Tennessee Law Review

Volume 82
Issue 4 *Summer 2015*

Article 5

2015

ADDRESSING RACIAL DISPARITIES IN PRESCHOOL SUSPENSION AND EXPULSION RATES

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ADDRESSING RACIAL DISPARITIES IN PRESCHOOL SUSPENSION AND EXPULSION RATES

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In 2014, the Department of Education's Office for Civil Rights published data for the first time that tracked preschool suspension and expulsion rates. The data was startling: not only were preschoolers being suspended and expelled, something that surprised many readers on its own, they were being suspended and expelled in racially disproportionate numbers, with African-American boys bearing the brunt of the discipline. Politicians, researchers and advocates quickly spoke out, noting that these numbers confirmed that the school to prison pipeline really starts in preschool, and calling for reform.

In this Article, I explore some of the policies and practices that have led to preschool expulsions, including zero tolerance policies and the challenging behavior of preschoolers, and also offer theories on what might have led to their racially disproportionate use, including unconscious bias on the part of teachers and administrators. I also examine the tragic impact these disciplinary procedures can have on students and their families. I next examine the long odds for success that most legal challenges to racially disproportionate preschool expulsions and suspensions will face, due mostly to judicially imposed requirements that plaintiffs establish racially discriminatory intent, not just disparate outcomes. Finally, I sketch the contours of what a successful policy-based solution might look like, and how best practices from existing research and programs might be utilized to create meaningful change.

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INTRODUCTION

NPR Reporter: "Do you know what a suspension is?"

Suspended preschooler JJ, an African-American male: "I don't know."

NPR Reporter: "Have you heard that word before?"

JJ: "Yes."

NPR Reporter: "And what does it mean?"

JJ: "I forgot. But I do have Captain Damerica. He's the guy with the shield."

NPR Reporter: "Captain what?"

JJ: "Captain Damerica."[1]

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1. *This American Life: Is This Working?*, CHICAGO PUBLIC RADIO (Oct. 17, 2014), transcript available at http://www.thisamericanlife.org/radio-archives/episode/538/transcript.

In March of 2014, the U.S. Department of Education's Office for Civil Rights ("OCR") released data it had collected from the 2011-2012 school year, data pulled from all 97,000 of the nation's public schools and its 16,500 school districts. OCR has been collecting these Civil Rights Data Collections ("CRDC") since 1968, and while it conducted various CRDCs throughout the first decade of the 2000s using a sample of school districts, the 2011-2012 CRDC was the first since 2000 that included all public schools and school districts.[2] For the first time ever, the 2011-2012 CRDC also included data on the suspension and expulsion of preschool students, who were defined as "children younger than kindergarten age."[3] The results showed profound racial disparities in the administration of preschool discipline. While black students represented 18% of preschool enrollment, they made up 42% of students suspended once, and 48% of students suspended more than once.[4] The statistics were even bleaker for boys, who were the recipients of three out of four preschool suspensions. Over 8,000 preschool students were suspended at least once.[5] "This critical report shows that racial disparities in school discipline policies are not only well documented among older students, but actually begin during preschool," then Attorney General Eric Holder said in a press release.[6]

In Section I, I will explore some of the pressures and policies that have contributed to the startling preschool suspension and expulsion rates highlighted in the CRDC results as well as earlier studies conducted by Walter Gilliam of Yale. The rise in our nation's schools' zero tolerance policies following high profile high school shootings in the 1990s, policies that assigned automatic expulsions for any behavior deemed "violent," have trickled down to primary schools and even preschools. The result of those policies when applied to typical challenging preschool behavior, including behavior such as biting and hitting, has been disastrous and has created an even earlier entry point to the "school to prison pipeline." Further, recent

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2. U.S. DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, 2011-12 CIVIL RIGHTS DATA COLLECTION QUESTIONS AND ANSWERS (2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2011-12-factsheet.html.

3. U.S. DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, 2011-12 CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION 15 (2014), *available at* http://ocrdata.ed.gov/Downloads/CRDC-Early-Childhood-Education-Snapshot.pdf.

4. *Id.* at 3.

5. *Id.* at 15.

6. Press Release, U.S. Dept. of Educ., Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities (Mar. 21, 2014), *available at* http://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities.

studies have shown that teachers and other authority figures tend to overestimate the age of young African-American boys, and thus perhaps subconsciously expect better behavior of them and are harsher in their punishments.[7] Additionally, recent research has raised the issue of whether unconscious bias might impact the way that preschool teachers perceive preschoolers engaged in pretend play.[8] Finally, I discuss how preschool expulsions and suspensions are especially hurtful to children and families, given the crucial developmental need for preschool aged children to bond with their caregivers and the fact that the overwhelming majority of children enrolled in preschool programs have working parents who need reliable childcare in order to continue their employment.[9]

In Section II, I analyze the likelihoods of success for the most obvious federal legal challenges to racial disparities in preschool discipline: due process (both procedural and substantive), Fourteenth Amendment Equal Protection, Title VI of the Civil Rights Act of 1964 (both private litigation and claims brought by the Department of Education), and Sections 1981 and 1983. The discussion includes the reason that each claim is likely to come up short, mostly due to judicially imposed requirements that litigants prove discriminatory intent (not just racially disproportionate outcomes or disparate treatment), as well as the long history of federal courts' reluctance to second guess school discipline decisions and not wade into what are viewed as local or state issues. There are some glimmers of hope – the Department of Education has the power to launch investigations into racially disproportionate preschool disciplinary practices under Title VI under a disparate treatment theory, something not available to private litigants. Recent policy pronouncements and the Department's track record of investigating racially disparate school discipline in older students provide room for optimism that they may indeed launch such investigations. But advocates or parents hoping to find direct relief in the federal court system are likely to be disappointed.

Therefore, finally, in Section III, I make a case for implementing a policy based approach to remedying the issue of racial disparities in preschool discipline, and outline what the contours of such an approach would look like according to existing research and best

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7. Press Release, American Psychological Association, *infra* note 47.

8. Tuppet M. Yates & Ana K. Marcelo, *Through Race-colored Glasses: Preschoolers' Pretend Play and Teachers' Ratings of Preschooler Adjustment*, EARLY CHILDHOOD RESEARCH QUARTERLY 29 (2014), at 1-2.

9. DAWN NOELLE BEE, AN EXPLORATORY STUDY OF CHILD CARE CENTER DIRECTORS' RESPONSE TO CHALLENGING BEHAVIOR AND THE IMPACT ON PRESCHOOL EXPULSION 5 (Nov. 12, 2012).

practices. Such a solution both recognizes the inherent costs and risks of impact litigation and also acknowledges a growing trend away from public law litigation in the field of education law in favor of approaches that involve relevant stakeholders and are voluntarily adopted. I recommend that this approach include three key factors that have been shown in research to dramatically reduce preschool expulsion and suspension rates for all students, and which are supported by various governmental agencies and national organizations: (1) access to mental health consultants for preschool teachers, students and their families, (2) smaller teacher-student ratios, and (3) improved teacher job conditions. These recommendations, while admittedly costly to implement, have great promise in reducing preschool expulsions and suspensions. Given the stakes for our nation's children, especially the research regarding the school to prison pipeline beginning in preschool, they may well be recommendations we cannot afford to ignore.

I. THE BASIS FOR AND IMPACT OF PRESCHOOL EXPULSIONS AND SUSPENSIONS

A. Prior Studies and Public Outrage

While a finding that African-American students are disproportionately punished in our school systems has been established in prior CRDC reports,[10] the fact that these disparities actually begin in *preschool*, when most children are just beginning to learn their ABCs and nursery rhymes, was surprising to many. "I think most people would be shocked that those numbers would be true in preschool, because we think of 4- and 5-years-olds as being innocent," Judith Browne Dianis, co-director of the Advancement Project, told the Associated Press. Indeed, many commentators expressed surprise that expulsions and suspensions occur *at all* in preschools, let alone that they occur disproportionately by race.[11]

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10. For example, in the 2000 CRDC, black students made up almost 18% of the total student body enrollment but approximately 34% of those suspended and 30% of those expelled. *See* U.S. DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, 2000 NATIONAL AND STATE ESTIMATIONS (2000), *available at* http://ocrdata.ed.gov/StateNational Estimations/Projections_2000.

11. Christina A. Samuels, *Pre-K Suspension Data Shines Spotlight on Interventions*, EDUCATION WEEK, Apr. 2, 2014 at 6. "The notion that preschool pupils even face suspension surprised some, including U.S. Secretary of Education Arne Duncan, who called the data 'mind-boggling' at a press event March 21 where he rolled out comprehensive U.S. Department of Education data on a broad range of P-12 indicators, including discipline."

Editorial boards called the results an "outrage,"[12] and child development advocates pointed out that suspensions for preschool students is at best a questionably effective disciplinary tactic, as "[c]hildren of that age do not have the ability to logically understand why they are being sent home."[13]

Despite the national press they garnered, the CRDC results were not the first study to conclude that preschool discipline happens in a racially disproportionate manner. A 2005 study by Walter Gilliam, the nation's leading expert on prekindergarten discipline, focused on expulsion rates in state preschool programs and concluded that African-American preschoolers were twice as likely to be expelled as Latino and white preschoolers.[14] As with the CRDC data, boys in the Gilliam study fared worse than girls, facing expulsion at a rate over 4.5 times that of girls.[15] Gilliam's study was focused on each of the 52 state-funded preschool programs then in existence, and included an 81% response rate from the nearly 4,000 preschool classrooms he surveyed.[16] More than 10% of preschool teachers surveyed reported having expelled at least one preschooler in the past year. The preschool expulsion rate was a staggering 3.2 times the rate expulsion rate for K-12 students.[17]

In December of 2014, Education Secretary Arne Duncan and Health and Human Services Secretary Sylvia Burwell responded to the CRDC findings with a policy statement and "recommendations to assist States and their public and private local early childhood programs in preventing and severely limiting expulsions and suspensions in early learning settings."[18] Those recommendations, which are discussed at greater length in Section III of this Article, are entirely voluntary at this point. Because the policy statement and recommendations were just released, and in light of the fact that they are entirely voluntary, it is too early to know if they alone will

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12. Editorial, *Giving Up on 4-Year-Olds*, N.Y. TIMES, Mar. 26, 2014, at A30.

13. Caroline Porter, *Suspensions More Likely for Black Students, Report Finds*, WALL ST. J, Mar. 21, 2014 (quoting Laura Bornfreund, deputy director of the Early Education Initiative at the New American Foundation).

14. WALTER S. GILLIAM, PREKINDERGARTENERS LEFT BEHIND: EXPULSION RATES IN STATE PREKINDERGARTEN SYSTEMS 6 (2005) [hereinafter PREKINDERGARTENERS LEFT BEHIND].

15. *Id.*

16. *Id.* at 2.

17. *Id.* at 6.

