades-defining-moments/> [https://perma.cc/389C-GQ5F]. The prosecutors in the case argued that Zimmerman confronted Trayvon out of racial profiling. Zimmerman was ultimately acquitted of killing Trayvon, claiming self-defense. André Munro, *Shooting of Trayvon Martin*, BRITANNICA (Dec. 5, 2022), <https://www.britannica.com/event/shooting-of-Trayvon-Martin> [https://perma.cc/UD7Q-FGVT]. The protests after Zimmerman's acquittal, were not just for Trayvon but also for other Black people who are unfairly treated because of the color of their skin. Thebault, *supra*. Trayvon—not Zimmerman—was the true victim in this tragedy. After the protests subsided, Trayvon's parents, his family, and the Black community were left to deal with the pain of his murder. Chitra Tamaswamy, *Trayvon Martin's Parents, Five Years On: Racism Is Alive and Well in America*, GUARDIAN (Feb. 13, 2017), <https://www.theguardian.com/us-news/2017/feb/13/trayvon-martin-parents-racism-alive-and-well-in-america> [https://perma.cc/8PB5-JSTK]. Trayvon's life was lost because of discrimination and bias, and the verdict sent a message that Black lives are worthless, including the lives of Black children. Trayvon's murder is often paralleled to the murder of fourteen-year-old Emmett Till, who was lynched in Mississippi in 1955 for allegedly whistling at a white woman. Associated Press in New York, *Trayvon Martin Compared to Emmett Till on 10th Anniversary of Death*, GUARDIAN (Feb. 26, 2022), <https://www.theguardian.com/us-news/2022/feb/26/trayvon-martin-black-teenager-death-george-zimmerman> [https://perma.cc/WE4D-GAV3]. President Barak Obama, when asked about Zimmerman's acquittal, said, "You know, when Trayvon Martin was first shot I said that this could have been my son. Another way of saying that is Trayvon Martin could have been me 35 years ago. And when you think about why, in the African American community at least, there's a lot of pain around what happened here, I think it's important to recognize that the African American community is looking at this issue through a set of experiences and a history that doesn't go away." President Barack Obama, Remarks by the President on Trayvon Martin (July 19, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin> [https://perma.cc/8ARV-UURN].

<sup>216</sup> Karen Steinhauser, *Everyone Is a Little Bit Biased*, A.B.A. (Mar. 16, 2022), [https://www.americanbar.org/groups/business\\_law/publications/blt/2020/04/everyone-is-biased/](https://www.americanbar.org/groups/business_law/publications/blt/2020/04/everyone-is-biased/) [https://perma.cc/29YU-5AT6].

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

authority to determine *who* is referred for punishment and *why*.<sup>219</sup> According to the Brookings Institution, there is a practical limitation to studying the impact of discrimination on school discipline—student behavior, a key variable, is “recorded by school personnel.”<sup>220</sup> These personnel may have their own implicit biases, which could impact how they describe the behavior.<sup>221</sup>

Regardless of the discipline policy that prescribes a given punishment, *why* the student was selected for punishment in the first place requires examination. Examining the mindset of the teachers and administrators assigning punishment provides insight into the intersection of bias and discretion by school-level decision makers. Researchers found that “disparities in disciplinary outcomes may be better explained by the behavior of teachers and principals in schools rather than student characteristics such as misbehavior, poverty, or race.”<sup>222</sup> This is an encouraging finding as the behavior of teachers and principals may be more readily changed than complex underlying economic, political, and social structures.

Teachers are human, and like all humans, they have biases. Teachers bring their belief systems to school each day; these can manifest into explicit and, most often, implicit bias toward their students. That bias forms the basis for their decisions, including those involving discipline. Even subconsciously, a teacher with negative bias can discriminate against students, including prescribing unfair punishment.<sup>223</sup> The most typical instance is when a teacher writes a referral for disciplinary action to a Black student who displays very

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<sup>219</sup> See Amy Auletto, *The Role of Teachers in Disciplinary Outcomes of Black Students*, MICH. STATE UNIV. (Mar. 27, 2017), <https://education.msu.edu/green-and-write/2017/the-role-of-teachers-in-disciplinary-outcomes-of-black-students/> [<https://perma.cc/R5W2-KWT5>].

<sup>220</sup> Nora Gordon, *Disproportionality in Student Discipline: Connecting Policy to Research*, BROOKINGS (Jan. 18, 2018), <https://www.brookings.edu/research/disproportionality-in-student-discipline-connecting-policy-to-research/> [<https://perma.cc/G77P-Z4LF>].

<sup>221</sup> *Id.*

<sup>222</sup> Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. EDUC. RSCH. 752, 758 (2018).

<sup>223</sup> Tasminda K. Dhaliwal et al., *Educator Bias Is Associated with Racial Disparities in Student Achievement and Discipline*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/20/educator-bias-is-associated-with-racial-disparities-in-student-achievement-and-discipline/> [<https://perma.cc/9TD4-ZJYV>].

identical behavior to a white student,<sup>224</sup> while disregarding the bad behavior of a white student as “kids will be kids.”<sup>225</sup>

Teachers are expected to make judgments about their students daily, from evaluating their knowledge through assignments to determining what behavior requires a referral for discipline. Teachers cannot simply turn their biases on and off,<sup>226</sup> and as such, their decisions are rooted in bias, good or bad. The problem arises when those judgments are based on negative bias rooted in racial prejudice.<sup>227</sup> Without acknowledgement and training, as discussed later in Part V, a teacher who has a negative bias—even a subconscious one—may be susceptible to discriminatory behavior.<sup>228</sup> Additionally, a lack of awareness of students’ cultural backgrounds may mean that teachers and administrators lack the necessary skills to interact with students of all cultures and ethnicities and may misinterpret classroom behaviors. One result of this lack of awareness may be disproportionate school discipline.

In 2014, the Minnesota ED received a letter from the US ED’s Office for Civil Rights (OCR), referred to as the Joint “Dear Colleague” letter.<sup>229</sup> The letter outlines “the fact that students of color—[Black] students, in particular—are disproportionately impacted by exclusionary discipline policies and practices,” and explicitly identifies racial discrimination as a problem.<sup>230</sup> The subsequent OCR investigation concluded that despite making up only “40 percent of the student [population]”, Black students were involved in almost 75 percent of the district’s documented disciplinary occurrences, “including over 60 percent of the in-school suspensions,” more than “78 percent of out-of-school suspensions,” and more than “69 percent of the referrals to law

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<sup>224</sup> Brett Arends, *Black Children Are More Likely to Be Disciplined than White Kids for the Same Behavior*, MKT. WATCH (Oct. 16, 2019, 10:34 PM), <https://www.marketwatch.com/story/black-children-are-more-likely-to-be-disciplined-than-white-kids-for-the-same-behavior-2019-10-16> [https://perma.cc/4U7H-XQAT].

<sup>225</sup> See Erin Karter, *Study Finds Discipline Disparities in Preschool Driven by Racial Bias*, PHYS.ORG (Sept. 29, 2021), <https://phys.org/news/2021-09-discipline-disparities-preschool-driven-racial.html> [https://perma.cc/Z2YM-33SQ].

<sup>226</sup> See Steinhäuser, *supra* note 216.

<sup>227</sup> While teachers could have biases based on other aspects of a child’s identity, like gender or disability, this article focuses on racial bias.

<sup>228</sup> See *infra* Part V.

<sup>229</sup> Joint “Dear Colleague” Letter from the U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUST. (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html> [hereinafter Joint “Dear Colleague Letter”]; Erin Hinrichs, *Minnesota Educators Weigh In on Student Discipline Debate Unfolding in D.C.*, MINNPOST (Dec. 5, 2017), <https://www.minnpost.com/education/2017/12/minnesota-educators-weigh-student-discipline-debate-unfolding-dc/> [https://perma.cc/S25S-SM54].

<sup>230</sup> Hinrichs, *supra* note 229.

enforcement.”<sup>231</sup> The OCR report also highlighted examples of how discipline was applied inequitably. It identified instances where a white student was assigned “to an alternative instruction room for fighting with another student,” while “four Black students who engaged in similar fights” were suspended “for one or two days.”<sup>232</sup>

Other specific examples of discriminatory practices were included in the letter sent to Minnesota Public Schools. For instance, federal investigators found that “a white second grader who threw a rock that [struck] another student and [destroyed] a teacher’s sunglasses was not” suspended, but a Black second grader who poked another kid with a pencil was suspended.<sup>233</sup> For several days, the white student was permitted to assist the teacher at lunch in order to pay off the expense of the sunglasses.<sup>234</sup> The white student was not required to miss classroom instruction although the offense was just as egregious as that of the Black student, and not only resulted in harm to another student and property damage, but harm to the teacher as well. This was just another occurrence of bias in administering discipline in that school district.

