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THE CHALLENGE OF CHANGE:

OVERCOMING STRUCTURAL IMPEDIMENTS TO CHILDREN OF COLOR RECEIVING AN ADEQUATE EDUCATION

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I. INTRODUCTION

Dr. Martin Luther King Jr. once remarked, "[O]ur very survival depends on our ability to stay awake, to adjust to new ideas, to remain vigilant and to face the challenge of change."[1] This Note examines the structural impediments to children of color receiving an adequate education by first reviewing the history of both educational reform and the federal right to education in America. Part II will discuss the major structural barriers faced by children of color. Part III will propose some solutions to overcoming these barriers. Finally, Part IV discusses the roles that laws can play in supporting adequate education for children of color.

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[1] Martin Luther King Jr., *Remaining Awake Through A Revolution,* INVISIBLE CHILDREN, https://invisiblechildren.com/blog/2013/01/21/mlk-remaining-awake-through-a-revolution/ (last visited Nov. 20, 2020).

II. A HISTORICAL OVERVIEW OF EDUCATION REFORM IN THE UNITED STATES

General education reform has had three major iterations: racial desegregation, school finance, and right-to-education.[2] Section A of this paper reflects on racial desegregation through the lens of *Brown v. Board of Education*, as an early educational reform movement. Section B includes *the San Antonio Independent School District v. Rodriguez* and *Serrano v. Priest* in considering the next reform, the school-finance movement. Section C considers the most recent reform, a fundamental right to education through *Plyler v. Doe.*

A. THE RACIAL DESEGREGATION MOVEMENT

The first wave of education reform, racial desegregation, was epitomized in *Brown v. Board of Education*.[3] There, school children from four different states (Kansas, South Carolina, Virginia, and Delaware) alleged that segregation was depriving them of equal protection under the laws of the Fourteenth Amendment.[4] These segregation practices were a result of the "separate but equal" doctrine established by the Court in *Plessy v. Ferguson*.[5] "Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be[sic] separate."[6] The plaintiffs from Kansas, South Carolina, and Virginia contended that their deprivation of equal protection of the laws was a result of the inherent and uncorrectable inequities of public schools.[7]

Finding that segregation in public education is the denial of equal protection of the laws, the *Brown* Court concluded that the doctrine of separate but equal has "no

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[2] Anna Williams Shavers, *Using International Human Rights Law in School Finance Litigation to Establish Education as a Fundamental Right*, 27 KAN J.L. & PUB. POL'Y 457, 459-68 (2018).
[3] *Id.* at 461; Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[4] *Brown*, 347 U.S. at 486, 488.
[5] *Id.* at 488; Plessy v. Ferguson, 163 U.S. 537 (1896).
[6] *Brown*, 347 U.S. at 488.
[7] *Id.*

place" in the field of public education.[8] Also, describing education as

> [p]erhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. These days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[9]

Although *Brown* promised the opportunity of equal education, it did not address mechanisms for assessing whether equal opportunity had been achieved once the de Jure segregation was overcome.[10] These more pragmatic issues were addressed in the second wave of reform, school finance(which sought to change the systems established to fund public schools and the resulting funding inequalities).[11]

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[8] *Id.* at 495.
[9] *Id.* at 493.
[10] Shavers, *supra* note 2, at 462; *Id.* at 492-93 (overturning the prevailing "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537).
[11] Shavers, *supra* note 2, at 467.

B. THE SCHOOL-FINANCE MOVEMENT

The school-finance approach to education reform[12] is well demonstrated in *San Antonio Independent School District v. Rodriguez* and *Serrano v. Priest*. *Rodriguez* was filed in Texas Federal court in 1968 by parents on behalf of Mexican-American children who lived below the poverty line and resided in school districts with low property taxes.[13] The *Rodriguez* Court found that property and wealth distribution issues were not substantial because, prior to this case, Texas was considered a rural state with a relatively even distribution of wealth and population.[14] The Court explained,

> Sizable differences in the value of the assessable property between local school districts became increasingly evident as the State became more industrialized and rural-to-urban population shifts became more pronounced. The location of the commercial and industrial property began to play a significant role in determining the number of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.[15]

The plaintiffs, under the Equal Protection Clause, claimed an established right to substantially equal funding for all school districts within the state,[16] further asserting that poor students living in districts with a low property tax base (the assessed valuation of real property within its borders),[17] were being denied an equal education opportunity