18. Letter from Sylvia M. Burwell, Secretary of Health and Human Services, & Arne Duncan, Secretary of Education, to Colleagues (Dec. 10, 2014), *available at* http://www2.ed.gov/policy/gen/guid/school-discipline/letter-suspension-expulsion-policy.pdf.

be able to address racial disparities in preschool discipline. If they are not, or if advocates do not want to take a "wait and see" approach, it is doubtful that they will find meaningful relief in the court system, as the CRDC and Gilliam results alone are unlikely to form the basis for a successful litigation strategy aimed at eliminating these racially disparate punishment practices in our nation's preschools, for the reasons discussed in Section II.

B. Preschoolers and Challenging Behavior

Neither the CRDC nor the Gilliam study collected data regarding *why* the preschoolers involved were suspended or expelled. However, a 2014 report from the District of Columbia's Office of the State Superintendent of Education that examined preschool suspensions in D.C. noted that "pre-K students have been punished [in the District] for temper tantrums, classroom disruption, repeated vulgarity, and bathroom mishaps;" in other words, behaviors that are often "age-appropriate misconduct."[19] The report prompted one D.C. Councilmember to introduce a bill banning preschool suspensions and expulsions.[20]

One mother, Tunette Powell, came forward after reading about the CRDC results, sharing the stories of her sons' preschool suspensions for throwing objects and hitting, behavior that any parent of a preschooler would recognize as challenging but common.[21] When interviewed by an NPR Reporter, Ms. Powell explained that her four-year-old son JJ, who is African-American, was first suspended for throwing a chair. Later that week, after being back at school for only 30 minutes, he was again suspended for crying at the breakfast table and pushing a chair. Two weeks later, he was suspended a third time for spitting.[22]

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19. OFFICE OF THE STATE SUPERINTENDENT OF EDUC., REDUCING OUT-OF-SCHOOL SUSPENSIONS AND EXPULSIONS IN DISTRICT OF COLUMBIA PUBLIC AND PUBLIC CHARTER SCHOOLS, 19 (2014), *available at* http://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/OSSE_REPORT_DISCIPLINARY_G_PAGES.pdf.

20. *See* Press Release, Councilmember David Grosso, Grosso Introduces Critical Legislation to Ban Pre-K Suspensions and Expulsions (July 14, 2014), *available at* http://www.davidgrosso.org/news/2014/7/14/grosso-introduces-critical-legislation-to-ban-pre-k-suspensions-and-expulsions.

21. Tunette Powell, *My Son Has Been Suspended Five Times. He's Three*, WASH. POST, (July 24, 2014), https://www.washingtonpost.com/posteverything/wp/2014/07/24/my-son-has-been-suspended-five-times-hes-3/.

22. *This American Life: Is This Working?*, *supra* note 1. Ms. Powell also relayed that she spoke with other mothers in her son's preschool class, mothers whose

Research has backed up the rather obvious notion that it can, in fact, be quite normal for preschool aged children to have behavioral problems. One study estimates that approximately 10-15% of *typically developing* preschoolers have "chronic mild to moderate levels of behavior problems."[23] The most common challenging behaviors in preschool aged children are aggression, noncompliance, defiance, tantrums, and destruction of property, and very young children also commonly exhibit "sleeping problems, eating problems, and toilet-training problems."[24] The December 2014 Joint Recommendations from DOE and HHS (hereinafter "Joint Recommendations") recognize that preschool can be a difficult age for setting reasonable behavioral expectations. "[W]ithout enough training in child development, it may be difficult to distinguish behaviors that are inappropriate from those that are developmentally age appropriate. Early childhood experts posit that developmentally inappropriate behavioral expectations may lead to inappropriate labeling of child behavior as challenging or problematic."[25]

C. Zero Tolerance Policies and the School to Prison Pipeline

If such behaviors or misconduct are, while exasperating, indeed age-appropriate, why are they being punished, and why are they being punished with the severity of a disciplinary practice like expulsion? The answer lies in part in the creep of zero tolerance policies from our nation's secondary and primary schools into preschool programs. These policies first emerged in schools in the 1980s and 1990s and were codified by the Gun-Free Schools Act of

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children had hit and bitten other children, including an incident where the other child had to be rushed to the hospital. These children, all white, had never been suspended from JJ's preschool.

23. Debora F. Perry, et al., *Challenging behavior and expulsion from child care: the role of mental health consultation*, ZERO TO THREE, November 2011, at 4 (citing S.B. Campbell, *Behavior Problems in Preschool Children: A Review of Recent Research*, 36 J. CHILD PSYCHOLOGY & PSYCHIATRY 113-149 (1995)).

24. *Id.*

25. U.S. DEPT. OF EDUC. & U.S. DEPT. OF HEALTH AND HUMAN SERVICES, POLICY STATEMENT ON EXPULSION AND SUSPENSION POLICIES IN EARLY CHILDHOOD SETTINGS 4 (2014), *available at* http://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf [hereinafter DOED AND HHS POLICY STATEMENT]. The recommendations also stress that "teachers must also be trained to recognize behaviors that may be a manifestation of a child's disability. This training is essential to ensure that children with disabilities receive reasonable modifications for their disabilities and are not impermissibly suspended or expelled for behaviors caused by disabilities." *Id.*

1994, which conditioned federal funding on schools' adoption of policies requiring a minimum of one-year suspension for any student who brings a firearm to school. The policies at first focused specifically on gun possession and violent acts but soon included mandatory responses for even minor, non-violent offenses.[26] The visibility of school shootings throughout the 1990s, culminating in the tragic killings at Columbine High School in 1999, created a persistent perception of school violence as a growing problem (despite studies showing that juvenile violence actually fell in the 1990s), and school administrators responded with zero tolerance policies that often involved suspension and expulsion.[27] Although the effectiveness of zero tolerance policies has been called into serious question,[28] and despite being opposed by the Attorney General,[29] the Secretary of Education,[30] and the American Bar Association,[31] these policies remain stubbornly prevalent today, even in preschools.

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26. *See generally* Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies As Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 305-08 (2011).

27. NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE, 4 (2005), *available at* http://www.naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf; *see also* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. QUARTERLY 65, 65-67 (2003).

28. *See* Press Release, American Psychological Association, Zero Tolerance Policies Are Not as Effective as Thought in Reducing Violence and Promoting Learning in School (Aug. 9, 2006), *available at* http://www.apa.org/news/press/releases/2006/08/zero-tolerance.aspx (concluding that "schools are not any safer or more effective in disciplining children than before these zero tolerance policies were implemented in the mid-1980s."); *see also* Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 585-87 (2009) (noting that zero tolerance policies "alienate the children who are most in need of stability and guidance" and "promote an irrational climate of fear.").

29. Eric Holder, Attorney General, Remarks at the Release of the Joint Dept. of Justice – Dept. of Educ. School Discipline Guidance Package at The Academies at Frederick Douglass High School, Baltimore, MD (Jan. 8, 2014) ("Too often, so-called 'zero-tolerance' policies – however well-intentioned – make students feel unwelcome in their own schools. They disrupt the learning process. And they can have significant and lasting negative effects on the long-term well-being of our young people – increasing their likelihood of future contact with juvenile and criminal justice systems.").

30. *See* U.S. DEPT. OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 13 (2014), *available at* http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf [hereinafter U.S. DEPT. OF EDUC., GUIDING PRINCIPLES] (noting "Zero-tolerance discipline policies, which generally require a specific consequence for specific action

This prevalence is not due to a lack of objection from policy makers. The Obama Administration, recognizing the dangers of zero tolerance policies, issued in January 2014 voluntary guidelines aimed at reducing schools' reliance on them. In its 35-page "Guiding Principles" document, the Department of Education recommends that schools "[c]ollaborate with local mental health, child welfare, law enforcement, and juvenile justice agencies and other stakeholders to align resources, prevention strategies, and intervention services."[32] The Department also recommended that students be removed from the classroom "only as a last resort," and that students be returned to the classroom as soon as possible.[33] The guidelines urge schools to "explicitly reserve the use of out of school suspensions, expulsions, and alternative placements for the most egregious disciplinary infractions that threaten school safety and when mandated by federal or state law," and explicitly clarifies that the Gun Free Schools Act only requires an expulsion when a firearm is brought to or possessed at school.[34] Given the relative recency of the announcement of these guidelines, and the fact that they are voluntary in nature, it is too early to know if they will have any meaningful impact on schools' use of zero tolerance policies.

Zero tolerance policies contribute negatively to what has been termed the "school to prison pipeline," wherein disciplinary policies and practices "push our nation's schoolchildren, especially our most

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regardless of circumstance, may prevent the flexibility necessary to choose appropriate and proportional consequences."). In a speech on January 8, 2014, Education Secretary Arne Duncan urged school discipline reforms that are "grounded in research and promising practices--instead of being based on indiscriminate zero tolerance policies . . . ." Arne Duncan, Secretary, U.S. Dept. of Educ., Remarks at the Release of the Joint Dept. of Justice – Dept. of Educ. School Discipline Guidance Package at The Academies at Frederick Douglass High School, Baltimore, MD (Jan. 8, 2014).

31. The leadership of the ABA adopted a resolution in 2001 opposing "'zero tolerance' policies that mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the students history." AMERICAN BAR ASSOC. RESOLUTION ON SCHOOL DISCIPLINE "ZERO TOLERANCE" POLICIES (Feb. 2001), *available at* http://www.americanbar.org/groups/child_law/tools_to_use/attorneys/school_disciplinezerotolerancepolicies.html. More recently, the President of the ABA told the Senate that "[g]iven the devastating impact of these policies as well as the fact that research has shown them to be ineffective, zero tolerance policies should be eliminated." *Ending the School-to-Prison Pipeline: Hearing Before the S. Comm. On the Judiciary,* 112th Cong. 159 (2012) (Statement of Laurel G. Bellows, President, Am. Bar Assoc.).

32. U.S. DEPT. OF EDUC., GUIDING PRINCIPLES, *supra* note 30, at 8.

33. *Id.* at 14.

34. *Id.* at 15.

at-risk children, out of classrooms and into the juvenile and criminal justice systems."[35] Children who are suspended or expelled may be left unsupervised and therefore more likely to get into legal trouble, and they certainly miss critical time in their classes, raising their risk for dropping out.[36] A 2009 study found that 1 in every 10 male high school dropouts is in jail or juvenile detention, compared with 1 in every 35 male high school graduates, and that *nearly 1 in 4* African-American male dropouts is incarcerated or otherwise institutionalized.[37] Government officials have recognized these dangers, with Attorney General Eric Holder acknowledging that "[e]very data point [in the CRDC] represents a life impacted and a future potentially diverted or derailed" and pledging that "[t]his administration is moving aggressively to disrupt the school-to-prison pipeline in order to ensure that all of our young people have equal educational opportunities."[38] Speaking at an elementary school in Washington D.C. in March of 2014, Secretary of Education Arne Duncan said "[t]he fact that the school-to-prison pipeline appears to start as early 4-year-olds, before kindergarten, should absolutely horrify us."[39]

The danger of increased incarceration at some later date may seem remote when it is 3- and 4-year-old preschool students who are expelled or suspended. But, several studies have found that behavior problems in preschool are, in fact, "powerful predictors of subsequent delinquency and criminal offenses."[40] "Early suspension, expulsion and other exclusionary disciplinary practices contribute to setting many young children's educational trajectories in a negative direction from the beginning."[41] The Departments of Education and Health and Human Services have recognized that "there is evidence that expulsion or suspension early in a child's education is associated with expulsion or suspension in later school grades," and that these later suspensions and expulsions might make a student

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35. *Locating the School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/images/asset_upload_file966_35553.pdf.

