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The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities

Torin D. Togut

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THE GESTALT OF THE SCHOOL-TO-PRISON PIPELINE: THE DUALITY OF OVERREPRESENTATION OF MINORITIES IN SPECIAL EDUCATION AND RACIAL DISPARITY IN SCHOOL DISCIPLINE ON MINORITIES

TORIN D. TOGUT*

Introduction	164
I. Racial Disparities in the Identification and Provision of Special Education	166
A. The Meaning of Disproportionate Representation	166
B. Possible Factors Leading to Overrepresentation of Minorities in Special Education	166
1. Socio-Demographic Factors Influencing Overrepresentation.....	167
2. Special Education Eligibility and Decision Making Processes.....	169
3. Poorer Versus Wealthier School Districts	171
4. Percentage of Minorities Enrolled in School District.....	172
5. High-Stakes Testing	172
6. Assessment	173
II. Strategies to Reduce Overrepresentation	174
III. Racial Disparity of School Discipline on Minorities.....	175
A. Socioeconomic Status	176
B. Minority Status.....	177

* Adjunct Professor and leader of the Special Education Practicum, University of Georgia School of Law; Specialist Attorney, Georgia Legal Services Program. I want to thank J. Peter Bodri, Executive Editor, *Journal of General, Social Policy & the Law*, Volume 20 and the editorial law review board for its editing and assistance with this Article. I also want to thank my colleagues Phyllis Holmen and Lisa Krisher at Georgia Legal Services Program, Professor Alex Scherr, University of Georgia School of Law, and my wife Teresa for their support of my work representing students with disabilities.

C. Correlation Between Overrepresentation of Minorities and Racial Disparity in Discipline.....	178
D. Recommendations to Address Racial Disparity in School Discipline.....	179
Conclusion.....	179

INTRODUCTION

A United States Department of Education Office for Civil Rights survey reveals that since the 1970s there has been persistent overrepresentation of minorities in certain special education eligibility categories.¹ The greatest overrepresentation occurs for black students.² In the 1980s, black students represented only 16% of the total school population while representing 38% of children in classes for the intellectually disabled.³ Almost forty years later, little has changed—black children constitute 17% of total school enrollment and 33% of enrollment in classes for the intellectually disabled.⁴

The reasons for the growing disparity in the identification of black students in certain special education disability categories are complex. There are several interacting factors contributing to the disparity, “including unconscious racial bias of educators, large resource inequities that run along lines of race and class, unjustifiable reliance on [intelligence tests], educators’ inappropriate responses to the pressures of high-stakes testing, and power differentials between parents of students of color and school officials.”⁵ In one of the most cited examples explaining the occurrence of the overrepresentation of minorities in special education, Representative Chaka Fattah testified before the U.S. House of Representatives Committee on Education and the Workforce on October 4, 2001, about the story of Billy Hawkins:

[F]or the first fifteen years of his life, Billy Hawkins was labeled by his teachers as “educable mentally retarded.” Billy was backup quarterback

1. RACIAL INEQUITY IN SPECIAL EDUCATION, at xv (Daniel J. Losen & Gary Orfield eds., 2002) [hereinafter RACIAL INEQUITY].

2. *Id.* at xx; see also Jacob Hibel et al., *Who is Placed in Special Education*, 83 SOC. OF EDUC. 312, 314 (2010) (noting that the overrepresentation of black students has been accepted as evidence of racial discrimination).

3. NAT’L RESEARCH COUNCIL, PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY, at ix (Kirby A. Heller et al. eds., 1982).

4. RACIAL INEQUITY, *supra* note 1, at xvi.; see also Rebecca Vallas, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL’Y & L. 181, 184-85 (2009).

5. APPLIED RESEARCH CTR, REPORTING ON RACIAL, EDUCATION & NO CHILD LEFT BEHIND 6-7 (2003), available at <http://www.arc.org/pdf/199c.pdf>.

for his high school football team. One night he was called off the bench and rallied his team from far behind. In doing so, he ran complicated plays and clearly demonstrated a gift of the game. The school principal, who was in the stands, recognized that the “retarded boy” could play, and soon after had Billy enrolled in regular classes and instructed by his teachers to give him extra help. Billy Hawkins went on to complete a Ph.D. and is now Associate Dean at Michigan’s Ferris State University.⁶

Another troubling finding is that black students are twice as likely as white students to be educated in a more restrictive environment.⁷ Among the majority of racial groups, there has been a modest decline in percentages of students labeled intellectually disabled.⁸ However, for the period between 2000 and 2001, U.S. Department of Education data indicates that at least thirteen states labeled more than 2.75% of black students intellectually disabled.⁹ Nationally, the prevalence of white students labeled mentally retarded was approximately 0.75% in 2001, and in no state did the incidence of labeling white students rise above 2.38%.¹⁰ Nearly three-quarters of the highest incident rates (2.75%-5.41%) occurred in the South.¹¹ One promising sign is that the southern states showed the largest decreases in percentages of black students labeled intellectually disabled since 1979.¹² Nevertheless, the trend continues toward overrepresentation of blacks in the eligibility categories of intellectual disability and emotional behavior disorders.¹³

6. *Overidentification Issues Within the Individuals with Disabilities Education Act and the Need for Reform: Hearing Before the H. Comm. on Educ. and the Workforce*, 107th Cong. 26-42 (2001) [hereinafter *Hearings*] (testimony of Rep. Chaka Fattah).

7. *Hearings*, *supra* note 6; see, e.g., Mary MacDonald, *Mental Disability Report Finds Disparity in Schools*, THE ATLANTA J. CONST., Jan. 8, 2004, at C1; see also Thomas Parrish, *Racial Disparities in the Identification, Funding, and Provision of Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 15, 26 (Daniel J. Losen & Gary Orfield eds., 2002). One report found that 25% of Georgia’s special education students spent at least 60% of the school day in special education classes. Only nine states had a higher percentage than Georgia’s students who spend most of the school day in special education classes. Surprisingly, Hawaii had the largest percentage with 31% of its special education students assigned to special education classes most of the day.

