

2014

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Recommended Citation

Kaeanna Wood, *Restoring Our Children's Future: Ending Disparate School Discipline Through Restorative Justice Practices*, 2014 J. Disp. Resol. (2014)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2014/iss2/10>

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Restoring Our Children's Future: Ending Disparate School Discipline Through Restorative Justice Practices

*Mitchell v. Westerville City Sch. Dist. Bd. of Educ.*¹

I. INTRODUCTION

Education is the key to unlocking the American dream. But too many children—particularly African American and Hispanic males—are locked out. Statistics show African American and Hispanic boys are having a difficult time making it through the American education system successfully. As recently as 2013, only fourteen percent of black boys and eighteen percent of Hispanic boys scored proficient or above on the 4th grade reading component of the National Assessment of Educational Progress, compared to forty-two percent of white boys who scored proficient or above.² By the time students reached 9th grade, forty-two percent of black males have been suspended or expelled during their school years, compared to fourteen percent of white male students.³ Moreover, while black youth account for only sixteen percent of the youth population, they represent twenty-eight percent of juvenile arrests, and thirty-seven percent of the detained juvenile population.⁴

Schools are tasked with the important duty of educating and nurturing *all* children. Despite this mission, current school discipline policies are depriving African American and Hispanic males from an education and prosperous future. School boards and administrators must reconsider traditional, retributive school discipline policies, and implement more effective policies to promote school safety, further student achievement, and develop relationships with *all* children.

This note opens the discussion on disparate school discipline with a case harboring egregious facts,⁵ then goes on to explore the history of zero-tolerance policies as the primary method of school discipline, federal civil rights laws prohibiting discrimination based on race in school discipline, and the rise of restorative practices as a means of school discipline. In conclusion, this note argues that in implementing restorative justice practices as an alternative dispute resolution method, schools can end a pattern of disproportionately disciplining African American and Hispanic students and create an environment that fosters success for *all* children.

1. No. 2:11-cv-1057, 2013 WL 4776561 (S.D. Ohio Sept. 6, 2013).

2. Valerie Jarret and Broderick Johnson, *My Brother's Keeper: A New White House Initiative to Empower Boys and Young Men of Color*, THE WHITE HOUSE BLOG (Feb. 27, 2014), <http://www.whitehouse.gov/blog/2014/02/27/my-brother-s-keeper-new-white-house-initiative-empower-boys-and-young-men-color>.

3. *Id.*

4. *Id.*

5. *Mitchell v. Westerville City Sch. Dist. Bd. of Educ.*, No. 2:11-cv-1057, 2013 WL 4776561 (S.D. Ohio Sept. 6, 2013).

II. FACTS & HOLDING

This case arose from an incident involving elementary students on a school bus headed to Pointeville Elementary School. In the fall of 2011, Mikeal Mitchell was a third-grader at Pointeville Elementary School (the elementary school) in the Westerville City School District (the school district) in Ohio, and his sister, Michelle, was a second-grader.⁶ On the morning of October 19, 2011, Mikeal and Michelle boarded the bus headed to the elementary school and sat in the front row.⁷ Shortly thereafter, a surveillance video shows Mikeal rising from his seat several times and facing the rear of the bus.⁸

Although the bus was filled with loud voices and commotion, the bus driver, Deidre Vandewater, heard Mikeal taunting other students, and the bus driver claimed to repeatedly ask Mikeal to stop.⁹ As the students lined up to exit the bus, Mikeal continued to taunt students, and grabbed the jacket of one student.¹⁰ It appeared that Mikeal and the student pushed each other, and then the other student pushed Mikeal with his foot.¹¹ As a female student approached the front of the bus where Mikeal was located, Mikeal made a motion with his arm toward her.¹² The female student then pushed Mikeal back on the seat and struck him.¹³

The bus driver told Mikeal and the female student to stay on the bus while the bus driver called for a school administrator.¹⁴ Michelle also remained on the bus.¹⁵ The bus driver instructed Michelle to exit, but Michelle refused to exit the bus without her brother, encouraging him to exit with her.¹⁶ As the bus driver stood between Mikeal and Michelle, Mikeal pushed against the bus driver's back for 15 to 20 seconds, and the bus driver again called for help on her radio.¹⁷ Shortly thereafter, Principal Jeanne Roth (the principal) arrived and stood at the bus doors as she spoke to the bus driver.¹⁸ Michelle pushed the principal, attempting to exit the bus, while Mikeal climbed over several seats and ran toward the back of the bus.¹⁹ The principal eventually allowed Michelle to exit and instructed the female student and Mikeal to go to her office.²⁰

Later, the principal met Mikeal and Michelle in her office.²¹ According to the principal, both children refused to listen, and behaved in an unruly manner throughout the office visit.²² The principal called the children's mother, Tonya Mitchell, and told her she was needed at the school immediately; however, the

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Mitchell*, 2013 WL 4776561, at *1.