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[12] *Id.*; Comm. for Educ. Equal. v. State, 294 S.W.3d 477, 499 (Mo. 2009).
[13] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4 (1973).
[14] *Id.* at 7.
[15] *Id.* at 8.
[16] *Id.* at 6; Shavers, *supra* note 2, at 463.
[17] *Rodriguez*, 411 U.S. at 46.

due to the state's unfair finance systems.[18] The Court held that education was not a right, implicitly or explicitly, in the text of the Constitution and that strict scrutiny was not required in this instance because there was no "suspect class or fundamental right."[19]

The pursuit of school equality through education financing continued in the 1968 case of *Serrano v. Priest*.[20] There, plaintiffs brought a class action claim in California state court on behalf of California students.[21] Because the public school financing system was primarily based on wealth generated from local property taxes, plaintiffs claimed that the system was discriminatory and violated the constitution.[22] The Supreme Court held that education was a fundamental interest and agreed with plaintiffs that the school finance system "fails to meet the requirements of the [E]qual [P]rotection [C]lause of the Fourteenth Amendment[.]"[23]

C. A FUNDAMENTAL RIGHT TO EDUCATION

Finally, *Plyler v. Doe* illustrates the pursuit of a fundamental right to education.[24] In 1977, plaintiffs sought for undocumented Mexican school-aged children to have the right to the same free public education granted to children who are citizens or lawful residents of the United States.[25] Although the Court noted that education is not a right specifically granted by the Constitution, or a fundamental constitutional right,[26] it held that denying free public education to the children of illegal immigrants was a violation under the Equal Protection Clause.[27] The *Plyler* Court broadened the scope of the Equal Protection Clause of

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[18] *Id*. at 4. Shavers, *supra* note 2, at 463.
[19] *Rodriguez*, 411 U.S. at 35; Shavers, *supra* note 2, at 464.
[20] Serrano v. Priest, 5 Cal. 3d 584, 589 (1971); Shavers, *supra* note 2, at 463.
[21] *Serrano*, 5 Cal. 3d at 589; Shavers, *supra* note 2, at 463.
[22] *Id.*
[23] *Serrano*, 5 Cal. 3d at 589-90; Shavers, *supra* note 2, at 463.
[24] Plyler v. Doe, 457 U.S. 202, 229(1982); Shavers, *supra* note 2, at 485.
[25] *Plyer*, 457 U.S. at 206.
[26] *Id.* at 239.
[27] *Id.* at 240.

the Fourteenth Amendment to include school children who were not legal immigrants or citizens of the United States.[28]

Justice Marshall, in his concurring opinion in *Plyler*, articulated his disagreement with the Court's failure to find a fundamental right to education. He commented,

> While I join the Court's opinion, I do so without in any way retreating from my opinion in . . . Rodriguez. I continue to believe that an individual's interest in education is fundamental and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.[29]

An overview of general education reform illuminates the three iterations of reform (racial desegregation, school finance, and right-to-education) that have advanced the federal right to education. While still not establishing a the right to education, each of these reforms has sought to "face the challenge of change" influencing the current educational climate for children of color.

III. STRUCTURAL IMPEDIMENTS TO ADEQUATE EDUCATION FUEL THE SCHOOL-TO-PRISON PIPELINE

Structural barriers are obstacles that collectively affect a group disproportionately and perpetuate or maintain stark disparities in outcomes.[30] There are numerous structural impediments to children of color receiving an adequate education.[31] Many of these impediments have been,

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[28] *Id.* at 240-41.
[29] *Id.* at 230; Shavers, *supra* note 2, at 485.
[30] Margaret C. Simms, Structural Barriers to Racial Equity in Pittsburgh, URB. INST. (2015).
[31] Chauncee D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1010-49 (2009); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, THE BROOKINGS INST. (1998), https://www.brookings.edu/articles/unequal-opportunity-race-and-education/.

at least minimally, combatted by students, parents, educators, and school administrators alike.[32] Nevertheless, education practices continue to fuel the school-to-prison pipeline.[33] The school-to-prison pipeline is defined as "an ambiguous yet seemingly systematic process, through which a wide range of education and criminal justice policies and practices collectively result in students of color being disparately pushed out of school and into prison."[34] Part A focuses on children of color's overrepresentation in special education programming, and Part B focuses on harmful general education practices. Both contribute to the school-to-prison pipeline.[35]

