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MAKING THE CASE FOR A SCHOOL-AND-NEIGHBORHOOD DESEGREGATION APPROACH TO DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE

Deborah Fowler, Madison Sloan,** & Dr. Ellen Stone****

I. INTRODUCTION

Last year marked the sixty-fifth anniversary of the Supreme Court of the United States' landmark decision in *Brown v. Board of Education*.¹ It also marked the twentieth anniversary of the Columbine school shooting,² one of the high-profile tragedies that fast-tracked a shift in policy in the way that school discipline is handled across the country.³ In the decades following *Brown* and Columbine, advocates and researchers have documented a new civil rights crisis in education: the school-to-prison pipeline. The school-to-prison pipeline refers to the way that exclusionary discipline and school policing pushes students out of school and into contact with the justice system. An abundance of research has shown that students of color and those with disabilities bear the brunt of the pipeline.⁴ This article will examine links between segregation and the pipeline using Texas data, and will consider opportunities outside of traditional school desegregation law for addressing the link between segregation and the pipeline.

This article begins by discussing the development of the school-to-prison pipeline in Texas,⁵ and moves to a discussion of Texas data showing the link between school segregation and the pipeline.⁶ Next, the article discusses the problems associated with challenging school segregation in the

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1. 347 U.S. 483 (1954).

2. Elizabeth Hernandez, *Columbine Community Gathers for Tearful, Hopeful Ceremony*, DENV. POST (Apr. 20, 2019) <https://www.denverpost.com/2019/04/20/columbine-20-year-anniversary-remembrance/>.

3. See *infra* note 12.

4. See *infra* note 24.

5. See *infra* Part II.

6. See *infra* Part III.

wake of United States Supreme Court cases that narrowed the application of litigation theories used during the civil rights era.⁷ Finally, the article explores potential avenues for addressing the issue through civil rights law related to housing and neighborhood segregation.⁸

II. THE EMERGENCE OF THE PIPELINE IN TEXAS

Across the United States, tragedies like Columbine inspired a shift in the way that student discipline was handled in the nation's schools.⁹ Though there already was a growing movement on the part of teachers to adopt zero tolerance disciplinary policies prior to Columbine,¹⁰ the use of zero tolerance disciplinary policies¹¹ and the emergence of a police presence on school campuses gained steam in the aftermath of the Columbine shooting.¹²

Texas was no different. In response to fears surrounding school violence, the State Board of Education and the Texas Federation of Teachers began to call for zero tolerance school discipline policies in the early 1990s.¹³ The Texas legislature included zero tolerance measures in an omnibus education bill in 1995.¹⁴ In addition, school districts across the state began to dramatically increase the number of zero tolerance measures through their own Codes of Conduct, so that school exclusion was allowed for low-level behavior in addition to the more serious behaviors outlined in state law.¹⁵ The Texas Education Code and local Codes of Conduct allow a student to be excluded from class through in-school (ISS) or out-of-school sus-

7. See *infra* Part IV.

8. See *infra* Part V.

9. COUNCIL OF STATE GOV'TS, JUSTICE CTR., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* 3 (2011) [hereinafter *BREAKING SCHOOLS' RULES*].

10. See Randi Weingarten, *Moving Past Punishment Toward Support*, 39 AM. EDUCATOR, no. 4, Winter 2015–16, at 1 (acknowledging prior support for zero tolerance policies).

11. In the context of school discipline, zero tolerance measures mandate a specific exclusionary disciplinary response—suspension or expulsion—for certain behaviors. For example, bringing a weapon to school may result in an automatic expulsion without reference to any factors surrounding the incident. However, this can result in absurd examples of students disciplined when their intent obviously was not to threaten safety. See, e.g., Associated Press, *High School Expels Junior after Guard Finds Knife in Truck*, N.Y. TIMES, March 21, 2002 at A25 (student expelled when security guard found a ten-inch bread knife in the bed of his truck).

12. *BREAKING SCHOOLS' RULES*, *supra* note 9, at 2–3.

13. TEX. EDUC. AGENCY, *SAFE TEXAS SCHOOLS: POLICY INITIATIVES AND PROGRAMS* 12, 18 (1994).

14. S. B. 1, 75th Leg., Reg. Sess. (Tex. 1995); see also DEBORAH FOWLER, TEX. APPLESEED, *TEXAS' SCHOOL TO PRISON PIPELINE: DROPOUT TO INCARCERATION* 130–133 (Janis Monger ed., 2007).

15. *BREAKING SCHOOLS' RULES*, *supra* note 9, at 15–18.

pension (OSS), or through referral to off-campus Disciplinary Alternative Education Programs (DAEPs) or Juvenile Justice Alternative Education Programs (JJAEPs).¹⁶

The increased focus on zero tolerance policies caused a dramatic increase in the number of Texas students who were excluded from their regular classrooms due to discipline.¹⁷ The vast majority of these were not for the mandatory zero tolerance reasons listed in the Education Code for serious disciplinary violations, but for discretionary offenses outlined in local Codes of Conduct.¹⁸

A national study of school discipline by the Council of State Governments (CSG) used de-identified Texas school and juvenile justice data to track outcomes for three seventh-grade cohorts enrolled in the state's public schools during the 2000 to 2003 school years.¹⁹ The researchers found that, of the almost one million students tracked by the researchers, close to sixty percent had received some exclusionary discipline referral by the time they finished, or should have finished, high school.²⁰ Of these students, half had received at least four referrals by the time they were in twelfth grade and the average number of referrals for students disciplined was more than eight.²¹ The 553,413 Texas students who were included in the study and received a disciplinary referral accounted for more than 4.9 million referrals during the eight-year period that the data was tracked, which is a staggering number.²² Less than three percent of these were for violations for which the state mandated discipline.²³

In addition to the increased reliance on exclusionary discipline, a growing body of research began to highlight the disproportionate impact the zero-tolerance-policy shift had on students of color and students with disabilities.²⁴ The CSG study found that students of color (particularly black students) and students with disabilities were over-represented in exclusionary disciplinary referrals, even when controlling for more than eighty student and campus attributes including socio-economic status, attendance rate, and

16. *Id.* at 20–22.

17. FOWLER, *supra* note 14, at 25–26.

18. *Id.* at 26.

19. BREAKING SCHOOLS' RULES, *supra* note 9, at 25–26.

20. *Id.* at 35–36.

21. *Id.* at 37.

22. *Id.*

23. *Id.* at 38.

24. See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 317 (2000); Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 9, 12–13; AM. PSYCHOL. ASS'N, ZERO TOLERANCE TASK FORCE, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS? AN EVIDENTIARY REVIEW AND RECOMMENDATIONS 56–62 (2006); FOWLER, *supra* note 14, at 36–56.

at-risk status.²⁵ According to the findings, ninth grade black students had a thirty-one percent higher likelihood of discretionary discipline compared to otherwise identical white students.²⁶ The study found that nearly three out of four students who qualified for special education were disciplined at least once, with the frequency of discipline varying by type of educational disability.²⁷ When controlling for the study variables, the researchers found that youths who were “emotionally disturbed,” which was the special education code used for students with mental health issues, were almost twenty-four percent more likely than other students to be disciplined.²⁸

These numbers are important because of the very poor outcomes that research shows are associated with suspension and expulsion.²⁹ Students who are suspended or expelled are less likely to graduate from high school, and their risk of academic failure increases with every exclusionary discipline action.³⁰ They are also more likely to be retained in a grade, which in and of itself is associated with poor outcomes.³¹ These poor academic outcomes are likely the result of critical classroom time lost to students when they are excluded from school.³²

Students who are suspended or expelled also are more likely to become juvenile justice involved.³³ Again, this risk increases with each instance of exclusionary discipline.³⁴ CSG’s study showed that the chances that a student would become juvenile justice involved nearly tripled if he or she were suspended or expelled and this risk increased exponentially with each disci-

25. BREAKING SCHOOLS’ RULES, *supra* note 9, at 42–45, 50–51.

26. *Id.* at 45. The report also found that black students had a twenty percent *lower* likelihood of facing disciplinary action mandated by the state, suggesting this was not likely explained by a difference in behavior between black and white students. *Id.*

27. *Id.* at 47.