12. *Id.* at *2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Mitchell*, 2013 WL 4776561, at *2.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

principal maintained she was not sure if Ms. Mitchell was going to come.²³ The principal then called police, requesting assistance with controlling the children until their mother arrived.²⁴ When the Westerville City Police officer arrived, Mikeal and Michelle still refused to listen,²⁵ running around the principal's office, knocking items off shelves and calling the officer profane names.²⁶ The officer called for backup, placed the children in handcuffs and removed them from the office.²⁷

Following this incident, the principal suspended Mikeal and Michelle for 10 days and recommended to the superintendent that they be expelled.²⁸ A hearing regarding the expulsion took place on November 7, 2011.²⁹ Based on the evidence presented before the hearing officer, the officer determined that both children violated the Code of Conduct³⁰ by engaging in assault, destroying school property, engaging in disruptive and insubordinate behavior, using profanity while on school property, and taunting another student.³¹ The hearing officer recommended that both children be expelled for 80 days from November 9th, 2011 to March 20th, 2012.³² The children would have an opportunity to return to school on January 4, 2012 if they provided documentation that they each received counseling and agreed to abide by the Code of Conduct upon their return.³³ The superintendent accepted the hearing officer's recommendations and the children were expelled.³⁴

On behalf of both of her children, Tonya Mitchell, filed a complaint under 42 U.S.C. § 1983 for racial discrimination against the school district board (board), Principal Roth, and bus driver Vandewater.³⁵ Ms. Mitchell's complaint alleged that the expulsion of Mikeal and Michelle was an undue harsh punishment, and the children were discriminated against because they are African American.³⁶ The complaint also stated a claim against the bus driver for false imprisonment.³⁷ The

23. *Mitchell*, 2013 WL 4776561, at *2.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at *1 n.1 (“The complaint named the Westerville Police Department and the individual officers as defendants. The claims against those defendants have been dismissed pursuant to settlement.”).

28. *Id.* at *3.

29. *Mitchell*, 2013 WL 4776561, at *3.

30. *Id.*; see also 2014-2015 District Handbook for Elementary School, <http://www.westerville.k12.oh.us/docs/district/depts/30/2014-15%20elementary%20final%2006-23-14.pdf> (“Fighting/Violence is mutual participation in an incident involving physical contact. A student shall not behave in such a way that could threaten to cause or cause physical injury to another person. A student shall not assemble to observe or encourage a fight nor inhibit school personnel from intervening when a fight occurs. Included in this prohibition are those students who assist, are present, or in any way participate in the violation of this rule Students are responsible for proper care of school property, school supplies and equipment. Students who cause damage to school property shall be subject to disciplinary measures. Vandalism is the willful destruction or defacement of school or personal property. A student shall not cause or attempt to cause damage to private or school property. Included in this prohibition are those students who assist, are present, or in any way participate in the violation of this rule.”).

31. *Id.* at *3 (Mikeal's assault claim stemmed from pushing the bus driver and Michelle's assault claim stemmed from pushing the principal; Mikeal was the child charged with taunting the student).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Mitchell*, 2013 WL 4776561, at *1.

36. *Id.*

37. *Id.*

board filed a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), and in the alternative, also filed a motion for summary judgment under Fed. R. Civ. P. 56.³⁸ The board argued that the Mitchells' complaint failed to allege the existence of a policy or custom by which African American students received harsher discipline compared to students who were not members of the protected class for behavior similar to that of Mikeal's and Michelle's.³⁹ The bus driver and principal also filed motions for summary judgment.⁴⁰

First, the trial court found that the Mitchells' complaint sufficiently alleged that the Caucasian administrators at the school district had a settled practice of discrimination against African American students in disciplinary matters so as to establish a custom for the purposes of *Monell*⁴¹ liability.⁴² In response to the board's motion for summary judgment, the Mitchells' did not submit any evidence to controvert the board's claim that the expulsion of the children was based solely on their conduct and not their race.⁴³ Therefore, the trial court found that the board was entitled to summary judgment because the Mitchells failed to show the children suffered a constitutional deprivation.⁴⁴ As to the racial discrimination claim against the principal, the Mitchells were unable to provide enough evidence to prove that the principal treated Mikeal and Michelle differently than she had treated similarly situated Caucasian students.⁴⁵ Because the Mitchells did not procure enough evidence to dispute the principal's claim that she suspended and expelled Mikeal and Michelle based solely on conduct, the trial court found that the principal was entitled to summary judgment. Finally, the trial court also found the bus driver was entitled to summary judgment, because the bus driver did not take any disciplinary action against Michelle, and the bus driver held Mikeal only for his conduct, not his race.⁴⁶

III. LEGAL BACKGROUND

The Mitchells' claims raise important concerns about school disciplinary policies and the application of those policies to minority students. This case provides a medium for the discussion of alternative discipline policies, such as restorative justice practices. This section examines implementation of zero-tolerance policies as the primary method of school discipline, federal civil rights laws prohibiting discrimination based on race in school discipline, and the increasing use of restorative practices as a means of school discipline.

