

CHALLENGING ZERO TOLERANCE: FEDERAL AND STATE LEGAL REMEDIES FOR STUDENTS OF COLOR

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INTRODUCTION

Widely-publicized incidents of school violence during the 1990s¹ frightened communities across the country, creating a climate of concern

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¹ See, e.g., James Brooke, A 'Suicide Mission': Authorities Say Killers Also Used Bombs—at Least 20 Injured, N.Y. TIMES, Apr. 21, 1999, at A1; Stacy Finz et al., CHAOS:

over the safety of America's schools.² Whether the danger was real or perceived,³ this fear prompted educational policymakers to develop and implement new measures that promised "zero tolerance" for school violence.⁴ These policies required school officials to impose harsh punishments for a broad range of offenses. Zero tolerance inevitably resulted in a significant rise in disciplinary action against students.⁵

With time, the once popular philosophy of zero tolerance has become increasingly controversial. Critics point to the rigid application of the rules,⁶ the negative impact of increased discipline on students,⁷ and

Students Flee in Horror as Gunman Opens Fire on Campus, S.F. CHRON., Mar. 6, 2001, at A1; Mark Mueller, *4 Girls, Teacher Killed in Arkansas 'Ambush'*, BOSTON HERALD, Mar. 25, 1998, at 2; Anne Rochelle & Christina Cheakalos, *Boy Who Mocked Ky. Prayer Group Kills 3 in Rampage*, ATLANTA J. & CONST., Dec. 2, 1997, at A1.

² See, e.g., Amarjit S. Buttar, *School Boards Send Tough Message on Violence*, HARTFORD COURANT, Dec. 29, 1999, at A8; Joe Chojnacki, *Students: Fear of Violence Is Rampant, Hard to Prevent*, BOSTON HERALD, Sept. 13, 1999, at 14; Anne Davis, *Littleton Still Has Students Unsettled: School Officials Contend with Rumors, Anxiety*, MILWAUKEE J. SENTINEL, May 3, 1999, at M1; Julie Deardorff & Michael Martinez, *Educators Anxious over a New Hazard: Killers from Within*, CHICAGO TRIB., May 22, 1998, at 11; Keith Ervin & Jill Leovy, *School Violence "Out of Hand"—Parents Fear for Children's Safety*, SEATTLE TIMES, Feb. 28, 1991, at B2; Maria Elena Fernandez, *School Violence: 'We're Tired of Feeling Unsafe'*, WASH. POST, May 5, 1998, at B1; *Teacher's Union Wants to Expel Students Who Carry Guns*, N.Y. TIMES, July 19, 1994, at A13.

³ *Publicity Aside, School Shootings Not Rising*, MILWAUKEE J. SENTINEL, Jul. 30, 1998, at 8; *School Survey Finds Violence All over; Big Cities Are Worst*, WASH. POST, Nov. 2, 1994, at A1; Mike Bowler, *School Violence Less Than Thought; Report Says Fears in Shootings' Wake Are Overblown*, BALTIMORE SUN, Apr. 12, 2000, at 1A; Susan Feeney, *School Crime Down, Government Reports; But Fear of Violence, Theft Up Among Schoolkids, Study Says*, DALLAS MORNING NEWS, Oct. 15, 1998, at 1A; Keith Henderson, *School Violence Rising in Cities, Suburbs*, CHRISTIAN SCI. MONITOR, Nov. 21, 1994, at 2; Bill Hutchinson, *Urban, Suburban, & Rural Schools Report Rise; Study: School Violence Skyrockets*, BOSTON HERALD, Jan. 6, 1994, at 4; Tamar Lewin, *Study Finds No Big Rise in School Crime*, N.Y. TIMES, Mar. 25, 1998, at A20; Mike A. Males, *Five Myths, and Why Adults Believe They Are True*, N.Y. TIMES, Apr. 29, 1998, at 9; Terence Monmaney, *High School Violence Is Down. Study Says: Students in Government Survey Report Less Fighting, Fewer Weapons in 1990s.*, ST. LOUIS POST-DISPATCH, Aug. 6, 1999, at A6; Vincent Schiraldi, *Hyping School Violence*, WASH. POST, Aug. 25, 1998, at A15; Vincent Schiraldi, *Americans Overreact to Youth Crime*, MILWAUKEE J. SENTINEL, Dec. 20, 2000, at 19A; Diane R. Stepp, *School Crime Rate Increases Dramatically*, ATLANTA J. & CONST., Jan. 13, 1996, at J1; John Woestendiek, *Survey Finds Rise in School Violence*, PHILA. INQUIRER, Nov. 2, 1994, at A3.

⁴ See TAMMY JOHNSON ET AL., APPLIED RESEARCH CENTER, RACIAL PROFILING & PUNISHMENT IN U.S. PUBLIC SCHOOLS: HOW ZERO TOLERANCE POLICIES & HIGH STAKES TESTING SUBVERT ACADEMIC EXCELLENCE & RACIAL EQUITY 14 (2001); Robert E. Shepherd, Jr. & Anthony J. DeMarco, *Weapons in Schools and Zero Tolerance*, CRIM. JUST., Spring 1996, at 46; Joan M. Wasser, Note, *Zeroing in on Zero Tolerance*, 15 J.L. & POL. 747, 748 (1999).

⁵ Wasser, *supra* note 4, at 759-60; Fern Shen, *Educators Get Tough on Violence*, WASH. POST, Aug. 24, 1995, at Md.1

⁶ See, e.g., Margaret Graham Tebo, *Zero Tolerance, Zero Sense*, 86 A.B.A. J. 40 (2000).

⁷ THE ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE 9-13 (June 2000) [hereinafter THE ADVANCEMENT PROJECT]; Patrick Pauken & Philip T.K. Daniel,

the lack of alternative educational services.⁸ Such criticism has been bolstered by evidence demonstrating that there is little connection between zero tolerance and improved school safety.⁹

A particular area of concern is the impact of zero tolerance on students of color. Harsh discipline policies are more likely to exist in predominantly minority schools,¹⁰ and school officials are more likely to punish minority students than white students.¹¹ While the disproportionate punishment of students of color is certainly not a new issue,¹² evidence shows that the disparities may increase as disciplinary actions increase.¹³ Thus, zero tolerance has the potential to make the problem of racial disparities in discipline even more acute and the search for solutions even more imperative.

This note will examine the legal frameworks available to address the disproportionate impact of zero tolerance policies on students of color. Part I will outline the development of zero tolerance and the criticisms of these policies. Part II will detail the harsh consequences for minority students of this approach to school discipline. Finally, Part III will assess the likelihood of successfully challenging the discriminatory impact of zero tolerance using Federal and state laws including the Federal Equal Protection Clause, Title VI of the Civil Rights Act of 1964 and its regulations, and the education and equality provisions of state constitutions.

I. ZERO TOLERANCE COMES TO SCHOOLS

A. DEVELOPING ZERO TOLERANCE

During the 1990s, reports of escalating crime and violence in American schools raised the fears of students, parents, and educators.¹⁴

Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis, 139 EDUC. L. REP. 759, 771 (2000).

⁸ Wasser, *supra* note 4, at 762.

⁹ THE ADVANCEMENT PROJECT, *supra* note 7, at 17; Russell J. Skiba & Peter E. Leone, *Zero Tolerance & School Security Measures: A Failed Experiment*, in TAMMY JOHNSON ET AL., *supra* note 4, 34-35 (2001); Wasser, *supra* note 4, at 773.

¹⁰ THE ADVANCEMENT PROJECT, *supra* note 7, at 7.

¹¹ See Pauken & Daniel, *supra* note 7, at 766; RUSSELL J. SKIBA ET AL., INDIANA EDUCATION POLICY CENTER, THE COLOR OF DISCIPLINE: SOURCES OF RACIAL & GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 1-3 (June 2000); Wasser, *supra* note 4, at 768-69.

¹² See Skiba & Leone, in TAMMY JOHNSON ET AL., *supra* note 4, at 35; SKIBA ET AL., *supra* note 11. See also, THE ADVANCEMENT PROJECT, *supra* note 7, at 7; Virginia K. Costenbader & Samia Markson, *School Suspension: A Survey of Current Policies and Practices*, NAASP BULLETIN, October 1994, at 103.

¹³ SKIBA ET AL., *supra* note 11, at 2.

¹⁴ See, e.g., *Teachers' Union Wants to Expel Students Who Carry Guns*, *supra* note 2, at A13; Buttar, *supra* note 2, at A8; Chojnacki, *supra* note 2, at 14; Davis, *supra* note 2, at M1; Deardorff & Martinez, *supra* note 2, at 11; Ervin & Leovy, *supra* note 2, at B3; Fernandez, *supra* note 2, at B1.

Policymakers responded to these concerns by promising “zero tolerance” for school violence¹⁵ and “mandat[ing] predetermined consequences or punishments for specific offenses.”¹⁶ One of the first to act, Congress passed the Gun Free Schools Act in 1994 (GFSA).¹⁷ The GFSA requires states receiving federal funding to direct local school authorities to: 1) expel for at least one year any a student possessing a firearm on school grounds;¹⁸ 2) refer any student caught with a weapon at school to the juvenile justice system;¹⁹ and 3) permit modification of the expulsion requirement on a case-by-case basis.²⁰

Federal endorsement of zero tolerance for weapons accelerated the institution of strict policies at the state and local levels, and by 1996-97 (the most recent school year for which this data is available), 94% of schools had implemented zero tolerance policies for firearms.²¹ School districts did not limit themselves to punishing students for possession of weapons, but they considerably expanded the scope of zero tolerance policies.²² Mandatory punishment was required for possession of weapons other than firearms in 91% of schools, for violence in 79%, for drugs in 88%, for alcohol in 87%, and for tobacco in 79%.²³ Moreover, school districts enacted zero tolerance policies for a variety of behaviors that posed little or no safety risks.²⁴ In 1999, for example, Maryland schools suspended 44,000 students for “disobeying rules,” “insubordination,” and “disruption.”²⁵

Zero tolerance policies have compelled schools to punish students in large numbers. Nationally, schools suspended more than 3.1 million students and expelled more than 97,000 during the 2000-01 school

¹⁵ TAMMY JOHNSON ET AL., *supra* note 4; Shen, *supra* note 4; Wasser, *supra* note 4, at 748-49.

¹⁶ JILL F. DEVOE, ET AL., U.S. DEP’T OF EDUCATION, U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY, 2002, 135, 137 (2002).

¹⁷ 20 U.S.C. § 7151 (2004). The Gun-Free Schools Act of 1994 was amended by the No Child Left Behind Act. The current version is the same as the 1994 law but provides an exception for firearms “lawfully stored inside a locked vehicle on school property” or used “for activities approved and authorized by the local educational agency.” Pub. L. No. 107-110, 115 Stat. 1762 (2002).

¹⁸ U.S. DEP’T OF EDUC., GUIDANCE CONCERNING STATE AND LOCAL RESPONSIBILITIES UNDER THE GUN-FREE SCHOOLS ACT, 3 (2004), at <http://www.ed.gov/programs/dvpformula/gfsaguid03.doc>. State and local policies enacted pursuant to the GFSA are required to define “firearm” to include guns, bombs, grenades, missile launchers, and poison gas. *Id.* at 7.

¹⁹ *Id.* at 5.

²⁰ *Id.* at 4.

²¹ SHEILA HEAVISIDE, ET AL., U.S. DEP’T OF EDUC., VIOLENCE AND DISCIPLINE PROBLEMS IN U.S. PUBLIC SCHOOLS: 1996-97 18 (1998).

²² THE ADVANCEMENT PROJECT, *supra* note 7.

²³ HEAVISIDE ET AL., *supra* note 21, at 18.

²⁴ THE ADVANCEMENT PROJECT, *supra* note 7, at 1.

²⁵ This does not include Baltimore schools. *Id.* at 1-2.

year.²⁶ On a state and local level, Wisconsin school suspensions increased 34% between 1991-92 and 1999²⁷, and the number of students expelled in Chicago rose from 14 in 1992-93 to 737 in 1998-99.²⁸ Many school districts are expelling children two to three times more often than before the adoption of zero tolerance.²⁹ Zero tolerance policies mandating that schools share information on student infractions with law enforcement authorities have increased referrals of students to the justice system. In Florida, for instance, schools referred 3,831 students to the juvenile justice system for their conduct in school in 1999.³⁰

B. CONTROVERSIES OVER ZERO TOLERANCE

Champions of zero tolerance claim that these policies reduce crime, violence, and disruption in schools, thereby allowing schools to fulfill the mission of educating students.³¹ Nevertheless, critics are increasingly condemning zero tolerance discipline for a variety of reasons.³² Many commentators and litigants express concern about the due process implications of zero tolerance policies.³³ Another basis for criticism is the rigid application of policy that results in the discipline of students for seemingly harmless conduct. Anecdotal evidence of such events is plentiful.³⁴ Schools have expelled or suspended students of all ages for pos-

²⁶ THOMAS D. SNYDER, ET AL., U.S. DEP'T OF EDUC., DIGEST OF EDUC. STATISTICS 2003 179 (2004).