36. *Id.*

37. Sam Dillon, *Study Finds High Rate of Imprisonment Among Dropouts*, N.Y. TIMES, Oct. 8, 2009, at A12.

38. Press Release, U.S. DEPT. OF EDUC., *supra* note 6.

39. *All Things Considered: Widespread Racial Disparities in Public School Punishments*, NATIONAL PUBLIC RADIO (Mar. 21, 2014) http://www.npr.org/2014/03/21/292470976/report-widespread-racial-disparities-in-public-school-punishments.

40. John B. Reid, *Prevention of Conduct Disorder Before and After School Entry: Relating Interventions to Developmental Findings*, 5 DEV. & PSYCHOPATHOLOGY 243, 244 (1993).

41. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 4.

up to 10 times more likely to face incarceration.[42] When these at risk children are expelled or suspended from preschool, most are separated from the critical interventions and supports they need at precisely the time in their lives those interventions are most likely to have an impact. "Not only do these practices have the potential to hinder social-emotional and behavioral development, they also remove children from early learning environments and the corresponding cognitively enriching experiences that contribute to healthy development and academic success later in life."[43]

D. Unconscious Bias and Dehumanization of African-American Boys

The Joint Recommendations from DOE and HHS acknowledge that the question of why racial disparities exist in preschool discipline has not been properly studied, but notes that research in school-aged children has found "that potential contributors may include uneven or biased implementation of disciplinary policies, discriminatory discipline practices, school racial climates, and under-resourced, inadequate education and training for teachers, especially in self-reflective strategies to identify and correct potential biases in perceptions and practice."[44] While overt racism may be one explanation for the racial disparities in suspension and expulsion rates for preschool students, other less sinister (though no less damaging) factors are likely at play as well. Young African-American males may be uniquely at risk of being unfairly disciplined because those with authority over them may subconsciously overestimate their age and accordingly may have higher expectations for their behavior.[45] Further, unconscious bias could be affecting teachers.[46]

A 2014 study found that African-American boys as young as ten "may not be viewed in the same light of childhood innocence as their white peers, but are instead more likely to be mistaken as older, be perceived as guilty and face police violence if accused of a crime . . . ."[47] Such "dehumanization" need not be "paired with

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42. *Id.* at 3.

43. *Id.*

44. *Id.* at 4.

45. *Id.*

46. Tuppet M. Yates & Ana K. Marcelo, Through Race-colored Glasses: Preschoolers' Pretend Play and Teachers' Ratings of Preschooler Adjustment, EARLY CHILDHOOD RESEARCH QUARTERLY 29, 1-2 (2014).

47. Press Release, American Psychological Association, Black Boys Viewed as Older, Less Innocent Than Whites, Research Finds (Mar. 6, 2014), *available at* http://www.apa.org/news/press/releases/2014/03/black-boys-older.aspx.

explicit prejudice" but can "cause individuals to see Black children as more like adults or, more precisely, to see them as older than they are."[48] While that study focused largely on police officers, one part of the study involved mostly white, female undergraduate students from large public U.S. universities. These young women were shown photographs alongside descriptions of various crimes and asked to assess the age and innocence of white, African-American, or Latino boys ages 10 to 17. The results were striking: the young women overestimated the age of the African-American youths "by an average of 4.5 years and found them more culpable than whites or Latinos . . . ."[49]

The findings, while intriguing, are of limited use in explaining racial disparities among preschoolers, as the study focused on children aged ten and older. Further, preschool teachers surely know the ages of the children they are teaching, as preschool classes are divided by age. But this and similar dehumanization research may provide insight into one reason why young African-American children, especially boys, are repeatedly given stiffer punishments for otherwise age appropriate behavior.

Unconscious bias is another factor that could produce racially disparate preschool discipline rates. A study published in 2014 from researchers at the University of California, Riverside, examined how preschool teachers rate preschoolers' readiness for kindergarten after measuring, among other things, the children's pretend play, an important development activity for preschool students.[50] While the researchers who observed the children playing saw no difference in the way children of different races played or in their own ratings of the children's adjustment and readiness for kindergarten, the preschool teachers reported very different results. "Among black preschoolers, imaginative and expressive pretend play features were associated with teachers' ratings of less school preparedness, less peer acceptance, and more teacher–child conflict, whereas comparable levels of imagination and affect in pretend play were related to positive ratings on these same measures for non-Black children."[51] In other words, African-American preschoolers who were creative and expressive were more likely to be seen by their teachers as sources of conflict, and thus perhaps more likely candidates for suspensions or expulsion, than were other children. "Specifically,

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48. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY & SOC. PSYCHOL. 526, 527 (2014).

49. American Psychological Association, *supra* note 47.

50. Yates & Marcelo, *supra* note 46 at 1-2.

51. *Id.* at 1.

Black children with imaginative and expressive pretend play skills were evaluated negatively, whereas non-Black children with similar play skills were evaluated positively."[52] These results held up even after the researchers controlled for child age, child IQ, family socioeconomic status, teacher–child racial congruence, teacher familiarity with the child, and child gender.[53] It is important to note that this bias would appear to be unconscious, as the teachers did not perceive any races as inherently better adjusted than others, but instead perceived different attributes (like pretend play) as "related to more or less positive adjustment in different racial groups."[54] The researchers acknowledged several limitations of the study, including its size and selection effects,[55] but the research nonetheless raises questions that might help illuminate the racial disparities found in preschool suspension and expulsion rates.

E. Impact of Preschool Expulsions on Children and Families

Whatever the cause of racial disparities in preschool discipline, for all students, including those suspended for mere age appropriate misconduct, the impact of these suspensions on the children and their families as a whole is immediate and, in many ways, more disruptive than discipline for older students. "Expulsion from a preschool program interrupts a child's bonding with his or her caregiver, increases parental stress within the family and the workplace, and has negative economic impacts on the parents and child care professionals."[56] While a high school-aged student who is suspended can, in theory, be left home without parental supervision during the duration of their suspension, preschool-aged students require constant adult supervision. Further, the majority of children who are enrolled in preschool programs have parents who work outside of the home. For these parents, arranging alternative care for suspended children can be difficult and may well result in lost wages or employment opportunities. "In many cases, families of children who are expelled do not receive assistance in identifying an alternative placement, leaving the burden of finding another program entirely to the family. There may be challenges accessing

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52. *Id.* at 8.
53. *Id.* at 1.
54. *Id.* at 8.
55. *Id.* at 9.
56. Dawn Noelle Bee, An Exploratory Study of Child Care Center Directors' Response to Challenging Behavior and the Impact on Preschool Expulsion 5 (Nov. 12, 2012) (unpublished Ph.D. dissertation, Florida State University), *available at* http://diginole.lib.fsu.edu/cgi/viewcontent.cgi?article=6828&context=etd.

another program, particularly an affordable high-quality program."[57] Natasha Brown, a single, working mother of two whose son was repeatedly suspended from preschool, reported that her son's suspensions jeopardized her job, as she frequently had to leave to pick him up.[58] "I wanted to ask, 'How do you want us to handle this child?'" she said. "I'm doing the best I can on my side, but you guys should have better-trained employees. They are too ready to expel or suspend to alleviate the problems."

Suspensions and expulsions also threaten a preschooler's attachment to his or her preschool teacher, an attachment that is likely more crucial given their age than the attachment between older students and their teachers. "[R]esearch supports the notion that the first teacher connection is an important one for long-term academic achievement. Several studies have shown that children with a secure attachment to their preschool teachers feel more confident, are more successful at learning, and show increased kindergarten readiness."[59] When students are removed from the classroom at the age of three or four, ages where children may be unable to grasp why they are being sent home, this crucial attachment is threatened. The Department of Education noted recently, "[a] child's early years set the trajectory for the relationships and successes they will experience for the rest of their lives, making it crucial that children's earliest experiences truly foster – and never harm – their development."[60] Preschool disciplinary practices can have real, lifelong consequences for children and their families.

II. LIKELIHOOD OF SUCCESS OF LEGAL CHALLENGES

Given the high costs and stakes of preschool suspensions, and in light of strong evidence of racially disproportionate outcomes, it seems logical to look to our court system for relief. Indeed, in Joint Recommendations on preschool discipline, the Departments of Education and Health and Human Services suggest, without specific

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57. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 3. The Policy Statement goes on to recommend that in the "extraordinary case" where a child has been expelled or suspended from preschool, "the program should assist the child and family in accessing services and an alternative placement through, for example, community-based child care resource and referral agencies." *Id.* at 6.

58. Carla Rivera, *Preschool Expulsion Rate Is a Surprise*, L.A. TIMES, (May 17, 2005), *available at* http://articles.latimes.com/2005/may/17/local/me-preschool17.

59. Cari Wira Dineen, *Bonding With the First Teacher*, PARENTS, Sept. 2013 at 268.

60. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 2.

reference, that "if administered in a discriminatory manner, suspensions and expulsions of children may violate Federal civil rights laws."[61] However, as discussed below, legal challenges to preschool suspensions are unlikely to succeed on federal claims, regardless of the cause of action chosen. This is, in part, because the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[62] This reluctance to wade into second-guessing the disciplinary actions of school officials, when coupled with case law that mandates that discriminatory intent (not just racially disproportionate outcomes) is necessary to sustain a cause of action, makes these cases steep uphill battles.

Further, many of the causes of action discussed, including due process claims, are likely only available in cases involving public daycares, since these claims protect only against government action.[63] This is an important point, as one study found that expulsion rates were lowest in public preschools and highest in faith-affiliated centers and for-profit childcare.[64] Indeed, one major preschool provider, the federal Head Start program, has a "long-standing and continuing practice to prohibit the expulsion or suspension of any child."[65] Thus, even if claims were successful in some situations, it may not be possible to bring such a claim against the entities that are producing the most problematic and troubling results. Finally, while not addressed at length in this Article, there are potential defenses that would further weaken the listed claims, including: failure to exhaust administrative remedies, sovereign immunity, qualified immunity, public official immunity, legislative

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61. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 3.

62. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

63. *See, e.g.*, NCAA v. Tarkanian, 488 U.S. 179, 191 (1988) ("Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."); *see also* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 59 (1991) (noting that private schools are not limited by the due process clause when it comes to suspensions and expulsions.) As discussed below, while Section 1981 has been held to reach private conduct, there are other problems with using it to combat racially disparate preschool discipline policies and practices.