A. OVERREPRESENTATION OF CHILDREN OF COLOR IN SPECIAL EDUCATION PROGRAMMING

While some evidence suggests that administrators are making efforts to address the underperformance of marginalized populations, vague language in special education and continued segregation practices override the objectives of *Brown* and special education legislation. This leads to an overrepresentation of black children in special education programs.[36] Minority overrepresentation in special education programming has created yet another obstacle to children of color receiving an adequate education.[37]

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[32] *See generally* WILLIAMS V. STATE OF CAL., ACLU SOUTHERN CALIFORNIA, https://www.aclusocal.org/en/cases/williams-v-state-California (last visited Dec. 22, 2020); Hedreich Nichols, *A Guide to Equity and Antiracism for Educators,* EDUTOPIA (Nov. 22, 2020, 1:00 PM), https://www.edutopia.org/article/guide-equity-and-antiracism-educators.

[33] Libby Nelson & Dara Lind, *The School to Prison Pipeline: Explained,* JUST. POLICY INST. (2015).

[34] Smith, *supra* note 31, at 1012.

[35] *See* Stephen L. Nelson, *Special Education Overrepresentation, and End-Running Education Federalism: Theorizing Towards a Federally Protected Right to Education for Black Students*, 20 LOY. J. PUB. INT. L. 205, 221 (2019).

[36] *Id.*

[37] *See id.* at 219-21.

Researchers in the 1960s acknowledged that black children were disproportionately represented in programs for mental, emotional, and learning challenges.[38] A 1982 study by the National Research Council (NRC) confirmed these findings, concluding that black children were represented in the mentally retarded category disproportionately to their numbers in general education.[39] This trend of overrepresentation also marked the 1990s, and by 1992, black children were twice as likely to be classified as mentally retarded and 1.46 times as likely to be classified as emotionally disturbed in comparison to their white peers.[40]

In 1997, it was projected that more minority children were expected to enroll in special education programs than would be enrolled in general education programs and that "poor African-American children [were] 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterparts."[41] Statistics also indicated that although African-Americans represented sixteen percent of the elementary and secondary enrollments, they constituted twenty-one percent of total enrollments in special education at that time.[42]

Today, the disproportionate placement of Black and other minority students in special education programs results in the provision of educational services in separate and unequal settings.[43] "Special education legislation has led to the increased disenfranchisement and marginalization of those it purports to protect."[44] The combinations of poor educational opportunities in urban settings and disproportionate representation in minority and underfunded special education programs have "recreated the

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[38] Robert A. Garda, Jr., *The New Idea: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA L. REV. 1071, 1075 (2005).
[39] *Id.* at 1076.
[40] *Id.*
[41] *Id.* at 1077; Pub L. No. 105-17, §§ 601(c)(8)(C)-(D), 111 Stat. 37 (1997).
[42] Garda, *supra* note 38, at 1077; Pub L. No. 105-17, §§ 601(c)(8)(C)-(D), 111 Stat. 37 (1997).
[43] Nelson, *supra* note 35, at 217.
[44] *Id.*

ills of pre-*Brown* segregation."[45] Not only are Black children overrepresented in special education, but it is especially difficult for them to exit special education programs after their placement.[46] Furthermore, White students are often granted greater educational access as a result of their special education status, whereas a Black child's educational access diminishes under the same classification.[47]

Delineating between high- and low-incidence special education disabilities may further explain the overrepresentation of Black children. Most special education disabilities are categorized as high-incidence, rather than low-incidence.[48] Low-incidence disabilities comprise about twelve percent of the student population eligible for special education under the "Individuals with Disabilities Education Act" (IDEA).[49] Low-incidence disabilities include Hard of Hearing, Deafness, Visual Impairment, Orthopedic Impairment, and Deaf-Blindness.[50] Black children are not overrepresented in low-incidence disorders, which are typically diagnosed with clearly identifiable and objective determinations.[51] Unlike low-incidence categories, high-incidence categories, which comprise eighty-eight percent of the students under IDEA, are typically diagnosed in a school setting, without confirmation of an organic cause that can be biologically validated and quantified.[52] These social or judgmental disabilities are not biologically based but are instead based on practitioners' own social and cultural beliefs about appropriate learning behavior in the school setting.[53] In further contrast to the objective determinations used to diagnose low-incidence disabilities, practitioners apply subjective clinical discretion in diagnosing high-incidence disabilities.[54] Some examples of high-incidence