8. RACIAL INEQUITY, *supra* note 1, at xix.

9. OFFICE OF SPECIAL EDUC. PROGRAMS, U.S. DEP’T OF EDUC., PERCENTAGE (BASED ON 2000 CENSUS POPULATION) OF CHILDREN AGES 6-21 SERVED UNDER IDEA, PART B, BY RACE/ETHNICITY, DURING THE 2000-1 SCHOOL YEAR tbl.AA17 (2001), available at http://www.ideadata.org/tables24th/ar_aa17.htm. These states are Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Montana, Nebraska, North Carolina, Ohio, South Carolina, and West Virginia. *Id.*

10. *Id.*

11. *Id.*

12. Jeremy D. Finn, *Patterns in Special Education Placement as Revealed by the OCR Surveys*, in PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY 322, 365 (Kirby A. Heller et al. eds., 1982).

13. Congress has specifically found that African American children are identified as having mental retardation and emotional disturbance at rates higher than White

I. RACIAL DISPARITIES IN THE IDENTIFICATION AND PROVISION OF
SPECIAL EDUCATION

A. The Meaning of Disproportionate Representation

Two terms of art describe disproportionate representation: misidentification and misclassification.¹⁴ Misidentification refers to inappropriately recognizing minority students from racial and ethnic minority groups as students with disabilities.¹⁵ Misclassification, on the other hand, refers to inaccurately labeling students who have been identified for special education services. In the educational system, minority students eligible for special education are both misidentified and misclassified.¹⁶ Researchers do not agree on the formulas to determine whether there is overrepresentation of minorities in a school, school system, or the state. One generic method to determine overrepresentation is to calculate the odds that students from one ethnic group have to be placed in special education compared to students from other ethnic groups (or compared to all other groups).¹⁷

B. Possible Factors Leading to Overrepresentation of Minorities in Special Education

No one factor significantly contributes to overrepresentation of minorities in special education. To the contrary, research suggests a complex picture of the factors that may cause overrepresentation. Three primary variables contribute to overrepresentation: social-demographic contributions, general education and resource inequity, and the special education process.¹⁸

students. 20 U.S.C. § 1400(c)(12)(C) (2006).

14. *See generally* ELEMENTARY & MIDDLE SCHS. TECHNICAL ASSISTANCE CTR., DISPROPORTIONALITY: THE DISPROPORTIONATE REPRESENTATION OF RACIAL AND ETHNIC MINORITIES IN SPECIAL EDUCATION, <http://www.emstac.org/registered/topics/disproportionality/intro.htm> (last visited June 15, 2011) [hereinafter DISPROPORTIONATE REPRESENTATION] (explaining the difference between misidentification and misclassification).

15. *Id.*

16. *See id.* (acknowledging Congress's call for increased efforts to reduce the intensification of problems associated with misidentification and misclassification); *see also* 20 U.S.C. § 1412(a)(24) (2006). Despite Congress's requirement that school systems develop policies and procedures designed to prevent the inappropriate overidentification and disproportionate representation of students of color in special education, there is continuing evidence that schools have failed to meet this mandate.

17. ALFREDO J. ARTILES & BETH HARRY, ADDRESSING CULTURALLY AND LINGUISTICALLY DIVERSE STUDENT OVERREPRESENTATION IN SPECIAL EDUCATION: GUIDELINES FOR PARENTS 4 (2006), *available at* http://www.nccrest.org/Briefs/Parent_Brief.pdf.

18. RUSSELL J. SKIBA ET AL., CONTEXT OF MINORITY DISPROPORTIONALITY: LOCAL PERSPECTIVES ON SPECIAL EDUCATION REFERRAL, A STATUS REPORT 3 (2003)

I. Socio-Demographic Factors Influencing Overrepresentation

There are a number of demographic factors related to socioeconomic status that have an effect on student achievement. These factors include neighborhood and housing stability,¹⁹ the student's home environment,²⁰ family health care,²¹ and geographic location.²² The influence of poverty on a student's development and achievement may not necessarily implicate poverty as a direct link in the disproportionate representation of minorities in special education.²³ By contrast, minority students generally attend racially-isolated, low-performing elementary schools.²⁴ Subsequently, they are more likely to enroll in lower track courses in lower performing schools with weaker academic standards.²⁵ Thus, minority and low-income

[hereinafter MINORITY DISPROPORTIONALITY], available at <http://www.indiana.edu/~safeschl/contextofmindisp.pdf>.

19. P. Lindsay Chase-Lansdale & Rachel A. Gordon, *Economic Hardship and the Development of Five and Six Year Olds: Neighborhood and Regional Perspectives*, 67 CHILD DEV. 3338, 3338 (1996); see also Lee Shumow et al., *Perceptions of Danger: A Psychological Mediator of Neighborhood Demographic Characteristics*, 68 AM. J. ORTHOPSYCHIATRY 468, 468 (1998) (noting the relationship between higher violent crime rates and child misconduct rates, and lower neighborhood incomes and child psychological distress).

20. See Stephen J. Caldas & Carl L. Bankston, *Multilevel Examination of Student, School, and District-Level Effects on Academic Performance*, 93 J. EDUC. RES. 91, 97 (1999) (examining the correlation between family structure and academic performance); see also Wendy T. Miedel & Arthur J. Reynolds, *Parent Environment in Early Intervention for Disadvantaged Children: Does it Matter?*, 37 J. SCH. PSYCHOL. 379, 379 (1999) (considering the impact of parent involvement in early childhood programs).

21. Rachel A. Kramer et al., *Health and Social Characteristics and Children's Cognitive Functioning: Results from a National Cohort*, 85 AM. J. PUB. HEALTH 312, 316 (1995); see also Marshalyne Yeargin-Allsopp et al., *Mild Mental Retardation in Black and White Children in Metropolitan Atlanta: A Case-Control Study*, 85 AM. J. PUB. HEALTH 324, 327 (1995) (relating maternal medical or biological conditions, as well as lack of health care, among Black Americans to children's risk of mild mental retardation).