38. *Id.* at *3-4.

39. *Id.* at *4.

40. *Id.* at *8-9.

41. *Mitchell*, 2013 WL 4776561, at *4 (under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), school boards "cannot be found liable unless the plaintiff can establish that an officially executed policy, or the toleration of a custom within the school district leads to, causes, or results in the deprivation of a constitutionally protected right . . . [a] 'custom' for purposes of *Monell* liability must 'be so permanent and well settled as to constitute a custom or usage with the force of law.'") (citing *Doe v. Claiborne Cnty., Tenn.*, 103 F.3d 495, 507 (1996)).

42. *Id.*

43. *Id.* at *6.

44. *Id.* at *7.

45. *Id.*

46. *Id.* at *8.

A. An Overview of Zero-Tolerance Policies

From 1988 to 1994, the juvenile crime arrest rate climbed by sixty-two percent.⁴⁷ Beginning in 1994, it steadily began to decline for the next nine years.⁴⁸ In the wake of this violent trend, state legislatures began to revise youth-related laws, heeding grim predictions of a “coming blood bath.”⁴⁹ This led to the opening of juvenile records, increasing the number of juveniles who can be tried as adults, permitting local juvenile curfews, and expanding the classification of gang association and other juvenile offenses.⁵⁰

Consistent with the “get tough on crime” attitude that swept the country in the early 1990s, schools began to implement stricter disciplinary policies in an effort to increase school safety.⁵¹ The federal government reacted to these state efforts by passing the Gun-Free Schools Act.⁵² The law allowed schools to pursue federal funding to implement policies that either expelled a student for at least a year, or referred the student to authorities of the criminal justice system if the student brought a weapon onto school grounds.⁵³ Several school districts went even further, adopting policies that expelled students for various other violations, including bullying, fighting, drug use, swearing, or violating the dress code.⁵⁴ By 1997, at least seventy-nine percent of schools across the country adopted zero-tolerance policies.⁵⁵

Zero-tolerance policies mandate a fixed consequence, usually harsh and punitive, applied regardless of the circumstances, context, or seriousness of the behavior.⁵⁶ In schools with zero-tolerance policies, student discipline usually results in expulsion, suspension, or referral to law enforcement, despite the nature or seriousness of the behavior. Across the nation, 3.3 million students were suspended during the 2009-2010 school year.⁵⁷ Although punitive and exclusionary policies like zero-tolerance have affected all students, they have disproportionately impacted students of color.⁵⁸

Proponents of zero-tolerance policies argue that such policies remove discretion from administrators and actually ensure that every student is treated equally.⁵⁹

47. SARAH H. RAMSEY AND DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 428-29 (4th ed. 2008).

48. *Id.* at 429.

49. *Id.*

50. TONY FABELO ET AL., BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT 2 (2011).

51. *Id.*

52. *Id.* at 3; Gun-Free Schools Act, 20 U.S.C.A. § 7151 (2014).

53. *Id.*

54. Christopher Boccanfuso and Megan Kuhfeld, *Multiple Responses, Promising Results: Evidence-based Alternatives to Zero Tolerance*, CHILD TRENDS (Mar. 2011), available at <http://www.childtrends.org/?publications=multiple-responses-promising-results-evidence-based-nonpunitive-alternatives-to-zero-tolerance>.

55. *Id.*

56. RUSSELL SKIBA, ET AL., AM. PSYCHOL. ASS'N ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 2 (2006).

57. National School Boards Association, *Addressing the Out of School Suspension Crisis: A Policy Guide for School Board Members 2* (April 2013), <http://www.nsba.org/sites/default/files/0413NSBA-Out-Of-School-Suspension-School-Board-Policy-Guide.pdf> (last visited Nov. 8, 2014).

58. *Id.* at 1.

59. Kathy Koch, *Zero Tolerance*, 10 CQ RESEARCHER 185, 192 (2000).

Despite the claim to fairness, studies indicate that black and white students receive similar punishments once referred to administration; but black students are twice as likely as white students to be referred to the principal's office in the first place.⁶⁰ Black students were referred more often for inherently subjective conduct such as "loitering, disrespect, threats, excessive noise, and a catchall category called, 'conduct interference.'"⁶¹ White students, on the other hand, were referred for more objective behaviors such as using drugs or alcohol.⁶² A study by the Civil Rights Project at Harvard University found that African American and Latino children are more likely to be suspended for discretionary misconduct, like "defiance of authority" and "disrespect of authority."⁶³ This classification of offenses allows racial bias to play a role in carrying out disciplinary measures.⁶⁴