²⁷ THE ADVANCEMENT PROJECT, *supra* note 7, at 3.

²⁸ *Id.*

²⁹ Wasser, *supra* note 4, at 759-60.

³⁰ THE ADVANCEMENT PROJECT, *supra* note 7, at 4.

³¹ See, e.g., Wasser, *supra* note 4, at 751.

³² See, e.g., Jesse L. Jackson, Sr., *Justice in Decatur* (Nov. 7, 1999), at <http://www.rainbowpush.org/commentaries/1999/110799.html>; Position Statement, National Mental Health Association, Opposing the Blanket Application of Zero Tolerance Policies in Schools (2003), available at <http://www.nmha.org/position/zerotolerance.cfm>; Press Release, American Bar Association, *ABA Votes to Oppose School 'Zero Tolerance' Policies* (Feb. 19, 2001), at <http://www.abanet.org/media/feb01/zerotolerance.html>; Press Release, Rutherford Institute, *School Board to Decide Whether to Expel Student for Carrying Nail Clippers* (July 15, 1999), at http://www.rutherford.org/articles_db/press_release.asp?article_id=56; Tebo, *supra* note 6.

³³ See, e.g., Kevin P. Brady, *Zero Tolerance or (In)Tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J.* 159 (2002); Kathleen M. Cerrone, Comment, *The Gun-Free Schools Act of 1994: Zero Tolerance Takes Aim at Procedural Due Process*, 20 PACE L. REV. 131 (1999); Brooke Grona, Comment, *School Discipline: What Process Is Due? What Process Is Deserved?*, 27 AM. J. CRIM. L. 233 (2000); James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10-SPG KAN. J.L. & PUB. POL'Y 369 (2001).

³⁴ See, e.g., Dennis Cauchon, *Schools Struggling to Balance 'Zero Tolerance,' Common Sense*, USA TODAY, Apr. 13, 1999, at 1A; Marc Fisher, *Going Too Far: The Case of the Nail Clipper*, WASH. POST, Jan. 15, 2002, at B01; Christine Haughney, *Zero-Tolerance Makes Child's Play a Liability 2 Boys Called to Court over Paper Gun in Cops-and-Robbers*, S.F. CHRON., July 8, 2001, at A11.

session of “weapons” such as paper clips,³⁵ nail files,³⁶ and a toy ax used in a Halloween costume;³⁷ drugs, including aspirin,³⁸ midol,³⁹ and white-out;⁴⁰ and general misbehavior such as humming and tapping on a desk, which was classified as “defiance of authority.”⁴¹

The transformation of schools into conduits for the juvenile justice system is viewed as one of the serious consequences of zero tolerance. According to a recent report, the “increase in criminal charges filed against children for in-school behavior has been one of the most detrimental effects of Zero Tolerance Policies.”⁴² The GFSA and forty-one states require schools to refer students to law enforcement agencies for misconduct committed at school,⁴³ and in many cases, schools may be “simply transferring their disciplinary authority to law enforcement officials.”⁴⁴ In addition, suspension and expulsion may increase a student’s risk for juvenile delinquency.⁴⁵

The potential negative impact of school discipline on children makes zero tolerance policies especially troubling because they tend to increase the number of disciplinary actions. Experts have theorized and demonstrated a variety of harms associated with suspension and expulsion, including loss of learning and educational time,⁴⁶ poorer academic performance,⁴⁷ increased likelihood of special education placement, decreased participation in extracurricular activities, poorer attendance,⁴⁸ and increased risk of dropping out.⁴⁹ These punishments may be psychologically damaging as well,⁵⁰ causing frustration, lower self-esteem, and a distrust of authority.⁵¹ Some writers also propose that reduced contact with school “leads to perpetuation of low socioeconomic” status.⁵² Given the potential harm to students, school authorities should use suspension and expulsion only if they are necessary to achieve educational

³⁵ THE ADVANCEMENT PROJECT, *supra* note 7, at 1.

³⁶ Skiba & Leone, *supra* note 9, at 34.

³⁷ *Id.*

³⁸ THE ADVANCEMENT PROJECT, *supra* note 7, at 1.

³⁹ *Id.*

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 4-5.

⁴² THE ADVANCEMENT PROJECT, *supra* note 7, at 15.

⁴³ 20 U.S.C. § 7151(h)(2004); THE ADVANCEMENT PROJECT, *supra* note 7, at 15.

⁴⁴ THE ADVANCEMENT PROJECT, *supra* note 7, at 15.

⁴⁵ Skiba & Leone, *supra* note 9, at 35.

⁴⁶ See Pauken & Daniel, *supra* note 7, at 771.

⁴⁷ THE ADVANCEMENT PROJECT, *supra* note 7, at 13.

⁴⁸ Wasser, *supra* note 4, at 763.

⁴⁹ Pauken & Daniel, *supra* note 7, at 771.

⁵⁰ THE ADVANCEMENT PROJECT, *supra* note 7, at 9-12.

⁵¹ Pauken & Daniel, *supra* note 7, at 771.

⁵² *Id.* at 771-72.

goals. It is not clear, however, that zero tolerance policies are actually effective in reducing school violence or improving student behavior.⁵³

The failure of many states to make alternate placements available to suspended and expelled students exacerbates the negative effect of punishment. The GFSA does not require states to provide alternative education, and although thirty-six states chose to provide this service, only thirteen made it mandatory.⁵⁴ As a result, the Department of Education estimated that in the 1996-97 school year, only 56% of expelled students were placed in alternate education.⁵⁵ At this rate, approximately 38,200 expelled students did not receive any educational services in 1998-99.⁵⁶

II. ZERO TOLERANCE FOR STUDENTS OF COLOR

While zero tolerance policies have been widely adopted throughout the country, they are most likely to exist in predominantly African-American and Latino school districts.⁵⁷ In fact, the disproportionate impact of school discipline policies on minorities has been a consistent finding of research for more than twenty-five years.⁵⁸ Minority students appear to experience disciplinary action at rates higher than their percentages of school populations⁵⁹ and are subject to punishment more than white students.⁶⁰ Data from the Department of Education shows that in

⁵³ THE ADVANCEMENT PROJECT, *supra* note 7, at 17; Skiba & Leone, *supra* note 9, at 35; Wasser, *supra* note 4, at 773. One national survey found that schools using more elements of zero tolerance were less safe than those applying fewer components. Skiba & Leone, *supra* note 9, at 35. A report issued by the Educational Testing Service found that zero tolerance policies alone did not reduce problematic behavior. Wasser, *supra* note 4, at 773. Other surveys have determined that mandatory punishments for various weapons did not deter students from bringing those items to school. Wasser, *supra* note 4, at 772-73. Finally, "[a] high rate of repeat offending among students who have been suspended indicates that disciplinary removal is not a particularly effective method for changing behavior." Skiba & Leone, *supra* note 9, at 35.

⁵⁴ Wasser, *supra* note 4, at 761.

⁵⁵ *Id.* at 762. This percentage is even less for students expelled for possessing a "firearm" under the definition of the GFSA. KAREN GRAY-ADAMS & BETH SINCLAIR, U.S. DEPARTMENT OF EDUCATION, REPORT ON THE IMPLEMENTATION OF THE GUN-FREE SCHOOLS ACT IN THE STATES AND OUTLYING AREAS: SCHOOL YEAR 2001-2002 6 (2004). In the 2001-02 school year, only 39% of students expelled for firearm possession were referred to alternative education, a decrease from 43% in 1997-98. *Id.*

⁵⁶ *Id.*

⁵⁷ THE ADVANCEMENT PROJECT, *supra* note 7, at 7. During the 1996-1997 school year, high-minority school districts had discipline policies at the following rates: 97% for firearms, 94% for other weapons, 92% for drugs, and 85% for violence. *Id.* In comparison, school districts where the majority of students were white adopted the same policies at lower rates: 92% for firearms, 88% for other weapons, 83% for drugs, and 71% for violence. *Id.*

⁵⁸ SKIBA ET AL., *supra* note 11; Skiba & Leone, *supra* note 9, at 35; *see also* Costenbader & Markson, *supra* note 12, at 103.

⁵⁹ SKIBA ET AL., *supra* note 11, at 3 tbl.1; Wasser, *supra* note 4, at 768.

⁶⁰ Wasser, *supra* note 4, at 768-69. A 1993 study surveyed hundreds of thousands students across the country and found that African-American students were suspended or expelled at a rate 250% higher than white students. Pauken & Daniel, *supra* note 7, at 767.

the 2000-01 school year, while African-American children were 17% of the student population in the United States, they represented 34% of students that school districts suspended and 30% of students expelled.⁶¹ In the same year, white students were 62% of all students, but were only 48% of those suspended and 49% of those expelled.⁶² These national statistics reflect the situation in individual states.⁶³ Schools also seem to punish minority students more severely than white students, often for less serious⁶⁴ or more subjective infractions⁶⁵ such as "defiance of authority."⁶⁶ Moreover, the disproportionate impact of suspension and expulsion on students of color seems to increase as school officials use those punishments more frequently.⁶⁷ This suggests that minorities will face even greater harm from the implementation of zero tolerance policies.

"Despite extensive documentation of the existence of racial . . . disparities in school discipline data, there has been little systematic exploration of possible explanations for the disproportionality."⁶⁸ Some commentators have hypothesized that cultural and ethnic differences may cause white school officials to perceive the conduct of minority students as punishable.⁶⁹ It is also possible that the apparent correlation between race and discipline is actually caused by the relationship between race and socioeconomic status.⁷⁰ In other words, it is not students of color who are disproportionately disciplined, but low-income students, many of whom happen to be minorities. Another potential justification for the greater discipline of students of color is that these students are more disruptive and commit more infractions than other

⁶¹ OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., OCR ELEMENTARY AND SECONDARY SCHOOL SURVEY: 2000 (2002), available at <http://205.207.175.84/ocr2000r/wdsdata.html>.

⁶² *Id.*

⁶³ *E.g.*, DAVID RICHART, ET AL., BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF "ZERO TOLERANCE" AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY STUDENTS 21-24 (2003). One report found that in Colorado, Latinos represented 17% of the public school population and 33% of those expelled from school, and African-Americans made up 5% of the student body, but 12% of students expelled. Wasser, *supra* note 4, at 768. The same report stated that in a number of districts in Michigan, African-Americans were 40% of the student body, but 64% of expulsions. *Id.* In some of these districts, African-American students were expelled at twice the rate of their enrollment. *Id.*

⁶⁴ THE ADVANCEMENT PROJECT, *supra* note 7, at 7; Skiba & Leone, *supra* note 9, at 35.

⁶⁵ TAMMY JOHNSON ET AL., *supra* note 4, at 14; Wasser, *supra* note 4, at 769.

⁶⁶ THE ADVANCEMENT PROJECT, *supra* note 7, at 7.

⁶⁷ SKIBA ET AL., *supra* note 11, at 2; JOHANNA WALD & DANIEL LOSEN, DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE 2-3 (2003).

⁶⁸ SKIBA ET AL., *supra* note 11, at 1.

⁶⁹ *Hawkins v. Coleman*, 376 F. Supp. 1330, 1335 (N.D. Tex. 1974) (describing the testimony of an educational expert); Costenbader & Markson, *supra* note 12, at 103-107; Pauken & Daniel, *supra* note 7, at 764; Janice L. Streitmatter, *Ethnic/Racial and Gender Equity in School Suspensions*, THE HIGH SCH. J., Dec. 1985/Jan. 1986, at 139-43.

⁷⁰ SKIBA ET AL., *supra* note 11, at 4.

students, thus making punishment necessary.⁷¹ Studies have not substantiated this claim.⁷² Despite the various alternative justifications, a number of analyses maintain that the best explanation for the disparities is racism or racial stereotyping.⁷³

III. POTENTIAL LEGAL REMEDIES

Although the exact cause of the disproportionate effect of zero tolerance policies on students of color is debatable, the existence of a disparity is clear. Experts in many fields have recommended methods for schools to confront this problem.⁷⁴ While state and local governments might undertake such reforms on their own, it may be necessary to compel them to do so. This section will examine whether various federal and state laws can provide the means to force school systems to confront the impact of zero tolerance policies on minority students. Specifically, this section will analyze the potential for claims under the Federal Equal Protection Clause, Title VI of the Civil Rights Act of 1964 and its regulations, and the education and equality guarantees of state constitutions.

A. THE FEDERAL EQUAL PROTECTION CLAUSE

The history of litigation challenging racial disparities in education suggests that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution may provide a means to contest school discipline policies.⁷⁵ It is unlikely that such a challenge will prevail, however, because a successful equal protection claim will require proof of discriminatory intent.