64. PREKINDERGARTENERS LEFT BEHIND, *supra* note 14, at 5.

65. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 5.

immunity, quasi-judicial immunity and the political question doctrine.[66]

While this Article explores the likelihood of success of various federal causes of action to address racial disparities in preschool discipline, there are two important areas that are beyond its scope. First, this Article does not explore potential state causes of action, except as those are addressed in the individual court cases that are discussed. Second, this Article does not address claims made under Section 504 of the Rehabilitation Act,[67] which protects qualified individuals from discrimination based on disability, or claims made under the Individuals with Disabilities in Education Act ("IDEA").[68] While either of these might be promising avenues for redress in courts, the CRDC data "suggest[ed] that our nation's preschools are not disproportionately suspending preschool students with disabilities," who make up "22% of preschool enrollment, 19% of the students suspended once, and 17% of the students suspended more than once."[69] The question is worthy of further exploration, though, as the utility of the CRDC data on expulsion of preschool students with disabilities may be limited by the fact that many three- and four-year-olds who qualify under Section 504 or the IDEA have simply not yet been identified as having a disability, due to their young age. Indeed, in their Joint Recommendations on preschool discipline, the Departments of Education and Health and Human Services admonished that "early childhood programs must comply with applicable legal requirements governing the discipline of a child for misconduct caused by, or related to, a child's disability," and that preschools must consider positive behavioral interventions and support systems "so as to reduce the need for discipline of a child with disabilities and avoid suspension or expulsion from a preschool program."[70] Recent research in the field of neuroscience on the impact of poverty on cognitive development also suggests that IDEA in particular may define learning disabilities too narrowly, by excluding learning problems caused by economic disadvantage, thus an important subset of children with learning disabilities may be

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66. For a discussion of these potential defenses, *see* Frances P. Solari & Julienne E.M. Balshaw, *Outlawed and Exiled: Zero Tolerance and Second Generation Race Discrimination in Public Schools*, 29 N.C. CENT. L.J. 147, 180-90 (2007).

67. 29 U.S.C. § 794 (2012).

68. 20 U.S.C. § 1415 (2012).

69. U.S. DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, 2011-12 CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: EARLY CHILDHOOD EDUCATION, *supra* note 3, at 4.

70. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 3.

missed by the CRDC data.[71] In any event, given the lack of support for a finding of disproportionate discipline for preschool students with disabilities in the CRDC data, the question is beyond the scope of this Article.

A. Due Process

Section 1 of the Fourteenth Amendment to the U.S. Constitution forbids any state to "deprive any person of life, liberty, or property without due process of law."[72] Known as the "Due Process Clause," it has been described as "the least specific and most comprehensive protection of liberties."[73] The Amendment was one of the three "Reconstruction Amendments" adopted in the five-year period following the conclusion of the Civil War in order to protect the rights of newly freed slaves.[74]

The Due Process Clause provides both procedural and substantive protections. Broadly speaking, procedural due process is concerned with fairness in governmental procedures and substantive due process prohibits "the exercise of power without any reasonable justification in the service of a legitimate governmental objective."[75]

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71. *See generally* James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455 (2013). The author argues that "advances in neuroscience research will eventually end special education as we know it. In short, neuroscience research is challenging a number of important assumptions that undergird special education law, including, for example, the assumption that there is a real difference between students with a specific learning disability, who are covered by the law, and those who are simply 'slow,' who are not covered." *Id.* at 1458.

72. U.S. CONST. amend. XIV § 1.

73. Rochin v. California, 342 U.S. 165, 170 (1952).

74. As the Supreme Court noted in an early case addressing the Reconstruction Amendments, the Amendments' "one pervading purpose" was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." The Slaughter-House Cases, 83 U.S. 36, 71 (1872). The two other Reconstruction Amendments are the Thirteenth Amendment, which abolished slavery, and the Fifteenth Amendment, which prohibited voting rights discrimination on the basis of race. U.S. CONST. amends. XIII, XV.

75. Cty. of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (citation omitted). For more on procedural vs. substantive due process, *see generally* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38. HARV. C.R.-C.L. L. REV. 393, 432 (2003).

1. Procedural Due Process

Regarding procedural due process, the Supreme Court has held that when the government deprives students of the property interest they hold in their right to public education by virtue of suspension or expulsion, minimum procedural due process requirements apply.[76] In *Goss v. Lopez*, nine public high school students from Ohio sued various school officials, arguing that their suspensions of up to ten days without hearings violated their due process rights.[77] First, the Court identified the property interest at stake, holding that under Ohio law, the students had legitimate claims of entitlement to a public education.[78] The Court found that since state law directed local authorities to provide free education for all residents older than five and younger than twenty-one, and the state also had compulsory school attendance laws, Ohio had "chosen to extend the right to an education to people of appellees' class generally," and, having so extended it, could not "withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred."[79] The Court then dismissed arguments that these were "mere" suspensions, as opposed to expulsions, holding that "the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child."[80]

Next, the Court addressed the question of what minimal protections would satisfy the Due Process Clause in school suspension cases, identifying three key requirements: notice of the charges (either oral or written), an explanation of the evidence against the student, and an opportunity for the student to be heard.[81] Though the Court noted that these protections were "rudimentary," it nonetheless watered them down even further. With respect to notice, the Court held that "there need be no delay between the time 'notice' is given and the time of the hearing."[82] Indeed, the Court noted that in certain cases, notably those involving "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," the students could be immediately removed without prior

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76. Goss v. Lopez, 419 U.S. 565 (1975).
77. *Id.* at 568-69.
78. *Id.* at 573.
79. *Id.* at 573-74.
80. *Id.* at 576.
81. *Id.* at 581.
82. *Id.* at 582.

notice and that this would be consistent with due process standards.[83]

Regarding a student's opportunity to be heard, the *Goss* Court was clear that an informal hearing is sufficient for due process purposes, and that students were not entitled to "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident."[84] The Court reasoned that, given the frequency at which suspensions occur, requiring "even truncated trial-type procedures might well overwhelm administrative facilities" and would cost more than they would save in "educational effectiveness."[85]

Because the *Goss* decision sets a fairly low bar for preschools to meet, it is unlikely that parties will find success by challenging suspensions on procedural due process grounds. The *Goss* Court left open the possibility that expulsions or suspensions of longer than ten days "may require more formal procedures,"[86] but the Supreme Court has never revisited the issue. Lower courts have declined to enlarge any of the protections of *Goss*, holding that they "require no more process in the context of school suspensions of ten days or fewer than *Goss* demands."[87]

Of special note for challenges on behalf of preschool students, Courts have rejected the argument that the "notice" required under *Goss* must also be given to a parent when a student is very young and incapable of fully understanding the notice. In *S.G. ex rel. A.G. v. Sayreville Board of Education*, the Third Circuit held that a kindergarten student who was suspended for telling one of his friends "I'm going to shoot you" while playing guns at recess was capable of understanding the "notice" given to him before his suspension, which consisted of a conversation with his principal.[88] Ultimately, it is highly unlikely that parties wishing to challenge racially discriminatory preschool suspensions on procedural due process grounds will be successful unless the preschool has failed to comply with *Goss's* minimal and rudimentary requirements.

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83. *Id.* at 582-83.

84. *Id.* at 583.

85. *Id.*

86. *Id.* at 584.

87. Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 565 (6th Cir. 2011); *see also* C.B. by Breeding v. Driscoll, 82 F.3d 383, 386 (11th Cir. 1996) (noting that "once school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.").

88. S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 424 (3d Cir. 2003).

2. Substantive Due Process

Of course, "[t]he Due Process Clause guarantees more than fair process . . . [it] also provides heightened protection against government interference with certain fundamental rights and liberty interests."[89] The Supreme Court has recognized as fundamental, and thus given substantive due process protections, to rights such as the right to marry,[90] the right to have children,[91] and the right for married couples to use contraception.[92] The Supreme Court cautioned that it is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[93] While the Court has recognized that the right to direct the education and upbringing of one's children is a fundamental right,[94] it has held that education *itself* is not a fundamental right, and thus substantive due process challenges to preschool disciplinary actions are likely to fall flat.

In *San Antonio Independent School District v. Rodriguez*, the parents of Mexican American school children challenged Texas's system of school funding, which relied in part on local property taxation.[95] The district court found the finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, but the Supreme Court reversed that holding. In so doing, the Court held that education is not a fundamental right, as it is not explicitly protected under the Constitution and the Court saw no "basis for saying it is implicitly so protected."[96] Concluding that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," the *San Antonio* Court was not convinced by arguments that education is fundamental because it is essential to the exercise of other constitutionally protected rights such as voting or the exercise of First Amendment freedoms.[97] Because "the thrust of the Texas system [was] affirmative and reformatory"—it was implemented to help improve public education in the state, not to hurt it—it was to be "scrutinized under judicial

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89. Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).
90. Loving v. Virginia, 388 U.S. 1 (1967).
91. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
92. Griswold v. Connecticut, 381 U.S. 479 (1965).
93. Collins v. Harker Heights, 503 U.S. 115, 125 (1992).
94. Meyer v. Nebraska, 262 U.S. 390 (1923).
95. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4-5 (1973).
96. *Id.* at 35.
97. *Id.* at 33-35.

principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."[98]

Because education is not a fundamental right under the U.S. Constitution, challenges to its deprivation via suspension or expulsion will be upheld if they are "rationally related to a legitimate state interest."[99] In the context of school discipline, a substantive due process claim will succeed only in the "rare case" when there is "no 'rational relationship between the punishment and the offense.'"[100] As one court put it, substantive due process only protects against suspensions or expulsions that are "extraordinary departure[s] from established norms" and are "wholly arbitrary."[101] Courts will "uphold a school's decision to suspend a student in the face of a substantive due process challenge if the decision is not arbitrary, lacking a rational basis, or shocking to the conscience of federal judges."[102]

Courts have consistently denied substantive due process challenges to school disciplinary proceedings since the *San Antonio* decision. Even where courts have classified students' suspensions as "regrettable" and "overreactions," and posited that the school administrators "exercised questionable judgment," they have nonetheless held that the actions did not constitute a violation of the students' substantive due process rights.[103] In *Tun v. Whitticker*, a high school student was expelled after another student took a picture of him showering in the boys' locker room, as it was alleged that he violated a school rule that prohibited "[p]articipating in inappropriate sexual behavior including . . . public indecency on school property."[104] At the student's expulsion hearing, his attorney argued that he could not be expelled for violating the school rule since he had merely been "taking a shower in the boys' locker room."[105] He was expelled nonetheless, though the expulsion decision

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98. *Id.* at 39.

99. Nixon v. Hardin Cnty. Bd. of Educ., 988 F. Supp. 2d 826, 841 (W.D. Tenn. 2013) (citing Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 393 (6th Cir. 2005)) ("In the absence of a fundamental right, a plaintiff must show that the challenged school action was not 'rationally related to a legitimate state interest.'").