In response, some of the school districts in Minnesota, including the Minneapolis district, entered into “voluntary resolution agreements” and took such steps as revising their discipline policies, establishing a “school-wide engagement department,” and stopping their practice of suspending K-5 students for nonviolent behavior.<sup>235</sup> Less than three years later, when the Trump administration moved to roll back the Obama-era school discipline guidance, Minnesota advocated for the recission, despite the fact that discipline statistics remained alarming.<sup>236</sup> At the time of the rollback, in 2017, Black students made up “41 percent of the overall student population,” but “76 percent of the suspensions.”<sup>237</sup> While nationally, Black students were “suspended three times as often as their white peers,” it was “eight times as often” in Minnesota.<sup>238</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (quoting Joint “Dear Colleague” Letter, *supra* note 229).

<sup>233</sup> Erica L. Green, *Why Are Black Students Punished So Often? Minnesota Confronts a National Quandary*, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/us/politics/school-discipline-disparities-white-black-students.html> [https://perma.cc/84H9-RFAU].

<sup>234</sup> *Id.*

<sup>235</sup> Hinrichs, *supra* note 229.

<sup>236</sup> *Id.*

<sup>237</sup> Green, *supra* note 233.

<sup>238</sup> *Id.*

Following the OCR study, Minneapolis Schools superintendent Bernadeia Johnson conducted an independent review of discipline in her district.<sup>239</sup> During her review of the student disciplinary referrals, Johnson saw glaring differences in how teachers described the behavior of students of different races.<sup>240</sup> The teachers described white children as “gifted but can’t use [their] words” and “high strung,” excusing behavior because a student “had a hard day.”<sup>241</sup> Black children were described as “‘destructive,’ . . . ‘violent,’ and [unable to] be ‘managed.’”<sup>242</sup> Johnson went on to say, “[w]hen you see something like that and you’re a leader, and you’re trying to figure out how to move the school system forward—it was alarming.”<sup>243</sup> Based on her discoveries, Johnson directed changes including her directive to ban suspensions for nonviolent offenses committed by pre-K through first grade aged children.<sup>244</sup> She also “pledged to personally review referrals to suspend minority students for nonviolent offenses.”<sup>245</sup> Unfortunately, her efforts received “backlash[,] both locally and nationally.”<sup>246</sup> As a result, one month after announcing the changes, Ms. Johnson resigned.<sup>247</sup>

*D. Bias in School Policies and Practices: Zero Tolerance Policies & Eye-of-the-Beholder Offenses*

Zero tolerance policies that *assign* discipline and eye-of-the-beholder offenses that *trigger* those policies interact with one another, amplifying the negative effects of teacher and school administrator bias. “[S]ubjective, eye-of-the-beholder offenses, like wearing the wrong shoes [or] styling their hair in a way that is considered distracting,” have resulted in students being suspended from school.<sup>248</sup> The ED investigated and sued the State of Mississippi for incarcerating students over minor school disciplinary infractions, such as talking back to teachers and violating dress codes. The students were sent to a youth

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Brenda Álvarez, *School Suspensions Do More Harm than Good*, NAT’L EDUC. ASS’N. (Sept. 21, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/school-suspensions-do-more-harm-good> [<https://perma.cc/ZE8J-YR9L>].



court for the school infractions, where they were denied basic constitutional rights.<sup>249</sup>

Credited for creating zero tolerance school discipline policies is the Gun-Free Schools Act of 1994 (GFSA).<sup>250</sup> The GFSA mandated that every state receiving federal funding have state legislation in place forcing local educational organizations to expel students who are found to have taken weapons to school for a minimum of one year.<sup>251</sup> Mandating uniform punishment for weapons offenses was akin to zero tolerance policies which were developed as an approach to drug enforcement. In the school setting, “the term [zero tolerance] became widely adopted in schools in the early 1990s as a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context.”<sup>252</sup> The policy was originally intended to ensure safe and healthy schools by targeting serious offenses, like bringing a gun to school, selling drugs, or engaging in gang-related fights on school grounds.<sup>253</sup> In recent years, however, zero tolerance policies have been applied broadly to include minor offenses.<sup>254</sup> These minor offenses may include subjective offenses, like talking back to school personnel, and more objective offenses, like bringing over the counter or prescription drugs on school grounds without a doctor’s note or coming to school out of uniform.<sup>255</sup>

Despite research showing that exclusionary discipline policies are ineffective,<sup>256</sup> many schools continue to implement them. To assess whether the practice of zero tolerance school policies benefits students and schools, the American

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<sup>249</sup> Press Release, U.S. Dep’t of Just., Justice Department Releases Investigative Findings Showing Constitutional Rights of Children in Mississippi Being Violated (Aug. 10, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-showing-constitutional-rights-children> [https://perma.cc/DKA3-5V6N].

<sup>250</sup> *Zero Tolerance*, SCH. DISCIPLINE SUPPORT INITIATIVE, <https://supportiveschooldiscipline.org/zero-tolerance-policy> [https://perma.cc/F843-BLGQ].

<sup>251</sup> 20 U.S.C. § 7961.

<sup>252</sup> Am. Psych. Ass’n Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?*, 63 AM. PSYCH. 852, 852 (2008), <https://www.apa.org/pubs/reports/zero-tolerance.pdf> [https://perma.cc/6SSP-7RCT].

<sup>253</sup> Russ Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?*, 80 PHI DELTA KAPPAN 372, 373 (1999).

<sup>254</sup> AM. PSYCH. ASS’N ZERO TOLERANCE TASK FORCE, *supra* note 250, at 852.

<sup>255</sup> *See id.*

<sup>256</sup> CHRISTINA LICALSI ET AL., AM. INSTS. FOR RSCH., AN EMPIRICAL EXAMINATION OF THE EFFECTS OF SUSPENSION AND SUSPENSION SEVERITY ON BEHAVIORAL AND ACADEMIC OUTCOMES 1 (2021), <https://www.air.org/sites/default/files/2021-08/NYC-Suspension-Effects-Behavioral-Academic-Outcomes-August-2021.pdf> [https://perma.cc/NX56-KCM8].

Psychological Association created the Zero Tolerance Task Force.<sup>257</sup> This task force examined “[a]n extensive review of literature,” spanning the policy’s “[twenty]-year history.”<sup>258</sup> It found that the more severe the discipline, the greater the adverse effects on a student’s future academic performance, attendance, and behavior.<sup>259</sup> As such, suspending students does little to improve future behavior for the disciplined student or their peers.<sup>260</sup> The task force found that zero tolerance policies did not improve perceptions of a positive school climate.<sup>261</sup>

Rather than keeping children and schools safe, zero tolerance policies “push kids out of [school] at [alarming] rates.”<sup>262</sup> An educator noted that suspension “is quick and dirty.”<sup>263</sup> It does not take into account if the students are having mental health issues or problems at home.<sup>264</sup> Even during the COVID-19 pandemic, zero tolerance policies pushed children out of the classroom at disturbing rates.<sup>265</sup> In Jacksonville, “students found not wearing a mask could be removed from school and made to learn online.”<sup>266</sup> Some Texas school districts took this a step further and classified purposely coughing on another person as assault.<sup>267</sup> Even in districts utilizing remote learning in response to the pandemic, zero tolerance policies and other exclusionary policies were still applied. In schools in Shelby, Tennessee, during remote learning, “students [were] not to wear pajamas, hats, hoods, or sleeveless shirts on screen.”<sup>268</sup> Additionally, they were prohibited from eating or drinking during remote learning, and if they did, they risked “a virtual in-school suspension.”<sup>269</sup>

Studies have found that zero tolerance policies are driving the disproportionate punishment of Black and brown students in the school setting. The authors of *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* noted that “the universality of racial disparities in school punishment suggests that some form of systematic bias is

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<sup>257</sup> Am. Psych. Ass’n Zero Tolerance Task Force, *supra* note 252, at 852.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 860.

<sup>260</sup> *Id.* at 854.

<sup>261</sup> *Id.* (“[S]chools with higher rates of school suspension and expulsion appear to have less satisfactory ratings of school climate.”).

<sup>262</sup> Álvarez, *supra* note 248.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Álvarez, *supra* note 187.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

inherent in the use of school suspension and expulsion.”<sup>270</sup> They predicted that as the use of zero tolerance policies increased, documented incidents of racially discriminatory enforcement would increase as well.<sup>271</sup> Additionally, because some zero tolerance policies require an extended period of time out of the classroom, a correlation exists between suspensions and dropping out and falling behind.<sup>272</sup> In 2021, the American Institute for Research found that discipline that excludes students from their regular classroom learning, including in-school and out-of-school suspensions, is ineffective for dealing with student misbehavior.<sup>273</sup> Furthermore, simply removing students from the school environment does nothing to deal with students’ and schools’ deeper issues. This discipline method may lead to further disengagement from school, anger, and erosion of trust—all of which have been shown to exacerbate recidivism.<sup>274</sup>

#### IV. SCHOOL DISCIPLINE RATES & IMPACT OF DISPROPORTIONATE PUNISHMENT

*“It is easier to build strong children than to repair broken men.”—Frederick Douglass*<sup>275</sup>

The previous Sections set the stage for defining the problem and examining its origins by providing background information and a historical perspective. However, it is equally crucial to fully assess the scope and effects of the issue before

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<sup>270</sup> Russ Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* 19 (Univ. of Nebraska-Lincoln, Policy Research Report #SRS1, 2000), <https://k12engagement.unl.edu/color%20of%20discipline-%20IN.pdf> [<https://perma.cc/X9NV-AR3B>].