The Fourteenth Amendment mandates: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁷¹ *Id.* at 4-6; Pauken & Daniel, *supra* note 7, at 766.

⁷² John D. McCarthy & Dean R. Hoge, *Racial Disadvantage Out of Universalistic Process*, 65 SOC. FORCES 1101 (1987); Anna C. McFadden et al., *A Study of Race and Gender Bias in the Punishment of Handicapped School Children*, 24 URB. REV. 239 (1992); Pauken & Daniel, *supra* note 7, at 766.

⁷³ *Hawkins*, 376 F. Supp. at 1335 (describing the expert's report); TAMMY JOHNSON ET AL., *supra* note 4, at 15; Pauken & Daniel, *supra* note 7, at 766.

⁷⁴ SUSAN SANDLER ET AL., JUSTICE MATTERS INSTITUTE, *TURNING to Each Other Not on Each Other: How School Communities Prevent Racial Bias in School Discipline: A Preliminary Report* (2000); THE ADVANCEMENT PROJECT, *supra* note 7, at 31-39; *Id.* at app. VII; Gwendolyn Cartledge et al., *Professional Ethics Within the Context of Student Discipline and Diversity*, 24 TEACHER EDUC. & SPECIAL EDUC. 25 (2001); Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILDREN 381 (2000); Junious Williams, *Reducing the Disproportionately High Frequency of Disciplinary Actions Against Minority Students: An Assessment-Based Policy Approach*, 24 EQUITY & EXCELLENCE 31 (1989).

⁷⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973), *rehearing denied*, 414 U.S. 883 (1973).

Courts apply three standards of review when an individual or group challenges a state policy or law on equal protection grounds. The first test strongly presumes that the state's action is constitutional⁷⁶ and applies to most economic and social policy issues brought before the court. Under this standard, a court will only invalidate a law if it has no rational relationship to any legitimate government objective.⁷⁷ Courts generally use the second, intermediate standard when deciding a case involving classifications based on gender⁷⁸ or illegitimacy.⁷⁹ A court will uphold a law under this test as long as it bears a substantial relationship to an important governmental interest.⁸⁰ Finally, where a state law or policy classifies individuals by race or national origin⁸¹ or infringes on a fundamental right,⁸² a court will apply the most rigorous standard of review. The court will use "strict scrutiny" and require that the classification be narrowly tailored to meet a compelling government interest.⁸³ For example, it would be unconstitutional for a school policy to mandate suspension for white students who commit a particular infraction but require expulsion for students of color who commit the same act. Even if such a policy could be justified by the important goal of preserving school safety, the policy would not be narrowly tailored to meet that interest because any student committing the act deserves the same punishment, regardless of race.

In order to subject a state law or policy to any of these forms of review, however, the law must clearly categorize individuals in some manner.⁸⁴ A law can make a classification on its face or in its application. Where a law classifies on its face, the terms of the law expressly categorize persons for differential treatment based on a particular trait. Thus, there is no need to establish the existence of a discriminatory purpose or a disproportionate impact of the law on a particular group and the court can proceed to apply the appropriate standard.⁸⁵

⁷⁶ *F.C.C. v. Beach Comm., Inc.*, 508 U.S. 307, 314 (1993).

⁷⁷ *Id.* at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

⁷⁸ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁷⁹ *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

⁸⁰ *Craig*, 429 U.S. at 197.

⁸¹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

⁸² *E.g.*, *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

⁸³ *City of Cleburne*, 473 U.S. at 440.

⁸⁴ *E.g.*, *Califano v. Boles*, 443 U.S. 282, 293-94 (1979) ("The proper classification for purposes of equal protection analysis is not an exact science, but scouting must begin with the statutory classification itself. Only when it is shown that the legislation has a substantial disparate impact on classes defined in a different fashion may analysis continue on the basis of the impact on those classes.") *Id.*

⁸⁵ *E.g.*, *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

It is highly unlikely that a zero tolerance policy would openly classify students by race, even if officials actually intended to treat students differently. Therefore, an equal protection claim will depend on the challenger's ability to establish that school officials make a discriminatory classification when applying a zero tolerance policy. A law or policy that classifies individuals in its application is either neutral on its face or appears to make a legitimate classification, but is administered in a manner that imposes different burdens on different groups.⁸⁶ While it is clear that schools discipline students of color more frequently and more harshly than their white counterparts, evidence of the discriminatory impact of a policy alone will not be sufficient to sustain a claim under the Equal Protection Clause.

A court will require proof that government officials acted with discriminatory intent when applying a law.⁸⁷ While it is not necessary to show that bias was the sole or even primary motivation for the official action,⁸⁸ the Supreme Court has declared:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate 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.⁸⁹

Clearly, the best evidence of intent would be an official admission of discrimination.⁹⁰ Just as it is unlikely that a zero tolerance policy would explicitly discriminate, however, it is equally improbable that school officials would admit to either racial bias or considering race in

⁸⁶ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In this case, a San Francisco ordinance banned the operation of hand laundries, the majority of which were operated by Chinese persons, in wooden buildings. The Supreme Court invalidated the statute based on its discriminatory application after finding that, while all non-Asian launderers who applied had received an exemption to the statute, no Chinese applicant had received an exemption.

⁸⁷ *Washington v. Davis*, 426 U.S. 229, 241-43 (1976).

⁸⁸ *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (internal quotations, citations and footnote omitted)); *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 265 (1977).

⁸⁹ *Washington*, 426 U.S. at 242 (citation omitted).

⁹⁰ *See id.*

disciplinary decisions.⁹¹ Thus, to sustain an equal protection claim, it will be necessary to demonstrate intent by other means.

Proof of disproportionate impact "may provide an important starting point"⁹² by creating an inference of discriminatory intent⁹³ and a challenge to a zero tolerance policy would likely rely heavily on such evidence. The disparate impact of zero tolerance policies can generally be shown using data on student populations and disciplinary actions.⁹⁴ Statistical analyses that establish higher rates of punishment for students of color relative to their representation in the student body and correlations between race and the use of punishment will be particularly useful.

There are several obstacles to using such data as evidence of discriminatory intent. First, this information may be difficult to obtain, because schools may not keep sufficiently detailed records on disciplinary actions.⁹⁵ Second, courts often refuse to accept statistical evidence of impact as an indication of intent.⁹⁶ Third, to demonstrate discriminatory intent solely through the existence of a disparate effect of a policy, there must be "a clear pattern" that is "unexplainable on grounds other than race."⁹⁷ Without both of these elements, impact alone will not be determinative of intent.⁹⁸ While both factors have been

⁹¹ Such evidence is occasionally available. For example, in *Sherpell v. Humnoke School District*, the court required the school district to revise its disciplinary practices partly based on the evidence that teachers referred to black students as "niggers," "blue gums," and "coons," and that teachers administered punishment differently to black and white students. 619 F. Supp. 670 (E.D. Ark. 1985).

⁹² *Village of Arlington Heights*, 429 U.S. at 266.

⁹³ *Washington*, 426 U.S. at 242.

⁹⁴ See generally THE ADVANCEMENT PROJECT, *supra* note 7.

⁹⁵ THE ADVANCEMENT PROJECT, *supra* note 7, at app.V (detailing mandated record keeping policies in each state). Only 27 states collect discipline data by type of offense/conduct and eleven states collect data by race. *Id.* See *Tasby v. Estes*, 643 F.2d 1103, 1107 n.1 (1981) ("[T]he statistics offered are based upon a breakdown of offenses far too general to prove disproportionate severity in punishment. . . .").

⁹⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292-99 (1987) (holding that a statistical analysis of death penalty cases in Georgia was insufficient evidence of the decisionmakers in the state acting with a discriminatory purpose); *Tasby*, 643 F.2d at 1108 ("[S]tatistical proof that black students are disciplined more frequently and more severely than white and Mexican-American students has limited probative value.").

⁹⁷ *Village of Arlington Heights*, 429 U.S. at 266.

⁹⁸ See *Tasby*, 643 F.2d at 1108. In that case, the Court refused to infer discriminatory intent in part because the:

[S]tatistical evidence fail[ed] to account for the many variables at work in the process of disciplining school children. Too many legitimate, non-racial factors are involved to permit an inference of discriminatory purpose from a showing of disproportionate impact Black and white students in the [school district] may not commit disciplinary infractions at the same rate or of the same seriousness, and this differential may be accounted for in non-racial terms. In addition, school administrators and teachers are properly concerned with balancing numerous competing considerations when deciding how properly to discipline a student, including the

present in some cases,⁹⁹ this will be extremely rare in the education context.¹⁰⁰

Perhaps the most significant impediment to establishing discriminatory intent with data on disproportionate impact is that courts generally will require direct proof that state actors treated similarly situated persons differently in applying the law or policy.¹⁰¹ In *Fuller v. Decatur*,¹⁰² African-American high school students who were expelled by their school for fighting during a football game sued for reinstatement.¹⁰³ The plaintiffs argued, *inter alia*, that the school district violated the Equal Protection Clause through their arbitrary and disparate expulsions of African-American students.¹⁰⁴ To support their claim, the students provided statistics showing the disproportionate impact of the expulsions; they also provided evidence that school officials meted out lesser punishments to Caucasian students for fighting.¹⁰⁵ The District Court found the plaintiffs' evidence insufficient to prove that the school district had the requisite discriminatory intent when the school district decided to expel the students because one could not compare the white students expelled for fighting with the African-American plaintiffs.¹⁰⁶

As *Fuller* indicates, it will be extremely difficult to prove that school officials disciplined students of color more severely than similarly situated white students.¹⁰⁷ It may even be impossible to provide evidence of multiple disciplinary actions that a court would consider compa-

personal history and individual needs of a student, the flagrancy of his offense, and the effect that the misconduct may have on other students.

Id.

⁹⁹ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. U.S.*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939).

¹⁰⁰ See, e.g., *Tasby*, 643 F.2d at 1103.

¹⁰¹ *U.S. v. Armstrong*, 517 U.S. 456, 465 (1996) (claim of selective prosecution). In that case, the defendant offered a study showing that, of the twenty-four cases involving drug charges similar to the defendant's that the federal prosecutor's office prosecuted during 1991, all of the defendants were African-American. The court concluded that these statistics were insufficient in part because the study did not identify non-black individuals who the federal prosecutors could have prosecuted for the same offense but did not. *Id.* at 470. Similarly, in *Tasby v. Estes*, the Third Circuit Court of Appeals found that the statistical evidence offered was insufficient to establish a prima facie case of racial discrimination because it did not contain proof that black students were punished more severely than white students for the same offenses when all other factors were equal. 643 F.2d at 1107 n.1.

¹⁰² 78 F. Supp. 2d 812 (2000), *aff'd*, 251 F.3d 662 (2001).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ The Plaintiffs' evidence showed that 82% of the students expelled in the school district from the beginning of the 1996-1997 school year through December 1999 were African-American, even though African-American students represented only 46-48% of the student population. Only 18% of those expelled were Caucasian. *Id.* at 824.

¹⁰⁶ *Id.* at 825.

¹⁰⁷ See *id.*

table.¹⁰⁸ In addition, differential treatment of students may occur before any record is made. Research has indicated that teachers and schools officials are more likely to accuse students of color than white students of subjective infractions.¹⁰⁹ If discrimination occurs at the official's initial determination of whether to refer a student for disciplinary action, it would be impossible to identify similarly situated students because the official would not even refer the white students for punishment.

If sufficient proof of disproportionate impact is not available, there are some additional types of evidence that can be used to show discriminatory intent.¹¹⁰ A court may consider the historical background of the law or policy.¹¹¹ In the context of a public educational institution, a school or district's prior record of segregation will be relevant, particularly if a court has ordered the school to desegregate and this order is still in effect at the time the zero tolerance policy is contested. Furthermore, when a school district seeks to have a desegregation order lifted, the court holds a hearing where the district bears the burden of proving that it has eliminated segregation. Challengers may provide evidence of the disparate impact of a school discipline policy at this hearing to show that the district has not complied with the desegregation order.¹¹² A court may also consider whether government officials departed from standard procedures in creating or implementing the law.¹¹³ However, these types of evidence will either be difficult to obtain or will not be influential enough to persuade a court that a school or district has violated the Federal Equal Protection Clause.¹¹⁴ Thus, it appears that in most cases the lack of evidence of discriminatory intent will mean that an equal protection claim will not be a viable method of challenging the application of zero tolerance policies.

¹⁰⁸ THE ADVANCEMENT PROJECT, *supra* note 7, at app. V. *See Tasby*, 643 F.2d at 1107 n.1; *see, e.g., McCleskey v. Kemp*, 481 U.S. 279, 292-99 (1987).

¹⁰⁹ THE ADVANCEMENT PROJECT, *supra* note 7, at 8; Skiba & Leone, *supra* note 9, at 35.

¹¹⁰ *See Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252 (1977).

¹¹¹ *See id.* at 267.