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[45] *Id*. at 218.
[46] *Id*. at 220.
[47] *Id*. at 220-21.
[48] Garda, *supra* note 38, at 1078.
[49] *Id*.
[50] EL DORADO CHARTER SELPA, LOW INCIDENCE GUIDELINES, https://charterselpa.org/wp-content/uploads/2017/05/17-18_Low_Incidence_Guidelines.pdf (last visited Nov. 20, 2020).
[51] Garda, *supra* note 38, at 1078.
[52] *Id*. at 1078-79.
[53] *Id*. at 1079.
[54] *Id*.

disabilities include Autism spectrum disorders, Communication Disorders, Intellectual disabilities, Specific learning disabilities, emotional or behavioral disorders, and physical and sensory needs (that affect educational opportunities).[55] The subjective determinations of high-incidence disabilities may explain the staggering number of black children diagnosed with high-incidence disabilities and the misrepresentation of black children in special education programs.

When black students who do not have disabilities are misidentified as "having disabilities," they are more likely to receive restrictive placements and achieve less academically.[56] These outcomes are often compounded by the financial limitations common to urban school districts.[57] Lower academic achievement contributes to lower graduation rates, which ultimately leads to fewer higher-educational[58], social, and occupational options for black students receiving special education services.[59] These negative outcomes are often cyclical.[60] Students not given adequate opportunities to learn are at risk of special education placement because a student's achievement is directly related to the magnitude of opportunities granted for him to learn (meaning opportunities granted are proportional achievement).[61] Compounded with low achievement, students identified as disabled are often "pushed out of school," which is a major contributing factor to black children's matriculation to the school-to-prison pipeline.[62]

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[55] Univ. of Kan., Sch. of Educ. & Hum. Sci., *High-Incidence Disabilities Definition,* https://educationonline.ku.edu/community/high-incidence-disabilities-definition (last visited Nov. 20, 2020).
[56] Nelson, *supra* note 35, at 218.
[57] *Id.*
[58] *Id*. at 221.
[59] *Id.*
[60] *See generally id*. at 218-21.
[61] *Id*. at 219.
[62] *See generally id*. at 221.

B. HARMFUL GENERAL EDUCATION PRACTICES AND POLICIES

In addition to the overrepresentation of minority students in special education programming, mandatory disciplinary policies, pushouts, and educational tracking remain barriers for children of color pursuing adequate education.[63] Mandatory discipline and zero tolerance policies "illustrate how the intersection of education and criminal justice policies leads to disparate minority student pushouts and potential incarceration."[64] It is widely acknowledged that more disproportionate disciplinary treatment exists among low-income and minority students than other groups—a trend that occurs nationally.[65]

Community demands for student safety and discipline have popularized zero tolerance policies, where no discretion exists and discipline for certain misconduct is mandated.[66] At least seventy-five percent of all schools have some form of a zero tolerance policy.[67] The effectiveness of zero tolerance policies is widely debated.[68] Critics claim that these policies, in some cases, undermine public and school safety rather than improving student conduct.[69] Another concern of zero tolerance policies is that they encourage a trend towards reliance on juvenile justice interventions, even in common school misbehavior, rather than traditional school discipline measures.[70] This demonstrates a breakdown of the goals of a statewide educational system.[71]

The Gun-Free Schools Act of 1994 (GFSA) provides an example of the harm zero tolerance policies can have on the educational advancement of students. The GFSA declared "zero tolerance for weapons in public schools" and was initially adopted to promote school safety.[72] However, since the GFSA's enactment, schools have expanded the use of zero

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[63] *See generally id.* at 218-21; Smith, *supra* note 31, at 1010-12.
[64] Smith, *supra* note 31, at 1012.
[65] 3 EDUCATION LAW § 9.10(2)(d)(i) (2020).
[66] 3 EDUCATION LAW § 9.10 (2)(b)(i) n. 11 (2020).
[67] *Id.* at n. 12.
[68] *Id.* at n. 20.
[69] *Id.* at n. 23.1.
[70] *Id.* at n. 28.1.
[71] *Id.* at n. 28.3.
[72] Smith, *supra* note 31, at 1012-13 n. 22.

tolerance policies to areas not included in the initial act.[73] These expansions have permitted common adolescent behaviors to be treated as punishable offenses that provide grounds for both school and criminal sanctions.[74] In one instance, a zero tolerance policy for age-appropriate behavior led to a five-year-old Latino kindergartener being handcuffed and removed from school for having a temper tantrum in class, despite suffering from attention deficit disorder.[75]