A report on South Carolina schools showed that black and white children were proportionately disciplined for weapons violations and white children were more frequently disciplined for drug violations; however, black students were disciplined at much higher rates for subjective offenses.⁶⁵ Sixty-nine percent of students charged with the offense of "disturbing schools" were African American compared to twenty-nine percent who were white.⁶⁶ Although "disturbing schools" is a minor offense, the consequences are overwhelmingly serious: seventy percent of students charged with the offense were referred to law enforcement, seventy-two percent were referred for suspension, and twenty-one percent were referred for expulsion.⁶⁷

There are relatively few judicial decisions that challenge school discipline or zero-tolerance policies.⁶⁸ School discipline matters are typically handled in unreported administrative proceedings or juvenile courts without courts of record.⁶⁹ Litigation of constitutional claims is expensive and time-consuming, directly contradicting many families' goal of an expeditious return to school.⁷⁰ In the cases addressing school discipline that have been litigated, courts have specifically found schools to have broad authority in the discipline of students, and overwhelmingly uphold zero-tolerance policies.⁷¹

Beginning with *Tinker v. Des Moines Independent Community School District* in 1969, the United States Supreme Court held that school administrators have "comprehensive authority . . . consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools."⁷² While *Tinker* upheld

60. *Id.* at 193; see also Russell J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (June 2000), www.indiana.edu/~equity/docs/ColorOfDiscipline.pdf.

61. *Id.*

62. *Id.*

63. *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (Advancement Project & The Civil Rights Project, Cambridge, MA), June 2000, at 7, available at http://b3cdn.net/advancement/8d91c72205a1b9d955_ujm6bhguv.pdf.

64. *Id.*

65. *Id.* at 8.

66. *Id.* at 6-7 (black children represent 42% of public school enrollment).

67. *Id.* at 7.

68. Avarita L. Hanson, *Have Zero Tolerance School Discipline Policies Turned into A Nightmare? The American Dream's Promise of Equal Educational Opportunity Grounded in Brown v. Board of Education*, 9 U.C. DAVIS J. JUV. L. & POL'Y 289, 356 (2005).

69. *Id.* at 356-57.

70. *Id.* at 357.

71. *Id.*

72. 393 U.S. 503, 507 (1969) (internal citations omitted).

the First Amendment rights of three students to wear black armbands in their school to express their opposition to the Vietnam War, the case stands as the seminal case granting school officials sweeping deference in authority to discipline students.⁷³

In *Goss v. Lopez*, the United States Supreme Court held that students facing temporary suspension from public school were entitled to protection under the Due Process Clause.⁷⁴ When a student faces a suspension of up to ten days, due process requires the student be given notice of charges and an opportunity to present his version to authorities.⁷⁵ *Goss* also recognized that “judicial interposition in the operation of the public school system . . . raises problems requiring care and restraint,” and public education should be left to the control of State and local authorities.⁷⁶

In *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. Of Educ. Sch. Dist. 61*, a decision that gained much notoriety, the Seventh Circuit upheld the suspension of six African American high school students for fighting in the stands during a football game.⁷⁷ The students and parents argued that an unconstitutional two-year expulsion sprang from the school’s zero tolerance policy, punishing them as a group, denying their constitutional rights, and discriminating based on race.⁷⁸ The students sued the school district pursuant to 42 U.S.C. § 1983 and sought an order overturning their expulsion and reinstating them.⁷⁹

In upholding the expulsion of the students, the court noted the very limited role federal courts should have in school disciplinary matters.⁸⁰ Reiterating that the right to an education is not guaranteed by the Constitution, the court declared that education is not a fundamental right.⁸¹ A school disciplinary policy will be upheld unless the policy is “wholly arbitrary,” an “extreme departure from established norms,” or “shocks the conscious.”⁸² With this in mind, the school board’s action did not constitute an “exercise of governmental power without any reasonable justification.”⁸³

The Seventh Circuit in *Fuller* drew part of its reasoning from an earlier Supreme Court decision. In *Wood v. Strickland*, the Supreme Court upheld the expulsion of students for violating the prohibition against use or possession of alcohol at school or school activities.⁸⁴ It is not the role of federal courts to overturn school disciplinary decisions of administrators believed to be lacking “wisdom” or “compassion.”⁸⁵ The national system of public education relies on the discretion

73. 393 U.S. 503 (1969).

74. 419 U.S. 565 (1975).

75. *Id.* at 581.

76. *Id.* at 578.

77. *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp.2d 812, 821 (C.D. Ill. 2000) *aff’d sub nom. Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662 (7th Cir. 2001).

78. *Id.* at 814.

79. *Id.*

80. *Id.* at 821 (citing *Anita J. v. Norhfield Township-Glenbrook North High School Dist.* 225, No. 94 C 6480, 1994 WL 604100, at *2 (N.D. Ill. 1994)).