28. *Id.* at 51.

29. Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 17, 26 (“School suspension correlates significantly with a host of negative outcomes, including students’ poor academic achievement, grade retention, delinquency, dropping out, disaffection and alienation, and drug use.”).

30. COUNCIL OF STATE GOV’TS, JUSTICE CTR., THE SCHOOL DISCIPLINE CONSENSUS REPORT: STRATEGIES FROM THE FIELD TO KEEP STUDENTS ENGAGED IN SCHOOL AND OUT OF THE JUVENILE JUSTICE SYSTEM 9 (2014) [hereinafter DISCIPLINE CONSENSUS REPORT]; BREAKING SCHOOLS’ RULES, *supra* note 9, at 54; *see also* RENE R. ROCHA, SPARE THE ROD, SUSPEND THE CHILD? 11 (2003), <https://d2y1pz2y630308.cloudfront.net/6327/documents/2015/6/report024.pdf>.

31. BREAKING SCHOOLS’ RULES, *supra* note 9, at 54.

32. *Id.* It is important to note that these poor outcomes are associated with exclusionary discipline even when controlling for the more than eighty variables tested in CSG’s Texas study. *Id.* at 55.

33. DISCIPLINE CONSENSUS REPORT, *supra* note 27, at 9.

34. BREAKING SCHOOLS’ RULES, *supra* note 9, at 69–70.

plinary action.³⁵ This study is still one of the best descriptions of the role that exclusionary discipline plays in creating a pipeline to prison, both through school failure (itself linked to future juvenile and criminal justice involvement)³⁶ and direct contact with the juvenile system.

III. THE LINK BETWEEN THE PIPELINE AND SCHOOL SEGREGATION: A LOOK AT TEXAS DATA

More than sixty years after *Brown v. Board of Education*, the public school system in the United States still struggles with racial and socioeconomic segregation.³⁷ Though white students are a minority in the nation's public schools, on average, they attend a school in which sixty-nine percent of the student body is white.³⁸ Of grave concern, segregation for black students is increasing.³⁹ According to a study on school segregation published in 2019, “the typical student of each race (except for the typical Asian student) attends a school in which the largest share of his/her schoolmates are same-race peers.”⁴⁰

Texas Appleseed (“Appleseed”), a public interest justice center that works across a range of civil rights issues, became interested in the intersection between school-and-neighborhood segregation for two reasons. First, anecdotally, we noticed that in some districts, campuses for which the student body was predominantly (or almost entirely) students of color often appeared to have higher than average rates of discipline. We were interested in a more systematic look at the issue to see whether we could find any evidence of a correlation in data. Second, because we also focus on systemic fair housing work, we were curious about the intersection between school segregation, neighborhood segregation, and the pipeline—and whether the Fair Housing Act or administrative remedies could provide new options for legal or policy advocacy.

35. *Id.* at 70.

36. See PETER LEONE, ET AL., NAT'L CTR. ON EDUC., DISABILITY, & JUVENILE JUSTICE, SCHOOL FAILURE, RACE, AND DISABILITY 2 (2003).

37. ERICA FRANKENBERG ET AL., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* 4 (2019).

38. *Id.*

39. *Id.*

40. *Id.* at 22.

A. School Segregation in Texas

Though there are a number of ways that school segregation can be measured,⁴¹ for purposes of Appleseed's analysis, all school districts and campuses in Texas were coded as follows:

- **Students of color (SOC) majority** – districts or campuses where at least seventy-five percent or more of the student body population were students of color (i.e. Black, Asian, American Indian or Alaska Native, Two or More Races, and Native American).
- **White majority** – districts or campuses where at least seventy-five percent or more of the student body population were white.
- **About equal** – districts or campuses where both students of color and white students make up between forty-five percent to fifty-five percent of the student body population.
- **No category** – districts or campuses where the student body population does not fall into any of these categories.

Appleseed's assessment of segregation by school type showed that charter schools in Texas skew toward being predominantly a students-of-color majority. However, traditional school districts are more evenly split. Therefore, for purposes of this analysis, we excluded charter schools.

Our analysis of traditional school districts with an enrollment of at least 100 students showed fewer schools have about equal enrollment between students of color and white students than have either a students-of-color or white majority. In other words, there are more school districts in Texas that are segregated than are integrated.

41. Compare *id.* at 4 (using exposure statistics to measure school segregation); with Kendra Taylor et al., *School and Residential Segregation in School Districts with Voluntary Integration Policies*, 94 PEABODY J. OF EDU. 371, 371–87 (2019) (using information theory and evenness measure indexes to measure residential and school segregation by both race and poverty).

Count of Segregated Traditional School Districts by Type (SY 2017-18)

Segregation Type	Count	Percent of Districts*
SOC Majority	213	21%
White Majority	213	21%
About Equal	109	11%
No Category	475	47%

*Percent calculated out of total districts with at least 100 students

When we analyzed data at the campus level,⁴² however, the split between students-of-color majority and white majority campuses was not evenly split, and an even smaller percentage of campuses are about equal. Close to half of all campuses are predominantly students-of-color, meaning that in Texas, of campuses of at least 100 students, close to half have a student enrollment that is seventy-five percent or more students-of-color.

42. Again, because charters tend to skew majority students-of-color, our campus analysis included only campuses in traditional school districts with an enrollment of 100 or more students.

Count of Segregated Traditional School Campuses by Type (SY 2017-18)

Segregation Type	Count	Percent of Campuses*
SOC Majority	3,656	49%
White Majority	620	8%
About Equal	704	9%
No Category	2,449	33%

*Percent calculated out of total campuses that have at least 100 students enrolled

B. Intersection of School Segregation and the Pipeline in Texas Schools

Appleseed next looked at whether there were differences in exclusionary discipline rates between the different types of districts and campuses outlined above. What we found was consistent with other research, which suggests that districts or schools that have a high enrollment of students of color have higher rates of exclusionary discipline, even when controlling for student behavior.⁴³

An analysis of disciplinary referral rates broken out by level and type of segregation in traditional school districts showed that districts with a majority student-of-color enrollment have significantly higher disciplinary rates than all other district types. School districts with a white majority enrollment have the lowest disciplinary rates.

43. See BROWN CTR. ON EDUC. POL'Y, BROOKINGS INST., HOW WELL ARE AMERICAN STUDENTS LEARNING? 30 (2017) (reporting that California schools with the lowest proportion of black students do not suspend as frequently as schools with a high enrollment of black students); RUSSELL J. SKIBA, ET AL., PARSING DISCIPLINARY DISPROPORTIONALITY: CONTRIBUTIONS OF BEHAVIOR, STUDENT, AND SCHOOL CHARACTERISTICS TO SUSPENSION AND EXPULSION 8 (2012) ("The statistical relationship between Black enrollment and increased punishment has been well documented"); Kelly Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 25-48 (2010).