Educational tracking is another barrier to adequate education. Used by the majority of public schools, this is the practice of separating school children into groups (such as "above average" and "below average") with similarly-abled children in efforts to provide more specialized academic instruction.[76] Education experts widely acknowledge that tracking is particularly detrimental to children of color, who are disproportionately placed on lower level academic tracks.[77] This leads to inequitable curricula and learning instructional methods that fuel disruptive behavior. In the 1967 seminal case about educational tracking, *Hobson v. Hansen,* Judge Wright found that "tracking tends to separate students from one another according to socioeconomic and racial status, albeit in the name of ability grouping."[78] The court held that "ability grouping is by definition a classification intended to discriminate among students, the basis of that discrimination being a student's capacity to learn."[79] Zero tolerance policies in conjunction with tracking results in students of color being disparately pushed out of schools and into prisons.[80]

Students of color across the country also have disproportionately high dropout, expulsion, and pushout

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[73] *Id.* at 1013 n. 22.
[74] *Id.* at 1013 n. 23.
[75] *Id.* at 1013 n. 24.
[76] *Id.* at 1013 n.25, n. 26.
[77] *Id.* at 1013-14 n. 28.
[78] Matt Chayt, Note, *Thirty-five Years After Berkelman: Seeking a New Debate About Ability Grouping*, 37 HASTINGS CONST. L.Q. 617, 622 (2010).
[79] *Id.*
[80] Smith, *supra* note 31, at 1014 n. 31.

rates.[81] Pushouts are discriminatory discipline procedures and practices in public schools[82] that occur when students are neither properly expelled nor voluntarily end their school career.[83] Instead, they are encouraged to leave school for unjustified, unregulated reasons such as low test scores, insufficient credits, or too many absences.[84] The impetus for pushout measures is often administrative pressures to increase test scores by excluding low-performing students "rather than addressing their educational needs."[85] The invisible nature of pushouts and diminutive litigation only contribute to this already injurious practice.[86] Accordingly, measures are needed to address the immediate effects of pushouts, particularly on minority students.[87]

Numerous structural barriers impede children of color from receiving an adequate education. Overrepresentation in special education and harmful general education policies and practices are two such barriers contributing to the school-to-prison pipeline, but these are certainly not exhaustive.[88]

IV. CONSIDERATIONS TO CHILDREN OF COLOR RECEIVING AN ADEQUATE EDUCATION

In addition to overcoming deficient special and general education policies and practices, an intersectional approach to addressing financial disparities and academic rigor may provide even greater opportunities for children of color to receive an adequate education. Part A considers accountability practices in special education. Then Part B considers the application of teaching versus punishment-based discipline practices. Finally, Part C considers fostering academic rigor and equalized educational spending in conjunction with better discipline and accountability

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[81] Davin Rosborough, *Left Behind, And Then Pushed Out: Charting a Jurisprudential Framework to Remedy Illegal Student Exclusions*, 87 WASH U. L. REV 663, 663-64 (2010).
[82] *See generally id.* at 663-69.
[83] *Id.* at 665
[84] *Id.* at 664.
[85] *Id.* at 665.
[86] *Id.*
[87] *Id.*
[88] *See generally* Nelson, *supra* note 35, at 205-28.

measures as considerations to mitigate the educational impediments faced by children of color.

A. ACCOUNTABILITY MEASURES IN SPECIAL EDUCATION

The recent holding of *Endrews v. Douglass County School Board* proposed better accountability methods for special education systems.[89] There, the Supreme Court held that "individualized educational programs that are not reasonably calculated to achieve educational benefit for the student are a violation of IDEA's mandate for provision of a free and appropriate public education"[90] This significant ruling implies that special education programs ensure a student's academic improvement by employing techniques to measure the student's substantive change.[91] Perhaps of equal importance, this ruling holds school administrators more accountable and provides students who are not making academic progress with legal redress; neither of which are guaranteed in the current educational framework for students enrolled in general education.[92]