22. See E.S. Huebner, *The Influence of Rural, Suburban, and Urban Student Background and School Setting upon Psychoeducational Decisions*, 14 SCH. PSYCHOL. REV. 239, 239 (1985) (acknowledging the differences between urban, rural, and suburban students).

23. Compare MINORITY DISPROPORTIONALITY, *supra* note 18, at 4, 38 (finding empirical evidence that the impact of poverty may vary considerably by disability category and percent minority enrollment), with Donald P. Oswald et al., *Ethnic Overrepresentation in Special Education: The Influence of School-Related Economic and Demographic Variables*, 32 J. SPECIAL EDUC. 194, 203 (1999) (finding a clear poverty effect for black students).

24. See generally MINORITY DISPROPORTIONALITY, *supra* note 18 (discussing disparities in minority education, especially as pertaining to special education).

25. See, e.g., MICHELLE L. AVERY ET AL., COMM'N ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR MINORITY STUDENTS: FEDERAL ENFORCEMENT OF TITLE VI IN ABILITY GROUPING PRACTICES 53 (1999), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/d2/80; NAT'L EDUC. ASS'N, ACADEMIC TRACKING: REPORT OF THE NEA EXECUTIVE COMMITTEE/SUBCOMMITTEE ON ACADEMIC TRACKING, 9-10 (1990) [hereinafter NAT'L

students are much more likely to be grouped into average or low-ability courses, as compared to predominantly white, higher income schools, which often offer average, above average, and honors courses.²⁶ In addition, there is some indication that teacher perceptions and expectations concerning race, either conscious or unconscious, play a role in creating and maintaining the Black-White achievement gap.²⁷

One study found that poverty does account for some of the over-identification of minorities in special education²⁸ because some racial groups earned disproportionately low income.²⁹ On the other hand, it is difficult to explain that poverty and socioeconomic factors alone account for the extreme differences between black overrepresentation and Hispanic underrepresentation in special education, which in some states is even greater than disparities between whites and blacks.³⁰ For instance, “blacks in Alabama and Arkansas are more than seven to nine times as likely as Hispanics to be labeled intellectually disabled.”³¹ Nationally, the disparity for identification rates for intellectual disabilities and emotional behavioral disorders between blacks and Hispanics is greater than the disparity between blacks and whites.³² While both black and Hispanic students are at a greater risk of living in poverty than their white counterparts, the high incidence of overrepresentation of blacks who have similar levels of poverty and academic failure as Hispanics raises doubts on research that poverty, and not racial bias, is the cause of these disparities.³³ Moreover, “as factors associated with wealth and better schooling increase, black males are at greater risk of being disproportionately labeled ‘mentally retarded.’”³⁴

EDUC. ASS’N] (finding that ability grouping and tracking are used in a vast majority of public schools and tend to exacerbate racial inequities).

26. AVERY ET AL., *supra* note 25, at 53; NAT’L EDUC. ASS’N, *supra* note 25, at 7.

27. Ronald F. Ferguson, *Teachers’ Perceptions and Expectations and the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP* 273, 273-317 (Christopher Jencks & Meredith Phillips eds., 1998).

28. Oswald et al., *supra* note 23, at 196.

29. *Id.* (noting that the poverty rate for African American families in the United States is approximately three times that of all other families); see also Donald L. MacMillan & Daniel J. Reschly, *Overrepresentation of Minority Students: The Case for Greater Specificity or Reconsideration of the Variables Examined*, 32 *J. SPECIAL EDUC.* 15, 19-20 (1998) (commenting that ethnicity and poverty are inextricably linked).

30. RACIAL INEQUITY, *supra* note 1, at xxiv.

31. *Id.*

32. *Id.*

33. *Id.* at xxiv-xxv.

34. Daniel J. Losen, *New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement*, in *RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM* 263, 266 (2001).

Some researchers conclude that poverty is a strong variable contributing to the disproportionality of minorities in special education.³⁵ One study found that although African American children are more likely to become eligible for special education services than white children, statistically controlling for socio-demographic status reduces the influence of race.³⁶ This is not to say, however, that poverty is a direct contributing cause to special education placement; socio-economic status appears to play a varying role in the likelihood that a given child will be placed in special education depending on his disability category, the percent of minority enrollment, and per pupil expenditure of the school.³⁷ The extent that poverty influences a child's placement in special education is still not precisely known.³⁸ In any case, it has been shown that early intervention services can make a significant difference in the educational performance of students with poverty-related risk factors.³⁹

2. Special Education Eligibility and Decision Making Processes

With respect to the special education referral process, research suggests that students may be treated differently depending upon their race.⁴⁰ "Differences in the severity of reasons for referral for white and black students, however, lead [researchers] to conclude that black students may receive pre-referral interventions only when their academic or behavioral problems reach a higher level of severity."⁴¹ Meanwhile, another study found that teachers referred minority students to a special education program more frequently than non-minority students, and often referred minority students for behavioral problems rather than academic

35. See *Coal. to Save Our Children v. State Bd. of Educ.*, 901 F. Supp. 784, 820-21 (D. Del. 1995), *aff'd*, 90 F.3d 752 (3d Cir. 1996) (explaining that "when the poverty level is equalized between races, the disparity between races in special education participation narrows, but is not eliminated"); see also DEP'T. OF EDUC., EIGHTEENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF INDIVIDUALS WITH DISABILITIES EDUCATION ACT 86-88 (1996), available at <http://www2.ed.gov/pubs/OSEP96AnlRpt/> (discussing Mary Wagner's findings in *The Contributions of Poverty and Ethnic Background to the Participation of Secondary School Students in Special Education* (citation omitted)).

36. See Parrish, *supra* note 7, at 25 ("[D]ata suggest[s] that something more than the effects of poverty are causing black students to be disproportionately identified for some categories of disability."); see also Yeargin-Allsopp et al., *supra* note 21, at 326.

37. See generally Donald P. Oswald et al., *Community and School Predictors of Overrepresentation of Minority Children in Special Education*, in RACIAL INEQUITY IN SPECIAL EDUCATION 1, 7-10 (Daniel J. Losen & Gary Orfield eds., 2002) (finding that sociodemographic factors play a role in determining the disproportionate representation of minorities in special education, but the effects are different for different groups and are not always intuitive).