Average Discipline Rate in Segregated Traditional (2017-2018)

	Average ISS Rate*	Average OSS Rate*	Average Discipline Rate*
White Majority	12	2	14
SOC Majority	22	7	31
About Equal	17	3	21
No Category	18	3	23

*Per 100 students

The same dynamic exists at the campus level, with campuses with majority student-of-color enrollment having higher rates of disciplinary referrals than campuses that are about equal and those with a predominantly white enrollment.⁴⁴

Average Discipline Rates at Traditional Campuses by School Segregation (2017-2018)

	Average ISS Rate*	Average OSS Rate*	Average Discipline Rate*
White Majority	11	1	13
SOC Majority	15	7	23
About Equal	14	2	17
No Category	15	3	18

*Per 100 students

In Texas, Latinx students represent most of the state's students of color.⁴⁵ Yet, Appleseed's data analysis for our school discipline work has shown that while black students are consistently overrepresented across all disciplinary referral types, Latinx students are not consistently overpre-

44. Appleseed noticed one interesting difference between district and campus disciplinary referral rates by segregation type when a more sensitive test (Kruskal-Wallis) was used; student-of-color majority districts have a lower median referral rate than all other districts for in-school suspensions. A high number of outliers of high-referring districts drive up the overall average for student-of-color majority districts. However, this is not entirely inconsistent with the other trends discussed, since in-school suspension is considered to be the lowest level of disciplinary referral types. This tends to reinforce findings suggesting that student-of-color majority schools and districts rely on harsher disciplinary methods.

45. See *Snapshot 2018: State Totals*, TEX. EDUC. AGENCY, <https://rptsvr1.tea.texas.gov/perfreport/snapshot/2018/state.html> (last visited May 22, 2020) (showing Latinx students comprised fifty-two percent of the student body in 2018).

sented.⁴⁶ This trend was also reported in CSG's report.⁴⁷ This suggests that black students, in particular, disproportionately bear the burden of harsh discipline practices.

Because we were curious to know what referral rates looked like for students attending schools with a predominantly black student body, we analyzed data for the sixty-seven Texas school campuses with a majority black student enrollment and compared their discipline rates with the district average.⁴⁸ More than twenty-two percent of these campuses had a higher overall discipline rate than the district average, and some had rates that were shockingly high. A few examples:⁴⁹

- Smith Middle School in Beaumont Independent School District (ISD) had a discipline rate of 324 per 100 students, compared to a district rate of 104.⁵⁰
- Attucks Middle School in Houston ISD had a discipline rate of 169 per 100 students, compared to a district rate of 21.
- Yates and Worthing High Schools, both also in Houston ISD, had discipline rates of 141 and 100, respectively.
- Lincoln High School, in Dallas ISD, had a disciplinary referral rate of 43 per 100 students, compared to a district rate of 11.

C. District Referral Rates by Segregation Type and Student Race/Ethnicity

The differences between referral rates between students-of-color majority districts, integrated districts, and predominantly white districts led us to

46. See FOWLER, *supra* note 14; DEBORAH FOWLER, TEX. APPLESEED, TEXAS'S SCHOOL-TO-PRISON PIPELINE: SCHOOL EXPULSION 45 (2010); DEBORAH FOWLER, TEX. APPLESEED, TEXAS' SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 112 (2010).

47. BREAKING SCHOOLS' RULES, *supra* note 9, at 41.

48. Our district-level analysis showed that eleven of the thirteen districts that are majority black were charter schools, therefore Appleseed focused on a campus-level analysis.

49. A deeper analysis would be needed to draw any conclusions beyond the snapshot of data outlined above. For example, our comparison looked only to the district average referral rate as a point of comparison; a deeper analysis might look at similar schools within the district to determine whether even those black majority campuses that did not have a referral rate that exceeded the district average still had a higher referral rate than other elementary schools in the district with a different student body composition.

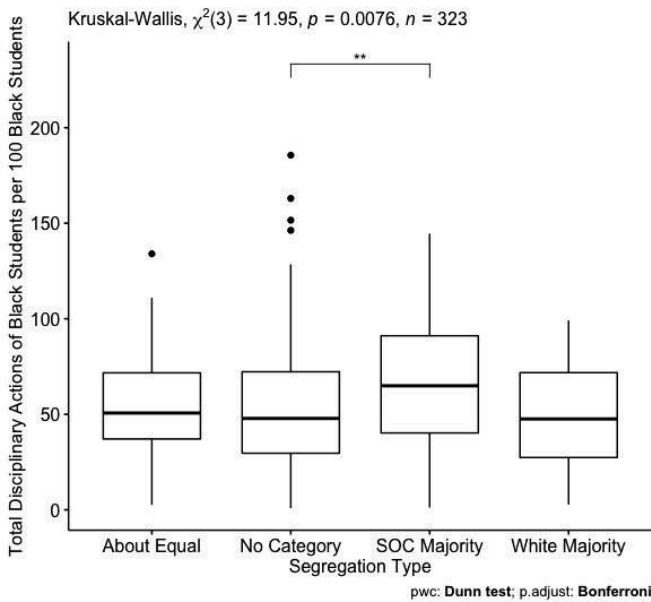
50. Beaumont ISD—which has, incidentally, struggled with school segregation—was recently determined to have the highest discipline rate in the State. Isaac Windes, *Time Out: Beaumont ISD's First-in-Texas Suspension Rates Spark Calls for Change*, BEAUMONT ENTER. (January 17, 2020) <https://www.beaumontenterprise.com/news/article/Time-out-Beaumont-ISD-s-first-in-Texas-14980468.php>.

another question: what is the experience of students-of-color in each of these district or campus types? We were curious to see whether rates for students were consistently lower, regardless of race or ethnicity, in white and integrated districts.

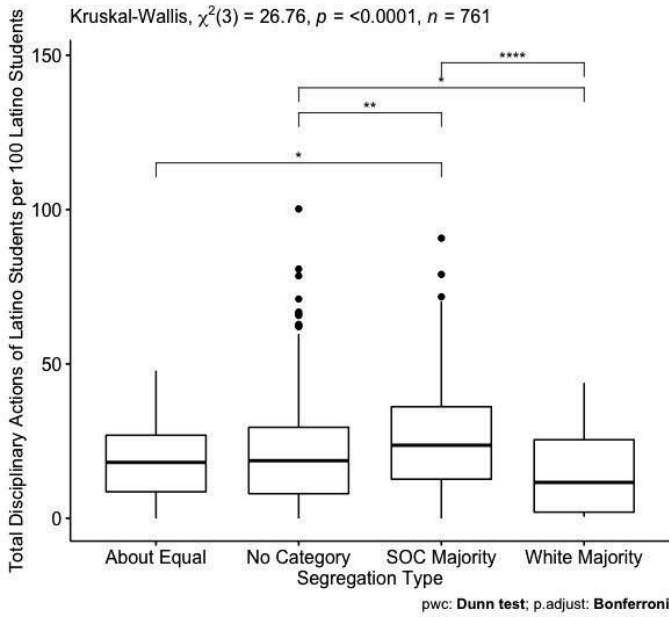
Though students of color are still overrepresented across all district types, our analysis in the charts that follow show that all students—regardless of race or ethnicity—experience lower disciplinary referral rates in more integrated districts and in districts with a predominantly white enrollment. Similarly, these charts show that all students have higher rates of disciplinary referrals in districts that have a predominantly student-of-color enrollment. This suggests that there is something fundamentally different about the way discipline is handled within school districts that are predominantly white and those that are integrated, compared to those that are predominantly students-of-color.

In the charts below, the bold line in the middle of each box represents the median referral rate.