According to Rob Garda, Jr., professor of law and a special education law expert, special education reform cannot improve outcomes for special education students.[93] He explains that policy changes to special education are vital, but even the most rigid wording used in recent iterations of IDEA have not corrected the issues of disproportional identification of racial and ethnic minorities for special education services.[94] If Garda's assertion is correct, "it is incumbent upon researchers and practitioners to find alternative methods for assuring and ensuring educational equity for populations who are at risk of marginalization, disenfranchisement, neglect, and oppression."[95]

Recent case law provides a means of accountability for special education systems to end practices of

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[89] *See generally id*. at 208-28.
[90] *Id*. at 227-28 n. 149.
[91] *Id.*
[92] *Id*.
[93] *Id*. at 221-22 n.108.
[94] *Id*.
[95] *Id*.

overrepresentation.[96] Additionally, establishing teacher training to write effective IEP's, and more effective implementation and monitoring of IEP progress would also improve accountability measures in special education, ultimately granting children of color greater access to an adequate education.[97]

B. TEACHING-BASED DISCIPLINARY PRACTICES

While traditional disciplinary practices were often synonymous with punishment, a more contemporary perspective classifies discipline as a learning process that promotes the personal development of students, who will become effective contributing members of society.[98] This can be accomplished by implementing schoolwide positive behavior supports,[99] discipline training for educators,[100]

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[96] *Id.* at 208-28.

[97] THE ACCESS CENTER: IMPROVING OUTCOMES FOR ALL STUDENTS K-8, U.S. OFF. OF SPECIAL ED. PROGRAMS, ALIGNING IEPS WITH STATE STANDARDS AND ACCOUNTABILITY SYSTEMS (Updated Sept. 16, 2004), https://education.wm.edu/centers/ttac/documents/articles/aligniepstate.pdf; *See generally IEP Tips for Parents & Teachers: Before, During, After the Meeting,* The Wrightslaw Way to Special Education Law and Advocacy (Sept. 20, 2012), https://www.wrightslaw.com/blog/iep-tips-for-parents-teachers-before-during-after-the-meeting/; *See generally* PROGRAM DESCRIPTIONS, https://www.wrightslaw.com/speak/programs.htm (last visited Nov. 21, 2020); *See generally Individualized Education Programs,* KIDS HEALTH FROM NEMOURS, https://kidshealth.org/en/parents/iep.html?WT.ac=p-ra (last visited Mar. 7, 2020); Amanda Morin, *For Teachers: What to Expect in an IEP Meeting,* UNDERSTOOD, https://www.understood.org/en/school-learning/for-educators/learning-and-attention-issues-basics/for-teachers-what-to-expect-in-an-iep-meeting (last visited Mar. 7, 2020).

[98] 3 EDUCATION LAW § 9.10(1) n.1 (2020).

[99] Stephen S. Worthington, *Student Submission: Roles For Neutrals in Remedying the School Discipline Gap*, 7 Y.B. ARB. & MEDIATION 289, 304 n.123 (2015).

[100] *Id.* at n.121.

social-emotional learning,[101] limiting expulsions and extreme disciplinary measures to severe violations of behavior,[102] and shifting paradigms from out-of-school suspension" to in-school suspension and completion of assignments.[103]

C. FOSTERING ACADEMIC RIGOR AND EQUALIZING EDUCATIONAL SPENDING

Finally, both fostering academic rigor[104] and equalizing educational spending[105] can undergird the other measures, ultimately improving opportunities for children of color to receive an adequate education. Disproportionate disciplinary treatment of children of color likely results from the culture and mindsets of schools serving disadvantaged students and not just the result of the school system involved.[106] For example, it may be a school's routine practice to "counter-violence with force; to curb crime by creating intense environments designed to coerce students into compliance; and to create safe schools by identifying, apprehending, and excluding students that have the potential to be disruptive."[107] These goals of "order and control" are predominantly in urban schools and stand in contrast to the "academic rigor" typically found in suburban

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[101] *Id*. at n.122; *What You Need to Know About Social-Emotional Learning,* WATERFORD. ORG (DEC. 4, 2018), https://www.waterford.org/education/what-you-need-to-know-about-social-emotional-learning/.
[102] Christopher Suarez, Article, *School Discipline in New Haven: Law, Norms, and Beating the Game*, 39 J.L & EDUC. 503, 515 (2010).
[103] *Id*.
[104] 3 EDUCATION LAW § 9.10(1) n.114 (2020).
[105] *See generally* Barbara Biasi, *Equalizing School Spending Boosts Lifelong Income,* YALE INSIGHTS (Sept. 4, 2019), https://insights.som.yale.edu/insights/equalizing-school-spending-boosts-lifelong-income#:~:text=School%20finance%20reforms%20that%20equalize,by%20Yale%20SOM's%20Barbara%20Biasi; Darling-Hammond, *supra* note 31.
[106] 3 EDUCATION LAW § 9.10(2)(d)(i) n.113 (2020).
[107] *Id*.