38. Oswald, *supra* note 23, at 196.

39. MINORITY DISPROPORTIONALITY, *supra* note 18, at 4.

40. *Id.* at 7.

41. *Id.* (citing MacMillan & Reschly, *supra* note 29).

difficulties.⁴² In a more practical way, a teacher's reaction to a particular student's behavior that the teacher finds unfamiliar or uncomfortable may be counter-productive. For example, an African-American male that engages in behavior within the norms of the local black community may be perceived as disruptive or threatening to a teacher that is unfamiliar with that student's cultural context.⁴³ This unfamiliarity does not necessarily mean that referral for behavioral problems is inappropriate, although it may mean that African-American students are more likely to be referred by standing out, assuming higher levels of minority students are labeled as having emotional-behavioral disorders in the classroom setting.⁴⁴

The regular education system serves as a conduit for the referral of undiagnosed students with disabilities.⁴⁵ In an elementary way, the cause of racial disparity is rooted, in part, in the regular education system, which is part of the special education system.⁴⁶ Moreover, "most students referred for evaluation by the regular education system are deemed in need of services."⁴⁷ Based on years of research, a cited study concludes that "[t]he point at which differences [in measured performance and ability] result in one child being labeled disabled and not another are totally matters of social decision making."⁴⁸ Importantly, other elements of subjective decision making that go unrecognized include school politics, relationships between school officials and parents, the quality of regular education, and classroom management of the referring regular education teacher.⁴⁹ There are also other race-linked factors such as poorly trained teachers that are employed at minority schools, beliefs in black and Latino inferiority accompanied by subsequent low expectations, express cultural insensitivity, and fear and misunderstanding of black males.⁵⁰ Furthermore, overcrowded schools that are disproportionately located in school systems with a high percentage of minorities contribute to the faulty

42. *Id.* at 7-8 (citing Jay Gottlieb et al., *Parent and Teacher Referrals for a Psychoeducational Evaluation*, 25 J. SPECIAL EDUC. 155, 165 (1991)).

43. *Id.* at 40 (citing Brenda L. Townsend, *Disproportionate Discipline of African American Learners: Reducing School Suspension and Expulsions*, 66 EXCEPTIONAL CHILD. 381, 383 (2000)).

44. *Id.*

45. RACIAL INEQUITY, *supra* note 1, at xxv.

46. *Id.*

47. *Id.*

48. *Id.* (citing Beth Harry et al., *Of Rocks and Soft Places: Using Qualitative Methods to Investigate Disproportionality*, in RACIAL INEQUITY IN SPECIAL EDUCATION 71 (Daniel J. Losen & Gary Orfield eds., 2002)).

49. Jim Ysseldyke, *Reflections on a Research Career: Generalizations from 25 Years of Research on Assessment and Instructional Decision Making*, 67 EXCEPTIONAL CHILD. 295, 304 (2001).

50. Townsend, *supra* note 43, at 383-88.

identification process, which has a disparate impact on minority students.⁵¹

3. *Poorer Versus Wealthier School Districts*

It is often believed that the quality of education is directly related to funding.⁵² If this is true, then it is expected that there would be higher special education enrollment in poor districts and lower enrollment in more affluent districts. There are three variables contributing to this hypothesis: (1) district-level per-pupil spending, (2) class size as a function of school resources, and (3) variations in teacher pay.⁵³ Of these variables, class size and teacher pay are related to special education; resources do matter.⁵⁴

Data collected demonstrates that in Florida and Texas, urban districts have a greater percentage of minority students as part of total enrollment than in rural districts.⁵⁵ This disparity is certainly true in large urban areas such as Milwaukee, Philadelphia, St. Louis, Atlanta, and Birmingham.⁵⁶ The more urban a school district, the lower percentage of minority students enrolled in special education classes.⁵⁷ An urban district may, in fact, under-identify students with special needs.⁵⁸ This under-identification

51. See generally Richard Rothstein, *Equalizing Educational Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 90-92 (2000); Deborah L. Voltz, *Challenges and Choices in Urban Teaching: The Perspectives of General and Special Educators*, in MULTIPLE VOICES FOR ETHNICALLY DIVERSE EXCEPTIONAL LEARNERS 41 (2001); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 3 (2000); James F. Gregory, *Three Strikes and They're Out: African American Boys and American Schools' Responses to Misbehavior*, 7 INT'L. J. OF ADOLESCENCE & YOUTH 25 (1997); Townsend, *supra* note 43.

52. Rothstein, *supra* note 51, at 32.

53. See generally Linda Darling-Hammond & Laura Post, *Inequality in Teaching and Schooling: Supporting High-Quality Teaching and Leadership in Low-Income Schools*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 127, 127-67 (2000).

54. See Cynthia Esposito, *Learning in Urban Blight: School Climate and Its Effect on the Performance of Urban, Minority, Low Income Children*, 28 SCH. PSYCHOL. REV. 365, 365-77 (1999) (questioning how urban schools with limited resources can effectively contribute to children's schooling and, therefore, their future success).

55. Matthew Ladner & Christopher Hammons, *Special but Unequal: Race and Special Education*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 85, 94 (C.E. Finn, Jr. et al. eds., 2001).

56. Jerome E. Morris, *What is the Future of Predominantly Black Urban Schools? The Politics of Race in Urban Education Policy*, 81 PHI DELTA KAPPAN 316, 317 (1999).