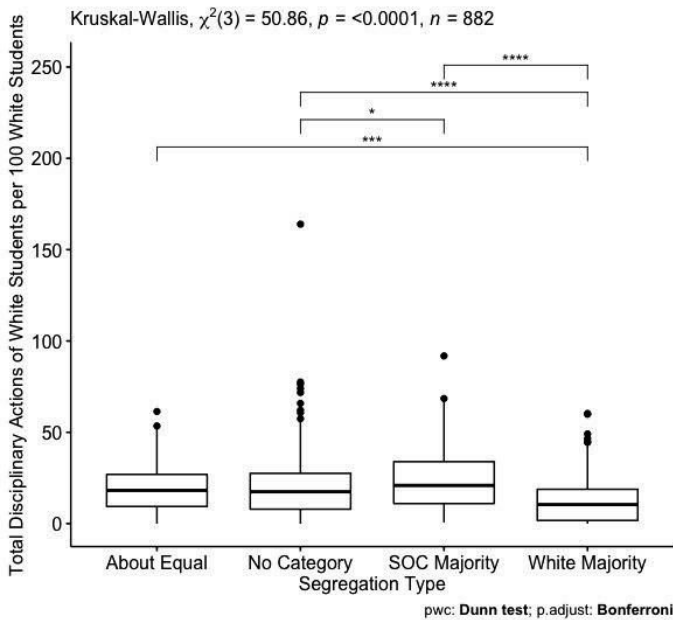
Total Disciplinary Action Rates for Black Students by Segregation Type (SY 2017–18)



Total Disciplinary Action Rates for Latino Students by Segregation Type (SY 2017–18)



Total Disciplinary Action Rates for White Students by Segregation Type (SY 2017–18)



D. Segregation and Measures of Educational Quality

Because of the link between higher rates of exclusionary discipline and poor student outcomes,⁵¹ Appleseed examined measures of educational quality for the districts we studied. Where the link between the “discipline gap” and achievement gap has been studied by others, the research indicates that schools that had higher disparities in exclusionary discipline for students of color also had higher achievement gaps.⁵² This suggests that disparities in discipline may at least exacerbate disparities in student achievement.⁵³

The impact of school segregation on student outcomes has been studied more extensively: research indicates that both socioeconomic and racial segregation are linked with poor outcomes.⁵⁴ By contrast, the more socioeconomically and racially integrated schools are, the better student outcomes.⁵⁵

Appleseed’s findings with regard to segregation and educational quality and outcomes were consistent with the existing body of research, showing:⁵⁶

- Student-of-color majority districts had lower accountability ratings than integrated schools and those that were predominantly white.
- Student-of-color majority districts had higher average teacher turnover rates than integrated schools and schools that were majority white.
- Teachers in student-of-color majority districts had less experience, measured in average years of experience, than teachers in integrated districts and majority white districts.

51. See discussion *supra* Part II.

52. Maithreyi Gopalan, *Understanding the Linkages between Racial/Ethnic Discipline Gaps and Racial/Ethnic Achievement Gaps in the United States*, EDUC. POL’Y ANALYSIS ARCHIVES, Dec. 9, 2019, at 1, 4–6.

53. *Id.*

54. See Sean F. Reardon, *School Segregation and Racial Academic Achievement Gaps*, 2 THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI., Sept. 2016, at 34, 35; see also Gopalan, *supra* note 52, at 4–6.

55. See GREGORY PALARDY ET AL., THE EFFECT OF HIGH SCHOOL SOCIOECONOMIC, RACIAL, AND LINGUISTIC SEGREGATION ON ACADEMIC PERFORMANCE AND SCHOOL BEHAVIORS 4 (2015); *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, THE CENTURY FOUND. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/>.

56. In addition to the measures listed, Appleseed also looked at spending-per-student across the different types of schools and districts we studied. We were surprised to find that our data did not show that segregation had an impact on spending per pupil; in fact, spending per pupil in predominantly student-of-color districts was slightly higher than the other district types. Interestingly, more integrated districts had the lowest spending per student of the four types we studied (white majority, SOC majority, about equal, and no category).

- The average student-to-teacher ratio was higher in student-of-color majority districts than those that were integrated or majority white.

We are not aware of any research examining the link between school segregation, disparities in student discipline, and the achievement gap. Appleseed's research does not establish this link—it merely shows that Texas's segregated schools both have higher discipline rates and lower measures of educational quality.⁵⁷ But since research shows that exclusionary discipline contributes to academic failure, it stands to reason that segregated schools that rely heavily on exclusionary discipline will also have poor student outcomes. Appleseed's analysis of Texas data is thus consistent with the body of research that shows poor student outcomes across a variety of measures in segregated districts—a civil rights problem that continues to exist more than sixty years after the Supreme Court's decision in *Brown v. Board*.⁵⁸

IV. CHALLENGES IN ADDRESSING SCHOOL SEGREGATION & THE PIPELINE

The Civil Rights Act of 1964⁵⁹ and early Supreme Court school desegregation decisions⁶⁰ resulted in a significant decrease in school segregation, particularly for black students.⁶¹ But as schools integrated, white parents began to flee to the suburbs.⁶² This change in housing patterns had the effect of re-segregating schools.⁶³

57. We also were not able to consider the socioeconomic composition of the districts and schools we studied. Socioeconomic composition or status (SES) of the school has been shown to have as much or more impact on student achievement as a student's own socioeconomic background. Research examining academic outcomes for low SES students finds significant differences depending on the SES composition of the school as a whole. PALARDY ET AL., *supra* note 51, at 5. In addition, "schools serving low SES students tend to put a greater emphasis on obedience to authority and conforming to rules and procedures, whereas schools serving middle-and high SES students put a greater emphasis on student initiative and creativity . . . promoting different[] behavioral expectations." *Id.* at 12. Socioeconomic and racial segregation are highly correlated. *Id.* at 3. However, while socioeconomic composition may be correlated with different disciplinary models, for example, the way schools respond to student behavior, it is not correlated with differences in student behavior. *Id.*

58. See FRANKENBERG ET AL., *supra* note 37, at 4.

59. Pub. L. No. 88-352, 78 Stat. 241 (1964).

60. *Mendez, et. al. v. Westminster School District*, 64 F.Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (en banc); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Green v. Kent*, 391 U.S. 430 (1968); *and, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

61. See FRANKENBERG ET AL., *supra* note 37, at 4.

62. See Susheela Jayapal, *School Desegregation and White Flight: The Unconstitutionality of Integration Maintenance Plans*, 1987 U. OF CHI. LEGAL FORUM 389, 389 (1987).

63. See *id.*; FRANKENBERG ET AL., *supra* note 37, at 4–5.

The Supreme Court's decision in a case that attempted to address this change—*Milliken v. Bradley*⁶⁴—had a profound impact on the ability to address school segregation going forward. In 1970, the Detroit branch of the NAACP filed a lawsuit against the city and several state officials, alleging that the Detroit public school system was illegally segregated.⁶⁵ The trial court found in favor of the plaintiffs and entered an order requiring the city's board of education to submit a Detroit-only desegregation plan.⁶⁶ However, in addition to the city's desegregation plan, the court also ordered the state officials, who were defendants, to submit desegregation plans encompassing the three-county metropolitan area surrounding Detroit, despite the fact that the districts in these counties were not defendants in the suit.⁶⁷

The District Court's finding was premised on the interaction between residential patterns and the racial composition of the city's schools and specifically linked residential and school segregation, noting that a desegregation plan that did not take into account the residential segregation both within and around Detroit would fail to integrate schools. The District Court found:

Governmental actions and inaction at all levels, federal, state, and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area. It is no answer to say that restricted practices grew gradually (as the black population in the area increased between 1920 and 1970), or that since 1948 racial restrictions on the ownership of real property have been removed. The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community – as we know, the choice of a residence is a relatively infrequent affair. For many years, FHA and VA openly advised and advocated the maintenance of “harmonious” neighborhoods, *i.e.*, racially and economically harmonious. The conditions created continue When we speak of governmental action we should not view the different agencies as a collection of unrelated units And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.⁶⁸

64. 418 U.S. 717 (1974).

65. *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, *Milliken v. Bradley*, 418 U.S. 717 (1974).

66. *Id.* at 595; *see also* *Bradley v. Milliken*, 345 F. Supp. 914 (E. D. Mich. 1972) (directing preparation of metropolitan desegregation plan).

67. *Bradley v. Milliken*, 338 F. Supp. at 595.