and rural schools.[108] Fostering academic rigor can be accomplished through effectively incentivizing highly qualified teachers to teach in low-income schools,[109] stronger curriculum development and implementation,[110] on-going professional development,[111] and smaller class sizes.[112] Providing schools with the same minimally adequate amount of resources per pupil, through an equalized spending, model can also provide a more adequate education.[113]

THE ROLE FEDERAL LAWS CAN PLAY IN ENSURING THAT CHILDREN OF COLOR RECEIVE AN ADEQUATE EDUCATION

While addressing the major, non-legal structural impediments to children of color receiving an adequate education might encourage students, parents, and educators

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[108] *Id.* at n.114.

[109] *See generally* Darling-Hammond, *supra* note 31; *see generally* Jane L. David, *Educational Leadership*: *What Research Says About…Teacher Recruitment Incentives,* 65 POVERTY AND LEARNING, 84-86 (2008) (discussing the effectiveness of teacher incentives as recruitment measures for high-poverty schools and recommending collegial and administrative support over monetary incentives).

[110] *See generally* Darling-Hammond, *supra* note 31.

[111] *Id.*; Rick Allen, *Support Struggling Students with Academic Rigor*: A Conversation with Author and Educator Robyn Jackson, 54 EDUC. UPDATE 8, 3-5 (2012) (discussing rigorous learning and thinking for children depends on professional training and teacher development).

[112] *See generally* Darling-Hammond, *supra* note 31; Worthington, *supra* note 99, at 303; U.S. DEPARTMENT OF EDUCATION, GUIDING PRINCIPLES: A RESOURCE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE 2-4 (2014), https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf.

[113] *See generally* Darling-Hammond, *supra* note 31; *Education Policy: School Funding Equity Factor*, NEW AMERICA, https://www.newamerica.org/education-policy/topics/school-funding-and-resources/school-funding/federal-funding/title-i/school-funding-equity-factor/(last visited Mar. 7, 2021); Mike Maciag, *Why School Spending Is So Unequal,* GOVERNING: THE FUTURE OF STATES AND LOCALITIES, https://www.governing.com/archive/gov-education-spending-states.html (last visited Nov. 20, 2020).

to advocate for pragmatic change at more localized levels, changes at the federal level through a structural lens may also reduce these impediments.[114]

The likelihood of parents and caretakers bringing successful litigation is minuscule, especially for poor, minority families with limited resources and access.[115] Such realities leave faint opportunities for children of color in both general and special education programs to procure adequate education through lawsuits.[116] Moreover, a historical glance at education reform in America and the Supreme Court's application of "non-structural" discrimination leaves less than promising hopes for positive change through more litigation at a national level.[117]

A. THE LIMITATIONS OF RACIAL DISCRIMINATION LEGAL REMEDIES

Often, civil rights advocacy has been "stymied by resistance to institutional and structural approaches to subordination"[118] whereby racial discrimination is perceived as an individual character flaw or poor moral decision, rather than "a system woven over generations into politics, economics, history, culture."[119]

The Supreme Court's individualist definition of discrimination has limited the remedies available for both state and private actors pursuing redress from the effects of discrimination.[120] *Washington v. Davis* (while not the subject of an adequate education claim) illustrates the limiting effect that a motive-centered approach can have on removing impediments to discriminatory practices.[121] There, equal protection claimants were required to "prove that facially race-neutral measures have a discriminatory purpose, or are

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[114] *See* Smith, *supra* note 31, at 1014-15.
[115]Nelson, *supra* note 35, at 221.
[116] *Id*. at n. 104.
[117] *See* Smith, *supra* note 31, at 1014-16.
[118] Angela P. Harris & Aysha Pamukcu. *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV 758, 765(2020).
[119] *Id.*
[120] *See id.* at 787-89.
[121] Smith, *supra* note 31, at 1014-15 n. 35.

administered to discriminate on the purpose of the race."[122] It is argued by critical race scholars that the motive standard put forth in *Washington* "downgrades the Constitution's equal protection mandate to an illusory promise because proving the existence of a discriminatory motive in a system built upon racially discriminatory principles is an impractical and thus insurmountable barrier."[123]