81. *Id.* at 822 (quoting *Smith v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997)).

82. *Id.* (quoting *Dunn v. Fairfield Cmty. High School Dist. No. 225*, 158 F.3d 962, 965-66 (7th Cir. 1998)).

83. *Fuller*, 78 F. Supp.2d at 822-28 (quoting *Dunn*, 158 F.3d at 965).

84. *Wood v. Strickland*, 420 U.S. 308 (1975).

85. *Id.* at 326.

and judgment of school administrators, but § 1983 revokes discretion when specific constitutional rights have been violated.⁸⁶

B. Title IV and Title VI of the Civil Rights Act

While schools have authority to enforce disciplinary measures to create secure and orderly scholastic environments, federal law forbids public schools from discriminating against certain personal characteristics, such as race.⁸⁷ Title IV of the Civil Rights Act of 1964 (Title IV) 42 U.S.C. §§ 2000c *et seq.*, prohibits discrimination in public elementary and secondary schools based on race, color, or national origin, among others.⁸⁸ Additionally, Title VI of the Civil Rights Act of 1964 (Title VI) 42 U.S.C. §§ 2000d *et seq.*, prohibits discrimination based on race, color, or national origin by beneficiaries of Federal financial assistance.⁸⁹ Titles IV and VI demand that discipline be administered in a racially nondiscriminatory manner.⁹⁰ Titles IV and VI seek to protect students from the beginning to the end of the disciplinary process.⁹¹ This protection requires fair application when managing the classroom, when referring children to outside authority, and when determining appropriate discipline.⁹²

A school's execution of student discipline can result in unlawful discrimination based on race if (1) a student is subjected to different treatment based on the student's race, or (2) if a policy has a disparate impact on students of a particular race.⁹³ Disparate treatment based on race occurs when a school discipline policy is facially neutral, but the school manages the policy in a discriminatory way or allows discriminatory discipline in areas where policy remains ambiguous.⁹⁴ Different treatment can occur when similarly situated students of distinct races are disciplined differently for the same misconduct.⁹⁵ Selective enforcement of a facially neutral policy against students of a particular race is also impermissible discrimination.⁹⁶ This discrimination can occur when school administrators choose to ignore violations by students of one race, but at the same time stringently enforce the policy against students of another race.⁹⁷

Schools also violate Titles IV and VI if they objectively implement facially neutral policies and processes that unjustifiably result in the discrimination of students based on race.⁹⁸ School policies that have a disparate impact on students of a certain racial group include those that seek to impose mandatory suspension

86. *Id.*

87. See Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 2 (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>.

88. *Id.*

89. *Id.*

90. *Id.* at 6.

91. *Id.*

92. Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 6 (Jan. 8, 2014).

93. *Id.* at 7.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 11 (Jan. 8, 2014).

or expulsion upon any student who commits a specific offense, such as tardiness or disobedience.⁹⁹

The Department of Justice Civil Rights Division (DOJ) and the Department of Education Office for Civil Rights (OCR) are responsible for enforcing Title IV and Title VI and its regulations concerning schools and other institutions receiving funding from the Department of Education.¹⁰⁰ The DOJ and OCR initiate investigations of student discipline policies and practices at specific schools based on complaints from students, parents, and community members.¹⁰¹ The DOJ and OCR may also initiate investigations based on public reports of racial disparities in student discipline or as part of their regular compliance monitoring duties.¹⁰²

The Civil Rights Data Collection (CRDC) is required to collect data under Title VI, Title IX, and Section 504, and the Department of Education Organization Act, 20 U.S.C. § 3413.¹⁰³ Since 1968, the CRDC has collected data on important education and civil rights concerns in public schools.¹⁰⁴ In data collected for the 2011-2012 school year, the CRDC found that African American and Latino students are more likely to be disciplined than their peers.¹⁰⁵ Specifically, “African American students without disabilities are more than three times as likely as their white peers without disabilities to be expelled or suspended.”¹⁰⁶ While African American children comprised only fifteen percent of students in the CRDC, they made up thirty-five percent of first-time suspended students, forty-four percent suspended multiple occasions, and thirty-six percent wholly expelled.¹⁰⁷ Furthermore, over fifty percent of children involved in school-related arrests or referred to law enforcement are Hispanic or African American.¹⁰⁸

Although various factors may contribute to inconsistencies in student discipline rates, research shows that the considerable racial disparities revealed by the CRDC are not explained by “more frequent or more serious misbehavior by students of color.”¹⁰⁹ Substantial and inexplicable racial disparities in student discipline exposed by the CRDC heighten concerns that schools across the nation are engaging in racial discrimination that violate Federal civil rights laws.