100. Brewer v. Austin Indep. Sch. Dist., 779 F.2d 260, 264 (5th Cir. 1985) (citation omitted).

101. Dunn v. Fairfield Cmty. High Sch. Dist. No. 225, 158 F.3d 962, 966 (7th Cir. 1998).

102. Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1200-01 (10th Cir. 2003).

103. Tun v. Whitticker, 398 F.3d 899, 904 (7th Cir. 2005).

104. *Id.* at 900-01.

105. *Id.* at 901.

was ultimately overturned and the student was able to return to school after missing a full six weeks of classes.[106] The Seventh Circuit rejected the student's argument that his substantive due process rights had been violated by his six week expulsion, noting that the scope of substantive due process is very limited and that "[c]ases abound in which the government action—though thoroughly disapproved of—was found not to shock the conscience."[107]

As the Supreme Court held in another school discipline case shortly after *San Antonio*, it is not "the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."[108] The Sixth Circuit did criticize zero tolerance policies and their lack of scienter requirements in a 2000 decision, holding that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest,"[109] but that case is a relative outlier (and the Fourth Circuit reached an opposite conclusion on the same issue less than a year later).[110]

Thus, substantive due process claims to racially disparate preschool suspensions or expulsions are unlikely to succeed, unless they raise to a level that courts find "conscience shocking." One may hypothesize that courts would be more sympathetic to three and four-year-olds, whose relative innocence as compared to high school students might make officials' actions seem more arbitrary or lacking in rational basis. However, courts have generally not been any more receptive to substantive due process challenges made by elementary school students than high school students, so the claim remains a difficult one for advocates to win with.[111]

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106. *Id.*

107. *Id.* at 902. The Court noted the student's procedural due process rights had been respected: "he had hearings, his attorney was present, and ultimately the discipline imposed on him was found to be improper and his record was cleared." *Id.*

108. Wood v. Strickland, 420 U.S. 308, 326 (1975).

109. Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000).

110. Ratner v. Loudon Cty. Pub. Sch., 16 F. App'x. 140,140 (4th Cir. 2001).

111. *See, e.g.*, Anthony v. Sch. Bd. of Iberia Parish, 692 F. Supp. 2d 612, 630 (W.D. La. 2010) (denying substantive due process challenge to the suspension of elementary school student for possessing white powdery substance, which was later confirmed to be crushed aspirin); Smith *ex rel.* Lanham v. Greene Cnty. Sch. Dist., 100 F. Supp. 2d 1354, 1367 (M.D. Ga. 2000) (granting summary judgment to Defendants on substantive due process claim of fifth grade student suspended for three days for, among other things, wearing shirt that said "kids have civil rights too" and "even adults lie").

B. Fourteenth Amendment Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits state actors from denying any person "the equal protection of the law."[112] When a policy is challenged as violating the Equal Protection Clause, courts will apply strict scrutiny when the policy explicitly classifies people on the basis of race (something any preschool discipline policy is highly unlikely to do) or when the policy is facially neutral but its application results in racially disproportionate outcomes.[113] The statistics in the CRDC and the Gilliam study appear to strongly support a theory of racially disparate impact in preschool suspension policies. However, a challenge under the Equal Protection Clause to these policies will nonetheless be difficult to maintain as the Supreme Court has consistently held that statistical evidence alone, absent discriminatory intent or purpose, is not enough.

In *Washington v. Davis*, the Supreme Court examined an Equal Protection challenge brought by African-Americans who had applied to be police officers in the District of Columbia.[114] The plaintiffs argued that a higher percentage of African-American applicants failed the required written personnel test than did white applicants, that the test had not been shown to reliably measure job performance, and that the test had led to a disproportionately white police force.[115] The Court rejected the claim, holding that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."[116] The Court held that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations."[117]

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112. U.S. CONST. amend. XIV § 1.

113. The seminal case establishing strict scrutiny for facially neutral laws is *Yick Wo v. Hopkins*. In that case, the Supreme Court invalidated a San Francisco ordinance banning certain laundries in wooden buildings, noting that all non-Asians who applied had received an exemption to the statute, but no Chinese launderers had been granted an exemption. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

114. Washington v. Davis, 426 U.S. 229 (1976).

115. *Id.* at 235.

116. *Id.* at 239.

117. *Id.* at 242.

Courts applying the *Washington* decision to claims that school disciplinary proceedings are racially biased have demanded more than statistical evidence and have looked for evidence of racially discriminatory intent or animus. In *Fuller v. Decatur Public School*, high school students suspended for their involvement in a fight at a high school football game argued that their two year expulsions were "racially motivated" and that their "District [ ] maintained a policy and practice of arbitrary and disparate expulsions with regard to African–American students."[118] During discovery, the school district released records showing that African-American students made up only 46-48% of the student body but represented 82% of the students who were expelled.[119] The Court acknowledged that these statistics "could lead a reasonable person to speculate that the School Board's expulsion action was based upon the race of the students."[120] However, in nonetheless rejecting the students' Equal Protection claim, the Court held that it could not "make its decision solely upon statistical speculation. The court's finding must be based upon the solid foundation of evidence and the law that applies to this case."[121] The Court concluded that in the absence of evidence that the suspensions were racially motivated the claim could not be sustained, as "the law is clear that a claim of racial discrimination and violation of equal protection cannot be based upon mere statistics standing alone."[122]

Other courts have used this same analysis in rejecting Equal Protection claims brought by suspended or expelled students of color, holding that "statistical proof that black students are disciplined more frequently and more severely than white and Mexican-American students has limited probative value."[123] In *Tasby v. Estes*, parents of African-American students attending public school in Dallas brought suit alleging that the school district's disciplinary policies and practices discriminated against their children.[124] The Court assumed *arguendo* that the plaintiffs' evidence reflected a statistically significant disparity between the frequency and severity of punishment given to African-American and white students, and also "recognize[d] that prior judicial determinations of racial

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118. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 78 F. Supp. 2d 812, 814, 823 (C.D. Ill. 2000) *aff'd sub nom.* Fuller *ex rel.* Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61, 251 F.3d 662 (7th Cir. 2001).

119. *Id.* at 824.

120. *Id.*

121. *Id.*

122. *Id.* at 825.

123. Tasby v. Estes, 643 F.2d 1103, 1108 (5th Cir. 1981).

124. *Id.* at 1104.

discrimination in the [Dallas school district's] student disciplinary policies and practices make this statistical evidence more persuasive."[125] But the Fifth Circuit still rejected the claim, holding that "[o]fficial conduct is not unconstitutional merely because it produces a disproportionately adverse effect upon a racial minority," and prior Supreme Court decisions had "reiterate[d] the basic equal protection principle that the uneven consequences of governmental action claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[126]

Other courts have joined *Fuller* in demanding that students bringing an Equal Protection challenge to discriminatory disciplinary policies show that white students were not disciplined for the same kinds of infractions.[127] While one district court in 1974 did find evidence of "institutional racism" based on the disproportionate number of African-American students being suspended and given corporal punishment within school district, that case was an outlier and also predated *Washington v. Davis*.[128] Accordingly, the CRDC data alone would not be enough to establish an Equal Protection claim on behalf of students of color who were suspended or expelled from preschool.

C. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance, including schools.[129] Section 601 of that Title provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI.[130] Section 602 authorizes federal agencies "to effectuate the provisions

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125. *Id.* at 1107.

126. *Id.* at 1107-08 (emphasis added).

127. *Id.* at 1108 ("[A]bsent a showing of arbitrary disciplinary practices, undeserved or unreasonable punishment of black students, or failure to discipline white students for similar misconduct, the plaintiffs have not satisfied their burden of proving that the disproportionate punishment of black students in the [school district] is the product of a racially discriminatory purpose."); *see also* Sweet v. Childs, 507 F.2d 675, 681 (5th Cir. 1975) ("There was no showing of arbitrary suspensions or expulsions of black students nor of a failure to suspend or expel white students for similar conduct.").

128. Hawkins v. Coleman, 376 F. Supp. 1330, 1330 (N.D. Tex. 1974).

129. 42 U.S.C. § 2000d *et seq.* (2012).

130. 42 U.S.C. § 2000d (2012).

of [§ 601] . . . by issuing rules, regulations, or orders of general applicability[.]"[131]

A 1974 Supreme Court decision, *Lau v. Nichols*, held that a disparate impact discrimination claim could be sustained under Title VI in a school context, even in the absence of evidence of intentional discrimination.[132] In that case, San Francisco's public schools' English only instruction policy was challenged by a group of non-English-speaking Chinese students.[133] The Court held that "merely . . . providing students with the same facilities, textbooks, teachers, and curriculum" was not enough to defend against a Title VI § 601 claim if students from a minority received fewer educational benefits than students from the majority and were denied "a meaningful opportunity to participate in the educational program."[134] Calling these the "earmarks of the discrimination banned" by Title VI, the Court found for the students.[135] Thus, Title VI at first blush seems a more promising vehicle for pursuing claims of discrimination in preschool discipline than equal protection or due process claims. However, subsequent Supreme Court case law has sharply curtailed the ability of private persons to pursue disparate impact claims under Title VI. Thus, advocates are unlikely to find success there. However, as discussed below, the possibility remains open that the Department of Education could take action.

1. Private litigation under Title VI

In *Alexander v. Sandoval*, a class of non-English speakers challenged Alabama's policy of only issuing driver's license examinations in English, arguing that this amounted to discrimination based on national origin in violation of Title VI.[136] In rejecting their claim, the Supreme Court held that there is no private right of action for disparate impact claims under Title VI.[137] "It is clear now that the disparate-impact regulations do not simply apply § 601 – since they indeed forbid conduct that §601 permits – and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations."[138]

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131. 42 U.S.C. § 2000d–1 (2012).
132. Lau v. Nichols, 414 U.S. 563 (1974).
133. *Id.* at 564.
134. *Id.* at 566, 568.
135. *Id.* at 568.
136. Alexander v. Sandoval, 532 U.S. 275, 279 (2001).
137. *Id.* at 293.
138. *Id.* at 285 (internal citations omitted).