<sup>271</sup> *Id.*

<sup>272</sup> See Skiba & Peterson, *supra* note 253, at 376.

<sup>273</sup> See LICALSI ET AL., *supra* note 256, at 44–45.

<sup>274</sup> See Virginia Costenbader & Samia Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCH. 59, 74, 76, 78 (1998).

<sup>275</sup> *Frederick Douglass: Quote Investigation*, DARE TO DREAM FOR AM. (May 1, 2018), <https://authenticamericandream.blogspot.com/2018/05/quote-investigation-frederick-douglass.html> [<https://perma.cc/JGV6-79K9>]; see generally *Frederick Douglass*, HISTORY.COM (Jan. 21, 2022), <https://www.history.com/topics/black-history/frederick-douglass> [<https://perma.cc/9VNH-L8XS>] (“Frederick Douglass was a formerly enslaved man who became a prominent activist, author and public speaker. He became a leader in the abolitionist movement, which sought to end the practice of slavery, before and during the Civil War. After that conflict and the Emancipation Proclamation of 1862, he continued to push for equality and human rights until his death in 1895. Douglass’ 1845 autobiography, *Narrative of the Life of Frederick Douglass, an American Slave*, described his time as an enslaved worker in Maryland. It was one of five autobiographies he penned, along with dozens of noteworthy speeches, despite receiving minimal formal education. An advocate for women’s rights, and specifically the right of women to vote, Douglass’ legacy as an author and leader lives on. His work served as an inspiration to the civil rights movement of the 1960s and beyond.”).

any potential remedies are examined. This Part delves into the statistics on K-12 disciplinary rates and preschool discipline rates, presenting data from the Civil Rights Data Collection survey, which all public schools receiving federal funds are required to complete. School discipline at the state level is also covered, as well as the regional differences, given that Black students receive a disproportionate share of annual school suspensions in southern states. Finally, this Section examines the negative and long-lasting effects that discriminatory punishment practices and policies in the school setting have on Black children.

#### A. *Data on Disproportionate School Discipline*

The CRA of 1964 was a critical tool in the fight against pervasive inequalities in the educational school system. Title II functionally prohibits discrimination “on the [basis] of race, color, religion, or national origin” in “any place of public accommodation,”<sup>276</sup> and Title VI prohibits discrimination “on the [ground] of race, color, or national origin” in federally funded programs.<sup>277</sup> It also notably “strengthened the enforcement of voting rights and the desegregation of schools.”<sup>278</sup> Passage of the CRA ended the application of Jim Crow laws, which had been upheld by the Supreme Court since its *Plessy* decision in 1896.<sup>279</sup> In 1965, ESEA was passed, authorizing federal funds to support educational programs in elementary and secondary education, while “emphasizing high standards and accountability.”<sup>280</sup> When the CRA passed in 1964, followed quickly by the ESEA in 1965, both “the U.S. Department of Justice and the [ED] were able to investigate and litigate violations of the law.”<sup>281</sup>

The US ED’s OCR was created in 1980 to serve student populations facing discrimination. OCR enforces “[f]ederal civil rights laws that prohibit[] discrimination in programs or

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<sup>276</sup> Title II, Civil Rights Act of 1964, 42 U.S.C. § 2000(a).

<sup>277</sup> Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

<sup>278</sup> *Legal Highlight: The Civil Rights Act of 1964*, DEP’T OF LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> [https://perma.cc/8N8N-EFND].

<sup>279</sup> *Id.*

<sup>280</sup> Catherine A. Paul, *Elementary and Secondary Education Act of 1965*, VCU LIBRS.: SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/education/elementary-and-secondary-education-act-of-1965/> [https://perma.cc/QK45-Z55G].

<sup>281</sup> Jessica Cardichon & Linda Darling-Hammond, *Protecting Students’ Civil Rights: The Federal Role in School Discipline*, 49 VOICES IN URB. EDUC. 29 (2020), <https://steinhardt.nyu.edu/metrocenter/vue/students-civil-rights> [https://perma.cc/K46P-HPQG].

activities that receive[] [funding] from the [ED].”<sup>282</sup> “The mission of [OCR] is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.”<sup>283</sup> OCR collects data through the annual Civil Rights Data Collection (CRDC) survey.<sup>284</sup> The survey is mandatory for public schools.<sup>285</sup> A major data point and topic for collection in the survey is student discipline.<sup>286</sup>

During the 2013–2014 school year, Black students represented 15.5 percent of the overall student population, while white students accounted for 50.3 percent, with the next largest group being Hispanic students at 24.7 percent.<sup>287</sup> The study demonstrated stark disparities in suspension rates for students at both the preschool and K-12 levels. In preschools, 47 percent of students suspended were Black and 28 percent were white, even though only 19 percent of enrolled preschoolers were Black and 41 percent were white.<sup>288</sup> The disparity stretched across genders: Black boys, at 19 percent of male enrollment, received 45 percent of male suspensions.<sup>289</sup> Black girls represented 20 percent of female preschool enrollment, but 54 percent of female suspensions.<sup>290</sup> Given these statistics, it is unsurprising that Black preschool children were 3.6 times as likely to be suspended

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<sup>282</sup> *Department of Education Office for Civil Rights*, NAT’L ARCHIVES, <https://catalog.archives.gov/id/10518452> (last visited Jan. 12, 2023); *About OCR*, U.S. DEPT OF EDUC. (July 13, 2022), <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<https://perma.cc/FW26-Y2Q4>].

<sup>283</sup> *Id.*

<sup>284</sup> OFF. FOR C.R., U.S. DEPT OF EDUC., 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 2 <https://ocrdata.ed.gov/assets/downloads/2013-14-first-look.pdf> [<https://perma.cc/3VG3-VG6U>] (“Since 1968, the CRDC has collected a variety of information, including student enrollment and educational programs and services data that are disaggregated by race/ethnicity, sex, English learner status, and disability, from public schools across the nation.”).

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* The 2013–2014 CRDC collected data from 16,758 school districts and 95,507 schools (representing 99.5 percent of all public schools), which covered 50,035,077 students.

All school districts were able to choose to report data by the traditional five race and ethnicity categories (Hispanic, White, Black/African-American, Asian/Pacific Islander, and American Indian/Alaska Native). Districts that met all of the requirements of the Department’s 2007 Final Guidance on Collecting, Maintaining and Reporting Data on Race and Ethnicity had the option of reporting data using the seven race and ethnicity categories (Hispanic/Latino, White, Black/African-American, Asian, Native Hawaiian/Other Pacific Islander, American Indian/Alaska Native, and Two or More Races).

*Civil Rights Data Collection: Data Notes*, OFF. OF C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-data-notes.doc> (last visited Jan. 12, 2023); OFF. FOR C.R., *supra* note 284, at 1.

<sup>288</sup> *Id.* at 3.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

as white children during the 2013–2014 school year.<sup>291</sup> In K-12, this trend continued, as Black students were 3.8 times as likely as white students to be suspended.<sup>292</sup> Although 6 percent of K-12 students received one or more suspensions, the number was 18 percent for Black boys and 10 percent for Black girls.<sup>293</sup>

During the 2015–2016 period, the disproportionate discipline rates for Black students increased.<sup>294</sup> Once again, there were stark disparities in discipline based on race during the 2015–2016 school year. While Black boys represented 8 percent of K-12 students, they received 25 percent of out-of-school suspensions.<sup>295</sup> And Black girls, who were also 8 percent of K-12 students, received 14 percent of suspensions.<sup>296</sup> In contrast, only 5 to 6 percent of overall students were suspended, and white boys had a suspension rate that was proportional to their representation in schools—they comprised 25 percent of K-12 enrollment and accounted for 24 percent of suspensions.<sup>297</sup>

Due to these staggering and increasingly disparate statistics, the US Government Accountability Office (GAO) was asked to review school discipline.<sup>298</sup> It was explicitly asked to “provide insight into” the following areas: “(1) patterns in disciplinary actions among public schools, (2) challenges selected school districts reported with student behavior and how they are approaching school discipline, and (3) actions Education and Justice have taken to identify and address disparities or discrimination in school discipline.”<sup>299</sup> The GAO found that in K-12 public schools, Black students were disproportionately disciplined through suspensions and expulsions.<sup>300</sup> Although Black students made up only 15.5

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> OFF. FOR C.R., U.S. DEPT OF EDUC., 2015-2016 CIVIL RIGHTS DATA COLLECTION: SCHOOL CLIMATE AND SAFETY 12, 15 (2019), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf> [<https://perma.cc/D2XA-ZH49>] (noting that the 2015–16 survey represented 50.6 million students from more than ninety-six thousand schools.).

<sup>295</sup> *Id.* at 13.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 13–14.

<sup>298</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BLACK BOYS, AND STUDENTS WITH DISABILITIES (2018), <https://www.gao.gov/assets/gao-18-258.pdf> [<https://perma.cc/MB8B-CMBX>].