99. *Id.* at 12. The Departments engage in a three-part inquiry to determine whether the facially neutral policy has an unlawful disparate impact on the basis of race: (1) has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races? (2) Is the discipline policy necessary to meet an important educational goal? (3) Are there comparably effective alternative policies or practices that would meet the school’s stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school’s proffered justification a pretext for discrimination? *Id.* at 11.

100. *Id.* at 2.

101. *Id.*

102. *Id.*

103. Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 3 n. 5 (Jan. 8, 2014).

104. *Id.* at 3.

105. *Id.* at 3-4.

106. *Id.*

107. *Id.*

108. *Id.* at 4.

109. Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline 4 (Jan. 8, 2014); see also Thomas Billitteri, *Discipline in Schools*, 18 CQ RESEARCHER 145, 153 (2008) (“Researchers found no evidence that poverty or family instability explains the phenomenon . . . [c]ultural differences cannot explain all the disparity . . . [f]or now, though ‘we don’t have the answer’ to explain why minorities are disciplined more harshly than whites.”).

C. *The Introduction of Restorative Justice in Schools*

In response to concerns about racial disparities in traditional school discipline methods, combined with the need for safe and productive learning environments, several school districts have turned to the emerging field of restorative justice. Restorative justice as an alternative disciplinary method to suspensions and expulsions has taken root in twenty-one Oakland schools, as well as districts in Los Angeles, San Francisco, Chicago, Denver, Maryland, and Portland.¹¹⁰ Restorative Justice provides an alternative framework to consider wrongdoing, by recognizing that certain actions may violate another person and the relationship between them.¹¹¹ The central obligation of the program is to right the wrong that has been done.¹¹² Implemented in schools, restorative justice practices urge students to create meaningful resolutions to wrongdoing.¹¹³

In one Oakland school, “talking circles” led by a teacher facilitator challenge students to develop empathy for one another.¹¹⁴ The circle practice promotes collaboration and mutual respect by letting students speak without interruption.¹¹⁵ Innovative school districts that have adopted these restorative justice practices have experienced great success in reducing suspensions and lowering recidivism.¹¹⁶ In San Francisco, Richmond High School saw a forty-seven percent reduction in suspensions over a three year period after implementing a form of restorative justice circle in its building.¹¹⁷

IV. INSTANT DECISION

In *Mitchell*, the Mitchells did not file a complaint with either of the departments that enforce Titles IV or VI, which prohibit discrimination in public elementary and secondary schools based on race.¹¹⁸ Rather, Ms. Mitchell filed a complaint under the Equal Protection Clause, 42 U.S.C. § 1983, for racial discrimination in the United States District Court, Southern District of Ohio.¹¹⁹ The district court granted the school district’s, the principal’s, and bus driver’s motions for summary judgment because the Mitchells’ failed to submit evidence of a policy or custom by which African American students receive harsher discipline compared to students who are not African American for behavior similar to Mikeal’s and Michelle’s.¹²⁰ The court also held that the Mitchells did not submit any evi-

110. Patricia Leigh Brown, *Opening Up, Students Transform a Vicious Circle*, THE N.Y. TIMES (Apr. 3, 2013), available at <http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html?pagewanted=all&r=0>.

111. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 19 (2002).

112. *Id.*

113. Brown, *supra* note 110.

114. *Id.*

115. *Id.*

116. Robert K. Ross and Kenneth H. Zimmerman, *The Real Discipline in Schools*, THE N.Y. TIMES (Feb. 16, 2014), available at http://www.nytimes.com/2014/02/17/opinion/real-discipline-in-school.html?_r=0.

117. *Id.*

118. *Mitchell v. Westerville City Sch. Dist. Bd. of Educ.*, No. 2:11-cv-1057, 2013 WL 4776561 (S.D. Ohio Sept. 6, 2013).

119. *Id.* at *1.

120. *Id.* at *8, *10.

dence to refute the district's claim that the expulsion of the children was based solely on their conduct and not their race.¹²¹

In a § 1983 racial discrimination claim under the Equal Protection Clause, the plaintiff bears the burden of demonstrating that the defendants treated similarly situated persons in a disparate manner.¹²² The Mitchells admit that the school district provided data and reports regarding student discipline at the elementary school; but they also contend that the information was incomplete, and not sorted by race.¹²³ Nonetheless, the court deemed defendants to have complied with discovery requests.¹²⁴ Ultimately, the court held that the Mitchells did not meet their burden demonstrating the existence of a genuine dispute of fact as to whether defendants discriminated against the children on the basis of their race, thus suffering a constitutional deprivation.¹²⁵ Given recent studies and acknowledgement by the Department of Justice and Department of Education, plaintiffs wishing to bring these discrimination claims in the future may choose to file a Title IV or Title VI complaint with the departments.