Courts since *Sandoval* have rejected disparate impact claims under Title VI in school discipline challenges, requiring evidence of discriminatory motives on the part of school officials. In *Thompson v. Board of the Special School District 1*, the Eighth Circuit rejected a Title VI claim on behalf of an eighth grade student with a history of behavioral problems, including kicking, hitting and biting.[139] The student alleged that "the District discriminated against him because of his race in violation of Title VI of the 1964 Civil Rights Act and state law by denying him certain educational services and by improperly disciplining him[.]"[140] The Court disagreed, holding that "[t]o establish the elements of a prima facie case under Title VI, a complaining party must demonstrate that his/her race, color, or national origin *was the motive for* the discriminatory conduct."[141] The Court noted that Thompson had put forward no evidence that nonminority children with behavioral disorders were treated any differently than he was and that he presented no evidence that "race was the motivating factor in his suspensions."[142]

Even where students may seem to have powerful evidence that race played a role in their suspension or expulsions, if a school district can put forward a non-discriminatory reason for the discipline, the claim will fail unless the student can prove the offered reason is pretextual.[143] In *Griffin v. Crossett School District*, a fourteen-year-old African-American boy, Willie Griffin, challenged his expulsion for bringing a gun to school, noting that a Caucasian student in the same district had only been suspended for violating the same policy.[144] The district court rejected his Title VI claim, applying the burden-shifting framework of Title VII claims, which allows a school district to respond to a prima facie case of discrimination by "articulat[ing] a legitimate, non-discriminatory reason for the alleged discriminatory conduct."[145] The court accepted the District's explanation of the disparate treatment: that although both Willie and the Caucasian student were special needs students, only the Caucasian student's disability "impair[ed] his ability to understand the impact and consequence of his bringing a gun to school," and thus it was appropriate to only suspend that student

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139. Thompson v. Bd. of the Special Sch. Dis. No. 1, 144 F.3d 574, 574-76 (8th Cir. 1998).

140. *Id.* at 578.

141. *Id.* at 581 (emphasis added).

142. *Id.*

143. Griffin v. Crossett Sch. Dist., Inc., No. 07-CV-1015, 2008 WL 2669115, at *3 (W.D. Ark. July 1, 2008).

144. *Id.* at *3-4.

145. *Id.* at *3.

but to expel Willie in accordance with the school's zero tolerance policy.[146]

2. DOED claims under Title VI

As noted above, the *Sandoval* decision does leave open the possibility that the Department of Education could make a disparate impact claim under Title VI. "[P]rivate parties may file disparate impact complaints with the Department of Education, which has the power to investigate, review, and revoke federal funds pursuant to Title VI. Several civil rights organizations are actively pursuing that precise strategy right now."[147] In light of Secretary Duncan's strong statements of horror and outrage regarding the CRDC results[148] and also the remarks in the Joint Recommendations regarding preschool disciplinary practices as potentially violative federal law,[149] perhaps the Department will consider such action. The Department of Education under the Obama Administration has been more proactive than previous administrations when it comes to investigating claims of racial discrimination in school discipline. In fiscal years 2009 through 2012, the Department's Office for Civil Rights "launched 20 proactive investigations in schools with significant racial disparities in discipline based on data from the most recent CRDC."[150] While this at first blush seems to be a relatively small number of investigations, especially in light of the fact that during the same time period "OCR received more than 1,250 complaints . . . about possible civil rights violations involving school discipline systems," the number represents a marked increase over prior administrations.[151] For example, in fiscal year 2008, the OCR under the Bush Administration initiated *zero* Title VI discipline investigations in schools.[152]

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146. *Id.* at *4.

147. Zachary W. Best, *Derailing the Schoolhouse-to-Jailhouse Track: Title VI and A New Approach to Disparate Impact Analysis in Public Education*, 99 GEO. L.J. 1671, 1685 (2011).

148. *See* Press Release, *supra* note 6.

149. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 3 (stating that "if administered in a discriminatory manner, suspensions and expulsions of children may violate Federal civil rights laws.").

150. U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION 29 (2012), *available at* http://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf.

151. *Id.*

152. U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, ANNUAL REPORT TO CONGRESS OF THE OFFICE FOR CIVIL RIGHTS, FISCAL YEAR 2007-08, 13 (2007),

When the OCR investigates Title VI discipline cases, the agency can rely on the disparate treatment theory and is not bound by the requirement to show discriminatory intent that private litigants face.[153] In reporting on their successes in these investigations, the OCR mentions specifically the statistical underpinnings of their investigations, noting in one case "school administrators used their discretionary authority to impose harsher punishments than the student code normally called for on African-American students as compared with similarly situated white students, with a frequency that statistical analysis showed was virtually impossible to have occurred by chance."[154] The Office does seem sensitive to racially disparate discipline practices that impact the youngest of our nation's students, and included in its report an investigation involving "an African-American *kindergartner* [who] was given a five-day suspension for setting off a fire alarm, while a white ninth-grader in the same district was suspended for one day for the same offense."[155] While there is reason to be hopeful that the OCR will launch an investigation, absent action from the Department of Education, Title VI does not appear to be a promising avenue for addressing racial disparities in preschool suspensions and expulsions.

D. Sections 1981 and 1983

The Civil Rights Act of 1866 was enacted after the Civil War to help implement the Thirteenth Amendment, and is the precursor to Sections 1981 and 1983.[156] It provides in relevant part that "all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . ., shall have the same right, in every State and Territory in the United States, to make and enforce contracts, . . ., and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[157]

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available at www.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf.

153. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., COORDINATION AND REVIEW SECTION INVESTIGATION PROCEDURES MANUAL FOR THE INVESTIGATION AND RESOLUTION OF COMPLAINTS ALLEGING VIOLATIONS OF TITLE VI AND OTHER NONDISCRIMINATION STATUTES (Sept. 1998).

154. U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION, *supra* note 150, at 30.

155. *Id.*

156. Mahone v. Waddle, 564 F.2d 1018, 1030 (3rd Cir. 1977).

157. Act of April 9, 1866, ch. 31, 14 Stat. 27 (reenacted by Enforcement Act of

Section 1981 prohibits discrimination on the basis of race in the right to engage in contract and "to the full and equal benefit of all laws and proceedings[.]"[158] Like Section 1981, Section 1983 was passed after the Civil War in order to address racially discriminatory policies.[159] It provides monetary damages for civil rights violations.[160]

It is worth noting that, unlike several of the preceding causes of action this Article has examined, Section 1981 has been construed as reaching private conduct, not just government action.[161] Indeed, the seminal case holding that Section 1981 reaches private action was a school case brought on behalf of African-American children denied admission to private schools in Virginia, including a nursery school.[162] Thus, it would seem to offer a unique opportunity to address racially disparate discipline rates in private preschools, as one study found that expulsion rates were lowest in public preschools and highest in faith-affiliated centers and for-profit childcare.[163] Unfortunately, however, neither Section 1981 nor Section 1983 is likely to be a successful means of challenging racially disparate preschool expulsions or suspensions, as once again Courts have held that claims falling under them require discriminatory intent.[164]

In *Parker v. Trinity High School*, the court rejected a request for a preliminary injunction by two African-American high school students, sisters who were expelled for fighting.[165] They alleged violations of Section 1981, including that "white students have engaged in the same type of conduct, and more serious conduct, without being expelled."[166] The court first held that "[o]nly intentional, purposeful discrimination constitutes a violation of Section 1981," and that "Section 1981 does not reach conduct which merely results in a disparate impact."[167] While the court

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1870, ch. 114, § 18, 16 Stat. 140, 144 (1870) (codified as amended at 42 U.S.C. §§ 1981-1983 (2012)).

158. 42 U.S.C. § 1981 (2012).

159. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989).

160. 42 U.S.C. § 1983 (2012).

161. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (concluding that "the portion of § 1 of the 1866 Act presently codified as 42 U.S.C. § 1981 likewise reaches purely private acts of discrimination").

162. *Id.* at 165.

163. PREKINDERGARTENERS LEFT BEHIND, *supra* note 14, at 6.

164. Parker v. Trinity High Sch., 823 F. Supp. 511, 519 (N.D. Ill. 1993).

165. *Id.*

166. *Id.* at 512.

167. *Id.* at 519.

acknowledged that "[d]iscriminatory intent or motive may . . . be inferred from statistical or other evidence showing that minority students are disciplined more severely than white students for similar conduct," it rejected plaintiffs' argument that evidence from a former school administrator established that "discipline, especially expulsion, is disproportionately meted out to African–American students," noting that the data was imprecise.[168] The Court concluded that "[a]bsent some evidence of racial motivation, the public interest is not served by this court's interference with [the school's] disciplinary decision."[169]

In *Clark v. Board of Education of Franklin Township*, the parents of Dayshon Clark, an African-American preschool student, brought suit under Sections 1981 and 1983 (as well as various state law claims) alleging racial discrimination in their son's preschool suspensions.[170] In granting the defendants' summary judgment motion with respect to the Section 1981 claims, the court noted that "[a] showing of disparate impact is insufficient because § 1981 only provides a cause of action for intentional discrimination."[171] While the court denied the summary judgment motion with respect to the Section 1983 claims against the Vice Principal, it did so in part because of conflicting testimony that the vice principal had used a racial epithet when referring to Dayshon.[172] The court still required evidence of intent, noting that "[t]o bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiffs must prove the existence of purposeful discrimination."[173] Because very few cases are likely to involve evidence of purposeful discrimination as powerful as witness testimony of school administrators using racial epithets regarding preschoolers, Section 1981 and 1983 claims alleging racial discrimination in preschool discipline are unlikely to succeed.

Indeed, the most famous articulation of the Supreme Court's reluctance to involve itself in school discipline cases came in the context of a Section 1983 case. In *Wood v. Strickland*, high school students who had been expelled for spiking the punch served at a school meeting brought a Section 1983 suit against school board members.[174] After a mistrial where the jury was unable to reach a

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168. *Id.*

169. *Id.* at 521.

170. Clark v. Bd. of Educ., No. 06-2736 (FLW), 2009 WL 1586940 (D. N.J. June 4, 2009).

171. *Id.* at *6.

172. *Id.* at *10-11.

173. *Id.* at *6.

174. Wood v. Strickland, 420 U.S. 308, 310 (1975).

verdict, the district court ruled in favor of the Board members, holding that they had not acted with "malice" in expelling the students.[175] The court of appeals reversed, holding that malice was not a requirement for the recovery of damages, and that the decision to expel had been made on the basis of "no evidence."[176] In reversing the court of appeals, and refusing to reverse the expulsions, the Supreme Court said that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion . . . [t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees."[177]

III. POLICY-BASED PROPOSAL

As the preceding section makes clear, any legal challenges to racially disparate preschool suspension and expulsion rates will face sharp uphill battles. For that reason alone, it is worthwhile to explore non-legal, policy-based proposals as an alternative means of creating change. Further, "[i]mpact litigation can be costly, time-consuming, and risky."[178] As one scholar put it, even when parties win in court, they may "lose in life" as the court-ordered remedy "might never be effectively implemented or enforced, and the aggrieved party, who prevailed in court, might continue to suffer harm."[179] Therefore, it is crucial for several reasons that any movement to end racially disparate preschool disciplinary practices explore non-legal or extralegal remedies as well as redress in the courts.

Such exploration is also in keeping with a growing trend away from pursuing social justice primarily through the courts (so called "public law litigation"[180] that is defined by the *Brown v. Board* case)

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175. *Id.* at 313-14.

176. *Id.* at 314, 323.

177. *Id.* at 326.

178. Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role As Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127, 137 (2012).

179. Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943 (2011).