68. *Id.* at 587.

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's order,⁶⁹ and the defendants filed a cert petition in the U.S. Supreme Court, which the Court granted.⁷⁰ The Supreme Court reversed the District Court's decision, holding that a multidistrict, areawide remedy was impermissible where the surrounding school districts were not determined to have participated in creating the segregation complained of by plaintiffs.⁷¹ The Court's decision was premised, in part, on the "tradition" of local control:

Here the District Court's . . . analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn for 'political convenience.' Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process [L]ocal control over the education process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'⁷²

This decision effectively eliminated the use of traditional school desegregation legal challenges as a tool for addressing the de facto school segregation caused by residential housing patterns, providing a roadmap for avoiding desegregation orders for communities that were interested in resisting school segregation.⁷³

Since *Milliken* was decided, despite the Court's deference to local control, even the voluntary desegregation plans crafted by two school districts—Seattle and Jefferson County—were struck down by the Supreme Court in *Parents Involved v. Seattle*,⁷⁴ after opponents filed suit.⁷⁵ The Court held that voluntary desegregation orders that used race in school assignment were unconstitutional, even when the goal was diversity rather than segregation.⁷⁶

69. *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973).

70. *See Milliken*, 418 U.S. 717.

71. *Id.* at 746.

72. *Id.* at 741–42.

73. *See generally* Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 137–81 (2013).

74. 551 U.S. 701 (2007).

75. *See id.* at 701.

76. *Id.* at 733–34.

While the Court acknowledged diversity as a compelling government interest for purposes of a strict scrutiny analysis, it found:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again – even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis” . . . is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.⁷⁷

As discussed below, both the *Milliken* Court’s analysis and the *Parents Involved* analysis fail to acknowledge that, by and large, school segregation today is not the de jure segregation of the *Brown* era, but it is instead, de facto segregation tied largely to housing segregation. *Milliken* in fact went further, denying that housing segregation itself was the result of governmental activity, claiming that the majority-Black school population of Detroit was “caused by unknown and perhaps unknowable factors such as immigration, birth rates, economic changes, or cumulative acts of private racial fears” and that “[t]he Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist.”⁷⁸ The Supreme Court has continued to rely on this erasure of government action from the creation and perpetuation of residential segregation to strike down even voluntary school desegregation plans. Again, in *Parents Involved*, the Court relied on a distinction between state action and private choices to deny that proposed school desegregation plans were Constitutional.⁷⁹ “Where [segregation] is a product not of state action but of private choices, it does not have constitutional implications.”⁸⁰

While advocates have been able to find alternatives to the voluntary integration plans deemed unconstitutional by the Supreme Court, avenues for legal relief using traditional school desegregation law have narrowed significantly,⁸¹ leaving local advocacy as the primary option for those who pursue a more traditional path to school integration.⁸² The challenges of pushing for voluntary desegregation plans in politically conservative states make advo-

77. *Id.* at 747–48 (quoting *Brown v. Board of Education*, 349 U.S. 294 (1955)).

78. *Milliken*, 418 U.S. 717, 765 n.2 (1974) (Stewart, J., concurring).

79. 551 U.S. at 736.

80. *Id.* (quoting *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992)).

81. Taylor, *supra* note 41, at 372–373.

82. *See id.*

cacy alone an unrealistic nationwide option without some legal hook, whether through litigation or administrative remedies.

Similarly, while advocates made considerable gains in addressing the school-to-prison pipeline under the Obama administration by using administrative complaints alleging disparate impact filed with the federal Department of Justice (DOJ) or the Department of Education (ED), the Trump administration's DOJ and ED have no appetite for civil rights enforcement.⁸³ Early in Trump's presidency, the ED and DOJ began rolling back much of the civil rights guidance enacted by the Obama administration, including policy guidance indicating that the agencies would use a disparate impact analysis when investigating complaints alleging discrimination in school discipline and policing.⁸⁴ Without a change in administration, these avenues will remain foreclosed to advocates. Advocates need to look beyond traditional avenues for desegregating schools and addressing the school to prison pipeline.

V. SCHOOL SEGREGATION, NEIGHBORHOOD SEGREGATION, AND THE FAIR HOUSING ACT

By and large, schools look like their neighborhoods; school segregation reflects residential segregation. One nation-wide study found that “[t]he average U.S. public school is 2.6 percent less white, 1.8 percent more black, and 0.9 per-cent more Hispanic than its surrounding neighborhood within the same school district.”⁸⁵ This is also true in Texas. As part of our data analysis, Texas Appleseed mapped schools in Houston and Dallas ISDs.⁸⁶ The maps showed that the segregated schools in those districts existed, for the most part, within segregated neighborhoods.

Where school district boundaries follow the lines of residential segregation, school segregation is more pronounced.⁸⁷ The Fair Housing Act of 1968, which was intended to address residential segregation and systemic housing discrimination, was therefore a logical progression from *Brown v. Board of Education*.

83. *Id.* at 373.

84. See Annie Waldman, *Shutdown of Texas Schools Probe Shows Trump Administration Pullback on Civil Rights*, PROPUBLICA (Apr. 23, 2018), <https://www.propublica.org/article/shutdown-of-bryan-texas-schools-probe-shows-trump-administration-pullback-on-civil-rights>.

85. GROVER J. WHITEHURST ET AL., THE BROOKINGS INST., *BALANCING ACT: SCHOOLS, NEIGHBORHOODS AND RACIAL IMBALANCE* 14 (2017).

86. Texas Appleseed used census tract data overlaid with the segregated school campuses in each district.

87. See WHITEHURST, *supra* note 84, at 14.

A. The Interdependent Relationship Between Residential and School Segregation

Residential and school segregation are interdependent. Because schools draw students from the surrounding geographic area, segregated neighborhoods produce segregated schools. But segregated schools, and associated assumptions about their quality based on the racial demographics of the students, also drive continued residential segregation.⁸⁸

Increased school diversity may also trigger white flight, as noted above, reinforcing and even increasing residential segregation.⁸⁹ A 2006 testing study conducted by the National Fair Housing Alliance found that real estate agents often used schools as a proxy for race.⁹⁰ For example, in Westchester County, NY, real estate agents steered white testers away from homes in Tarrytown, NY, telling them that the schools were “bad” and had large Spanish-speaking populations, but telling Latinx homebuyers that the schools were “good.”⁹¹ The Tarrytown school district was almost forty-eight percent students of color, had a graduation rate of ninety-eight percent, and an eight-four percent student continuation to college.⁹²

The National Association of Realtors has recognized that “characterizations such as ‘a school with low test scores’ or ‘a community with declining schools’ become code words for racial or other differences in the community” and advises its members to send homebuyers to “objective” sources of information rather than commenting on school quality.⁹³ Sixty-two percent of white Americans said it was better for children to go to school in their own neighborhoods, even if those schools were not racially or ethnically diverse, while sixty-eight percent of Black Americans preferred diverse schools over local schools.⁹⁴ The preference for “neighborhood schools”

88. ERIC TORRES & RICHARD WEISSBOURD, HARV. GRADUATE SCH. OF EDUC., DO PARENTS REALLY WANT SCHOOL INTEGRATION? 3 (2020); Adam Goldstein & Orestes P. Hastings, *Buying In: Positional Competition, Schools, Income Inequality, and Housing Consumption*, 6 SOC. SCI. 416, 440–41 (2019).

89. Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 164, 177 (John Charles Boger & Gary Orfield eds., 2005).

90. NAT’L FAIR HOUS. ALL., UNEQUAL OPPORTUNITY—PERPETUATING HOUSING SEGREGATION IN AMERICA 6 (2006), <https://nationalfairhousing.org/wp-content/uploads/2017/04/trends2006.pdf>.

91. *Id.* at 12.