V. COMMENT

Recent data from CRDC proves what individual plaintiffs, like the Mitchells, could not: African American children are more likely to be punished and receive harsher discipline than white peers. Considerable racial disparities reflected in CRDC data are not explained by more frequent or more serious misconduct by students of color, because it does not appear to exist.¹²⁶ Although the Mitchells did procure the evidence of racial discrimination to meet the burden for their claim, the United States Department of Education and the United States Department of Justice (Departments) are the entities that must ultimately enforce non-discrimination in school disciplinary procedures in the nation's public schools.¹²⁷

The CRDC data also revealed that suspended and expelled children are missing out on important instructional time in the classroom due to retributive school discipline.¹²⁸ Suspensions, expulsions, and referrals to law enforcement have been linked to significant negative outcomes.¹²⁹ Instead, these disciplines appear to actually be *causing* some of the exact behaviors the policies are meant to mitigate: diminished academic achievement,¹³⁰ increased misbehavior,¹³¹ increased proba-

121. *Id.* at *8.

122. *Id.* at *6 (quoting *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1360 (6th Cir. 1996)).

123. *Mitchell v. Westerville City Sch. Dist. Bd. of Educ.*, No. 2:11-cv-1057, 2013 WL 4776561, *7 (S.D. Ohio Sept. 6, 2013).

124. *Id.*

125. *Id.*

126. *Boccanfuso & Kuhfeld*, *supra* note 54, at 4 n.7.

127. *Id.* at 2.

128. *Id.* (“[c]omparing the 1984 CRDC National Estimations to the 2009 CRDC National Estimations for the category of suspension-out of school”).

129. *Id.*

130. *Id.* at 4; Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. & URB. SOC'Y 359 (2006).

131. S.A. Hemphill et al., *Pathways from School Suspension to Adolescent Nonviolent Antisocial Behavior in Students in Victoria, Australia and Washington State, United States*, 40 J. COMMUNITY PSYCHOL. 301 (2012).

bility of dropping out,¹³² increased substance abuse,¹³³ and entanglement with the criminal and juvenile justice system.¹³⁴ When examined this way, current policies are negatively circular, doing more damage than they cure. School discipline should not be used as a means to exclude challenging students from school or deprive them of education.¹³⁵ Suspension and expulsion are powerful disciplines, and should be used only as a last resort when maintaining the safety of students and teachers.¹³⁶

On January 8, 2014, the Departments issued a Dear Colleague letter to assist public schools in recognizing and resolving discriminatory discipline as well as to inform families of their rights under Title IV and Title VI of the Civil Rights Act.¹³⁷ In their guidance to public schools, the Departments recommended several strategies to promote a safe educational environment and diminish student misconduct, including conflict resolution and restorative practices.¹³⁸

A. Restorative Justice as an Alternative to Zero Tolerance in Schools

Given their broad authority to regulate student conduct in schools, administrators and school boards should adopt Restorative Justice practices and Positive Behavior Interventions and Supports (PBIS) in response to warnings that harsh and exclusionary disciplinary policies are not effective and have a discriminatory impact on minority boys. PBIS is a program that accounts for the numerous variables that affect student behavior, which includes interaction with peers and teachers, and ability to learn.¹³⁹ Under this framework of school discipline, schools can create a positive and collaborative educational environment.¹⁴⁰ A Restorative Justice approach is student-focused and proactive in preventing misconduct in the first place.¹⁴¹ Furthermore, this type of disciplinary policy recognizes that in addition to holding students accountable for their behavior, administrators and teachers need certain skill sets to handle school conflict effectively.¹⁴²

The practice of Restorative Justice focuses on restoring peace and well being for everyone affected by a harmful act.¹⁴³ When used as the primary method of discipline in schools, the practice challenges the resilience of children and the ability to solve problems, instead of treating students as an inconvenience that needs fixed.¹⁴⁴ Restorative Justice reconnects broken relationships and empowers

132. Arcia, *supra* note 130; FABELO ET AL., *supra* note 50; Linda M. Raffaele Mendez, *Predictors of Suspensions and Negative School Outcomes: A Longitudinal Investigation*, 99 NEW DIRECTIONS FOR YOUTH DEV. 17 (2003).

133. S.A. Hemphill et al., *The Impact of School Suspension on Student Tobacco Use: A Longitudinal Study in Victoria, Australia, and Washington State, United States*, 39 HEALTH EDUC. & BEHAV. 45 (2012).

134. V. Costenbader & S. Markson, *School Suspension: A Study with Secondary School Students*, 26 J. SCH. PSYCHOL. 59 (1998); FABELO ET AL., *supra* note 50.