<sup>299</sup> *Id.* at *Highlights*.

<sup>300</sup> *Id.* “GAO analyzed discipline data from nearly all public schools for school year 2013-14 from Education’s Civil Rights Data Collection; interviewed federal and state officials, as well as officials from a total of 5 districts and 19 schools in California, Georgia, Massachusetts, North Dakota, and Texas.” *Id.* They “also reviewed federal laws and a non-generalizable sample of seven recently resolved federal school discipline investigations (selected in part based on the type of alleged discrimination).” *Id.*

percent of public school students, they disproportionately make up those who are suspended from school, accounting for 39 percent of suspended students.<sup>301</sup> GAO also found that the disparities were consistent in spite of variables such as the socioeconomic stature of the public school and the student's violation or type of disciplinary action.<sup>302</sup>

GAO conducted interviews with five school districts that were "selected . . . based on disparities in suspensions for Black students, boys, or students with disabilities," as well as "diversity in size and location."<sup>303</sup> GOA inquired how the five districts were addressing discipline, including challenges they were facing in responding to student conduct, given the complex issues influencing student behavior.<sup>304</sup> The study identified "a range of issues, including . . . the effects of poverty, mental health issues, and family dysfunction, that they said contributed to behavior that leads to discipline."<sup>305</sup> At a Georgia high school where the majority of the student body lived at or below the poverty line, officials reported that many students had personal responsibilities in addition to their academic commitments including "raising or watching siblings or working to support their family, which may cause students to be late to, or skip, class."<sup>306</sup> These infractions resulted in school-related discipline actions.<sup>307</sup> Mental illness, which school officials reported feeling ill-equipped to handle, was high on the list of issues.<sup>308</sup>

While OCR studied public schools, with students starting as young as kindergarten, the 2016 National Survey of Children's Health included both private and public preschool programs.<sup>309</sup> That survey revealed similar disparities—it found that Black children were "2.2 times more likely to be suspended or expelled than other children."<sup>310</sup> According to Rasheed Malik, the fact that the National Survey of Children's Health included private and public preschools "means that, across all types of

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 22.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 25.

<sup>309</sup> *The National Survey of Children's Health*, DATA RES. CTR. CHILD & ADOLESCENT HEALTH, <https://www.childhealthdata.org/learn-about-the-nsch/NSCH> [<https://perma.cc/85AV-D63S>]; Rasheed Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, CTR. AM. PROGRESS (Nov. 6, 2017), <https://www.americanprogress.org/article/new-data-reveal-250-preschoolers-suspended-expelled-every-day/> [<https://perma.cc/4RLM-XQWD>].

<sup>310</sup> Malik, *supra* note 309.

settings, the average school day sees roughly 250 instances of a preschooler being suspended or expelled.”<sup>311</sup>

Furthermore, the age of children suspended from school is dipping further into the tender years, with some exclusion happening with children as young as two years old.<sup>312</sup> The “‘pre-school to prison pipeline,’ a now [famous term] that describes the disturbing trend of setting children—disproportionately children of color—on a trajectory toward the criminal justice system through practices such as early expulsion and suspension,” is an alarming issue that exists in America today but is lacking in both basic and applied research.<sup>313</sup>

Several studies have confirmed that discipline disparities begin as early as preschool. To examine why, Dr. Walter Gilliam, a Yale University Child Study Center researcher, has studied racial discipline disparities since the 2000s.<sup>314</sup> Dr. Gilliam’s research revealed “that all the factors that predict preschool expulsion mainly have to do with a teacher’s job stress, the child-teacher ratio, length of the school day and access to more supports.”<sup>315</sup> He reiterated that expulsion was not based at all on a child’s behavior, but rather the factors that impact the teachers.<sup>316</sup> Dr. Gilliam further surmised that implicit bias was the main culprit and “that [i]mplicit bias start[ed] early in education.”<sup>317</sup> In his 2005 research, Dr. Gilliam was able to predict “a preschooler’s risk of expulsion” with the three B’s: “big, [B]lack or boy.”<sup>318</sup> During a 2017 presentation, Dr. Gilliam noted that his research found that children who “are bigger or taller than their peers, usually 4-year-olds, are more likely to be expelled for similar behaviors than 3-year-olds.”<sup>319</sup> Black children are expelled at a rate that is two times higher than white children.<sup>320</sup>

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<sup>311</sup> *Id.*

<sup>312</sup> Shantell E. Meek & Walter S. Gilliam, *Expulsion and Suspension in Early Education as Matters of Social Justice and Health Equity*, NAT’L ACAD. MED. (Oct. 31, 2016), <https://nam.edu/expulsion-and-suspension-in-early-education-as-matters-of-social-justice-and-health-equity/> [<https://perma.cc/ED9P-T66F>].

<sup>313</sup> *Id.*

<sup>314</sup> Arielle Dreher, ‘Big, Black or Boy’ Preschoolers Face Higher Expulsions and Suspensions, JACKSON FREE PRESS (Mar. 23, 2017, 1:16 PM), <https://www.jacksonfreepress.com/news/2017/mar/23/big-black-or-boy-preschoolers-face-higher-expulsio/> [<https://perma.cc/C84Q-KGXL>].

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* (emphasis added).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*



*B. School Discipline at the State Level: Florida's Public Schools*

Black students are experiencing educational mistreatment because they are disproportionately subject to suspension or expulsion in southern states, including Florida.<sup>321</sup> Research shows that in a single academic year, 1.2 million Black students were suspended from public K-12 schools nationwide, with thirteen southern states accounting for 55 percent of those suspensions.<sup>322</sup> Additionally, 50 percent of Black students in American public schools who were expelled were from school districts in the South.<sup>323</sup> Researchers assert that unfair discipline practices are to blame for the disproportionate results, noting that white students are more frequently in trouble for less subjective behaviors like “smoking or leaving campus”, while “[B]lack students are more likely to be suspended for subjective offenses” like “being disrespectful or threatening.”<sup>324</sup>

Florida makes up half of the United States’ top ten largest school districts.<sup>325</sup> In contrast, “Black students are 2.4 times as likely to be suspended as [w]hite students.”<sup>326</sup> A 2015 examination of school discipline rates in Duval County, Florida revealed 70 percent of students referred for discipline were Black, while they make up 44 percent of the student body.<sup>327</sup> The source also specifies the rates for suspension (nearly 80 percent) and in-school detention (more than 70 percent).<sup>328</sup> Duval had Florida’s highest percentage of out-of-school suspensions of

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<sup>321</sup> EDWARD J. SMITH & SHAUN R. HARPER, UNIV. OF PENN., CTR. FOR STUDY OF RACE AND EQUITY IN EDUC., DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES 1 (2015), <https://race.usc.edu/wp-content/uploads/2020/08/Pub-14-Smith-and-Harper.pdf> [<https://perma.cc/FYG4-QLTF>] (“Florida schools suspended the highest number of Black students.”).

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> Leslie Postal, *Black Students Disproportionately Suspended, Expelled in Florida Schools*, ORLANDO SENTINEL (Aug. 25, 2015, 3:33 PM), <https://www.orlandosentinel.com/news/education/os-black-students-florida-schools-suspensions-post.html> [<https://perma.cc/85PX-K4VW>].

<sup>325</sup> Jeffrey S. Solocheck, *Florida School Districts Remain Among Nation's Largest*, TAMPA BAY TIMES (Nov. 4, 2019), <https://www.tampabay.com/news/gradebook/2019/11/04/florida-school-districts-remain-among-nations-largest/> [<https://perma.cc/GMF2-CAP3>].

<sup>326</sup> *Miseducation Florida*, PROPUBLICA (2017), <https://projects.propublica.org/miseducation/state/FL> [<https://perma.cc/44C6-RM7H>].

<sup>327</sup> Denise Amos, *Duval Schools Suspend Larger Number of Blacks than Whites*, FLA. TIMES-UNION (July 28, 2017, 8:15 PM), <https://www.jacksonville.com/story/news/education/2017/07/29/duval-schools-suspend-larger-number-blacks-whites/15766553007/> [<https://perma.cc/6473-8DJQ>].