180. *See* Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 959-60 (2014) (describing public law litigation as

and an increasing reliance on community-generated, internal reform initiatives. "Today, constitutionally grounded institutional reforms may be most effectively pursued through a campaign for internally generated and voluntarily adopted alteration rather than relying exclusively or predominantly on externally imposed change reminiscent of the heyday of institutional reform litigation and structural injunctions."[181] Too often, federal institutional reform litigation as it applied to schools led to "a systemic, rather than an individual, approach to remediation" and the result was at times the subversion of individual interests and rights.[182] While traditional public law litigation often resulted in the "judicial takeover" of schools, this new model relies on stakeholder negotiation and the "adoption of performance standards grounded in the best available professional expertise[.]"[183] This "bottom-up, non-court-centric legal reform has increasingly been used to remedy deficiencies in school systems' performance, deficiencies that had not been remedied effectively by prior forms of institutional reform litigation."[184] Critics of traditional public law litigation have pointed out that courts have only been successful in creating the changes that litigants seek when they have the cooperation of both the executive and legislative branches.[185] Bearing this in mind, the Joint Recommendations from the Department of Education and Department of Health and Human Services,[186] while not exactly a "bottom-up" approach, may

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litigation that begins with a claim "brought on behalf of a representative individual or a group of similarly situated individuals—for example minority students," this "claim is also brought against an institutional defendant, which denotes a defendant that is a government institution, such as a school district," and "[m]ost importantly, the remedy sought is an institutional one—rather than compensation to a particular harmed plaintiff, the suit seeks a restructuring of the institution itself to end an ongoing harm, as well as to eliminate the vestiges of prior harms.").

181. Josie Foehrenbach Brown, *Developmental Due Process: Waging A Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 988 (2009).

182. Bauries, *supra* note 180, at 952.

183. Brown, *supra* note 181, at 988.

184. *Id.* at 989.

185. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70-71 (2d ed. 2008) (noting that "before Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing."). Not all commentators agree, of course, about the value (or lack thereof) of public law litigation for creating social change. For the seminal work supporting public law litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

186. *See generally* DOED AND HHS POLICY STATEMENT, *supra* note 25.

nonetheless provide an effective framework for advocates to use in creating change.

As those Joint Recommendations and existing research make clear, the most promising best practices for reducing preschool suspensions and expulsions are preventative in nature, and focus on supporting teachers and students through (1) access to mental health consultants for preschool teachers, students and their families, (2) smaller teacher-student ratios, and (3) improved teacher job conditions.[187] These policies are in line with the American Psychological Association's approach to student discipline, an approach that "is primarily preventive, addressing behavioral issues in students before they start to cause problems."[188] While these policies are not directly aimed at addressing the racial disparity that exists in preschool discipline, they are aimed at reducing and eliminating expulsion and suspension from preschools, which will have the secondary effect of addressing the racial disparity.

A. Access to Early Childhood Mental Health Consultation

Walter Gilliam's research at Yale has identified several best practices that appear to reduce significantly preschool suspensions and expulsion rates within a district. One of Dr. Gilliam's key findings is that teacher access to classroom-based mental health consultation was associated with a significant decrease in expulsion rates.[189] "[T]he lowest rates of expulsion were reported by teachers that had an ongoing, regular relationship with a mental health consultant – either because the teacher and consultant shared a building or because the consultant paid regular visits to the classroom at least monthly."[190] The Joint Recommendations from the Department of Education and Department of Health and Human Services also endorse this approach, saying it is "essential" that preschool teachers "have access to additional support from specialists or consultants, such as early childhood mental health consultants, behavioral specialists, school counselors, or special educators."[191] In its May 2014 Report to President Obama, the My

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187. *Id.*

188. Melina A. Healey, *Montana's Rural Version of the School-to-Prison Pipeline: School Discipline and Tragedy on American Indian Reservations*, 75 MONT. L. REV. 15, 53 (2014).

189. PREKINDERGARTENERS LEFT BEHIND, *supra* note 14, at 12.

190. *Id.*

191. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 7.

Brother's Keeper Task Force, an initiative launched by President Obama to address opportunity gaps faced by boys of color, recommended federal and state support for mental health consultants in early childhood settings as one way of eliminating suspensions and expulsions in preschool and other early-learning settings.[192] Despite the agreement that this access is critical, and despite the fact that "[a]ssistance with children's challenging behaviors is the greatest need identified by preschool administrators and educators,"[193] as of 2008, only 23% of preschool teachers reported having such regular access to a mental health consultant.[194]

Early childhood mental health consultation is a collaborative model and its successful implementation involves several relevant stakeholders. The practice includes "skilled observations, individualized strategies, and early identification of children who are at risk for mental health challenges."[195] It "aims to build the capacity of staff, families, programs and systems to prevent, identify, treat, and reduce the impact of mental health problems among children from birth to 6 years old and their families."[196] The inclusion of the child's family members in this practice is key; "to be effective, mental health consultants need to engage the families of young children with challenging behaviors in a partnership" with the preschool setting.[197]

> Such support would provide assistance in conducting more sophisticated evaluations; identifying additional services if needed for children, families, or staff; understanding and responding appropriately to other behavioral determinants in the child's life, such as exposure to traumatic events or stressors; developing evidence-based individualized behavior support plans for children who require them; and building greater capacity in teachers and staff to implement those behavior support plans and engage in self-reflective practice that can help prevent and eliminate potential biases in practice.

192. MY BROTHER'S KEEPER TASK FORCE REPORT TO THE PRESIDENT, May 2014, Recommendation 5.1.3, 27, *available at* http://mbk.ed.gov/wp-content/uploads/pdfs/MBK-Task-Force-Report.pdf.

193. Perry et al., *supra* note 23, at 5.

194. WALTER GILLIAM, IMPLEMENTING POLICIES TO REDUCE THE LIKELIHOOD OF PRESCHOOL EXPULSION, FOUND. FOR CHILD DEV. POLICY BRIEF NO. 7, Jan. 2008 [hereinafter *Implementing Policies*], at 6.

195. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 12.

196. Perry et al., *supra* note 23, at 5.

197. *Id.* at 10 (noting that in many cases communication was lacking and "[f]amilies often felt surprised by the news that their child was being asked to leave" the preschool program).

The mental health consultant can work with the preschool teacher in a way that targets a specific child and his or her family ("child and family-focused consultation"), or that focuses on an entire classroom ("program-focused consultation").[198] In either model, preschool teachers receive one-on-one coaching and mentoring from a professional consultant with mental health expertise, with the goal of building the skills and capacity of the preschool teacher.[199] Most programs range from three to six months, with visits between the consultant and the preschool teacher averaging once or twice a week, and "follow up" sessions recommended as needed.[200]

1. Results from Selected Existing Programs

The Joint Recommendations from the Department of Education and Department of Health and Human Services state that "[e]mpirical evidence has found that [early childhood mental health consultation] is effective in increasing children's social skills, reducing children's challenging behavior, [and] preventing preschool suspensions and expulsions[.]"[201] Two reviews of more than 30 evaluations of the practice conducted across the country concluded that "these programs can lead to reduced expulsions and improvements in children's behaviors."[202] Dr. Gilliam's own studies of Connecticut's Early Childhood Consultation Partnership found that preschools that received the services demonstrated statistically significant decreased in teacher-rated oppositional behavior.[203]

Michigan's Department of Community Health has implemented an early childhood mental health consultation approach to reducing preschool expulsions for over a decade via its Child Care Expulsion Prevention Program ("CCEPP"), and reports that "[t]hese services have been found to be effective in supporting young children at risk of expulsion to stay in their care setting successfully and to help teacher's [sic] and families to foster social and emotional growth of all young children within their care."[204] While an interdisciplinary

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198. *Id.* at 5.

199. *Id.* at 5, 9.

200. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 12.

201. *Id.*

202. Perry et al., *supra* note 23, at 5.

203. William Gilliam, *Early Childhood Consultation Partnership: Results of a Random-controlled Evaluation* 3, May 2007, *available at* http://www.chdi.org/files/3814/1202/7645/evaluation_of_cts_early_childhood_consultation_partnership.pdf.

204. MICHIGAN DEP. HEALTH & HUMAN RES., REDUCING THE EXPULSION OF CHILDREN FROM CHILDCARE: CHILD CARE EXPULSION PREVENTION (CCEP) PROGRAM,

research team from Michigan State University concluded that there were no differences in expulsion rates between children receiving CCEPP services and those in a control group, the researchers noted their "strong concerns about the validity of the comparison data for assessing differences in retention and removal" and urged that future studies "address those methodological weaknesses."[205]

Day Care Plus, "a collaborative effort of the Cuyahoga County Mental Health Board, a children's mental health agency, and a child care resource and referral organization in Cleveland, Ohio," is designed to "improve the social, behavioral, and emotional functioning of children in child care at risk, as well as to increase the competencies of the parents and child care staff."[206] The program provides mental health consultation, training, and crisis intervention services to child-care staff, and also provides parents with intervention strategies to use at home.[207] A preliminary research study indicated reduced expulsions and high levels of participation.[208]

Together for Kids, "a coalition of over 30 professionals from early childhood education, health care, child welfare, and social service agencies in Central Massachusetts," has been in operation since 2002 to "respond to the rising incidence of young children exhibiting challenging behaviors in preschool settings."[209] The program includes 13 consultants, all of whom have master's degrees in psychology or social work and experience in a clinical setting working with children and families, and each of whom spends 16-20 hours per week providing consultation services.[210] The results of the program have been impressive: "Suspension rates dropped

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http://www.michigan.gov/mdch/0,4612,7-132-2941_4868_7145-14785--,00.html (last visited Dec. 15, 2015).

205. Laure A. Van Egeren, et al., *An Interdisciplinary Evaluation Report of Michigan's Childcare Expulsion Prevention Initiative*, March 2011, at 9, *available at* http://cerc.msu.edu/documents/FINAL_COMPLETE_CCEP_REPORT_V2_2011-03-16.pdf.

206. Elena Cohen, & Roxanne Kaufmann, *Early Childhood Mental Health Consultation: Promotion of Mental Health and Prevention of Mental and Behavioral Disorders, 2005 Series Volume 1,* WASHINGTON, DC: SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., at 37, *available at* http://store.samhsa.gov/shin/content/SVP05-0151/SVP05-0151.pdf.

207. *Id.*

208. *Id.* at 39.

209. Frances Duran et al., *What Works? A Study of Effective Early Childhood Mental Health Consultation Programs,* GEORGETOWN UNIVERSITY CENTER FOR CHILD AND HUMAN DEVELOPMENT, August 2009, at 182, *available at* http://gucchdtacenter.georgetown.edu/publications/ECMHCStudy_Report.pdf.