57. Ted Gotsh, *Urban Disabled Children Lay Behind Non-City Peers*, 33 EDUC. DAILY 1-2 (2000).

58. See Jonathan Feldman, *Racial Perspectives on Eligibility for Special Education: For Students of Color who are Struggling, Is Special Education a Potential Evil or a Potential Good?*, 20 AM. U. J. GEN. SOC. POL'Y & L. 183, 190-92 (2011) (positing that because large urban school systems contain numerous students that could benefit from special education that students of color might well be under-represented, rather than over-represented, in special education).

occurs for two primary reasons. First, urban schools have different priorities.⁵⁹ Second, urban schools face interacting stressors which impair their ability to fully recognize and contribute to children's school functioning.⁶⁰ Therefore, the data indicates that the percentage of minority students in a district is the driving force in determining the special education rate.⁶¹

4. Percentage of Minorities Enrolled in School District

Primarily, white school districts enroll a greater percentage of minority students in special education than majority-minority school districts.⁶² One reason for this is that white districts maintain more rigorous academic standards than in-city, majority-minority districts.⁶³ As a result educators in majority white districts often blame minority students for their underachievement, seeing the students as "difficult or culturally and linguistically deprived."⁶⁴ Yet this reasoning is seriously weakened by evidence that the racial composition of the school accounts more for minority student academic differences than academic standards such as dropout rate, test scores, spending, and level of urbanization.

5. High-Stakes Testing

High-stakes testing is another area that disproportionately affects placement of minorities in special education.⁶⁵ High-stakes testing has increasingly been linked to grade retention and dropout rates, especially among poor and minority students.⁶⁶ Every year, almost 2.4 million students are retained; the typical retained student is male, black or Hispanic, poor, and from a household where the parents did not finish high school.⁶⁷ One study found that 20% of African-Americans between first

59. See Esposito, *supra* note 54, at 365-77 (describing the importance of school climate for urban schools as a tool for development in light of chronic poverty and other challenges).

60. *Id.*

61. Ladner & Hammons, *supra* note 55, at 95.

62. *Id.* at 86. Congress found that schools with predominately white students and teachers have placed disproportionately high numbers of their minority students into special education. 20 U.S.C. § 1400(c)(12)(E) (2006).

63. Ladner & Hammons, *supra* note 55, at 101.

64. Tamara Lucas et al., *Promoting the Success of Latino Language-Minority Students: An Exploratory Study of Six High Schools*, 60 HARV. EDUC. REV. 315, 315-16 (1990).

65. NOE MEDINA & MONTY NEILL, *FALLOUT FROM THE TESTING EXPLOSION: HOW 100 MILLION STANDARDIZED EXAMS UNDERMINE EQUITY AND EXCELLENCE IN AMERICA'S PUBLIC SCHOOLS* 19 (1988).

66. *Id.*

67. Torin D. Togut, *High-Stakes Testing: Educational Barometer for Success, or False Prognosticator for Failure*, THE BEACON, Fall 2004, at 12,

and eighth grade in Texas failed at least once and 42% will fail at least once between ninth and twelfth grade.⁶⁸ The corresponding rates for Hispanic students were 21% and 44%.⁶⁹ Certainly there is an inference that if minority students are retained at grade level because of high-stakes testing, they are more likely to be referred for a special education assessment. The increase in retention correspondingly has a greater impact on dropouts.⁷⁰ In fact, grade promotion is the strongest predictor of which students will drop out of school—it is a stronger predictor than race, ethnicity, or socioeconomic status.⁷¹

6. Assessment

States and school districts heavily rely upon intelligence and other tests as objective and scientific measures of a child's ability and performance.⁷² This testing often drives educators to determine special education eligibility and placement.⁷³ Evaluations are sometimes deemed subjective and are clouded by school politics, teachers' perspectives, and cultural bias.⁷⁴ Non-testing factors such as the management skills of the referring teacher and quality of regular education also influence assessment decisions.⁷⁵ This method of testing leaves educators with wide discretion on whom to test, what to test, when to use alternative tests, interpretation of responses, and weight to be given to certain tests.⁷⁶

In the assessment and decision-making process, there is evidence that both regular and special education teachers refer minority students for a special education assessment given identical referral information.⁷⁷ Information on race and socio-economic status may contribute to special

<http://www.harborouselaw.com/articles/highstakes.togut.pdf>.

68. Robert M. Hauser, *Should We End Social Promotion? Truth and Consequences* (Ctr. For Am. Youth Policy Forum, Working Paper No. 99-6, 1999), available at <http://www.ssc.wisc.edu/cde/cdewp/99-06.pdf>.

69. *Id.*

70. *Id.* at 2, 27 (controlling for academic performance and relevant social characteristics).

71. See generally STEVE ESTES ET AL., AM. YOUTH POL'Y FORMUM, RAISING MINORITY ACADEMIC ACHIEVEMENT: A COMPENDIUM OF EDUCATION PROGRAMS AND PRACTICES (2001), available at <http://www.aypf.org/formbriefs/2001/fb030201.htm>.

72. See NAT'L RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 111 (Jay P. Heubert & Robert M. Hauser eds., 2000) [hereinafter NAT'L RESEARCH COUNCIL].

73. *Id.* at 111-12.

74. See Harry et al., *supra* note 48, at 71-92 (requiring the response of teachers and administrators to the child's poor performance to move the student forward).

75. *Id.*

76. See generally *id.* (discussing the many areas of assessment and decisions schools and teachers make regarding students' education).

77. NAT'L RESEARCH COUNCIL, *supra* note 72, at 113.

education referrals.⁷⁸ Other evidence indicates that parents of minority students were contacted significantly less often to participate in the special education process than parents of white students, and recommendations to minority parents were often more restrictive and less diverse than recommendations for non-minority students.⁷⁹ Interestingly, regular and special education teachers viewed referral to special education as the only resource for students with learning and behavior problems.⁸⁰ These teachers prefer over-referral to the special education process to ensure that needy students receive all of the resources that they qualify for.⁸¹ Teachers will make these referrals regardless of whether the referral is validated by standardized assessment.⁸²

II. STRATEGIES TO REDUCE OVERREPRESENTATION

There are a number of recommended strategies to reduce overrepresentation of minorities in special education.⁸³ One strategy is to create a successful school environment for all students and accurately distinguish disabilities from cultural differences.⁸⁴ “An ecological approach that recognizes the influence of the learning environment on the process of teaching and learning is critical.”⁸⁵

Other commentators have made recommendations to reduce racial inequity in schools by: developing a district-wide vision for the education of all students; forming policymaking bodies that include community members; involving families, particularly those of culturally and linguistically diverse students, in all stages of the student’s school experience and maintaining such involvement;⁸⁶ recruiting racially and

78. *See id.*; A.G. Prieto & S.H. Zucker, *Teacher Perception of Race as a Factor in the Placement of Behaviorally Disordered Children*, 7 BEHAVIORAL DISORDERS 34, 34-38 (1981).