<sup>328</sup> *Id.*

Black students.<sup>329</sup> Rather than improving its ignominious ranking, the county repeated this trend in 2019.<sup>330</sup>

The issue did not go unnoticed by education advocates. During the Ninth Annual Urban Education Symposium in 2018, organizations and community leaders gathered to collectively discuss Black male achievement and discipline in public schools.<sup>331</sup> The Symposium took note of some sobering statistics regarding Black male literacy and discipline rates: since 2012, Black boys have scored the lowest of all demographic groups on state reading tests for third through tenth grade, with fewer than 40 percent of Black males receiving a passing score.<sup>332</sup> At the same time, 75 percent of boys suspended in Jacksonville public schools were Black.<sup>333</sup> Underscoring the low literacy and high suspension rates in kindergarten through the twelfth grade, Symposium attendees noted that Black male infants, toddlers, and preschoolers—members of a population at a prime age for brain development—are disproportionately expelled from early learning programs.<sup>334</sup> When asked about these jaw-dropping statistics and the connection between suspension and literacy, Denise Marzullo, CEO of the Early Learning Coalition of Duval, stated, “they’re not getting that early learning exposure . . . [t]hey’re not starting out on the pathway to success.”<sup>335</sup>

Florida, however, is not alone. In California, Black students experience suspension “rates three to four times higher than the state average for all students.”<sup>336</sup> The University of California, Los Angeles’ (UCLA) Civil Rights Project found significant racial discrepancies in California school districts’ disciplinary procedures, and the harshest exclusionary penalties were given to Black students.<sup>337</sup> Similarly, data from the Louisiana ED showed that

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<sup>329</sup> *Duval County Suspends More African-American Students Than Any School District in Florida*, ACTION NEWS JAX (May 3, 2019, 7:44 AM), <https://www.actionnewsjax.com/news/investigates/duval-county-suspends-more-african-american-students-than-any-school-district-in-florida/945798994/> [<https://perma.cc/BB68-WYFB>].

<sup>330</sup> *Id.*

<sup>331</sup> Lindsey Kilbride, *Jacksonville’s African-American Boys Disproportionately Suspended from School, Starting as Babies*, WJCT NEWS (Apr. 27, 2018, 4:17 PM), <https://news.wjct.org/first-coast/2018-04-27/jacksonvilles-african-american-boys-disproportionately-suspended-from-school-starting-as-babies> [<https://perma.cc/5VNQ-6ULH>].

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Tom Loveless, *Racial Disparities in School Suspensions*, BROOKINGS (Mar. 24, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/24/racial-disparities-in-school-suspensions/> [<https://perma.cc/6XFG-LZJJ>].

<sup>337</sup> TOM LOVELESS, BROOKINGS, *THE 2017 BROWN CENTER REPORT ON AMERICAN EDUCATION: HOW WELL ARE AMERICAN STUDENTS LEARNING?* 23 (2017),

during the 2018–2019 school year, 1,260 preschool and kindergarten students were suspended—most in kindergarten.<sup>338</sup> In response to this alarming data, Deborah Fowler, the director of a public policy nonprofit, remarked, “[i]t’s hard to understand why you would need to suspend a four-year-old out of school . . . [i]t’s kind of hard to imagine.”<sup>339</sup>

### C. *Impact of Disproportionate School Discipline*

The lasting emotional toll of these inequalities on children is significant. Chief Justice Earl Warren eloquently stated in *Brown*, “[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>340</sup> In his statement, Justice Warren was speaking to the type of discrimination that digs at the soul of a child—a child who will one day grow up and shape our society. Discrimination, particularly in the school setting, tears at the fabric of a child’s being. A child’s formative years are between the ages of zero and eight, and during this important time they also begin their formal education.<sup>341</sup> It is at this time that brain and neurobiology develop at the quickest rate.<sup>342</sup> A child’s success in life, as well as their physical and mental development, can all be impacted by what occurs to them during these formative years.<sup>343</sup> Beyond schoolbook concepts and knowledge, children develop a sense of self, purpose, and belonging during this time.<sup>344</sup> Discrimination in educational

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<https://www.brookings.edu/wp-content/uploads/2017/03/2017-brown-center-report-on-american-education.pdf> [https://perma.cc/D7VW-6E2W]; DANIEL J. LOSEN & JONATHAN GILLESPIE, CIV. RIGHTS PROJECT AT UCLA, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL 4 (2012), <https://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> [https://perma.cc/A6J2-8MKW].

<sup>338</sup> Blane Skiles, *More Than 1,000 Kindergartners Were Suspended from School in Louisiana Last School Year; Experts Warn of Detrimental Consequences*, KLSA NEWS 12 (Jan. 3, 2020, 6:36 PM), <https://www.ksla.com/2020/01/03/more-than-kindergartners-were-suspended-school-louisiana-last-school-year-experts-warn-detrimental-consequences/> [https://perma.cc/PE8Y-C2FY].

<sup>339</sup> *Id.*

<sup>340</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>341</sup> Pamela Li, *Formative Years—Why Are They Important in Child Development*, PARENTING FOR BRAIN (June 28, 2022), <https://www.parentingforbrain.com/formative-years/> [https://perma.cc/3APP-CLVT].

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> Kelly-Ann Allen, *The Importance of Belonging Across Life*, PSYCH. TODAY (June 20, 2019), <https://www.psychologytoday.com/us/blog/sense-belonging/201906/the-importance-belonging-across-life> [https://perma.cc/XN3H-78VP].

settings sends a strong message to very young children that they are not good enough and will never be good enough.<sup>345</sup>

Children without access to a quality education grow up to be adults who are more likely to live in poverty, suffer from poor health, have a shorter life span, lack a voice, and ultimately, be at risk for exploitation and inequality.<sup>346</sup> Additionally, the relation between literacy rates and discipline cannot be dismissed. A 2014 Johns Hopkins study found that being suspended just *one* time in ninth grade in Florida doubled a child's risk of dropping out from 16 percent to 32 percent.<sup>347</sup> The study also found that students who were Black, poor, or in special education received a disproportionately large number of suspensions, as well as longer suspensions.<sup>348</sup> The study abstract concluded that demographic disparities in disciplinary incidents “serve to further [widen any academic] achievement gap[s].”<sup>349</sup>

Expulsion and suspension have severe implications, including reducing the time of classroom instruction and in-school social interactions and removing students' access to resources such as school lunches or after school programming. Research reveals that that suspending children does not significantly improve peers' academic performance or views of a supportive school environment.<sup>350</sup> Nor does it significantly prevent future misbehavior for the penalized students or their peers.<sup>351</sup> Additionally, the more severe the exclusionary discipline, the more detrimental an impact it has on a student's future behavior, attendance, and academic achievement.<sup>352</sup> Furthermore, harsh discipline policies and practices have also been attributed to a disproportionate number of Black students being pushed out of the classroom and into the criminal justice system, commonly referred to by scholars and advocates as “[t]he school-to-prison pipeline.”<sup>353</sup> Many of these kids need additional educational and counseling services because they have learning impairments or

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<sup>345</sup> JENNIFER KEYS ADAIR, MIGRATION POL'Y INST., THE IMPACT OF DISCRIMINATION ON THE EARLY SCHOOLING EXPERIENCES OF CHILDREN FROM IMMIGRANT FAMILIES 4 (2015), <https://www.migrationpolicy.org/sites/default/files/publications/FCD-Adair.pdf> [<https://perma.cc/2HHU-PMXW>].

<sup>346</sup> Chris Drew, *Lack of Education: 11 Lifelong Effects*, HELPFUL PROFESSOR (July 6, 2022), <https://helpfulprofessor.com/lack-of-education/> [<https://perma.cc/F4FT-GUSQ>].

<sup>347</sup> Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, J. APPLIED RSCH. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK 1, 7–8 (2014).

<sup>348</sup> *Id.* at 7–8.

<sup>349</sup> *Id.* at 1.

<sup>350</sup> LICALSI ET AL., *supra* note 256, at 38.

<sup>351</sup> *Id.* at 33.

<sup>352</sup> *Id.* at 35–36.

<sup>353</sup> *School to Prison Pipeline*, WCASA, <https://www.wcasa.org/resources/areas-of-interest/topics/school-to-prison-pipeline/> [<https://perma.cc/YQJ9-LN59>].

face “poverty, abuse, or neglect,” but what they receive instead is isolation, punishment, and stigmatization.<sup>354</sup>

The Court in *Brown* warned that treating students differently in the school setting based on race was in effect creating two separate and unequal school structures.<sup>355</sup> While *Brown* was focused on school facilities, school discipline disparately applied also creates two separate and unequal school systems.

#### V. STRATEGIES FOR ERADICATING DISPROPORTIONATE SCHOOL PUNISHMENT

*“Education is the most powerful weapon which you can use to change the world.”—Nelson Mandela<sup>356</sup>*

If indeed Nelson Mandela was correct—“[t]he true character of society is revealed in how it treats its children”<sup>357</sup>—as long as Black children are disproportionately being punished in our public schools as a result of structural racism and bias, then we are failing as a society. But also, like Mandela, I am hopeful and see the opportunity to change course. This Part provides strategies for eradicating disproportionate race-based school punishment through state, federal, and societal intervention and collaboration. States are empowered through the US Constitution to make decisions based on the welfare of their residents. Black children are residents and their parents, resident-taxpayers; as such, they should be treated like all children in public-funded schools. States should also be invested in developing a skilled and qualified workforce to contribute to the state’s growth. Even more, the states should not be left alone to deal with education—the federal government, through the courts, has a constitutional obligation to intervene.

The Supreme Court must protect students’ constitutional rights in the educational setting, including their Fourteenth Amendment right to equal protection, which extends to education according to precedent. Congress must not delay and instead, fully enforce federal law, including intervening when students’ civil rights are infringed in the school discipline context. Society, as key stakeholders in public education, must also wake up and meaningfully engage in honest introspection

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<sup>354</sup> *Id.*

<sup>355</sup> *Brown v. Bd. of Educ.*, 347 U.S.483, 495 (1954).