¹¹² *See Tasby*, 643 F.2d at 1107 (holding that plaintiffs had not made out a prima facie case for racial discrimination, but noting that "[w]e also recognize that prior judicial determinations of racial discrimination in the [school district]'s student disciplinary policies and practices make [the] statistical evidence [of disparities] more persuasive"); THE ADVANCEMENT PROJECT, *supra* note 7, at app.II at 5 (describing *Bronson v. Board of Education of Cincinnati*, where the court determined that disparities in suspension and expulsion rates had not improved since the issuance of the original consent decree and, under the amended consent decree, required schools, *inter alia*, to monitor disciplinary recommendations by teachers and intercede when teachers are responsible for disproportionate referrals) (citing No. C-1-74-205, Amended Consent Decree (Doc. #840) (S.D. Ohio 1994) (originally 604 F. Supp. 68 (S.D. Ohio 1984))).

¹¹³ *Village of Arlington Heights*, 429 U.S. at 267.

¹¹⁴ *See id.*

B. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964¹¹⁵ states that, “[n]o person in the United States 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 programs or activity receiving Federal financial assistance.”¹¹⁶ Title VI applies to “all of the operations” of “a local educational agency. . .or other school system. . .any part of which is extended Federal financial assistance.”¹¹⁷

1. *Claims Under the Statute Itself*

Title VI “provides no more protection than the equal protection clause”¹¹⁸ and the Supreme Court has held that Title VI, like the Equal Protection Clause, covers only cases of intentional discrimination.¹¹⁹ In order to prove a violation of Title VI, a plaintiff must demonstrate both disparate treatment and a discriminatory purpose on the part of school officials.¹²⁰ To show disparate treatment, a plaintiff can provide direct evidence such as conduct or statements that both directly reflect the alleged discriminatory attitude and that bear directly on the contested decision.¹²¹

Because direct proof of discriminatory motive is often unavailable, plaintiffs may demonstrate intent by using the same sources that appear in equal protection cases. These sources include discriminatory statements of decisionmakers, events leading to the decision, departures from standard procedure, legislative or administrative history, previous official discriminatory actions, and evidence of substantial disparate impact.¹²² Although evidence of disparate impact may not be sufficient, by itself, to successfully state a claim of discrimination in some courts, the plaintiff

¹¹⁵ P.L. 88-352, 78 Stat. 241, 252 (1964).

¹¹⁶ 42 U.S.C. § 2000d (2003).

¹¹⁷ 42 U.S.C. § 2000d-4a; *see also* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (stating that Title VI applies to the entire institution where that institution receives federal funds); *Radcliff v. Landau*, 883 F.2d 1481 (9th Cir. 1989) (holding that Title VI applies to any school where federal funding is provided to a student or any portion of the school).

¹¹⁸ *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1405-6 n.11 (11th Cir. 1993).

¹¹⁹ *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

¹²⁰ *See, e.g., Elston*, 997 F.2d at 1406-07; *see also Tasby v. Estes*, 643 F.2d 1103, 1107-08 (5th Cir. 1981).

¹²¹ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹²² *Elston*, 997 F.2d at 1406 (citing *Village of Arlington Heights*, 429 U.S. at 266-68 (1977)).

does not have to provide evidence of "bad faith, ill will or any evil motive on the part of public officials."¹²³

The analysis of discrimination claims brought under Title VI is similar to the analysis of claims under the Federal Equal Protection Clause.¹²⁴ Courts generally evaluate claims of intentional discrimination under Title VI using the framework established for Title VII employment discrimination claims.¹²⁵ Under this approach, a court first determines whether a complainant can establish a *prima facie* case that raises the inference of discrimination.¹²⁶ The elements of this *prima facie* case will vary depending on the facts. Adapting the elements of a Title VII case to a claim challenging a zero tolerance policy, a plaintiff may be able to make a *prima facie* case by showing 1) that the student was a member of a racial minority; 2) that he or she was subjected to discipline; and 3) that school officials treated similarly situated white students differently from the plaintiff.¹²⁷ It will likely be difficult to provide this evidence because of the challenge in locating data on disciplinary actions against similarly situated white students that a court will accept.¹²⁸

If the evidence does establish a *prima facie* case of discrimination, the burden then shifts to the funding recipient to provide a legitimate, nondiscriminatory justification for the challenged action.¹²⁹ A school will likely be able to meet this burden based on its need to promote school safety and the fact that the disciplined students did commit punishable offenses. A court will then decide whether the stated reason is actually a pretext for discrimination.¹³⁰ This may be demonstrated by

¹²³ *Id.* at 1406 (quoting *Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1414 (11th Cir. 1984)); *see, e.g., Tasby*, 643 F.2d at 1108 ("Statistical proof that black students are disciplined more frequently and more severely than white and Mexican-American students has limited probative value.").

¹²⁴ *See Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 610 (1983); *Elston*, 997 F.2d at 1405-06 n. 11; *see also Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985).

¹²⁵ *Brantley v. Indep. Sch. Dist No. 625, St. Paul Pub. Schs.*, 936 F. Supp. 649, 658 n.17 (D. Minn. 1996); *Baldwin v. Univ. of Tex. Med. Branch at Galveston*, 945 F. Supp. 1022, 1031 (S.D. Tex. 1996). At least one court, however, refused to apply the Title VII standard to a Title VI claim. *See Godby v. Montgomery County Bd. of Educ.*, 996 F. Supp. 1390, 1414 n.17 (M.D. Ala. 1998).

¹²⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹²⁷ In a Title VII claim, a *prima facie* case is generally established by showing: 1) that the complainant was a member of a protected group; 2) that he or she applied for, and was eligible for, a federally-assisted program that was accepting applicants; 3) that despite the person's eligibility, he or she was rejected; and, 4) that the recipient chose another applicant with the complainant's qualifications or that the recipient continued to accept applications from other applicants with the complainant's qualifications. *See id.*

¹²⁸ THE ADVANCEMENT PROJECT, *supra* note 7; *see supra* notes 94-95 and accompanying text; *see also supra* note 108 and accompanying text.

¹²⁹ *See McDonnell Douglas Corp.*, 411 U.S. at 802.

¹³⁰ *See id.* at 804.

showing differential treatment of similarly situated people, a prior history of disparate treatment of people of color, or statistics relating to practices concerning minorities.¹³¹ While prior discrimination and statistical evidence may be available in a zero tolerance challenge, evidence of differential treatment of similarly situated students will be extremely difficult to provide¹³² and a court is not likely to hold that a disciplinary action was pretextual. Thus, claims under Title VI itself are unlikely to be successful because of the inability to rely on statistical evidence of disparities and the need to compare students of color to similarly situated white students.

2. *Claims Under the Regulations*

While Title VI itself will not likely be helpful in a zero tolerance challenge, the Civil Rights Act of 1964 could be useful. The Act authorizes federal agencies to make rules and regulations to effectuate its provisions¹³³ and the Department of Education has promulgated such rules.¹³⁴ It is permissible for these regulations to proscribe actions that the statute itself does not prohibit,¹³⁵ and the Department of Education's rules bar not only intentional discrimination, but also unintentional disparate-impact discrimination.¹³⁶

Like discrimination claims under the Title VI statute, the court analyzes disparate impact claims under the Title VI regulations using the method developed for Title VII employment cases.¹³⁷ This framework also involves a three step burden-shifting analysis. First, the plaintiff must prove by a preponderance of the evidence that a seemingly neutral policy has a disproportionate adverse effect on a protected class.¹³⁸ This may include showing that discriminatory conduct is the federal funding recipient's usual practice and is "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."¹³⁹ Statistical anal-

¹³¹ See *id.* at 804-05.

¹³² THE ADVANCEMENT PROJECT, *supra* note 7; see *supra* notes 92-97 and accompanying text; see also *supra* note 102 and accompanying text.

¹³³ 42 U.S.C. § 2000d-1.

¹³⁴ 34 C.F.R. §§ 100.1-100.13 (2004).

¹³⁵ *Guardians Ass'n v. Civil Serv. Comm'n of N.Y. City*, 463 U.S. 582, 584 n. 2 (1983); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993); see *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); *Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985).

¹³⁶ 34 C.F.R. § 100.3(b)(2).

¹³⁷ *N. Y. Urban League v. N.Y.*, 71 F.3d 1031, 1036 (2d Cir. 1995); see also *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1045 (7th Cir. 1987); *Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984).

¹³⁸ *Elston*, 997 F.2d at 1407; *Ga. State Conference*, 775 F.2d at 1417.

¹³⁹ See *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977).

yses are commonly used to provide evidence of widespread discriminatory effect.¹⁴⁰ A plaintiff cannot make a prima facie case, however, if the evidence shows that the official action did not cause the disparate impact and that it would have existed even if the institution had not discriminated.¹⁴¹ Since there is clear evidence that zero tolerance policies disproportionately affect minorities, as long as sufficient data on school discipline practices is available, it is likely that a zero tolerance challenge will meet the initial burden. Moreover, a court may give additional weight to evidence that the implementation of a zero tolerance policy resulted in increased disparities or a significant growth in the numbers of minority students disciplined.¹⁴²

Next, if a court is satisfied that a prima facie case of discrimination exists, the federal funding recipient must then show that there is a legitimate justification for its action.¹⁴³ There is a legitimate justification where the challenged policy is “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission[]”¹⁴⁴ and the justification has a “manifest[ly] demonstrable relationship” to the official action.¹⁴⁵ There is some indication that a court will consider post hoc justifications as long as they are legitimate.¹⁴⁶ In the education context, a legitimate justification exists where there is a showing of “educational necessity,” meaning that the policy is necessary to achieve an important educational goal.¹⁴⁷ This does not require that the school or district prove that the practice is “essential” or “indispensable,”¹⁴⁸ although the school system cannot simply provide a vague or

¹⁴⁰ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991-93 (1988).

¹⁴¹ *United States v. Lowndes County Bd. of Educ.*, 878 F.2d 1301, 1305 (11th Cir. 1989) (“Racial imbalance in the public schools amounts to a constitutional violation only if it results from some form of state action and not from factors, such as residential housing patterns, which are beyond the control of state officials.”). In *New York City Envtl. Justice Alliance (NYCEJA) v. Giuliani*, the court denied the plaintiffs’ request for a preliminary injunction under the Environmental Protection Agency’s Title VI regulations because they failed to provide sufficient proof of causation. The Court held that to establish causation, the plaintiffs had to “employ facts and statistics that ‘adequately capture’ the impact of the city’s plans on similarly situated members of protected and non-protected groups.” 214 F.3d 65, 70 (2d Cir. 2000) (quoting *N.Y. Urban League*, 71 F.3d at 1037).

¹⁴² THE ADVANCEMENT PROJECT, *supra* note 7, at app. II at 6 n.12.

¹⁴³ See *Elston*, 997 F.2d at 1407; see also *N.Y. Urban League*, 71 F.3d at 1038; *Young by and through Young v. Montgomery County Bd. of Educ.*, (M.D. Ala. 1996) (holding that even if a disparate impact was assumed, the defendants would triumph because they had established a “substantial legitimate justification”) (citing *Ga. State Conference*, 775 F.2d at 1417).

¹⁴⁴ *Elston*, 997 F.2d at 1413.

¹⁴⁵ *Ga. State Conference*, 775 F.2d at 1418.

¹⁴⁶ See *N.Y. Urban League*, 71 F.3d at 1039 (concluding that the justification that commuter rail subsidies for non-minority sub-urban communities were likely to bring material benefits to urban minority commuters was a post hoc justification—the state did not consider that justification in its decision).

¹⁴⁷ *Elston*, 997 F.2d at 1412-13.

¹⁴⁸ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989).

cursory rationale,¹⁴⁹ and the policy must actually serve the stated objectives.

School officials will probably argue that zero tolerance policies are necessary to create and maintain a safe learning environment and that any disparities that appear are due to a higher level of severity of initial or repeat offending by students of color.¹⁵⁰ The problem of school violence, combined with the courts' general deference to educators,¹⁵¹ makes it unlikely that the school's justification would be considered illegitimate or unreasonable. Studies have shown, however, that zero tolerance policies may be ineffective at curbing violence and ensuring safety.¹⁵² Therefore, an argument might be made that, while the school may have a legitimate goal, a zero tolerance policy has a tenuous relationship to that objective.

Finally, assuming a school system demonstrates a substantial justification, a court will invalidate a policy if it determines that the school's justification is merely a pretext for discrimination¹⁵³ or that there is a less discriminatory, but equally effective method of achieving the school's goals.¹⁵⁴ While it will likely be difficult to prove, evidence of a pretextual justification may include differential treatment of similarly situated people, prior history of treatment of people of color, and statistics relating to the school's practices relating to minorities.¹⁵⁵ One can also argue that there are comparably effective practices that will result in less disproportionate results. Experts have suggested a variety of alternative disciplinary practices that could achieve school goals without disproportionately burdening minority students.¹⁵⁶ For example, many zero tolerance policies impose mandatory out-of-school suspensions for a variety of infractions. If such a policy has a disparate impact, it could be replaced by an in-school suspension policy that would result in less adverse effect on minorities while still allowing disciplined students to be separated from the student body.¹⁵⁷

¹⁴⁹ See *id.*

¹⁵⁰ See *In re Cumberland County Sch. Dist.*, [1992-1993 Transfer Binder] 19 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. (LRP) 505, 508-10 (1992) (finding in an investigation of disciplinary actions taken against students of color versus white students that harsher punishments of students of color were due to "extenuating circumstances such as prior disciplinary records").