210. *Id.* at 39-40.

drastically, and the expulsion of children from preschools was all but eliminated (less than 1%)."[211]

2. Barriers to Implementation

One barrier to its implementation is the lack of professionals with training in infant and early childhood mental health, which is why the Joint Recommendations from the Department of Education and Department of Health and Human Services recommend that states "invest[] in endorsements that recognize a set of knowledge, skills and competencies" in early childhood mental health.[212] Another obvious barrier to nationwide implementation of early childhood mental health consultants for preschool teachers is cost. Ohio's "Day Care Plus" program, discussed above, costs approximately $20,000 to $25,000 per center for one year.[213] Massachusetts' Together for Kids program had an annual program budget in fiscal year 2009 of $861,343.[214] Because most states provide funding for preschool students at well below the levels they fund K-12 students (for example in California in 2005, the average funding for preschool students was about $3,100 per pupil, compared with $6,000 for K-12 students),[215] paying for these programs will require substantial assistance.

In December of 2014, the White House announced that the Department of Health and Human Services would be "dedicat[ing] $4 million toward early childhood mental health consultation services to prevent th[e] troubling practice [of expulsion and suspensions of preschool students]."[216] This amount is no doubt inadequate to address the problem meaningfully on a national scale. But it is an important step in the right direction, and acknowledges that these programs are an important part of the solution.

The Joint Recommendations from the Department of Education and Department of Health and Human Services also encourage states to think creatively when it comes to funding to improve access

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211. *Id.* at 40.

212. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 10.

213. Cohen & Kaufmann, *supra* note 206, at 37-38 ("This cost includes the consultant fee, as well as money for other services, such as transportation and resources for families.").

214. Duran et al., *supra* note 209, at 41.

215. Rivera, *supra* note 58.

216. *Fact Sheet, Invest in US: The White House Summit on Early Childhood Education*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY, Dec. 10, 2014, http://www.whitehouse.gov/the-press-office/2014/12/10/fact-sheet-invest-us-white-house-summit-early-childhood-education.

to this consultation for preschool teachers. "States can leverage Federal, State, and private funding to implement statewide early childhood mental health consultation systems so that all early learning programs have access to a knowledgeable early childhood mental health consultant."[217] The Joint Recommendations also include an appendix with resources to aid in the implementation of early childhood mental health consultant programs.[218] Given the promising research results showing early childhood mental health consultation can have profound impacts on preschool suspension and expulsion rates, more funding should be invested in growing these programs.

B. Lower Student-Teacher Ratios

Dr. Gilliam's research has also found that a higher number of children per teacher in preschool classrooms is predictive of increased expulsion rates. Where there were fewer than eight children per adult in the class, 7.7% of preschool teachers reported an expulsion, as opposed to 12.7% of teachers with classes of twelve or more children per adult.[219] Dr. Gilliam endorses the National Association for the Education of Young Children ("NAEYC") recommendation that ratios be no greater than ten preschoolers per teacher or assistant teacher in the classroom, and preferably less.[220] The Joint Policy Statement recommends that preschool programs follow the group size and child/adult ratios provided by the National Resource Center for Health and Safety in Child Care and Early Education,[221] which recommends that child care centers have a maximum child to staff ratio of 7:1 for three-year-olds (with a maximum group size of 14) and a maximum child to staff ration of 8:1 for four-year-olds (with a maximum group size of 16).[222] This recommendation based on age is especially interesting in light of

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217. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 10.

218. *See id.* at 12, App. 1.

219. *Implementing Policies*, *supra* note 194, at 3.

220. *Id.* at 7.

221. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 11.

222. NAT'L RES. CTR. HEALTH& SAFETY IN CHILD CARE & EARLY EDUCATION, *Stepping Stones to Caring for Our Children: National Health and Safety Performance Standards; guidelines for Early Care and Education Programs* 2, (2013), *available at* http://nrckids.org/default/assets/File/Products/Stepping%20Stones/Stepping%20Stones%203%20%20v5.pdf. While these recommendations include a maximum group size, Gilliam's studies have concluded that lower teacher-student ratios are more important than overall classroom group size. *Implementing Policies*, *supra* note 194, at 3.

Gilliam research establishing that older preschoolers are expelled at a higher rate relative to younger preschoolers.[223]

In contrast to these recommendations, some states such as Texas currently have *no* limit on the size of a prekindergarten class or student-teacher ratio, though the Texas Education Agency recommends that prekindergarten programs not exceed the 22:1 ratio required for elementary schools.[224] Nationwide surveys indicate that few states have adopted ratio standards as recommended by professional organizations and that average group sizes and ratios exceed recommended standards.[225] Again, cost may well be a barrier to implementation of this recommendation, as smaller class ratios obviously require more personnel. One study found that decreasing the average teacher-to-child ratio by just one student, for example from 11:1 to 10:1, was associated with increased costs of roughly 4.5%.[226]

C. Improved Teacher Job Conditions

"Teaching young children, especially those with challenging behaviors, can be a very stressful job."[227] Preschool teacher stress has been shown to be correlated with higher expulsion rates.[228] Gilliam's study concluded that preschool teachers' "self-reported job stress . . . was related significantly to the likelihood of expelling, and contributed to the prediction of expulsion even when class setting, size and student age were controlled."[229] Amongst preschool teachers who reported a high level of job stress, 14.3% of them had expelled a student within the past year, compared to only 4.9% of preschool teachers who reported a low level of job stress.[230] A full 80% of

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223. PREKINDERGARTENERS LEFT BEHIND, *supra* note 14, at 6. Four-year-olds were expelled at a rate about 50% greater than two- and three-year-olds, and five-year -olds were twice as likely as four year olds to be expelled. *Id.*

224. *Top 10 Frequently Asked Questions on Early Childhood in Texas*, TEXAS EDUCATION AGENCY, *available at* http://tea.texas.gov/ece/faq.aspx (last visited Dec. 15, 2015).

225. Deborah Lowe Vandell and Barbara Wolfe, *Child Care Quality: Does it Matter and Does it Need to be Improved?*, INSTITUTE FOR RESEARCH ON POVERTY, SPECIAL REPORT No. 78, Nov. 2000, at 99, http://www.irp.wisc.edu/publications/sr/pdfs/sr78.pdf.

226. *Id.* at 94.

227. *Implementing Policies*, *supra* note 194, at 8.

228. *Id.*

229. PREKINDERGARTENERS LEFT BEHIND, *supra* note 14, at 2.

230. *Implementing Policies*, *supra* note194, at 3.

preschool teachers report that problem behavior negatively affects their job satisfaction.[231]

Of course, it is possible that this is a "chicken-and-egg" problem, that it is not that teacher stress causes more expulsions but that the behavior that leads to expulsions causes teacher stress. In other words, that teachers who have more students at risk for suspension or expulsion because of challenging behaviors are likely more stressed out on the job by virtue of dealing with the behavior. But it does appear that teacher reported levels of stress can be independent of the behaviors of their students, as preschool teachers who "report elevated symptoms of depression are somewhat more likely to engage in child care practices that are rated as less sensitive to children's needs, more intrusive and more negative, as well as lead classrooms that spend larger amounts of unstructured time."[232] Another study echoed the idea that unstructured time can cause both stress to teachers and behavior problems in children, noting that when the "physical environment of the program was too open, unclearly defined, or lacked structure," children were more likely to exit the program (either be expelled or otherwise choose to leave) due to challenging behaviors.[233]

The Joint Recommendations suggest that preschool programs "promote teacher health and wellness and ensure that teachers work reasonable hours with breaks,"[234] which echoes Gilliam's recommendation.[235] As he notes, preschool teachers are typically with children for eight or more hours per day, and, "[l]ike truck drivers and hospital staff, . . . need reasonable hours and regular breaks in order to do their best work."[236] Limiting teacher-student ratios will presumably help reduce teacher job stress, as will access to early childhood mental health consultation.

The Joint Recommendations also recommend that states focus on entry-level credentials for preschool teachers, including practice-based professional development that is focused on "enhancing teacher and provider skills in promoting children's social-emotional and behavioral health and capacity to identify and eliminate biases."[237] However, Gilliam's study found that "neither teacher educational level, early educational credentials, nor years of experience teaching young children are reliable predictors of

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231. Perry et al., *supra* note 23, at 5.
232. *Implementing Policies*, *supra* note194, at 5.
233. Perry et al., *supra* note 23, at 7.
234. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 7.
235. *Implementing Policies*, *supra* note 194, at 7.
236. *Id.*
237. DOED AND HHS POLICY STATEMENT, *supra* note 25, at 10.

expulsion in either child care or [preschool programs]."[238] In any event, improving preschool teacher salaries, which would seem to be a necessary corollary to increasing entry level credentials, might also improve job conditions for preschool teachers. According to the Bureau of Labor Statistics, the median pay for a preschool teacher in 2012 was $27,130 per year, or $13.04 per hour, and that most of these teachers held at least associate's degrees.[239] In light of the fact that the median salary for full time wage and salary workers with an associate's degree in 2012 was $857 per week,[240] or approximately $44,000 per year, the pay is not especially competitive. As more is being asked of preschool teachers with regards to responding to the challenging behaviors of their students, serious consideration needs to be given to recognizing the value of their work through proper compensation.

CONCLUSION

I passed by the school where I studied as a boy
and said in my heart: here I learned certain things
and didn't learn others.
-From "The School Where I Studied" by Yehuda Amichai

The news that three- and four-year-old children are being expelled from preschool programs in racially disproportionate numbers is startling to even the most cynical among us. It is difficult to fathom what a three-year-old could do that would merit expulsion in the first place, let alone how our nation's preschools could be systematically singling out three- and four-year-old African-American boys for this punishment. The CRDC findings and the Gilliam studies have shone a light on a dark practice that must be remedied. The disruption to the educations, lives, and futures of our children caused by preschool expulsions, and the psychological damage caused by them, demand that we act.

However, as I have tried to show in this Article, our federal court system is unlikely to be the most effective venue for such action, unless litigation is initiated by the Department of Education. Because it is so difficult to establish racially discriminatory intent on

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238. *Implementing Policies*, *supra* note 194, at 4.

239. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook: Preschool Teachers*, http://www.bls.gov/ooh/education-training-and-library/preschool-teachers.htm (last visited Dec. 15, 2015).

240. Bureau of Labor Statistics, U.S. Department of Labor, *Highlights of Women's Earnings in 2012*, *Report 1045*, Oct. 2013, at 9, *available at* http://www.bls.gov/cps/cpswom2012.pdf.

the part of teachers and administrators (hopefully because that intent does not consciously exist), most federal claims will fall flat. Although the statistical evidence that these disciplinary practices are falling unfairly on African-American boys is fairly staggering, the disparate impact claims that these statistics would support are unlikely to be sustained.

Thus, we must instead consider policy-based approaches to addressing the issue of racially disparate preschool discipline rates. The Department of Education should take the lead, and their Joint Policy Statement and remarks from the Secretary are encouraging. But if they are to be effective, the recommendations can neither be toothless tigers nor unfunded mandates. There need to be consequences for preschools that fail to address their disciplinary practices, but there also needs to be support, including financial support, for preschools and states that make the necessary changes. The stakes for all of our children are entirely too high to do nothing.