92. *Id.* at 13; See also MARGERY AUSTIN TURNER ET. AL., U.S. DEP’T OF HOUSING AND URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf.

93. *Steering, Schools, and Equal Professional Service*, NAT’L ASS’N OF REALTORS, (June 9, 2014), <https://www.nar.realtor/articles/steering-schools-and-equal-professional-service>.

94. *More than Half Say Students Should Go to Schools in Their Local Community, Even if Less Diverse*, PEW RES. Ctr., (April 24, 2019), <https://www.pewsocialtrends.org/>

when residential segregation is prevalent is a preference for segregated schools.

The preference for segregated neighborhood schools by white families also reflects the local nature of school funding:

[O]n every tangible measure—from qualified teachers to curriculum offerings—schools serving greater numbers of students of color had significantly fewer resources than schools serving mostly White students. The continuing segregation of neighborhoods and communities intersects with funding formulas and school administration practices that create substantial differences in the educational resources made available in different communities.⁹⁵

Nationally, not only do one in six Black students and one in nine Latinx students attend schools that are at least ninety-nine percent children of color, seventy-one percent of those Black public school students and seventy-three percent of those Latinx public school students attend high-poverty schools.⁹⁶ By contrast, only twenty-eight percent of all White public-school students attended high-poverty schools.⁹⁷

The paradigm of “neighborhood schools” has been joined by the paradigm of “school choice,” which theoretically decouples school and residential segregation.⁹⁸ However, school choice, on average, has exacerbated racial and economic segregation.⁹⁹ As discussed above, most charter schools and districts in Texas skew toward majority students of color, suggesting that increasing the number of charters has not resulted in more integrated schools.

Residential segregation itself is not a result of individual choice, it is the product of deliberate government policy decisions at the federal, state, and local government level.¹⁰⁰ Included in these policies are racially explicit

2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/psdt_05-01-19_diversity-00-04/.

95. Annie Davis, *What Happens to a Dream Deferred? The Continuing Quest for Educational Opportunity*, *SOC. EDUC.*, Nov./Dec. 2014, at 274.

96. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY* 12–13 (2005), <https://escholarship.org/uc/item/4xr8z4wb>.

97. *Id.* at 19 tbl. 7.

98. Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 *SOC. OF EDUC.* 99, 101 (2016).

99. *Id.* at 111–12.

100. *See, e.g.*, Douglas Massey & Nancy Denton, *American Apartheid: Segregation and the Making of the Underclass*, 96 *AM. J. OF SOC.* 2 (1998); RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* (2005); JAMES LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005); PATRICK

zoning; segregated public housing developments; housing subsidies under the GI Bill that went almost exclusively to Whites,¹⁰¹ guaranteeing bank loans to mass-production suburban builders conditioned on imposing racially restrictive covenants; “redlining” maps that identified neighborhood risk for lending solely according to the race of its residents; discriminatory zoning that placed undesirable land uses into communities of color; denial of equal public services; urban renewal programs that displaced and isolated African-American communities or isolated them from other neighborhoods; and lending discrimination.¹⁰² The continuing effect of these policies and the investment of public resources in White homeownership and White communities can be seen clearly not only in continued residential segregation, but in the concentration of poverty and other kinds of disadvantage in historically segregated Black and Latinx neighborhoods.¹⁰³

B. Fair Housing and Housing-Related Civil Rights Claims¹⁰⁴

“[W]here a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.”¹⁰⁵ Residential segregation has a significant impact on children’s life outcomes including life expectancy, adult economic mobility, and educational achievement.¹⁰⁶ Children’s race and ethnicity strongly predict whether they live in a neighborhood with access to opportunity; access to quality early childhood education, safety, environmental health, parks and playgrounds, healthy food, good jobs and adequate income for their parents and other adults in their lives. Black children are 7.6 times more likely than white children, and Hispanic children are 5.3 times more likely than white

SHARKEY, STUCK IN PLACE; URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013).

101. MICHAEL BENNET, “THE LAW THAT WORKED,” *Educational Record* 72, (Fall 1994) at p 6.12.

102. See, e.g., ROTHSTEIN, *supra* note 87; KATZNELSON, *supra* note 87.

103. See, e.g., PATRICK SHARKEY, STUCK IN PLACE (2013).

104. This article focuses specifically on the Fair Housing Act, but concurrent and additional claims are available under Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Rehabilitation Act.

105. 114 CONG. REC. 2707 (1968) (statement of Sen. Phillip Hart).

106. Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, HARV. U., (2015), http://www.equality-of-opportunity.org/images/nbhds_exec_summary.pdf; Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, HARV. U., (2015), https://opportunityinsights.org/wp-content/uploads/2018/03/mto_paper.pdf.

children, to live in neighborhoods with very low opportunity to grow up healthy.¹⁰⁷

The Fair Housing Act¹⁰⁸ (FHA) bans discrimination on the basis of race, color, sex, religion, disability, national origin, and familial status. Among other prohibitions, the FHA makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.¹⁰⁹

The FHA was intended not only to end housing discrimination, but to dismantle segregation, and has been used at least once to challenge both housing and school segregation.¹¹⁰ In 1980, the United States and the NAACP filed suit against the City of Yonkers, New York under the FHA, the Civil Rights Acts of 1871 and 1968, section 1883, and the Thirteenth and Fourteenth Amendments to the Constitution, alleging that Yonkers intentionally segregated both housing and schools. The U.S. District Court held in 1985 that housing and schools in Yonkers were intentionally segregated by race, and that the fact that the City was a separate entity from the Board of Education did not absolve it of responsibility for school segregation.¹¹¹ The case settled in 2002, and the settlement ended in 2007. In general, however, challenges to school segregation have been separate from challenges to housing segregation, and the (arguably deliberate) disconnect between housing and school policy has remained the status quo, despite evidence of their impact on each other.

Areas with metropolitan-level school integration plans were more likely to remain integrated between 1980 and 2005 to 2009, while areas without metropolitan-level school integration plans were likely to re-segregate.¹¹²

107. DOLORES ACEVEDO-GARCIA ET AL., DIVERSITYDATAKIDS.ORG, THE GEOGRAPHY OF CHILDHOOD OPPORTUNITY: WHY NEIGHBORHOODS MATTER FOR EQUITY, FINDINGS FROM THE CHILD OPPORTUNITY INDEX 2.0 at 3 (2020), http://diversitydatakids.org/sites/default/files/file/ddk_the-geography-of-child-opportunity_2020v2_0.pdf.

108. 42 U.S.C. § 3602 *et seq.* (1968).

109. 42 U.S.C. § 3604 (a)–(b) (1968).

110. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985).

111. *Id.*

112. Myron Orfield, *Milliken, Meredith and Metropolitan Segregation*, 62 UCLA L. Rev. 364, 440 (2015).

Not only did residential integration increase faster in areas with metropolitan school integration plans, real estate agents were less likely to engage in illegal steering and advertisements were less discriminatory.¹¹³

While legal challenges to school segregation have not been foreclosed, and there are ongoing school desegregation orders that have had a substantial effect,¹¹⁴ challenging housing discrimination under the FHA, as well as other civil rights laws is effectively a way to challenge school segregation as well, and one that does not necessarily require a finding of intentional discrimination. These strategies may include stronger civil rights and fair housing enforcement; challenges to policies that have a disparate impact on the basis of race, including siting of affordable housing¹¹⁵ and discriminatory zoning,¹¹⁶ remedies for direct housing discrimination, particularly steering by real estate agents,¹¹⁷ challenges to disparate treatment;¹¹⁸ and fair housing remedies that address resource deficiencies in historically disinvested communities.¹¹⁹

In 1995, a class of African-American residents of public housing in Baltimore, Maryland, filed suit against HUD under the FHA and other civil rights laws alleging that they had been discriminated against on the basis of

113. *Id.* at 440.