¹⁵¹ THE ADVANCEMENT PROJECT, *supra* note 7, at 40.

¹⁵² Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1061-63 (2001); Wasser, *supra* note 4, at 772-73.

¹⁵³ *Elston*, 997 F.2d at 1407.

¹⁵⁴ *Id.*; see also *Young by and Through Young*, 922 F. Supp. at 551.

¹⁵⁵ See *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973).

¹⁵⁶ See generally *supra* note 74.

¹⁵⁷ THE ADVANCEMENT PROJECT, *supra* note 7, app. II at 8.

3. *Administrative Enforcement of Title VI*

a) Investigation of Violations

The primary responsibility for enforcing Title VI and its regulations in schools rests with the Office for Civil Rights (OCR), a division of the Federal Department of Education. The OCR fulfills its obligation by initiating compliance reviews of school districts and educational institutions and investigating complaints filed by individuals and groups.

Any individual or class who believes school officials have discriminated against them can file a written complaint with the OCR either personally or through a representative.¹⁵⁸ The complaint must be filed within 180 days from the date of the discriminatory conduct, although the OCR can extend this deadline.¹⁵⁹ If the complainant fails to file within the time limit and a waiver is not requested or granted, the OCR will close the case and inform the complainant of the decision.¹⁶⁰ Otherwise, the OCR has a duty to promptly investigate the complaint.¹⁶¹ An investigation will generally include interviews with the complainant, the funding recipient's staff, and other witnesses, a review of the recipient's records, and examination of other evidence.¹⁶²

The OCR is not required to investigate a complaint that does not appear to have merit or if there is another cause not to investigate.¹⁶³ In addition, the OCR does not have to proceed if it determines that: 1) the complaint involves the same allegations as previously filed complaints where the OCR has determined no violation has occurred; 2) the OCR has recently addressed the issues in the complaint in a complaint or compliance review; 3) previous court or administrative decisions bar the allegations; 4) litigation has been filed with the same allegations; 5) the same complaint has been filed with another agency or institution; 6) the OCR

¹⁵⁸ 34 C.F.R. § 100.7(b).

¹⁵⁹ *Id.* The OCR will grant a waiver of the time limit under a variety of circumstances, including where: 1) one could not reasonably expect the complainant to know that the institution's act was discriminatory within the time limit for filing; 2) the complainant was unable to file a complaint due to circumstances such as an illness; 3) the complainant filed a complaint for the same discriminatory action within the time limit with another federal, state or local agency; 4) the complainant filed, within the time period, an internal grievance alleging the same discriminatory conduct that is the subject of the OCR complaint, and the complaint is filed no later than 60 days after the internal grievance is concluded; or 5) the complainant was adversely affected by unusual circumstances resulting from the OCR's actions. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., OCR CASE RESOLUTION AND INVESTIGATION MANUAL Art. 1 § 108 (2004), available at <http://www.ed.gov/ocr/docs/ocrcrm.html>. [hereinafter CASE RESOLUTION MANUAL].

¹⁶⁰ *Id.*

¹⁶¹ The Department of Education will notify the complainant within 15 days of receipt of a complaint and must make a determination within 105 days. 48 Fed. Reg. 15,509, 15,511 (1983).

¹⁶² CASE RESOLUTION MANUAL, *supra* note 159, at Section 602(a).

¹⁶³ *Id.* at Section 109.

finds evidence that the complaint is moot and there are no class allegations; 7) the complaint does not offer enough detail; 8) the victim's refusal to cooperate impairs the OCR's ability to complete the investigation; 9) the OCR refers the complaint to another agency; 10) the complainant dies; or 11) the OCR determines that a compliance review is a more effective means of addressing multiple individual complaints.¹⁶⁴ If the OCR conducts a full investigation, but finds no violation, it will notify the recipient and complainant of its decision and close the case.¹⁶⁵

b) Remedies

Title VI provides that "no . . . action shall be taken until the department or agency concerned . . . has determined that compliance cannot be secured by voluntary means."¹⁶⁶ Agencies are encouraged to pursue voluntary compliance throughout the process, but they cannot use efforts to secure agreement to avoid or delay actual compliance.¹⁶⁷ The consequence of this emphasis on negotiations and voluntary compliance may be that most cases the OCR investigates do not result in findings of Title VI violations.¹⁶⁸

If the OCR is not able to obtain conformity from an institution through the negotiation process, the OCR must make a determination of noncompliance and initiate formal enforcement action.¹⁶⁹ Title VI provides that an agency can compel compliance by "the termination of or refusal to grant or to continue assistance."¹⁷⁰ The Secretary of Education may suspend, terminate, or refuse to grant funding only if an administrative hearing concludes that the school system has violated Title VI.¹⁷¹ Termination or modification of funding is limited to the program or part thereof that has violated the statute or its regulations,¹⁷² and the action is subject to judicial review.¹⁷³ The OCR also can obtain compliance with

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at Section 302.

¹⁶⁶ 42 U.S.C. § 2000d-1; *see* Ala. NAACP State Conference of Branches v. Wallace, 269 F. Supp. 346, 351 (D.C. Ala. 1967). Agencies are also urged to use Alternative Dispute Resolution (ADR) including the use of a neutral third party or mediator. CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, TITLE VI LEGAL MANUAL 85 n. 90 (2001) [hereinafter TITLE VI LEGAL MANUAL].

¹⁶⁷ TITLE VI LEGAL MANUAL, *supra* note 166, at 85.

¹⁶⁸ THE ADVANCEMENT PROJECT, *supra* note 7, app. II at II-9 (citing a statement by Art Coleman, Panelist at Kennedy School Conference on Education Standards (Apr. 29, 2000)).

¹⁶⁹ Voluntary compliance must occur within 195 days of receipt of a complaint; if not, commencement of a formal action must occur no later than 225 days after receipt of the complete complaint. 48 Fed. Reg. 15,509, 15,511 (1983).

¹⁷⁰ 42 U.S.C. § 2000d-1.

¹⁷¹ *Id.*

¹⁷² *Id.*

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

Title VI through "any other means authorized by law."¹⁷⁴ This generally means that the OCR will refer a violation to the Department of Justice which will then initiate court proceedings.¹⁷⁵

c) Use of the Complaint Process

The OCR complaint process is likely one of the best options, particularly at the federal level, for addressing the disproportionate impact of zero tolerance policies on students of color. There is some indication, however, that individuals and attorneys are reluctant to rely on this method because of problems with the process.¹⁷⁶ Since voluntary agreements between school systems and the OCR are only available to the public by request under the Freedom of Information Act,¹⁷⁷ it is difficult to examine a significant number of these agreements to determine how the OCR typically resolves cases involving school discipline.¹⁷⁸ According to at least one report, however, the OCR does not appear to regularly apply the adverse impact doctrine in complaint investigations and determinations.¹⁷⁹ Case reviews suggest that the OCR often processes complaints under the more rigid intentional discrimination standard.¹⁸⁰ The OCR may not be genuinely examining whether a school's disciplinary practices meet the educational necessity requirement of the Title VI regulations or whether alternate practices would be equally effective with less discriminatory impact.¹⁸¹ Furthermore, it does not appear that the OCR is conducting its own investigations of the educational necessity of the disciplinary practices of schools with the greatest racial disparities.¹⁸²

d) Private Action

If administrative action does not resolve school discipline problems, a complainant has a private right of action under Title VI itself¹⁸³ and injunctive and compensatory relief may be available.¹⁸⁴ However, since plaintiffs are unlikely to be successful in challenging a zero tolerance

¹⁷⁴ 42 U.S.C. § 2000d-1.

¹⁷⁵ CASE RESOLUTION MANUAL, *supra* note 159, at Secs. 304, 606(c).

¹⁷⁶ See THE ADVANCEMENT PROJECT, *supra* note 7, app. II at II-8, II-10.

¹⁷⁷ 5 U.S.C. § 552(a)(2)(A) (2001).

¹⁷⁸ THE ADVANCEMENT PROJECT, *supra* note 7, app. II at II-9. For a description of the process in one case, see *id.*, app. II at II-9-10.

¹⁷⁹ *Id.*, app. II at II-10-11.

¹⁸⁰ *Id.* at 42.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Guardians Ass'n v. Civil Serv. Comm'n of N.Y. City*, 463 U.S. 582, 594 (1983) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-703 (1979)). It has also been held that Title VI may be enforced under 42 U.S.C. § 1983. *Powell v. Ridge*, 189 F.3d 387, 402-03 (3d. Cir. 1999).

¹⁸⁴ *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); see *Guardians Ass'n.*, 463 U.S. at 597 (suggesting that, although damages were not available in a case where there was no pur-

policy under Title VI because of the requirement of proving discriminatory intent, this right of action will not be helpful. Although it may be possible to demonstrate sufficient adverse impact to show discrimination under the Title VI regulations, a private right of action is not available. In *Alexander v. Sandoval*, the Supreme Court held that the Civil Rights Act of 1964 contains no evidence that Congress intended to create a private right of action to enforce disparate impact regulations under Title VI.¹⁸⁵ Thus, “a failure to comply with [the] regulations. . . that is not also a failure to comply with § 601 [of Title VI] is not actionable.”¹⁸⁶

While the lack of a private right to enforce the Title VI regulations does not prohibit or limit action by the OCR, it appears to leave a complainant with no recourse if the OCR does not enforce the regulations. In 1973, civil rights groups attempted to resolve this problem by suing the Secretary of Health, Education, and Welfare for refusing to threaten to or actually withhold federal funding from school districts that would not comply with desegregation orders.¹⁸⁷ In that case, the court ordered the Secretary to take action and concluded that, while an agency has discretion in enforcement and may seek voluntary compliance, if schools did not respond to agency requests for compliance the agency was not relieved of its responsibility to enforce the regulations.¹⁸⁸ The agency’s failure to act would be a dereliction of its duty and would be reviewable by the courts.¹⁸⁹ Nevertheless, several courts have since ruled that individuals cannot sue federal agencies for failing to enforce regulations.¹⁹⁰ For example, in *Women’s Equity Action League v. Cavazos*, the D.C. Circuit held that, absent specific congressional authorization, individuals do not have a private right of action against federal agencies under Title VI.¹⁹¹ It is possible that an exception to these rulings might be made when the OCR finds that a funding recipient is in violation of Title VI but the agency refuses to enforce its own determination.¹⁹² In general, however, while a private plaintiff may have a remedy under Title VI

pose to discriminate, a victim of intentional discrimination would likely be entitled to compensatory damages). Attorney’s fees are also available under Title VI. 42 U.S.C. § 1988 (2004).

¹⁸⁵ *Alexander v. Sandoval*, 532 U.S. at 291-93.

¹⁸⁶ *Id.* at 286.

¹⁸⁷ See generally *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

¹⁸⁸ See *id.* at 1161, 1163. See also *Adams v. Weinberger*, 391 F. Supp. 269, 271 (D.D.C. 1975) (holding that HEW was guilty of “over-reliance” on “voluntary negotiations over protracted time periods”).

¹⁸⁹ See *Adams v. Richardson*, 480 F.2d at 1163.

¹⁹⁰ See, e.g., *Jersey Heights Neighborhood Ass’n v. Glendening et al.*, 174 F.3d 180 (4th Cir. 1999); *Washington Legal Found. v. Alexander*, 984 F.2d 483 (D.C. Cir. 1993); *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

¹⁹¹ See 906 F.2d 742, 752 (D.C. Cir. 1990).

¹⁹² See *Washington Legal Found.*, 984 F.2d at 488.

itself, there is no option for independent action to address a violation of the Title VI regulations and a claimant will have to rely on the OCR.

C. STATE CONSTITUTIONS

Since federal law offers limited opportunities to challenge the disparate impact of zero tolerance discipline policies, litigants must look to state law. The Supreme Court of the United States has recognized that state courts may interpret their own constitutions and statutes to provide greater rights than those afforded by federal law.¹⁹³ Moreover, commentators have argued that the Federal Constitution "serves as a floor, not a ceiling, for civil liberties and civil rights."¹⁹⁴ States may protect rights that federal law does not¹⁹⁵ or state law may offer greater protection for rights recognized by federal law.¹⁹⁶ State supreme courts are the final arbiters of issues arising under state constitutions.¹⁹⁷ Thus, state court decisions that rely on state constitutional law are not subject to review by the United States Supreme Court.¹⁹⁸

¹⁹³ See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-62 n.6 (1981); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

¹⁹⁴ Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 11 (1993); See A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES ST. CONST. L. 1, 8 (1988).