In other cases, the Supreme Court has similarly determined that the Fourteenth Amendment's Equal Protection Clause, while prohibiting actions taken by state actors with intent to harm someone based on race, does not address state actions with racialized impacts.[124] This determination is particularly problematic because it is unlikely that public officials serving today would admit that their actions were intended to harm a particular race—but their lack of intent does not lessen the effects of nonintentional, racially discriminatory mechanisms.[125] Disparities based on race (and sex) persist in the workplace because it is challenging to hold employers accountable for nonintentional bias under the disparate impact standard.[126] This same phenomenon manifests in education litigation, leaving little legal remedy for children of color impacted by nonintentional discriminatory practices.[127]

A. THE ADVANTAGES OF THE STRUCTURAL APPROACH

In contrast to the individualistic approach, utilizing a structural approach when assessing racially discriminatory practices "can aid courts striving for a holistic understanding of [education and prison to] pipeline cases by emphasizing [how] "individual and institutional behavior interact across domains and over time to produce unintended consequences with clear racialized effects."[128] While this approach

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[122] *Id.* at 1015 n. 36.
[123] *Id.* at 1015 n. 37.
[124] Harris & Pamukcu, *supra* note 118, at 787-88.
[125] *Id.* at 787.
[126] *Id.* at 788.
[127] *See generally id.* at 790.
[128] Smith, *supra* note 31, at 1015 n.39 (quoting John A, Powell, *A Tribute to Professor John O. Calmore: Structural Racism: Building Upon The Insights Of John Calmore*, 86 N.C. L. REV. 791 (2008)).

broadens the court's interpretation of discrimination by accounting for not only individualized discrimination but also institutional and structural discrimination, which includes "norms and practices, intentionally adopted or not, that perpetuate unjust disparities within a particular organization or throughout social institutions such as education, employment, and the legal system,"[129] it is also difficult to cure because structural discrimination is woven into institutions and policies such as housing markets, employment decisions, education, and medical research and treatment that appear to be fair and non-racially biased.[130] Because the intent requirement is deeply embedded in the current jurisprudence around racial discrimination, advocating for courts to move beyond the intent requirement will likely be a challenge. However, there are some small indications that such a change is possible.[131] Aziz Hug, for example, argues that the judicial "meaning of intent is more various and incoherent than it seems, giving judge's discretion to move between various definitions and to allow different evidentiary methods depending on their inclinations."[132] Furthermore, several cases that were decided based on Title IX of the Education Amendments of 1972, have permitted evidence of "deliberate indifference" in the face of actual knowledge of discrimination to count as intent."[133]

VI. CONCLUSION

The overrepresentation of children of color, particularly black students, in special education programs, zero tolerance policies, pushouts, and educational tracking, each contribute to the school-to-prison pipeline, preventing children from receiving an equally adequate education. The federal right to education is the newest wave of general education reform, but it may not be effective because similarly situated cases are assessed with a motive-based

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[129] Harris & Pamukcu, *supra* note 118, at 785.
[130] *See generally id.* at 787-90.
[131] *Id.* at 814.
[132] *Id.*
[133] *Id.* at 815.

approach, making it difficult to find racially discriminatory practices unconstitutional.

In the spirit of Dr. Martin Luther King Jr.'s admonishment to "stay awake, to adjust to new ideas, to remain vigilant and to face the challenge of change,"[134] this Note proposes that employing a structural approach to education litigation would permit advocates and courts to consider not just the motive—or the absence of a motive—in a particular policy or practice but also the holistic, social-historical context and effects of the particular policy or practice. This broader lens would likely provide students with redress not currently available through the motive-based assessment. "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[135] Pursuing adequate education for children of color through litigation and employing more localized techniques to remove structural impediments may be an effective means to ensure lasting change in the educational experiences of children of color and other disenfranchised pupils in the American education system. The challenge of change beckons us to rise to the occasion by ensuring that no pupil in the American education system is disenfranchised.

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[134] Martin Luther King Jr., *Remaining Awake Through A Revolution,* INVISIBLE CHILDREN, https://invisiblechildren.com/blog/2013/01/21/mlk-remaining-awake-through-a-revolution/ (last visited Nov. 20, 2020).
[135] *Brown*, 347 U.S. at 483, 493.