<sup>356</sup> Arne Duncan, *Education: The Most Powerful Weapon for Changing the World*, USAID (Apr. 23, 2013), <https://blog.usaid.gov/2013/04/education-the-most-powerful-weapon/> [<https://perma.cc/SN23-EHW5>].

<sup>357</sup> *Nelson Mandela Quotes About Children*, *supra* note 1.

and evaluation on issues of racism and discrimination in the educational setting.

#### A. *Federal Intervention*

The alarming rates of disproportionate school discipline demand immediate federal intervention. In 2013, national data showed Black students were disciplined at higher rates than white students.<sup>358</sup> In 2014, the Obama administration responded by issuing voluntary guidance to support state and local efforts to end exclusionary and discriminatory school discipline practices that prevent students from having equal access to educational opportunity.<sup>359</sup> The Obama Administration's guidance said schools have an obligation to address those disparities.<sup>360</sup> It suggested that schools found to be disproportionately disciplining students of color could be in violation of the CRA.<sup>361</sup> The guidance also suggested alternative methods “based [on] positive reinforcement and a restorative process” for pupils returning to the classroom after disciplinary action.<sup>362</sup>

In 2018, national discipline data revealed that the disparities gap had widened despite efforts to close it under the Obama Administration.<sup>363</sup> The CRDC found that Black students were suspended, arrested, and expelled more than white students.<sup>364</sup> Despite the widening gap, the Trump Administration rescinded Obama-era guidance that was

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<sup>358</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 298; *see also* Meek & Gilliam, *supra* note 312; Lauren Camera, *Did An Obama-Era School Discipline Policy Contribute to the Parkland Shooting?*, U.S. NEWS (Mar. 6, 2018), <https://www.usnews.com/news/education-news/articles/2018-03-06/did-an-obama-era-school-discipline-policy-contribute-to-the-parkland-shooting> (“According to the Department of Education’s Office for Civil Rights, among the 2.6 million students suspended each year, black boys are three times more like than white boys to be suspended [and] black girls are six times more likely than white girls to be suspended.”).

<sup>359</sup> Joint “Dear Colleague” Letter, *supra* note 229.

<sup>360</sup> Camera, *supra* note 358.

<sup>361</sup> Evie Bald, *New Federal School Discipline Guidance Addresses Discrimination, Suspensions*, EDUC. WEEK (Jan. 8, 2014), <https://www.edweek.org/teaching-learning/new-federal-school-discipline-guidance-addresses-discrimination-suspensions/2014/01> [<https://perma.cc/8CP2-NCDT>].

<sup>362</sup> Emily Boudrea, *School Discipline Linked to Later Consequences*, HARV. GRADUATE SCH. EDUC. (Sept. 16, 2019), <https://www.gse.harvard.edu/news/uk/19/09/school-discipline-linked-later-consequences> [<https://perma.cc/C7GA-GU2T>].

<sup>363</sup> Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018), [https://www.washingtonpost.com/local/education/racial-disparities-in-school-discipline-are-growing-federal-data-shows/2018/04/24/67b5d2b8-47e4-11e8-827e-190efaf1flee\\_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-190efaf1flee_story.html) [<https://perma.cc/M6JK-C6TE>].

<sup>364</sup> OFF. OF C.R., U.S. DEPT OF EDUC., CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (2014), <https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf> [<https://perma.cc/8S5L-WYBY>].

designed “to ensure that students of color aren’t disciplined more harshly than their peers.”<sup>365</sup> In response to this reverse course, education advocates have noted that the rescission of the Obama-era guidance by the Trump administration does not alter federal antidiscrimination laws. However, it deprives schools and districts of a research based collection of tools for fostering inclusive, safe learning environments as well as information on how to implement these policies in a nondiscriminatory manner and how to reduce or end harmful practices.<sup>366</sup> Despite the rescission by the Trump administration, some states and schools have continued to employ less stringent methods, which proponents claim has decreased the use of excessively severe punishments for small infractions.<sup>367</sup>

Mandatory reporting by school districts is not enough—the data has been clear for decades that the problem exists.<sup>368</sup> Further, guidance to schools, while helpful, is also not enough.<sup>369</sup> Without the enforcement of civil rights laws, the problem will only worsen and weaken the already fragile education system in the United States. This issue is becoming increasingly worrisome as education inequality is rising.<sup>370</sup> Equally troubling was the Trump Administration’s response to widening disparities. Rather than working to eradicate disparities by enforcing civil rights laws in the area of education, President Trump’s ED reduced enforcement efforts. Children’s lives and futures should not be pawns in the political chess game in DC and state capital buildings nationwide.

Title VI of the Civil Rights Act of 1964 states that “[n]o 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.”<sup>371</sup> When Black students in schools receiving federal funding are disproportionately punished compared to their white counterparts, on the basis of discrimination, there is a clear violation of federal law. Ongoing monitoring and enforcement by the federal government is a must.

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<sup>365</sup> Andrew Ujifusa, *Betsy DeVos Revokes Obama Discipline Guidance Designed to Protect Students of Color*, EDUC. WEEK (Dec. 21, 2018), <https://www.edweek.org/policy-politics/betsy-devos-revokes-obama-discipline-guidance-designed-to-protect-students-of-color/2018/12> [https://perma.cc/7D5Y-NE9S].

<sup>366</sup> Cardichon & Darling-Hammond, *supra* note 24, at 29–30.

<sup>367</sup> Arianna Prothero, *How to Manage Discord over Student Discipline*, EDUC. WEEK (Oct. 15, 2019), <https://www.edweek.org/leadership/how-to-manage-discord-over-student-discipline/2019/10> [https://perma.cc/7PFE-VJ2P].

<sup>368</sup> See Gordon, *supra* note 15.

<sup>369</sup> See *id.*

<sup>370</sup> See Black, *supra* note 17, at 738.

<sup>371</sup> Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

In his critique of *Brown*, Professor Derek Bell noted that “[f]ull enforcement require[d] more than either equalizing facilities or, in the case of Delaware because of the inadequacy of the [Black] schools, ordering plaintiffs admitted into the white schools.”<sup>372</sup>

Bell believed that the relief was needed by children of both races and proposed that it should be granted in three phases.<sup>373</sup> He suggested the following phases, which I deem are relevant to the issue of disparate treatment in school discipline: (1) “[E]qualization[,]” (2) “[r]epresentation[,]” and (3) “[f]ederal judicial oversight.”<sup>374</sup> The equalization prong, for purposes of school discipline, seems to be met because school districts are required to report school discipline data.<sup>375</sup> The major difference, however, is that Bell suggests reporting be court mandated.<sup>376</sup> The next phase is “[r]epresentation.”<sup>377</sup> In this phase, Bell suggests greater representation on school boards to adequately represent all children in accordance with the percentage of children in the district.<sup>378</sup> Finally, the next missing piece, as proposed by Bell, is “[j]udicial oversight.”<sup>379</sup> He suggests that there should be monitoring committees set up by federal district judges.<sup>380</sup> The goal of the committee is to “work with school officials to” develop plans to ensure the first two phases are met.<sup>381</sup> The district court will have the authority to oversee compliance and act in instances where schools “subvert or hinder . . . compliance.”<sup>382</sup> Bell’s plan provides the opportunity for the state and federal government to work together to ensure that children are not unfairly punished based on their race.<sup>383</sup>

#### B. *State Intervention*

The alarming rates of disproportionate school discipline demand immediate state intervention as well. While the Tenth Amendment vests states with the authority to regulate education,<sup>384</sup> they must do better to protect the interest of all their children. States with high rates of disparity should take a

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<sup>372</sup> BENNET CAPERS ET AL., CRITICAL RACE JUDGEMENTS 35 (2022).

<sup>373</sup> *Id.* at 35–36.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *See id.*

<sup>377</sup> *Id.* at 36.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *See id.* at 35–36.

<sup>384</sup> U.S. CONST. amend. X.



page from other states that have proactively examined school data rates and put policies and practices in place to protect all children. There are three major steps that states can take to analyze the problem more accurately and engage in solutions that help students succeed in school. The plan calls for (1) training in bias and cultural competence for all school personnel, (2) discipline data tracking at the state and school district levels, and (3) the implementation of restorative practices in school discipline. By adopting this plan, states can actively address discipline discrepancies in their schools. The governor, ED, and local school boards and administrators must buy in and serve as leaders in the plan's implementation, continuation, and routine evaluation for the plan to be successful.

States should not wait to be informed by the federal government that they are running afoul of federal law as a result of their discipline data. Taking ownership of the data and instituting internal mechanisms at the local and state levels can only serve to create a better learning environment for all children. Education should never be an issue that is politicized and contingent on which political party occupies the governor's mansion and the majority of the legislature. States should accept that what we do not acknowledge, we cannot fix. Taking steps to train educators and staff, monitor discipline rates, and act immediately to remedy issues and disparities should be the states' goal. States should also aim to be transparent in their efforts. Transparency opens the door for greater collaboration and support from the community, while also serving to heal past injustices and resulting wounds.