¹⁹⁵ See, e.g., *infra* Part III C 1; *Horton v. Meskill*, 376 A.2d 359, 371 (Conn. 1977) ("[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.").

¹⁹⁶ See, e.g., *Serrano v. Priest*, 557 P.2d 929, 950 (Cal. 1976) ("[O]ur state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."); *Skeen v. Minnesota*, 505 N.W.2d 299, 313 (Minn. 1993) ("Minnesota is not limited by the United States Supreme Court and can provide more protection under the state constitution than is afforded under the federal constitution."); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980) ("A state may enlarge rights under the Fourteenth Amendment announced by the Supreme Court of the United States, which are considered minimal, and thus a state constitutional provision may be more demanding than the equivalent federal constitutional provision.").

¹⁹⁷ G. ALAN TARR, *FEDERALISM, SUBNATIONAL CONSTITUTIONALISM, AND THE PROTECTION OF MINORITY RIGHTS IN THE UNITED STATES* 8 (2001), available at <http://www-camlaw.rutgers.edu/statecon/>.

¹⁹⁸ *Long*, 463 U.S. at 1041 (stating that "[i]f the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, [the Supreme Court of the United States]. . . will not undertake to review the decision."); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."). It is important to note, however, that the Supreme Court of the United States may have jurisdiction over state decisions that rest on federal precedent. *Long*, 463 U.S. at 1040.

Although state constitutions have long been used to protect civil rights in a variety of contexts,¹⁹⁹ litigators have relied primarily on federal constitutional and statutory law when challenging discriminatory practices in education.²⁰⁰ Even when state constitutional or statutory arguments have been raised alongside federal claims, state courts have tended to base their rulings on the federal claim²⁰¹ or rely on federal interpretations of provisions that appear to be analogous to state law.²⁰² However, attorneys are increasingly asserting claims under state constitutions,²⁰³ and a growing number of state courts are using the primacy method to address these claims.²⁰⁴ Courts following this method will decide state claims first even when arguments based on federal law are also made.²⁰⁵ A state court will look at the text and structure of the state constitution, state cases and common law, legislative history, and state policy to create an independent interpretation of the state constitution.²⁰⁶ Federal doctrine remains relevant, but not binding, and United States Supreme Court opinions will have no more influence than those of other states interpreting similar clauses.²⁰⁷

State courts that consider state claims first may also be more likely to interpret state law more broadly than federal law,²⁰⁸ and this is increasingly occurring.²⁰⁹ Between 1950 and 1969, state courts interpreted their constitutions to provide greater rights than those afforded by the Federal Constitution in only ten cases.²¹⁰ Over the next thirty years, however, this number increased to over 1,000 cases.²¹¹ The California

To prevent this review, the state court must include "a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Id.* at 1041.

¹⁹⁹ See Hershkoff, *supra* note 194, at 14-15.

²⁰⁰ JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* 3-2 (3rd ed. 2000). This may be due in part to the initial reluctance of state courts to protect the civil rights of people of color. *See id.* at 3.

²⁰¹ TARR, *supra* note 197, at 9.

²⁰² See James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1185 (2000).

²⁰³ See Hershkoff, *supra* note 194, at 7-8.

²⁰⁴ See, e.g., FRIESEN, *supra* note 200, at 1-26 n.111. According to Friesen, there are two methods of interpreting state constitutions in addition to the primacy method. The "conformity" or "lock-step" method leads state courts to interpret their constitutions according to federal rules for comparable provisions. *Id.* at 1-43. The "supplemental" or independent method considers federal standards first and departs from federal interpretations only when there are compelling reasons to do so or independent interpretation is required to fill gaps in federal rules. *Id.* at 1-45 to 1-46.

²⁰⁵ *See id.* at 1-42.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1-41.

²⁰⁸ *Id.* at 1-28 n.113.

²⁰⁹ TARR, *supra* note 197, at 8.

²¹⁰ *Id.*

²¹¹ *Id.*

Supreme Court, for example, interpreted the equal protection provision of the State's constitution to prohibit both *de jure* and *de facto* segregation,²¹² even though the U.S. Supreme Court previously had determined that the Federal Constitution only barred *de jure* segregation.²¹³ A number of state courts have also used independent constitutional interpretations to invalidate public school financing schemes.²¹⁴

State courts' ability to interpret their constitutions independently and their growing willingness to do so has considerable potential for successful challenges to zero tolerance policies. Moreover, education has traditionally been the province of the states,²¹⁵ so this is an appropriate area for states to diverge from federal standards. Legal arguments against the disparate impact of school disciplinary practices will generally rely on two types of state constitutional provisions: clauses granting the right to an education and clauses protecting equality.

1. State Education Clauses

The Federal Constitution contains no provision expressly granting the right to an education, and the United States Supreme Court has declared that education is not a fundamental right under the Fourteenth Amendment.²¹⁶ Nevertheless, nearly every state constitution contains a clause requiring the state to provide free public education.²¹⁷ A number

²¹² Crawford v. Bd. of Educ. of L.A., 551 P.2d 28 (Cal. 1976).

²¹³ See Keyes v. Sch. Dist. No. 1, 413 U.S. 189, *reh'g denied*, 414 U.S. 883 (1973). In 1979, however, voters in California voted to amend the State's constitution to require the latter to conform to federal law. CAL. CONST. art. I, § 7, *upheld in* Crawford v. Bd. of Educ. of L.A., 458 U.S. 527 (1982).

²¹⁴ See, e.g., DuPree v. Alma Sch. Dist. No. 30 of Crawford County, 651 S.W.2d 90 (Ark. 1983); Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash. 1978).

²¹⁵ Kimberlianne Podlas, *A New Sword to Slay the Dragon: Using New York Law to Combat Environmental Racism*, 23 FORDHAM URB. L.J. 1283, 1288 (1996).

²¹⁶ San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

²¹⁷ ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1. There is some disagreement about how many

of state courts have determined that these clauses guarantee individuals the right to an education²¹⁸ and some have even declared education to be a fundamental right.²¹⁹ Most notably, these clauses have been used to invalidate systems of school finance in several states.²²⁰ William E. Thro divides these clauses into four categories based on their language and the type of educational mandate.²²¹ Education clauses in the first category call for nothing more than free public schools.²²² The second category includes constitutional provisions that require public schools to meet certain minimum standards of quality.²²³ For example, the Pennsylvania Constitution states, “[t]he General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.”²²⁴ Education clauses in the third category²²⁵ contain mandates that are “stronger and

states have an education clause. Some assert that Mississippi is the only state that does not have an education clause. *See, e.g.*, William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989). Gershon Ratner, on the other hand, contends that neither Mississippi nor Alabama have education clauses. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814 n.138 (1985).

²¹⁸ *See generally* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMPLE L. REV. 1325 (1992) (analyzing litigation founded on equal protection clauses and education clauses in state constitutions); *see* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1 (1997) (comparing the success of education litigation based on claims of inequality with the success of education litigation based on claims of inadequate quality).

²¹⁹ *Infra* note 273. *See generally* Hubsch, *supra* note 218; Thro, *supra* note 217.

²²⁰ *See, e.g.*, Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989); McDuffy v. Sec’y of the Executive Office of Educ., 615 N.E.2d 516, (Mass. 1993); Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993); Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71 (Wash. 1978).

²²¹ Thro, *supra* note 217, at 1661-70.

²²² *Id.* at 1661-62. Clauses in this group include: ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; CONN. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; KAN. CONST. art. 6, § 1; LA. CONST. art. VIII, § 1; NEB. CONST. art. VII, § 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68.

²²³ Thro, *supra* note 217, at 1663-65. Clauses in this group include: ARK. CONST. art. 14, § 1; COLO. CONST. art. IX, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; KY. CONST. § 183; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MONT. CONST. art. X, § 1; N.J. CONST. art. VIII, § 4; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3.

²²⁴ PA. CONST. art. III, § 14.

²²⁵ Clauses in this group include: CAL. CONST. art. IX, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. IX, 2d, § 3; MASS. CONST. pt. II, ch. V, § II; NEV. CONST. art. 11, § 2, R.I. CONST. art. XII, § 1; S.D. CONST. art. VIII, § 1; WYO. CONST. art. 7, § 1.

more specific"²²⁶ with "purposive preambles."²²⁷ For example, the Wyoming Constitution requires the legislature to "create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge."²²⁸ Finally, the last category of clauses²²⁹ places the greatest level of responsibility on the state by proclaiming education fundamental, primary, or paramount.²³⁰

2. State Equality Clauses

Many state constitutions contain provisions that afford some right to equality under the law.²³¹ Jennifer Friesen classifies these clauses into four non-exclusive categories, three of which are relevant here.²³² The first category includes clauses guaranteeing equal protection similar to the Federal Fourteenth Amendment.²³³ States with these clauses include

²²⁶ Ratner, *supra* note 217, at 815.

²²⁷ Thro, *supra* note 217, at 1666 (citing Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 68 (1974)).

²²⁸ WYO. CONST. art. VII, § 9.

²²⁹ Clauses in this group include: GA. CONST. art. VIII, § 1; ILL. CONST. art. X, § 1; ME. CONST. art. VIII, pt. 1, § 1; MICH. CONST. ch. 1, art. VIII, § 2; MO. CONST. art. IX, § 1(a); N.H. CONST. pt. 2, art. 83; WASH. CONST. art. IX, § 1.

²³⁰ See, e.g., WASH. CONST. art. IX, § 1 (stating that education is "the paramount duty of the state[]"); ILL. CONST. art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."); GA. CONST. art. VIII, § 1, para. 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.").

²³¹ See, e.g., ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1, ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(a); CAL. CONST. art. I, § 7(b); COLO. CONST. art. II, § 3; CONN. CONST. art. I, § 1; CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; ILL. CONST. art. I, § 2; IND. CONST. art. 1, § 23; IOWA CONST. art. I, § 1; IOWA CONST. art. I, § 6; KAN. CONST. Bill of Rights, § 1; KY. CONST. § 3; LA. CONST. art. I, § 3; ME. CONST. art. I, § 1; ME. CONST. art. I, § 6-A; MD. CONST. Declaration of Rights, art. 46; MASS. CONST. pt. I, art. I, *as amended by* art. CVI; MICH. CONST. art. I, § 1; MICH. CONST. art. I, § 2; MINN. CONST. art. I, § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 1; NEB. CONST. art. I, § 3; NEB. CONST. art. I, § 16; NEV. CONST. art. I, § 1; N.H. CONST. pt. 1, art. 2; N.J. CONST. art. I, § 5; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 1; N.C. CONST. art. I, § 19; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OHIO CONST. art. I, § 1; OHIO CONST. art. I, § 2; OKLA. CONST. art. II, § 2; OR. CONST. art. I, § 1; OR. CONST. art. I, § 20; PA. CONST. art. I, § 1; PA. CONST. art. I, § 26; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.C. CONST. art. VI, § 18; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3; VT. CONST. ch. I, art. 1; VA. CONST. art. I, § 1; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12; W. VA. CONST. art. III, § 1; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 2; WYO. CONST. art. I, § 3.

²³² FRIESEN, *supra* note 200, at 3-5. The fourth category, not discussed in this Note, includes clauses relating to equality among the sexes. *Id.* at 3-8.

²³³ *Id.* at 3-5; see CAL. CONST. art. I, § 7(a); CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MD. CONST. Declaration of Rights, art. 46; MASS. CONST. pt. 1, art. 1; MICH. CONST. art. I, § 2; MINN. CONST. art. I, § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 3; N.J. CONST. art. I, para. 5; N.M. CONST. art. II, § 18; N.C. CONST. art. I,

California which provides, "a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."²³⁴ The second category of clauses prohibits the awarding of special rights or privileges to particular groups or individuals.²³⁵ For example, the Indiana Constitution states, "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens."²³⁶ The third group includes general provisions of equal rights, nondiscrimination clauses, or enumerations of specific civil rights.²³⁷ The Hawaii Constitution is a typical example, stating, "[n]o person shall be . . . denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."²³⁸ These clauses may specify grounds of discrimination that are particularly forbidden, such as race.²³⁹

Although some clauses parallel the Federal Equal Protection Clause,²⁴⁰ others may vary significantly from federal guarantees in language and historical development. These differences may be important when a state interprets its constitution. State courts generally analyze

§ 19; N.Y. CONST. art. I, § 11; OHIO CONST. art. I, § 2; PA. CONST. art. I, § 26; S.C. CONST. art. I, § 3; W. VA. CONST. art. III, § 1; WYO. CONST. art. I, § 3.

²³⁴ CAL. CONST. art. I, § 7(a).