79. J.R. Tomlinson et al., *Minority Status, Sex, and School Psychological Services*, 14 PSYCH. IN THE SCH. 456, 456-60 (1978).

80. MINORITY DISPROPORTIONALITY, *supra* note 18, at 20.

81. *Id.*

82. *Id.* at 50.

83. *See* Daniel Losen, *New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement*, in CITIZENS’ COMMISSION ON CIVIL RIGHTS 263, 263-84 (2000) (discussing educational research reforms and better targeting the regular and special education of minority children).

84. *Id.*

85. Jane Burnett, *Reducing the Disproportionate Representation of Minority Students in Special Education*, ERICDIGESTS.ORG (Mar. 1998), <http://www.ericdigests.org/1998-3/minority.html>.

86. *See* Shernaz B. Garcia, *Parent-Professional Collaboration in Culturally Sensitive Assessment*, in ENGLISH LANGUAGE LEARNERS WITH SPECIAL EDUCATION NEEDS: IDENTIFICATION, ASSESSMENT, AND INSTRUCTION 87, 87-103 (Alfredo J. Artiles & Alba A. Ortiz eds., 2002); C. Warger & J. Burnette, *Five Strategies to Reduce Overrepresentation of Culturally and Linguistically Diverse Students in Special*

culturally diverse staff; making the general education classroom conducive to all children; enhancing learning through relevant curriculum;⁸⁷ providing teachers that can distinguish the characteristics of a disability from characteristics that reflect cultural differences, and cultural knowledge, skills, and experience for instruction of racially diverse students with disabilities;⁸⁸ using evaluators that have adequate training in reviewing and interpreting assessments in a culturally competent manner;⁸⁹ linking assessment practices to a child's individual educational needs, such as prevention and intervention,⁹⁰ implementing nonstandard procedures, ecological assessments,⁹¹ and functional assessment;⁹² conducting research that provides better conceptual understanding of the variables that influence overrepresentation;⁹³ and developing new federal initiatives with implications for state accountability that require states and school districts to collect disaggregated data by race with disability category and educational setting.⁹⁴

III. RACIAL DISPARITY OF SCHOOL DISCIPLINE ON MINORITIES

For more than thirty years, there have been extensive investigations of school punishment and its linkage with socioeconomic and racial disproportionality in the administration of school discipline.⁹⁵ Although

Education, ERICDIGESTS.ORG (Aug. 2000), <http://www.ericdigests.org/2001-3/five.htm>.

87. Warger & Burnette, *supra* note 86.

88. Geneva Gay, *Building Cultural Bridges: A Bold Proposal for Teacher Education*, 25 *EDUC. & URB. SOC'Y* 285, 292-98 (1993), available at <http://eus.sagepub.com/content/25/3/285>.

89. *Id.* This list is not exhaustive. Some of these suggestions do not realistically reflect the factors that work against creating a school environment that is racially and culturally sensitive to minorities and their families.

90. NAT'L ASSOC. OF SCH. PSYCHOLOGISTS, *ASSESSMENT AND ELIGIBILITY IN SPECIAL EDUCATION: AN EXAMINATION OF POLICY AND PRACTICE WITH PROPOSALS FOR CHANGE* 22-29 (1994) (explaining that the IDEA policies intended to promote comprehensive assessment practices unfortunately result in excessive attention to identifying and labeling the disability).

91. Edward S. Shapiro & Christopher H. Skinner, *Best Practices in Observation and Ecological Assessment*, in *BEST PRACTICES IN SCHOOL PSYCHOLOGY-II* 507, 507-08 (Alex Thomas & Jeff Grimes eds., 1990).

92. Daniel J. Reschly & James E. Ysseldyke, *School Psychology Paradigm Shift*, in *BEST PRACTICES IN SCHOOL PSYCHOLOGY-III* 1, 25-26 (Alex Thomas & Jeff Grimes eds., 1995).

93. *See, e.g.*, Oswald et al., *supra* note 23, at 194-206.

94. *RACIAL INEQUITY*, *supra* note 1, at xxix-xxx.

95. *See generally* CHILDREN'S DEF. FUND OF THE WASH. RESEARCH PROJECT, INC., *SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN?* (1975) [hereinafter *CHILDREN'S DEF. FUND*]; Russell J. Skiba et al., *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 *EDUC. & TREATMENT OF CHILD.* 203, 295-315 (1997) [hereinafter *Office Referrals*]; Howard Witt, *School Discipline Tougher on African-Americans*, *CHI. TRIB.*, Sept. 25, 2007,

there is significant evidence for disproportionality, there has been little exploration of its causes. However, the little research that has been done has revealed several factors that contribute to racial disproportionality in school discipline.

A. Socioeconomic Status

Disproportionality can be seen between students from different socioeconomic backgrounds. For example, students who receive free lunches are at an increased risk for school suspension.⁹⁶ Another study found that students whose father did not have full-time employment were significantly more likely to be suspended than those whose father worked full time.⁷⁷ In addition, low-income students receive more severe punishment, such as being made to stand in the hall all day and being subjected to searches of personal belongings.⁹⁸ High-income students, on the other hand, are more likely to receive more mild discipline, such as teacher reprimand and seat reassignment.⁹⁹

There is one school of thought holding that racial disproportionality in school discipline is due to the correlation in most schools between race and socioeconomic status, and if income status were controlled, these racial disparities would disappear.¹⁰⁰ In a recent study, four measures of discipline were used: (1) office referrals per student, (2) suspensions per student, (3) proportion of referrals suspended, and (4) number of days per suspension.¹⁰¹ The results of this analysis suggest that racial disparity in school discipline for black students can be largely attributed to the prior disproportionate referral of black students to the school office.¹⁰² The likelihood of referral to the office follows this order: black male, white

www.chicagotribune.com/services/newspaper/eedition/chi-070924discipline,0,7975055.story; *School Discipline: Special Education*, RURAL POLICY MATTERS (The Rural Sch. & Cmty. Trust, Randolph, Vt.), Jan. 2009, at 1, 3, available at http://www.ruraledu.org/user_uploads/docs/RPM11_01.pdf.