### 1. Cultural Competency Training

States should proceed, "with all deliberate speed" to require bias and cultural competency training for all school employees<sup>385</sup>—from the school board chair to the cafeteria workers. Children are among the most vulnerable members of our society.<sup>386</sup> Their vulnerability, coupled with the importance of education to an ordered society, requires us to take steps to ensure that children are taught in an environment that welcomes them and understands their differences. This can only benefit society. Training will help eliminate some of the biases, particularly implicit bias, by teachers and school administrators

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<sup>385</sup> See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

<sup>386</sup> Social Sustainability Team, *Children's Rights*, UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org/what-is-gc/our-work/social/childrens-rights> [<https://perma.cc/GRZ4-CMMB>].

in learning and discipline. The training will also send a message to students that they all matter. To accomplish this goal, states should require all teachers seeking certification of a teaching license in that state to undergo cultural competency training.

Additionally, “[c]ulture plays a central role in learning; therefore, an awareness of students’ cultural and ethnic backgrounds is a tool in developing a positive academic environment.”<sup>387</sup> Per the National Education Association (NEA), “cultural competence” is “the ability to successfully teach students who come from cultures other than our own.”<sup>388</sup> Cultural competency is not just about understanding or tolerating others. It is also about understanding oneself through “identifying one’s own cultural assumptions, values, and beliefs and examining the impact of those beliefs on our interactions with people.”<sup>389</sup>

In our ever-changing society, it is critical to ensure that all school personnel, particularly teachers and school administrators, are trained to appreciate and interpret other cultures accurately. First acknowledging and then understanding cultural diversity is central to many facets of our society: “[c]ultural diversity is important because our country, workplaces, and schools increasingly consist of various cultural, racial, and ethnic groups.”<sup>390</sup> Due to our large immigrant population, “[t]here are many ethnic groups in the United States,” and each “contributes to America’s cultural heritage.”<sup>391</sup> We often boast about that very diversity.<sup>392</sup> To create a diverse learning environment, it should be mandated that teachers be trained on how to understand children of diverse cultures. In turn, teachers can share that knowledge with their students, which can plant the seed for understanding and tolerance before they become adults.

Schools are experiencing increasing diversity and demographic changes, resulting in exchanges among people

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<sup>387</sup> TAYLOR HAWK ET AL., PARTNERSHIP FOR PUB. EDUC., PROMOTING CULTURALLY COMPETENT TEACHING 1 (2017), <https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/8/4456/files/2017/09/Cultural-Competency-Brief-092217-web-1-117jxku.pdf> [<https://perma.cc/QKQ4-GTNG>].

<sup>388</sup> *Id.* (quoting D. VAN ROEKEL, NEA EDUC. POL’Y & PRACTICE DEP’T, PARENT, FAMILY, COMMUNITY INVOLVEMENT IN EDUCATION (2008)).

<sup>389</sup> *Cultural Competency for Educators*, UNIV. ST. THOMAS (2022), <https://education.stthomas.edu/continuing-education/cape/cultural-competency-for-educators/> [<https://perma.cc/5W9Q-JSQD>].

<sup>390</sup> *Ethnic and Cultural Diversity*, CENT. CMTY. COLL. (June 27, 2022), <https://libguides.cccneb.edu/diversity> [<https://perma.cc/8D76-R8HZ>].

<sup>391</sup> *Id.*

<sup>392</sup> *The New Colossus*, NAT’L PARK SERV. (Aug. 14, 2019), <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/W9VJ-CY6Z>].

from various cultural backgrounds, behaviors, beliefs, practices, and languages.<sup>393</sup> As a result of the lack of awareness of students' cultural backgrounds and the skills to interact with these students, teachers and administrators "misinterpret classroom behaviors."<sup>394</sup> "[D]isproportionate school discipline" may be one effect "of this lack of awareness."<sup>395</sup> Having cultural competency can help to reduce inequalities in education and disproportionate school discipline, all while increasing academic achievement among students.

The state of Minnesota, as of 2020, requires all educators to complete cultural competency training as a condition of license renewal.<sup>396</sup> Educators must demonstrate evidence of self-reflection and discussion of the following subjects in a way that deepens their understanding of their own frames of reference, the potential bias in these frames, and the impact of bias on expectations for and relationships with students, students' families, and school communities in order to meet licensing requirements. The Minnesota Professional Educator Licensing and Standards Board educates facilitators who provide schools and districts with the training.<sup>397</sup> Trainings include:

Racial, Cultural, and Socioeconomic Groups

American Indian and Alaskan Native Students

Religion

Systemic Racism

Gender Identity, Including Transgender Students

Sexual Orientation

Language Diversity

Individuals with Disabilities and Mental Health Concerns<sup>398</sup>

Requiring educators to engage in this level of cultural competency training evidences a state's commitment to ongoing training and evaluation of issues related to cultural competency. This shows concern for the entire school community, from

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<sup>393</sup> Mitchell F. Rice, *Promoting Cultural Competency in Public Administration and Public Service Delivery: Utilizing Self-Assessment Tools and Performance Measures*, 13 J. PUB. AFFS. EDUC. 41, 41 (2007).

<sup>394</sup> HAWK ET AL., *supra* note 387.

<sup>395</sup> *Id.*

<sup>396</sup> *Cultural Competency Training*, MINN. PRO. EDUCATOR LICENSING & STANDARDS BD., <https://mn.gov/pelsb/current-educators/trainings/cct/> [https://perma.cc/HQ9T-TLNE].

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

students to teachers to school staff. It also illustrates a commitment to ensuring that children are educated in an environment where they are shown empathy, support, and understanding for our differences. These are all important lessons that children can take with them into adulthood.

## 2. Tracking Discipline Data at the State and District Level

It is also imperative for states to take ownership of their discipline data. Every public school in the United States is required to participate in the CRDC biannually.<sup>399</sup> While data collection on the federal level is vital to monitoring school discipline rates around the nation, states could benefit significantly from tracking their own data. Instead of simply waiting for the CRDC, this information should be collected quarterly by states to ensure that all students within their state have access to education, free of discrimination. This data can highlight disparities well in advance of being notified of potential federal civil rights violations. It can also provide a basis and support for remediating issues and developing best practices to prevent future occurrences.

## 3. Implementing Restorative Practices

States should consider restorative practices when identifying strategies that work to punish, when appropriate, and deter future behavioral issues within schools. Zero tolerance and other disciplinary policies have not been shown to work, nor do they make the schools safer for students.<sup>400</sup> While some school districts remain reluctant to abandon zero tolerance policies, despite the overwhelming failure of these policies,<sup>401</sup> states have begun using alternative discipline models.<sup>402</sup> An alternative to

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<sup>399</sup> *Civil Rights Data Collection: Frequently Asked Questions*, DEPT OF EDUC. (last modified Nov. 7, 2022), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crdc.html> [https://perma.cc/T3BM-DTAW].

The purpose of the CRDC is to obtain data authorized under the statutes and regulations implementing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and under the Department of Education Organization Act (20 U.S.C. § 3413).

*Id.*

<sup>400</sup> See LICALSI ET AL., *supra* note 256, at 10–11.

<sup>401</sup> Am. Psych. Ass'n Zero Tolerance Task Force, *supra* note 252, at 852, 860.

<sup>402</sup> Alexandra Hess, *Zeroing In on "Zero Tolerance" School Discipline Laws*, BILL OF HEALTH (May 18, 2019),

traditional discipline methods is restorative justice, which is a concept that emphasizes “mediation and agreement” above punishment.<sup>403</sup> “[G]rounded in indigenous teachings,” before being adopted in the school setting, restorative justice principles have begun to be implemented in the criminal legal system.<sup>404</sup>

Restorative practices aim to resolve the issue, administer reasonable punishment, promote understanding, and modify the student behavior.<sup>405</sup> Instead of merely imposing punishment, restorative justice aims to work with students (both the victims and the accused) to find a solution.<sup>406</sup> To that end, restorative programs “should encompass not only student behaviors, but also staff behaviors, policies and procedures, pedagogical choices, curricular decisions, and schoolwide decision-making processes.”<sup>407</sup>

Some school districts have fully adopted restorative justice to address school discipline issues. According to the National Education Policy Center, “when schools implement[ed] a restorative initiative . . . out-of-school suspensions rates decrease[d].”<sup>408</sup> In 2006, the Oakland Unified School District (OUSD) in California started implementing the curriculum “at a failing middle school.”<sup>409</sup> In three years, the pilot school’s suspension rate dropped by 87 percent, and violence also decreased at a similar rate.<sup>410</sup> Restorative justice was adopted by OUSD as “the new model for [resolving] disciplinary [issues]” by 2011 due to the practice’s overwhelming effectiveness.<sup>411</sup>

Restorative approaches have unavoidably attracted their own criticism as more school districts move away from punitive

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<https://blog.petrieflom.law.harvard.edu/2019/05/08/zeroing-in-on-zero-tolerance-school-discipline-laws/> [https://perma.cc/BDB9-U6FF].