²³⁵ FRIESEN, *supra* note 200, at 3-6; *see* ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(b); CONN. CONST. art. I, § 1; HAW. CONST. art. I, § 21; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KY. CONST. § 3; NEB. CONST. art. I, § 16; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OHIO CONST. art. I, § 2; OR. CONST. art. I, § 20; S.C. CONST. art. VI, § 18; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12.

²³⁶ IND. CONST. art. I, § 23.

²³⁷ FRIESEN, *supra* note 200, at 3-6-7; *see* ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; CONN. CONST. art. I, § 20; COLO. CONST. art. II, § 3; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IOWA CONST. art. I, § 1; KAN. CONST. Bill of Rights, § 1; LA. CONST. art. I, § 3; ME. CONST. art. I, § 1; MASS. CONST. pt. I, art. I, *as amended by* art. CVI; MICH. CONST. art. I, § 1; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 1; N.H. CONST. pt. 1, art. 2; N.J. CONST. art. I, § 5; N.Y. CONST. art. I, § 11; N.C. CONST. art. I, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, § 2; OR. CONST. art. I, § 1; PA. CONST. art. I, § 1; R.I. CONST. art. I, § 2; VT. CONST. ch. I, art. 1; VA. CONST. art. I, § 1; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 2.

²³⁸ HAW. CONST. art. I, § 5.

²³⁹ *See, e.g.*, ALASKA CONST. art. I, § 3; CAL. CONST. art. I, § 8; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 5; MASS. CONST. pt. I, art. I; MONT. CONST. art. II, § 4; N.H. CONST. pt. 1, art. 2; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3a.

²⁴⁰ *See* FRIESEN, *supra* note 200, at 3-5; *see* CAL. CONST. art. I, § 7(a); CONN. CONST. art. I, § 20; FLA. CONST. art. I, § 2; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 5; ILL. CONST. art. I, § 2; LA. CONST. art. I, § 3; ME. CONST. art. I, § 6-A; MD. CONST. Declaration of Rights, art. 46; MASS. CONST. pt. 1, art. 1; MICH. CONST. art. I, § 2; MINN. CONST. art. I, § 2; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 3; N.J. CONST. art. I, para. 5; N.M. CONST. art. II, § 18; N.C. CONST. art. I, § 19; N.Y. CONST. art. I, § 11; OHIO CONST. art. I, § 2; PA. CONST. art. I, § 26; S.C. CONST. art. I, § 3; W. VA. CONST. art. III, § 1; WYO. CONST. art. I, § 3.

their equality clauses in one of three ways,²⁴¹ although individual court decisions may not be consistent in all cases.²⁴² First, a number of state courts rigidly adhere to federal equal protection principles, even if the state constitution contains different language or history.²⁴³

The second and third methods of interpreting state constitutional equality guarantees depart from federal analysis in some way. Some state courts utilize the federal framework of levels of scrutiny,²⁴⁴ but apply their own tests to determine what constitutes a fundamental right or suspect classification.²⁴⁵ A lesser number of state courts interpret their equality provisions independently of the federal framework.²⁴⁶ This independent interpretation may take the form of abandoning the concept of fundamental rights²⁴⁷ or applying a balancing or sliding scale approach to equal protection analysis under a particular state constitution.

The Alabama Supreme Court used a balancing approach in holding that the state's system of public school financing violated the state's equality provision.²⁴⁸ The court weighed a student's right to an education against the state financing scheme and determined that education is "the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights"²⁴⁹ while the method of financing schools had "no rational relationship to the educa-

²⁴¹ Thro, *supra* note 217, at 1670-71.

²⁴² *Id.* at 1670 n.145.

²⁴³ FRIESEN, *supra* note 200, at 3-8. *E.g.*, *Nadzius v. Lahr*, 234 N.W. 581, 583 (Mich. 1931) ("The equality of rights protected by our Constitution is the same as that preserved by the Fourteenth Amendment to the Federal Constitution."); *Commonwealth v. Kramer*, 378 A.2d 824, 826 (Pa. 1977) ("[T]he protection afforded by the equal protection clause of the federal constitution and the prohibition against special laws in the Pennsylvania Constitution are substantially the same."); *but cf.*, *Kroger Co. v. O'Hara Township*, 392 A.2d 266, 273-74 (Pa. 1978) ("In the past we have stated that the Content of [the Pennsylvania equal protection] provision is not significantly different from the Equal Protection Clause of the federal Constitution. . . . While there may be a correspondence in meaning and purpose between the two, the language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it was not there," (citations omitted)). *See generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 *TEX. L. REV.* 1195, 1219 (1985).

²⁴⁴ *See supra* notes 76-83 and accompanying text.

²⁴⁵ *Compare, e.g.*, *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (invalidating school financing system on grounds that education is a fundamental right and wealth is a suspect classification) *with* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that education is not a fundamental right and a classification based on wealth is not by itself suspect).

²⁴⁶ Williams, *supra* note 243, at 1220-21. *See also, e.g.*, *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).

²⁴⁷ David J. Shannon, Note, "No Pass, No Play": *Equal Protection Analysis Under the Federal and State Constitutions*, 63 *IND. L.J.* 161, 175-76 (1987/1988) (citing as an example *Carson v. Maurer*, 424 A.2d 825, 831 (N.H. 1980)).

²⁴⁸ *DuPree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90 (Ala. 1983).

²⁴⁹ *Id.* at 93.

tional needs of the individual districts.”²⁵⁰ Similarly, the New Jersey Supreme Court determined that it must strike a balance between “the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”²⁵¹ The New Jersey court applied this test in *Robinson v. Cahill* to invalidate the State’s method of funding public education.²⁵² In that case, the Court balanced the harm to students from inequalities between school districts that resulted from the financing scheme against the benefits of the state goal of local control of schools.²⁵³

A related mode of analysis is employed by the Alaska Supreme Court.²⁵⁴ The Court determines the appropriate level of scrutiny in an individual case by “assessing the importance of the individual rights asserted and the degree of suspicion with which the court views the resulting classification scheme.”²⁵⁵ Another approach is employed in Minnesota where state courts use a rational basis test to decide claims under the state equal protection clause that is considerably more stringent than the federal standard. A court will uphold a law under this three-prong test if: 1) the statute’s classification is not arbitrary, but provides a “natural and reasonable basis to justify legislation adapted to peculiar conditions and needs;”²⁵⁶ 2) the statute is relevant to the purpose of the law;²⁵⁷ and 3) the statute has a legitimate purpose.²⁵⁸ In *State v. Russell*, the Minnesota Supreme Court invalidated a statute using this test even while recognizing that it would likely survive a challenge under the Federal Equal Protection Clause.²⁵⁹

One significant area where state court equal protection analysis may differ from federal is the availability of disparate impact claims. As was made clear in the discussion of the Federal Equal Protection Clause above, challenges to zero tolerance policies generally must rely on evidence of discriminatory application. Some states follow the U.S. Su-

²⁵⁰ *Id.*

²⁵¹ *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985).

²⁵² *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

²⁵³ *Id.* at 297. The Oregon Supreme Court expressly adopted New Jersey’s approach in assessing its school finance system in *Olsen v. Oregon*, 554 P.2d 139, 145 (Or. 1976). The Oregon court determined that the system did not completely deprive any students of an education and that the tradition of local governance of schools was an established principle that existed at the state’s inception. *Id.* at 145-47. Based on this analysis, the Court held that the method of financing did not violate the state constitution’s equality provision. *Id.* at 149.

²⁵⁴ See, e.g., *Brandon v. Corrections Corp. of Am.*, 28 P.3d 269, 277-280 (Alaska 2001).

²⁵⁵ JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* 39 (3rd ed. Supp. 2004).

²⁵⁶ *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991); accord *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981).

²⁵⁷ *Wegan*, 309 N.W.2d at 280.

²⁵⁸ *Id.*

²⁵⁹ 477 N.W.2d at 891.

preme Court in barring claims based on disparate impact that do not include proof of discriminatory intent.²⁶⁰ Other state courts, however, will find a violation of their equality clauses with only a showing of disproportionate effect.²⁶¹ For example, the Massachusetts Equal Rights Act (MERA) provides for a discriminatory effects test.²⁶² The Massachusetts Supreme Judicial Court has stated that discriminatory purpose is not essential for invalidating a law under the state constitution²⁶³ and that adverse impact claims will be substantially similar to those under relevant federal law.²⁶⁴

The Minnesota Supreme Court has also interpreted its equality guarantee to allow discriminatory impact claims. In *State v. Russell*,²⁶⁵ mentioned above, the court used Minnesota's strict rational basis test to invalidate a statute²⁶⁶ requiring harsher penalties for crack than cocaine²⁶⁷ on the grounds that it discriminated against African-Americans.²⁶⁸ The court determined that its rational basis review should be applied "where the challenged classification appears to impose a substan-

²⁶⁰ See, e.g., *Rutgers Council of A.A.U.P. v. Rutgers*, 689 A.2d 828, 833 (N.J. 1997) ("In New Jersey when a statute is facially neutral, as here, even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class."); see also Ugo Colella, *Trust the Tale, Not the Author: Judicial Review of Legislative Motivation and the Problem of Proving a Racially Discriminatory Purpose Under the California Constitution*, 69 TEMP. L. REV. 1081, 1087 (1996) (stating that the California Supreme Court requires proof of discriminatory purpose under the state equal protection clause, particularly where a statute is facially neutral); Podlas, *supra* note 215, at 1291 (discussing the New York Court of Appeals determination that differential application of laws does not violate the state's equal protection provision unless the discrimination is intentional).

²⁶¹ Disparate impact claims under state law have been used in school finance cases. See, e.g., *DuPree v. Alma School Dist. No. 30 of Crawford County*, 651 S.W.2d 90, 93 (Ark. 1983); *Horton v. Meskill*, 376 A.2d 359, 374-75 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, 332 (Wyo. 1980).

²⁶² MASS. CONST. pt. 1, art. 1.

²⁶³ See, e.g., *School Comm. of Springfield v. Bd. of Educ.*, 319 N.E.2d 427, 434 (Mass. 1974), *cert. denied*, 421 U.S. 947 (1975) (holding that "regardless of legislative intent. . .any action taken either by the Legislature or by the school committee of Springfield which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield's schools would constitute a violation of . . .arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution").

²⁶⁴ See *Buchanan v. Dir. of the Div. of Employment Sec.*, 417 N.E.2d 345, 348 (Mass. 1984) (holding the statutes in question facially constitutional because they are gender neutral on their face and there is not sufficient evidence to support the contention that the statutes are applied in a discriminatory manner); *School Comm. of Braintree v. Mass. Comm'n Against Discrim.*, 386 N.E.2d 1251, 1254 (Mass. 1979) ("In disparate impact cases. . .discriminatory motive is not a required element of proof."); see also *supra* notes 137-149 and accompanying text (discussing the federal disparate impact test).

²⁶⁵ 477 N.W.2d 886 (Minn.1991).

²⁶⁶ MINN. STAT. § 152.025 (1990).

²⁶⁷ *Russell*, 477 N.W.2d at 886-87.

²⁶⁸ *Id.* at 887.

tially disproportionate burden on the very class of persons whose history inspired the principles of equal protection.”²⁶⁹ Thus, it appears that Minnesota courts would likely subject policies that result in disparate impact to a higher level of scrutiny than the federal courts.

3. *Challenges to Zero Tolerance Using State Constitutions*

Education clauses and equality provisions can be used in a variety of ways to challenge the discriminatory impact of school discipline policies. These options include: 1) claims relying on state equal protection provisions analyzed according to federal standards where education is considered a fundamental right; 2) claims using state equality guarantees that are independently interpreted in conjunction with clauses providing a right to an education; and 3) claims based solely on independent interpretations of state equal protection clauses.

a) *State Education Clauses and Federal-Style Equal Protection Analysis*

A claim against the disproportionate application of zero tolerance policies could be successful in a court where the state education clause is held to grant a fundamental right to an education for the purposes of the federal-style equal protection review that occurs in most states.²⁷⁰ State courts have frequently interpreted the education provisions in their constitutions in the context of equal protection analysis,²⁷¹ although they have differed in their characterizations of the right to an education and the protection they have been willing to give that right.²⁷²

Education is a fundamental right requiring strict scrutiny in equal protection analysis in a number of states.²⁷³ Other state courts have held

²⁶⁹ *Id.* at 889.

²⁷⁰ While the state court’s analysis would be identical to the U.S. Supreme Court’s review under the federal Equal Protection Clause, it is essential that claimants rely on the state equality provision and that court opinions make this clear. *Supra* note 198. If federal principles are applied, the issue will be subject to review by the U.S. Supreme Court which has held that education is not a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

²⁷¹ Claims involving state education clauses and equal protection analysis have frequently been used in school finance cases. *See, e.g.*, *Butt v. State*, 842 P.2d 1240 (Cal. 1992); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *see generally* Thro, *supra* note 217; Hubsch, *supra* note 218; Roni R. Reed, Note, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, CORNELL L. REV. (1996).