135. RAMSEY & ABRAMS, *supra* note 47.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Supra* note 57, at 12.

140. *Id.*

141. *Id.*

142. *Id.*

143. RAMSEY & ABRAMS, *supra* note 47, at 12.

144. *Id.*

students by holding them responsible for their behavior. When implemented, Restorative Justice can transform the culture of schools and promote a climate of harmony for students and adults.¹⁴⁵

As a relatively new approach to discipline, several Restorative Justice and PBIS models have emerged in school districts across the nation. A report from the National Association of School Psychologists determined that schools can prevent misconduct by students and promote strong relationships by implementing Restorative discipline models focusing on four goals: generating self-discipline among the school community, preventing misconduct, correcting misconduct, and remediating persistent misconduct.¹⁴⁶ To achieve these goals, an effective Restorative discipline model will create a culturally receptive educational environment that fosters meaningful relationships and promotes confidence, emotional health, and responsible citizens.¹⁴⁷

B. Elementary School Students and Family Group Conferences

While middle schools and high schools have begun to implement the programs and reap the benefits of adopting restorative practices, the potential for restorative practices in elementary schools remains largely low and untapped. Instead of the severe exclusionary discipline carried out in *Mitchell*, elementary schools and students like the Mitchell children would benefit from implementing the restorative practice of Family Group Conferences (FGC). FGC is a model of Restorative Justice that involves face-to-face conferences between key stakeholders: victims, offenders, family members, and individuals who are significant to the parties involved.¹⁴⁸ Facilitators leading the conferences oversee and guide the process, balancing the concerns and interests of all parties involved.¹⁴⁹ Unlike arbitrators, conference facilitators do not enforce settlements or sanctions.¹⁵⁰

FGC allows an opportunity for participants to explore facts, feelings, and resolutions.¹⁵¹ Parties are encouraged to tell their stories, ask questions, express their feelings, and work toward mutually beneficial outcomes.¹⁵² This program provides an opportunity for any misconduct to be articulated by victims and acknowledged by offenders.¹⁵³ To resolve student misconduct, a successful FGC will ensure that the harm or injustice is acknowledged, equity is restored, and future intentions are addressed.¹⁵⁴

Many believe that harsh discipline policies designed primarily to punish are counterproductive to important developmental needs of children.¹⁵⁵ FGC provides the opportunity for children to develop strong and trusting relationships with

145. *Id.*

146. *Id.*

147. *Id.*

148. ZHR, *supra* note 111, at 44.

149. *Id.* at 45.

150. *Id.*

151. *Id.*

152. *Id.*

153. ZHR, *supra* note 111, at 45.

154. *Id.*

155. Russell J. Skiba, et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment* (June 2000), www.indiana.edu/~equity/docs/ColorOfDiscipline.pdf.

adults, and form positive attitudes towards fairness and justice.¹⁵⁶ This growth provides what psychologist James Comer states is necessary for a child's success in school: the practice allows students to bond and identify with adults in school, imitate their behavior, and internalize their attitudes, values and conduct.¹⁵⁷ Using FCG as a method of discipline helps children solve problems, develop inner control, and learn effective expression of feeling.¹⁵⁸ As a result of participating in FCG, children can develop essential resiliency skills and positive attitudes about adult authority, justice, and fairness.¹⁵⁹

Implementing FGC will require the collaboration of teachers' unions, staff, and administrators and may require significant time dedicated to professional development in the area of restorative justice. Individual school approaches to implementing FGC may differ. Some schools may choose to completely overhaul their discipline policies, replacing it with FGC. Others may still allow suspensions and expulsions, enacting zero-tolerance policies only for the original purpose of preventing severe infractions involving violence or weapons. Either way, when parents and school officials convey to a child that they are *wanted* in the school and classroom, with expectations for behavior clearly communicated to the child, the response is often "miraculous."¹⁶⁰ While FGC is not a panacea for misbehavior or violence in schools, it carries the potential to positively transform the elementary school learning environment, an alternative much preferable to rigid and inflexible zero-tolerance policies.

VI. CONCLUSION

The school administrators of Pointeville Elementary School missed a key opportunity to teach the Mitchell children about respect and inspire their trust in authority figures. An FGC could have brought the children, parents, bus driver, and the principal together to discuss the incident. Led by a facilitator, the Mitchell children might have come to realize and acknowledge their harmful actions, school officials might have expressed their needs and expectations for a positive learning environment, and the parties involved could have worked toward a mutually beneficial resolution. Instead, the young Mitchell children were expelled for eighty days, experiencing a significant disruption to their education, and possibly delaying and permanently damaging their long-term development.

Our Nation's future rests upon the success of all our children. Retributive school disciplinary policies that primarily result in suspensions, expulsions, and law enforcement referrals are ineffective at increasing safety in schools, are detrimental to educational achievement, and disproportionately damage African American and Latino male students. Restorative practices are a better alternative dispute resolution method for schools seeking to end the pattern of disproportionate discipline in an attempt to ensure that all children have a key to the American dream.

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156. *Id.*

157. *Id.* at 9.

158. *Id.*

159. *Id.*

160. *Id.* at 8 (quoting JAMES COMER & ALVIN F., M.D., *RAISING BLACK CHILDREN* 197-98 (1992)).