96. *Office Referrals*, *supra* note 95, at 306.

97. Shi-Chang Wu et al., *Student Suspension: A Critical Reappraisal*, 14 URBAN REV. 13 (1983).

98. RUSSELL J. SKIBA ET AL., *THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 1-2* (2000) [hereinafter *THE COLOR OF DISCIPLINE*].

99. *Id.*

100. Nat'l Ass'n of Secondary Sch. Principals, *Statement on Civil Rights Implications of Zero Tolerance Programs* (Feb. 2000) (Testimony presented to the U.S. Comm'n on Civil Rights, Wash., D.C.).

101. *See* *THE COLOR OF DISCIPLINE*, *supra* note 98, at 13.

102. *Id.* (finding that white students were more likely to be referred to the office for smoking, leaving the school without permission, vandalism, and obscene language, while black students were more likely to be referred for disrespect to teachers and administrators, excessive noise, and loitering); *see also* CARL J. HUBERTY, *APPLIED DISCRIMINANT ANALYSIS* (1994).

male, black female, white female.¹⁰³ There is strong evidence that racial and gender disparities continue to exist even when controlling for socioeconomic status.¹⁰⁴ Further, there is no evidence that racial disparities in school punishment can account for disproportionate rates of misbehavior.¹⁰⁵ Thus, black students are referred for discipline and subjected to harsher consequences for less serious behavior and for more subjective reasons.¹⁰⁶

The racial disparity in discipline appears to be associated with an over-reliance on negative and punitive punishment. Schools with the highest rates of suspension also have the highest rates of suspended black students.¹⁰⁷ Relying upon harsher disciplinary measures contributes to school rejection and dropouts.¹⁰⁸ Racial stereotyping may occur because of cultural differences of teachers. Teachers that subscribe to the stereotype of adolescent black males as threatening and dangerous may overreact to minor infractions of school rules and authority.¹⁰⁹ Cultural differences of teachers support varied perceptions of racial disparities in discipline. White students and teachers perceive racial disparities in discipline as unintentional and unconscious while black students perceive it as conscious and deliberate.¹¹⁰

B. Minority Status

Overall, the rates of suspension for black students are between two to three times higher than suspension for white students in elementary, middle, and high school.¹¹¹ In twenty-nine states, more than 5% of the African-American population was suspended while only four states suspended more than 5% of their white students.¹¹² Between 1972 and 2000, the percentage of white students suspended for more than one day

103. Maurice C. Taylor & Gerald A. Foster, *Bad Boys and School Suspensions: Public Policy Implications for Black Males*, 56 SOC. INQUIRY 409, 498-505 (1986).

104. *Id.*

105. *Id.*

106. THE COLOR OF DISCIPLINE, *supra* note 98, at 16.

107. See Advancement Project/Civil Rights Project, *Education Denied: The Negative Impact of Zero Tolerance Policies*, Testimony before the United States Commission on Civil Rights, Washington, D.C. (Feb. 2000); ANNE WHEELLOCK, *THE WAY OUT: STUDENT EXCLUSION PRACTICES IN BOSTON MIDDLE SCHOOLS* (1986).

108. Daniel Thomas Bullara, *Classroom Management Strategies to Reduce Racially-Biased Treatment of Students*, 4 J. EDUC. & PSYCH. CONSULTATION, 357, 361-62 (1993).

109. Townsend, *supra* note 43, at 383-84.

110. Rosa Hernández Sheets, *Urban Classroom Conflict: Student-Teacher Perception: Ethnic Integrity, Solidarity, and Resistance*, 28 URBAN REV. 165 (1996).

111. CHILDREN'S DEF. FUND, *supra* note 95.

112. THE COLOR OF DISCIPLINE, *supra* note 98, at 2.

rose from 3.1% to 6.1% while the percentage for black students had risen from 6% to 13.2%.¹¹³ For students with disabilities, black students are three times more likely than white students to be suspended and four times more likely than white students to be educated in a correctional facility.¹¹⁴ Black students are more frequently exposed to harsher disciplinary punishment such as corporal punishment than other students.¹¹⁵ There appears to be a direct link between school discipline and minority disproportionality. Overrepresentation of black students in school suspension and expulsion seems to increase as those disciplinary measures are used more frequently.¹¹⁶

C. Correlation Between Overrepresentation of Minorities and Racial Disparity in Discipline

There appears to be a correlation between the discriminatory treatment of black children in school discipline and the overrepresentation of minorities in special education.¹¹⁷ Even if discrepancies in discipline are not racially motivated, the overrepresentation of black students and those of lower socioeconomic status in school discipline contributes to racial stratification in school and society.¹¹⁸ Although there is no absolute proof of racial discrimination, there is strong evidence that there exists some

113. JOHANNA WALD & DANIEL LOSEN, THE CIVIL RIGHTS PROJECT, DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE 2-3 (2003), available at http://www.justicepolicycenter.org/Articles%20and%20Research/Research/testprisons/SCHOOL_TO_%20PRISON_%20PIPELINE2003.pdf.

114. *Id.* at 3. The ten states with the highest rates for black disciplinary out-of-school suspension in 2007-2008 were Neb. (36.76%), Wis. (34.39%), Nev. (30.92%), Del. (28.39%), Tex. (25.98%), Minn. (24.24%), R.I. (23.46%), S.C. (22.85%), La. (21.82%), Ga. (22.17%). The U.S. average is 16.64%. See Daniel J. Losen, Discipline Policies, Successful Schools, and Racial Justice, in National Education Policy Center, 1, 5 (Oct. 2011). States are required to collect data, disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities. 20 U.S.C. § 1412(a)(22) (2006). If such discrepancies occur, the State educational agency, if appropriate, should revise its policies, procedures, and practices relating to the development and implementation of Individualized Educational Programs, the use of positive behavior interventions and supports, and procedural safeguards to ensure such policies, practices, and procedures comply with the law. 20 U.S.C. § 1412(a)(22)(B).

115. Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 24 URBAN REV. 239, 240-41, 243, 248 (1992).

116. Advancement Project/Civil Rights Project, *Education Denied: The Negative Impact of Zero Tolerance Policies*, Testimony before the United States Commission on Civil Rights, Washington, D.C. (Feb. 2000).

117. Rebecca Gordon et al., *Facing the Consequences: An Examination of Racial Discrimination in U.S. Public Schools*, Mar. 2000, at 2, available at <http://eric.ed.gov/PDFS/ED454323.pdf>.

118. Christine Bowditch, *Getting Rid of Troublemakers: High School Disciplinary Procedures and the Production of Dropouts*, 40 SOC. PROBLEMS, no. 4, 493, 506 (Nov. 1993).

form of systematic bias in the use of school suspension and expulsion.¹¹⁹ The overriding principle is that overrepresentation of African Americans and lower social economic status in school discipline contributes to stratification in school and society.¹²⁰

D. Recommendations to Address Racial Disparity in School Discipline

To address the cycle of fear and cultural discontinuity, teacher training in appropriate and culturally competent methods of classroom instruction can be used to address racial disparity in school discipline.¹²¹ Many teachers feel overwhelmed with the problems of classroom management. By teaching appropriate classroom management techniques, communication skills, and support of mental health staff and administration, a more supportive classroom environment can be created.¹²² There are additional strategies used to address cultural discontinuity, such as knowledge of linguistic or dialectic patterns of black students, family and community partnerships, multi-component training programs to enhance multicultural awareness,¹²³ exposure to diverse communities, and instructional practices, among others.¹²⁴ It has also been suggested that communities seek to improve the quality of educational service for all children. This improvement would include developing a set of district-wide standards and priorities, increasing resources to schools, developing procedures to ensure equitable distribution of resources across schools, conducting school resource inventories, instituting a methodology for implementation and evaluation across schools,¹²⁵ backing legal challenges to inequitable practices such as tracking,¹²⁶ and equalizing resource availability.¹²⁷

CONCLUSION

In almost sixty years since the United States Supreme Court decision of

119. See Gordon et al., *supra* note 117.

120. See *id.* at 358.

121. See generally Bullara, *supra* note 108.

122. See *id.* at 366-67.

123. Townsend, *supra* note 43, at 384-90.

124. HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 3-23 (James A. Banks & Cherry A. McGee Banks eds., 1995); Oliver S. Brown & Robert S. Peterkin, *Transforming Public Schools: An Integrated Strategy for Improving Student Academic Performance through Districtwide Resource Equity, Leadership Accountability, and Program Efficiency*, 32 EQUITY & EXCELLENCE IN EDUC. 37, 37-52 (1999).

125. Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451, 451-72 (1996).

126. *Id.*

127. Christopher Dunn, *Challenging Racial Discrimination in the Public Schools of New York State*, 32 EQUITY & EXCELLENCE IN EDUC. 19, 23 (1999).

Brown v. Board of Education,¹²⁸ the public schools of our country have experienced a different kind of discrimination: an overrepresentation of minorities in special education classes and programs and racial disparity in school discipline. This invidious discrimination not only segregates minorities from their white peers, it also segregates them into classes for students with disabilities. Does the unjustified identification and placement of minority children into classes for students with disabilities and racial inequity of school discipline constitute the twenty first century's rebirth of "separate but equal" facilities for children of color? Simply put, the answer is yes.

By grouping children of color into "separate but equal" special education classes and disproportionately suspending and expelling students of color, we have committed the cardinal sin of repeating a dark period in our nation's history. School districts and schools that perpetuate the overrepresentation of minority students in special education and engage in practices that result in a disproportionate number of children of color receiving harsher punishment for school disciplinary infractions are repeating the injustices of what was once considered a bygone era. But are these school districts and schools treating children of color differently for no other apparent reason than their race and national origin?

There is no simple answer to this question. No doubt, the perception of institutional racism still exists and may even flourish in various aspects of our society.¹²⁹ Until and unless we eliminate *all* vestiges of racial discrimination in our country, overrepresentation of children of color in special education and racial inequity in school discipline will continue unchecked. On the other hand, if we acknowledge that racism exists, then we can move toward eliminating those vestiges of discrimination over time. We face a daunting task of finding long-term solutions to prevent children of color from being further disenfranchised from our society. Civil rights advocates and litigants are encountering more onerous legal hurdles to challenge overrepresentation of minorities in special education and racial disparity in school discipline on minorities.¹³⁰ For this reason, we should

128. 347 U.S. 483, 493 (1954).

129. See Mary Giunca, *Office of Civil Rights to Examine Discipline of Black Students*, WINSTON-SALEM J., Mar. 24, 2011 (noting that the United States Office for Civil Rights visited six Winston-Salem/Forsyth County Schools in April 2011 to review whether the school disciplinary policies disproportionately punished black students).

130. The United States Supreme Court in *Alexander v. Sandavol*, 532 U.S. 275, 299-300 (2001), has made it increasingly difficult for civil right plaintiffs to enforce disparate impact claims of racial discrimination under Section 602 of Title VI regulations. See 34 C.F.R. § 100.3(b)(1)(iii)-(vi); see, e.g., Dan McCaughey, *The Death of Disparate Impact Under Title VI: Dan McCaughey, Alexander v. Sandavol and Its Effects on Private Challenges to High Stakes Testing Programs*, 84 B.U. L. REV. 247 (2004). Other legal avenues, such as filing a complaint with the United

take a closer look at utilizing non-litigation strategies to constructively change and significantly improve our nation's schools so they will truly become colorblind rather than color conscious.

States Department of Education, Office for Civil Rights, to redress Title VI violations of racial discrimination have also been largely ineffective. See Daniel J. Losen, COMM'N ON CIVIL RIGHTS, *New Research on Special Education and Minority Students with Implications for Federal Education Policy and Enforcement*, 270-71 (2002).