²⁷² *See generally* Reed, *supra* note 271.

²⁷³ *E.g.*, *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (“[T]he right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.”); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (“A child’s right to an adequate education is a fundamental one under our Constitution.”); *Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass’n*, 667 A.2d 5, 9 (Pa. 1995) (“[T]his court has consistently examined problems related to schools in the context of that fundamental right.”).

that education is a fundamental right, but varied in the level of scrutiny they are willing to apply.²⁷⁴ In a school finance case, the North Dakota Supreme Court determined that its state constitution provided a fundamental right to an education, but decided to apply intermediate scrutiny because strict scrutiny would be inappropriate for a law concerning taxing and finance.²⁷⁵ Similarly, the Wisconsin Supreme Court found that while "education is, to a certain degree, a fundamental right," only rational basis review should apply to funding issues because they do not involve "a complete denial of educational opportunity."²⁷⁶

Where a policy infringes on a fundamental right, a court will use the strict scrutiny standard in an equal protection challenge and require that the classification be narrowly tailored to meet a compelling government interest.²⁷⁷ This places a high burden on the government actor, and, where a state court has held that education is a fundamental right, it is not likely that a school's disparate application of zero tolerance would survive strict scrutiny review. Zero tolerance policies result in students of color being disproportionately suspended and expelled, thus inhibiting their right to an education, particularly if no alternate education is provided. Even though the school system will likely argue that harsh discipline policies serve the compelling interest of creating a safe learning environment, evidence does not show that zero tolerance is effective in achieving that goal.²⁷⁸ Furthermore, the fact that these policies disproportionately impact minority students bolsters the claim that zero tolerance is not narrowly tailored to serve the interest of safety, particularly because alternative means exist to promote safety without denying minority students their right to an education.

In those states that have found education to be a fundamental right, it is possible that strict scrutiny could be employed in a challenge to zero tolerance, even where courts have been unwilling to use this standard in other education cases. The North Dakota Supreme Court refused to apply strict scrutiny to the state's school finance system in *Bismarck Public School District Number 1 v. State*²⁷⁹ because the case involved issues of taxation and finance.²⁸⁰ It is conceivable, however, that the state supreme court would be willing to apply strict scrutiny to the disparate application of zero tolerance because its previous concerns would be irrelevant. In the case of the Wisconsin Supreme Court, however, it is less

²⁷⁴ See, e.g., *Bismarck Public Sch. Dist. No. 1 v. State*, 511 N.W.2d 247 (N.D. 1994) (applying an intermediate level of review in a school finance case).

²⁷⁵ *Id.* at 256-57.

²⁷⁶ *Kukor v. Grover*, 436 N.W.2d 568, 580 (Wis. 1989).

²⁷⁷ *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

²⁷⁸ *Supra* note 53 and accompanying text.

²⁷⁹ *Bismarck Public Sch. Dist. 1 v. State*, 511 N.W. 2d 247, 250 (N.D. 1994).

²⁸⁰ *Id.* at 256-57.

clear what standard the court would apply. The court seemed less than certain that education was a fundamental right, but could determine that cases of expulsion warrant the application of strict scrutiny because expulsion can be seen as an absolute denial of educational opportunity.²⁸¹

Some state courts have examined their education clauses but have been vague about exactly what type of right exists. For example, the New Hampshire Supreme Court determined that the right to an education was “at the very least an important, substantive right” but did not specify that it was fundamental.²⁸² Other state courts have held that education is not a fundamental right and applied rational basis review. The Maryland Court of Appeals, for instance, held that the state constitutional provision requiring “thorough and efficient” public schools²⁸³ did not compel the court to find that education was a fundamental right.²⁸⁴ In states that have not found education to be a fundamental right or have not been clear on this issue, it is less likely that a challenge to zero tolerance will be successful using equal protection analysis that is based on federal principles due to the reasons outlined in Section IIIA above.

b) State Education Clauses and Independently Interpreted State Equality Clauses

Another potentially successful option for challenging the discriminatory application of zero tolerance policies exists where state equality provisions are interpreted differently from the Federal Equal Protection Clause and education is considered a fundamental right. *Sheff v. O'Neill*,²⁸⁵ a landmark Connecticut case on education funding, is instructive. In that case, plaintiffs from Hartford, a racially and economically isolated urban school system,²⁸⁶ challenged the segregation between the urban and suburban school systems. They argued that the fundamental right to an education provided by the state constitution’s education clause²⁸⁷ should be construed in conjunction with two equality provi-

²⁸¹ *Kukor v. Grover*, 436 N.W.2d 568, 579-80 (Wis. 1989).

²⁸² *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *see also Sneed v. Bd. of Educ.*, 264 S.E.2d 106 (N.C. 1980) (concluding that equal access to education is a fundamental right under the state constitution).

²⁸³ MD. CONST. art. VIII, § 1.

²⁸⁴ *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 786 (Md. 1983); *accord Doe v. Superintendent of Sch.*, 653 N.E.2d 1088, 1089 (Mass. 1995); *see also Robinson v. Cahill*, 303 A.2d 273, 284-86 (N.J. 1973) (holding that the mention of education in the state constitution was not sufficient to make education a fundamental right). The *Robinson* court explained that such a holding would indicate that a wide variety of services was also fundamental and this would be unreasonable. *Robinson*, 303 A.2d at 285.

²⁸⁵ *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

²⁸⁶ *Id.* at 1271-73.

²⁸⁷ CONN. CONST. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”).

sions²⁸⁸ to create an obligation to provide students with at least a minimum standard of education and to prohibit the state from depriving students of such an education.²⁸⁹ Plaintiffs claimed that the state had maintained the *de facto* segregation between the urban and suburban school systems and had therefore discriminated against Hartford students by failing to provide them with an equal opportunity to a free education.²⁹⁰

The Connecticut Supreme Court agreed. The court held that the various state constitutional provisions compelled the state to provide students with substantially equal educational opportunity.²⁹¹ Thus, since the racial and ethnic isolation in the Connecticut schools deprived students of their right to an equal educational opportunity, the legislature had a duty to remedy the situation.²⁹² The court went beyond the U.S. Supreme Court's ruling in *Brown v. Board of Education*²⁹³ by holding that the state had to remedy both *de jure* and *de facto* segregation²⁹⁴ and that the state could not avoid its responsibility by arguing that it did not intend to create a segregated system.²⁹⁵

An analogous claim might be made to challenge a zero tolerance policy. When a student is suspended or expelled from school under zero tolerance, this can be viewed as a denial of the fundamental right to an education, especially if the school system does not provide an alternate program. Relying on this argument alone likely would not be sufficient, though, since the school could counter that it is the student's action that necessitates the denial of educational services. However, if a claim relying on the state constitution's education clause is interpreted together with the state equality guarantee and a showing that it is students of color who are being denied an education, a court might find that the state is not providing minority students with equal educational opportunity.

c) Disparate Impact Claims Under State Equality Provisions

Even where a state has not established a fundamental right to an education, a court might still invalidate a zero tolerance policy by inde-

²⁸⁸ CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability. . ."); CONN. CONST. art. I, § 1 ("All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community. . .").

²⁸⁹ *Sheff*, 678 A.2d at 1271-72.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1281.

²⁹² *Id.*

²⁹³ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

²⁹⁴ *Sheff*, 678 A.2d at 1283.

²⁹⁵ *Id.* at 1284.

pendently interpreting the state's equality guarantee. This is particularly true where the state does not require intent and allows for discriminatory impact analysis. In a state such as Massachusetts that employs a disparate effects test similar to that used under the Federal Title VI regulations, a plaintiff would likely be successful in challenging a zero tolerance policy.²⁹⁶ The claimant, however, would have to first demonstrate that the policy results in a significant disparate impact.²⁹⁷ Zero tolerance policies clearly lead to the disproportionate suspension and expulsion of students of color.²⁹⁸ Thus, assuming adequate data on school discipline exists,²⁹⁹ it should not be difficult to provide this evidence. If the plaintiff is able to prove disparate impact, the state actor can rebut the inference of discrimination by showing that the policy is necessary to achieve an important state goal.³⁰⁰ School officials will likely argue that zero tolerance policies are necessary to maintain a safe learning environment. While a court may accept this as a reasonable goal, it may also determine that zero tolerance is not necessary to accomplish the school system's objective because of the questionable connection between zero tolerance and school safety.³⁰¹

A challenge to a zero tolerance policy could also be successful under an interpretation similar to that of the Minnesota Supreme Court in *State v. Russell*.³⁰² In *Russell*, the state court held that a stricter level of scrutiny should be applied to cases where a policy disproportionately burdens people of color.³⁰³ The Minnesota Supreme Court would employ its stringent rational basis test under which a policy will be valid as long as it is not arbitrary, it is relevant to the purpose of the law, and it has a legitimate purpose.³⁰⁴ A zero tolerance policy that results in disproportionate impact on students of color could be invalidated under this test. While such policies clearly have the legitimate purpose of promoting school safety, the disparities in punishment could be considered irrelevant to this goal.

²⁹⁶ *Supra* notes 262-264 and accompanying text (discussing the Massachusetts disparate impact test); *supra* notes 133-149 and accompanying text (assessing the federal disparate impact test under the Title VI regulations).

²⁹⁷ *Buchanan v. Dir. of the Div. of Employment Sec.*, 471 N.E.2d 345, 349 (Mass. 1984).

²⁹⁸ *Supra* notes 57-67 and accompanying text.

²⁹⁹ *Supra* note 94 and 109 and accompanying text.

³⁰⁰ *See Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993); *see also N.Y. Urban League v. N.Y.*, 71 F.3d 1031, 1039 (2d Cir. 1995) (reversing the district court's preliminary injunction because that court failed to consider whether there was a "substantial legitimate justification" for a subway fare increase that had an adverse impact on minority users of the transit system).

³⁰¹ *Supra* note 53.

³⁰² *State v. Russell*, 477 N.W.2d 886 (Minn.1991).

³⁰³ *Id.* at 889.

³⁰⁴ *Wegan v. Village of Lexington*, 309 N.W.2d 273, 280 (Minn. 1981).

CONCLUSION

School systems have increased their reliance on harsh punishment to deal with a vast range of student behaviors, even though there is little evidence that these practices effectively promote a safe learning environment. At the same time, the backlash against these zero tolerance policies has become substantial, ranging from criticisms of the absurd application of the rules to the negative psychological and social impacts on students. There is no doubt, though, that one of the most critical problems with the use of zero tolerance is its impact on students of color. Minority students are disproportionately and more severely disciplined, often for more subjective offenses. Racial inequality in school discipline is not a new phenomenon. However, the increase in punishment associated with zero tolerance could result in a significant increase in these disparities, further threatening the healthy educational and social development of large numbers of students.

While a variety of experts have recommended strategies to resolve this problem, school systems continue to be reluctant to adopt different disciplinary methods. For those concerned about this problem, legal action may be required to compel schools to change. This Note has assessed three of the main options litigants may consider in challenging the disproportionate application of zero tolerance. Plaintiffs have traditionally relied on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in cases involving civil rights in education. However, it is clear that this avenue generally will not be available in a zero tolerance case because of the difficulty of proving discriminatory intent. Statistics showing disparities in punishment may create an inference of discriminatory purpose, but a claimant would also have to provide proof of the differential treatment of similarly situated persons and it is unlikely that such evidence will be available.

Title VI of the Civil Rights Act of 1964 may provide some relief. While claims under the statute itself will fail for the same reasons as federal equal protection arguments, the regulations promulgated under Title VI by the Department of Education expressly bar policies that have disparate effects. Administrative enforcement of these regulations is underutilized and inconsistent, but could be one of the best methods for dealing with the problem of disparities in discipline. Unfortunately, though, if the Department of Education does not enforce its regulations, individuals have little recourse since there is neither a private right of action under the Title VI regulations nor a right to sue the Department to require enforcement.

It appears, therefore, that state constitutions and possibly other state laws, offer the most promising means for challenging the discriminatory application of zero tolerance policies. State courts may interpret their

own constitutions to afford greater protections than those provided by federal law and plaintiffs have a number of potentially successful options for claims relying on state constitutional law. Almost every state constitution places an affirmative duty on the state to provide education, and many courts have held that this makes education a fundamental right. Combining these education provisions with state equality guarantees, whether interpreted independently or using federal equal protection principles, may persuade courts in many states to invalidate school discipline policies that have a disparate effect on students of color. Additionally, state courts that interpret their equality provisions differently from the Federal Equal Protection Clause, particularly if they allow for disparate impact claims, may also be willing to declare zero tolerance unconstitutional.

Students cannot learn and teachers cannot teach if they are preoccupied with concerns for their safety. However, it is imperative that the methods used to create safe learning environments not place additional burdens on students of color, who are often educationally disadvantaged in other ways. Zero tolerance fails this test and those who are concerned about the emotional and intellectual development of children must address the problems these policies create.