<sup>403</sup> We Are Teachers Staff, *What Teachers Need to Know About Restorative Justice*, WE ARE TEACHERS (Sept. 2, 2022), <https://www.weareteachers.com/restorative-justice/> [https://perma.cc/M4CA-BSZT]; see also ANNE GREGORY & KATHERINE EVANS, NAT’L EDUC. POLY CTR., *THE STARTS AND STUMBLES OF RESTORATIVE JUSTICE IN EDUCATION: WHERE DO WE GO FROM HERE?* 3 (2020), [https://nepc.colorado.edu/sites/default/files/publications/Revised%20PB%20Gregory\\_0.pdf](https://nepc.colorado.edu/sites/default/files/publications/Revised%20PB%20Gregory_0.pdf) [https://perma.cc/C6LE-QBS6] (“Restorative Justice is grounded in indigenous teachings and points to a way of life experienced by pre-modern communities, such as the Maori and the Navajo. It was introduced into the Western judicial system as a response to crime and wrongdoing; it sought to meet the needs of those harmed, to repair the harm, and to restore relationships for all affected by an incident.”).

<sup>404</sup> GREGORY & EVANS, *supra* note 403, at 3.

<sup>405</sup> Larry Ferlazzo, *Response: How to Practice Restorative Justice in Schools*, EDUC. WEEK (Feb. 6, 2016), <https://www.edweek.org/teaching-learning/opinion-response-how-to-practice-restorative-justice-in-schools/2016/02> [https://perma.cc/D7U4-5Y74].

<sup>406</sup> *Id.*

<sup>407</sup> GREGORY & EVANS, *supra* note 403, at 4.

<sup>408</sup> *Id.* at 9.

<sup>409</sup> We Are Teachers Staff, *supra* note 403.

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

exclusionary measures.<sup>412</sup> Issues with restorative justice approaches can occur when the punishment is solely focused on behavior management but does not address the need for preventative practices to transform the school climate.<sup>413</sup> Another problem that can diminish the impact of restorative justice programs is the lack of collaboration between “stakeholders, teachers, and other school staff.”<sup>414</sup> The lack of follow-up, coaching, and demonstration after the initial training of school staff on restorative approaches can also diminish its impact.<sup>415</sup> With each of these concerns, it is important for states and school districts adopting restorative approaches to discipline to plan well, and as a part of that process, collaborate with students, parents, teachers and school staff, and insure follow-up is built into the plan.<sup>416</sup>

Despite the challenges that go along with implementation, restorative justice programs are a successful alternative to traditional and zero tolerance discipline policies.<sup>417</sup> Consistently, studies reflect the effectiveness that restorative justice programs have on “reduc[ing] exclusionary discipline and . . . [stark] racial disparities in” the application of discipline in schools.<sup>418</sup>

#### 4. Increasing the Number of Black Teachers in the Classroom

Increasing the diversity of teachers may also have a positive impact in reducing the rates of discriminatory discipline in public schools. According to the National Center for Education Statistics, “79 percent of public school teachers were White and non-Hispanic” in the 2017–2018 school year.<sup>419</sup> Conversely, approximately “9 percent of teachers were Hispanic (of any race), and 7 percent were Black and non-Hispanic.”<sup>420</sup> During this same period, even in schools where the majority of students

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<sup>412</sup> Tim Walker, *Restorative Practices in Schools Work . . . But They Can Work Better*, NAT’L EDUC. ASSOC. (Jan. 20, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/restorative-practices-schools-work-they-can-work-better> [https://perma.cc/82TZ-3L5N].

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *See id.*

<sup>418</sup> *Id.*

<sup>419</sup> Maura Spiegelman, *Race and Ethnicity of Public School Teachers and Their Students*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/pubs2020/2020103/index.asp> [https://perma.cc/QH29-FG3U].

<sup>420</sup> *Id.*

were Black, “[t]he majority of teachers were White.”<sup>421</sup> Numerous studies have shown that, in the short term, students of color who have teachers of color perform better academically “in terms of standardized test scores, attendance, contemporaneous course performance, and suspensions.”<sup>422</sup>

Researchers discovered evidence that having a Black teacher has favorable effects for Black students, “with the strongest effect often among Black males from low-income households.”<sup>423</sup> These effects include improved “educational attainment and lower rates of discipline.”<sup>424</sup> The researchers identified “demographic mismatch” as a key culprit.<sup>425</sup> The study surmised that “less than a quarter of teachers [in US classrooms] [are] people of color,” despite the fact that nearly half of students are nonwhite.<sup>426</sup> A greater understanding of student and teacher behavior may explain the effect of “demographic match” that results in the numerous benefits identified for having more Black teachers.<sup>427</sup> As an example, researchers noted that “[e]xposure to a large share of same-race teachers significantly reduced the number of reported incidents for Black students, particularly for the types of offenses that required subjective evaluation, suggesting that teacher discretion may play a role in those outcomes.”<sup>428</sup> Further, “Black teachers may be less likely to make discretionary referrals for Black students for ‘defiance.’”<sup>429</sup>

States should explore targeted strategies to increase the diversity of teachers in the K-12 classroom by increasing salaries, expanding loan forgiveness for teachers, creating teacher-training pipelines as early as high school, and investing in scholarships through their state colleges and universities, all designed to encourage more students to consider a career in education. Unfortunately, in comparison to “many other highly educated professionals,” teachers are paid substantially less.<sup>430</sup> There is a myriad of progressive strategies and legislative

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<sup>421</sup> *Id.*

<sup>422</sup> Michael Hobbs, *The Power of a Black Teacher*, EDGE: CAROLINA EDUC. REV. (Sept. 8, 2020), <https://ed.unc.edu/2020/09/08/the-power-of-a-black-teacher/> [<https://perma.cc/B26P-L9N2>].

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> Anya Kamenetz, *Teachers With Student Debt: The Struggle, the Causes and What Comes Next*, NPR (July 17, 2017, 5:00 AM), <https://www.npr.org/sections/ed/2017/07/16/536488351/teachers-with-student-debt-the-struggle-the-causes-and-what-comes-next> [<https://perma.cc/AF5H-LYZV>].

actions that have been taken by states to address teacher shortages, while also making teacher diversity a priority.<sup>431</sup>

### C. *Societal Intervention*

Ultimately, the alarming rates of disproportionate school discipline also demand immediate societal intervention. To move forward as a united nation and productive society, we must address the bias and inequality in K-12 school discipline. We must first acknowledge why the issue of disproportionate race-based school punishment exists, with the understanding that we cannot fix what we do not have the courage to acknowledge. We must start by first recognizing that, while slavery and Jim Crow have ended, the 246 years of bondage and resulting oppression and systemic racism continue to impact society and, more importantly, Black people in the present day.

From inequalities in education to those in health care, the fact is that the starting line is not the same for Black and white people. White children often start the race at the starting line, while Black children start as far back as the bleachers. This is due to societal attitudes, stereotypes, and biases that are rooted in systemic racism and can be traced through the nation's history of the treatment of Black people. This does not mean that Black children cannot succeed; on the contrary, they can and are. However, their work ethic, grit, and determination to overcome the odds to be successful do not negate the real barriers that exist and make their journey more difficult based on their skin color, often with willful blindness to the content of their character. Disparities in school discipline occur when Black students are unfairly disciplined compared to their white counterparts for the same offense, or subjected to subjective, and often, offensive school policies that prevent them from engaging in school activities because of their hair.

Discriminatory discipline policies and practices, including suspensions that result in students being removed from the classroom, place Black students further behind the starting line. If, indeed, children are our future, then as a society, we must eliminate discriminatory policies and practices to ensure that all students receive a high quality education in schools, where they feel safe and supported. If we fail to accept this responsibility, we will be denying *Brown's* promise and relegating children to the

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<sup>431</sup> Raven DeRamus-Byers, *Grow Your Own and Teacher Diversity in State Legislative Sessions: What We Can Learn from Successfully Passed Bills*, NEW AM. (July 12, 2021), <https://www.newamerica.org/education-policy/edcentral/grow-your-own-teacher-diversity-state-legislative-sessions/> [https://perma.cc/X3J7-96T6].



separate but unequal school education system that our nation rejected in 1954.<sup>432</sup> In acknowledging that disparate treatment of Black children is permeated by structural racism and biases, society at all levels must commit to being antiracist. This national acceptance of responsibility will ensure that education is the golden ticket to the American Dream—for all.

## CONCLUSION

With so much racial division in the United States, there needs to be a collective rallying cry in the protection of the nation's children. That rallying cry should be "All Children Matter" and "Education Matters." When we treat students with compassion and grace, we teach them that they are worthy and that they are our future. When we punish them harshly, we teach them that they are unworthy and do not have a future. Treating children disparately through school discipline policies that are applied disproportionately to Black students will keep our nation divided. Children grow up. The seeds we plant into their impressionable beings will blossom and eventually bear fruit; we need to decide the harvest we want to reap as a country. Instead of being reactive to the results of our failures, we should focus on being proactive and finding solutions. We should focus on first fixing our bias and next fixing our schools.

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<sup>432</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).