114. *See, e.g.*, Educational Equity, *Case: Sheff v. O'Neill*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/case-issue/sheff-v-oneill> (last visited Mar. 16, 2020).

115. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513–14 (2015).

116. It is well settled that where zoning decisions and policies create a disproportionate impact on minorities, this provides the basis for asserting a discrimination claim under the Fair Housing Act 42 U.S.C. § 3604 (2020). *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988), *aff'd* 488 U.S. 15 (1988). Importantly, discriminatory animus displayed by members of the public alone is enough to support a finding of intentional discrimination by government officials; the expression of discriminatory animus by such officials themselves is not necessary to prove discriminatory intent.

117. Racial steering is illegal under the Fair Housing Act 42 U.S.C. §§ 3604, 3605 (2020).

118. *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish.*, 641 F. Supp. 2d 563, 567–68 (D. La. 2009).

119. We urge caution about “gentrification” as a means to reduce school desegregation. The influx of higher-income whites into historical communities of color is one arena in which residential desegregation does not generally reduce school segregation as parents use “school choice” policies to send their children to school outside the neighborhood. Further, the authors wish to make clear that their vision of school integration does not rely on the movement of individual families or place the burden of integration solely on people of color. True integration requires: “Racial, ethnic, and economic diversity in composition; Appoint leadership Representative of this diversity; Facilitate Relationships across people of different backgrounds; Practice Restorative justice; and Share equitable access to Resources and opportunities.” We are indebted to the students of Integrate NYC for this framework. *Our Mission*, NEWYORKAPPLESEED.ORG, <https://www.nyappleseed.org/our-mission/> (last visited May 24, 2020).

their race.¹²⁰ The Court held that HUD must take a regional approach to public housing desegregation:

Geographic considerations, economic limitations, population shifts, etc. have rendered it impossible to effect a meaningful degree of desegregation of public housing by redistributing the public housing population of Baltimore City within the City limits. Baltimore City should not be viewed as an island reservation for use as a container for all of the poor of a contiguous region including Anne Arundel, Baltimore, Carroll, Harford and Howard Counties.¹²¹

HUD's jurisdiction and "ability to exert practical leverage" throughout the region, along with its statutory duty, made it unreasonable for the agency not to consider regional desegregation.¹²² Analysis of the results of the Moving to Opportunity (MTO) demonstration, which included families from Baltimore Public Housing, found that children who moved to a lower-poverty neighborhood when they were young (below age thirteen) had significantly higher college attendance rates and earnings.¹²³

Through both its Housing Choice Voucher (HCV) Program and siting priorities, HUD can engage in desegregation efforts that cross local jurisdictional lines. HUD's 2016 Small Area Fair Market Rent (SAFMR) rule¹²⁴ also promotes regional integration by adjusting the Fair Market Rent (FMR) for landlords renting to HCV holders for specific areas, rather than setting FMRs for broad metropolitan areas, which result in HCV holders being unable to afford rents in low-poverty areas with access to better educational opportunity, but overpaying for rent in high-poverty areas. HUD's 2017 interim evaluation of the SAMFRs showed that they have helped families move to higher-opportunity neighborhoods;¹²⁵ the share of voucher holders who lived in high-opportunity neighborhoods rose at SAFMR agencies but

120. *Thompson v. U.S. Dep't of Hous. and Urban Dev.*, 348 F. Supp.2d 398, 408–09 (D. Md. 2005).

121. *Id.*

122. *Id.* at 408.

123. Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 4 AM. ECON. REV. 855, 876–89 (2015). *but see* NAT'L BUREAU OF ECON. RESEARCH, MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION 213–60 (Nov. 2011), <http://www.huduser.org/portal/publications/pubasst/MTOFHD.html>.

124. Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 80567 (Nov. 16, 2016).

125. Researchers identified high-opportunity neighborhoods through an index that considered poverty rate, school quality, access to jobs, and exposure to environmental toxins. MERYL FINKEL ET AL., DEP'T OF HOUS. AND URBAN DEV., SMALL AREA FAIR MARKET RENT DEMONSTRATION EVALUATION: INTERIM REPORT, U.S. 6 (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/SAFMR-Interim-Report.pdf>.

not at a group of comparison agencies that did not use SAFMRs during the same period.¹²⁶

Policies that give low-income children of color access to low-poverty high-performing schools by providing and increasing affordable housing in low-poverty areas have a direct effect on school segregation. For example, the Texas Qualified Allocation Plan (QAP) for Low Income Housing Tax Credits (LIHTC) provides a point for development sites “located in the attendance zone of a general enrollment public school rated A or B by TEA for the past academic year”¹²⁷ and “[a]ny Development that falls within the attendance zone of a school that has a 2019 TEA Accountability Rating of F and a 2018 Improvement Required Rating is ineligible with no opportunity for mitigation.”¹²⁸ LIHTC siting priorities and requirements can also perpetuate segregation by giving weight to neighborhood opposition or requiring local government approval of LIHTC applications.¹²⁹

Exclusionary zoning that prevents low-cost homes and multifamily housing in certain areas also perpetuates segregation (and it is often clear from the comments of opponents of affordable housing that their opposition is intended to do so).¹³⁰ Anti-density zoning that forbids or deters more affordable multi-family housing exacerbates the segregation of households into different neighborhoods according to income and race.¹³¹ Schools in

126. *Id.* at 45.

127. 10 Tex. Admin. Code § 11.9 (c)(4)(B)(i)(XV).

128. *Id.* at § 11.101 (b)(1)(C); *See also*, PHILIP TEGELER & MICHAEL HILTON, POVERTY & RACE RESEARCH ACTION COUNCIL, DISRUPTING THE RECIPROCAL RELATIONSHIP BETWEEN HOUSING AND SCHOOL SEGREGATION HARVARD CENTER FOR JOINT HOUSING STUDIES SYMPOSIUM PAPER, (2017), https://www.prrac.org/pdf/Disrupting_the_Reciprocal_Relationship_JCHS_chapter.pdf.

129. Letter from Garry L. Sweeney, Director, Fort Worth Director of Fair Housing and Equal Opportunity, Region VI, U.S. Department of Housing and Urban Development, to Sylvester Turner, Mayor, City of Houston (January 11, 2017). (on file with the author) and available at: <https://www.scribd.com/document/336506979/HUD-letter-to-Mayor-Sylvester-Turner-find-civil-rights-violations> (Finding that the City of Houston’s “procedures for approving Low Income Housing Tax Credit (“LIHTC”) applications are influenced by racially motivated opposition to affordable housing and perpetuate segregation” in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000 (d); *See also*, 10 TAC 11.1(d)(5) (opposition from a local government body or state representative are the only criteria on which an application can lose points).

130. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988) (per curiam); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); *Mhany Management, Inc. v. County of Nassau*, 819 F.3d 581 (2nd Cir. 2016); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F.Supp.2d 563 (E.D. La. 2009).

131. Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. OF THE AM. PLAN. ASS’N 125, 125–42; Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., Nov. 2009, at 74–90; Jonathan Rothwell & Douglass S. Massey, *The Effect of Density Zoning on Racial*

low-poverty areas have more resources for schools and better school performance, which makes these areas more desirable and increases property values and school resources.¹³² Many of these low-poverty areas were created by segregation and government investment in White homeownership in the first place.¹³³

Governments also cannot discriminate in the provision of municipal services on the basis of race or other protected class status.¹³⁴ Because school resources are dependent on property values and property taxes, and school performance is tied to resources, government policies and actions that depress property values in Black or Latinx neighborhoods may also constitute discrimination.¹³⁵ Zoning decisions and policies that locate undesirable land uses in neighborhoods of color and depress property values discriminate against protected classes in the provision of services or facilities in connection with housing. Given the strong connection between schools and housing, the provision of substandard educational opportunities may itself constitute discrimination in the provision of services or facilities in connection with housing.

After all, if segregation that is not a product of state action does not have Constitutional implications¹³⁶ the corollary is that segregation that is produced by state action does have Constitutional implications and can be successfully challenged on those grounds.

Segregation in U.S. Urban Areas, URB. AFF. REV., July 2009, at 74–90; Jonathan Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. AND ECON. REV. 290, 290–358; Jonathan Rothwell & Douglas Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123–43 (2010).

132. Johnathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS (Apr. 2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf.

133. Billingham, *supra* note 97, at 99–100

134. *See, e.g.*, *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2007); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690 (9th Cir. 2009).

135. *See, e.g.*, Kane et al., *School Accountability Ratings and Housing Values*, BROOKINGS-WHARTON PAPERS ON URB. AFF., 83–137 (2003); Greater competition for homes in white neighborhoods created by real estate steering can drive up the values in those white neighborhoods. DAVID RUSK, THE BROOKINGS INST. CTR. ON URB. AND METROPOLITAN POL'Y, *THE SEGREGATION TAX: THE COST OF RACIAL SEGREGATION TO AFRICAN-AMERICAN HOMEOWNERS* 10 (2001).

136. *Parents Involved in Cmty. Schools v. Seattle*, 551 U.S. 701, 736 (2007) (quoting *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992)).

C. Administrative Remedies Under the Fair Housing Act

There may also be FHA administrative remedies that advocates can pursue, though, as is the case for civil rights enforcement by the DOJ and ED, the Department of Housing and Urban Development (HUD) has walked back tools and guidance promulgated under the Obama administration. Section 3068 of the FHA requires both the Secretary of HUD and all executive departments and agencies, including any federal agency having regulatory or supervisory authority over financial institutions, to administer their housing and community development programs “in a manner affirmatively to further the policies of this subchapter.”¹³⁷ In other words, the federal government and its grantees must affirmatively further fair housing (“AFFH”).¹³⁸

In order to be eligible for federal housing and community development grant funds, grantees—which include most cities and states—must certify that they are in compliance with their statutory obligation to AFFH.¹³⁹ To make this certification, grantees must conduct an analysis to identify impediments to fair housing choice within the jurisdiction, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard.¹⁴⁰ This requirement has never been seriously enforced, and the analysis of impediments process that was supposed to result in meaningful action to overcome segregation was ineffective.¹⁴¹ In 2015, however, HUD published a new AFFH rule that laid out a detailed and standardized assessment process

137. 42 U.S.C. § 3608 (2020).

138. “[The Fair Housing Act] imposes . . . an obligation to do more than simply refrain from discriminating . . . This broader goal [of truly open housing] . . . reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” *NAACP v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, J.).

139. 42 U.S.C. § 5304(b)(2): “Any grant under [the CDBG program] shall be made **only if** the grantee certifies to the satisfaction of the Secretary that . . . the grant will be conducted and administered in conformity with the Civil Rights Act of 1964 [42 U.S.C. 2000a et seq.] and the Fair Housing Act [42 U.S.C. 3601 et seq.], and the grantee will affirmatively further fair housing.” (Housing and Community Development Act of 1974).

140. 24 C.F.R. § 570.601(a)(2) and 24 CFR § 91.225(a) (2019).

141. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA, (June 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law>; *See also*, GOV’T ACCOUNTABILITY OFFICE, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS (2010), <https://www.gao.gov/assets/320/311065.pdf>.

and standards for compliance, and in 2017, began supplying jurisdictions with specific data and mapping tools.¹⁴²

One of the critical aspects of the 2015 rule is its clearer definition of affirmatively furthering fair housing. It states:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that **overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics**. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. **The duty to affirmatively further fair housing extends to all of a program participant's activities and programs relating to housing and urban development.**¹⁴³

The definition clarifies that AFFH requires both increasing housing choice in all areas for members of protected classes and remedying disinvestment in historically segregated and disinvested areas to create inclusive communities with equitable access to opportunity, citing specifically, “improving community assets such as quality schools.”¹⁴⁴ The definition also clarifies the AFFH obligation is not limited to the expenditure of federal funds, a point that is underscored in the section of the regulations that addresses certification requirements and HUD’s own pre-2015 guidance.¹⁴⁵

142. 24 C.F.R. 5.150 et. seq.; *AFFH Data and Mapping Tool*, HUD EXCHANGE, (Sept. 2017), <https://www.hudexchange.info/resource/4867/affh-data-and-mapping-tool/>;

143. 24 C.F.R. § 5.152 (emphasis added). *See also*, 24 C.F.R. § 5.150 (“A program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation”).

144. 24 C.F.R. § 5.150 (2019).

145. *See* 24 C.F.R. 570.602 (2019); § 570.506(g)(1) (“Documentation of the analysis of impediments and the actions the recipient has carried out with its housing and community development *and other resources* to remedy or ameliorate any impediments to fair housing choice in the recipient’s community.”) (emphasis added). “Although the grantee’s AFFH obligation arises in connection with the receipt of Federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the State or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded.” OFFICE OF FAIR HOUS. & EQUAL

The first disparity in access to opportunity that the Assessment of Fair Housing Tool for Local Governments asks jurisdictions to analyze is access to educational opportunities, including:

- Any disparities in access to proficient schools based on race/ethnicity, national origin, and familial status;
- The relationship between the residency patterns of racial/ethnic, national origin, and family status groups and their proximity to proficient schools; and,
- How school-related policies, such as school enrollment policies, affect a student's ability to attend a proficient school and which protected class groups are least successful in accessing proficient schools.¹⁴⁶

HUD extended jurisdictions' time to comply with the new rule on January 5, 2018.¹⁴⁷ On May 23, 2018, HUD withdrew that notice and simultaneously issued two others in the Federal Register that instruct participants not to follow the AFFH Rule's requirements. In the first such notice HUD withdrew the Assessment Tool.¹⁴⁸ On January 14, 2020, HUD published a revised version of the AFFH rule for public comment.¹⁴⁹ The proposed rule revision would reverse decades of progress toward desegregation.¹⁵⁰

While the 2015 AFFH rule was a substantial step forward, there is a growing consensus that housing and neighborhood are central to life outcomes, and that issues from health care to policing to educational quality cannot be addressed in silos. This recognition may, in some states and cities, build support for state or locally focused solutions.¹⁵¹

VI. CONCLUSION

While hostility toward civil rights has resulted in the loss of traditional tools used to dismantle school segregation and the school-to-prison pipeline,

OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE VOLUME 1, at 1–3 (1996), <https://www.hud.gov/sites/documents/FHPG.PDF>.

146. U.S. DEP'T OF HOUS. & URBAN DEV., ASSESSMENT OF FAIR HOUSING TOOL 3–4 (2015), <https://files.hudexchange.info/resources/documents/Assessment-of-Fair-Housing-Tool.pdf>; *see also* 80 Fed. Reg. 81840 (Dec. 31, 2015).

147. 83 Fed. Reg. 683 (Jan. 5, 2018).

148. 83 Fed. Reg. 23922 (May 23, 2018). HUD had never published a final assessment tool for States and Insular Areas or PHAs.

149. 85 Fed. Reg. 2041 (Jan. 14, 2020).

150. *Id.*

151. The State of California, for example, passed legislation adopting portions of the 2015 rule and requiring fair housing planning. A.B. 686, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

education advocates should consider joining with housing advocates to identify solutions that focus on neighborhood and, consequently, school desegregation. Appleseed's data analysis and other research suggests that there is something fundamentally different about the way that school discipline is handled in more integrated schools. Integrated schools also have better academic outcomes than segregated schools. But reaching beyond school segregation to include broader integration efforts has the capacity to offer better access to opportunity for communities of color that extend beyond educational opportunity.