

COMMENTS

The Achievement Gap and Disparate Impact Discrimination in Washington Schools

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I. INTRODUCTION

In today's public schools, students designated as "white" and "Asian" consistently outperform students from other ethnic groups in test scores and graduation rates.¹ These disparities, commonly called "the achievement gap," are a symptom of greater issues, or "opportunity gaps."² In fact, commissioned studies on the achievement gap in Washington public schools show that the gap is the result of, in part, policies that are neutral on their face but have a disproportionate effect on communities and students of color.³ These gaps are evidenced in several areas, including performance on standardized tests, classroom assessments, tardiness and absences, access to key courses, advanced placement

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1. HB 2722 ADVISORY COMM. & OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, A PLAN TO CLOSE THE ACHIEVEMENT GAP FOR AFRICAN AMERICAN STUDENTS 6 (2008), available at <http://www.k12.wa.us/cisl/pubdocs/AfrAmer%20AchGap%20Rpt%20FINAL.pdf> [hereinafter A PLAN TO CLOSE]. Current data shows that 23.6 percent of African-American students in Washington State drop out during their high school years. The Washington Assessment of Student Learning (WASL) for 4th, 7th, and 10th grades shows the glaring disparity, but the results are no different than disparate scores on standardized tests used over the last thirty years. *Id.*

2. *Id.* at 6. There are a number of different gaps that contribute to this phenomenon of low achievement: an opportunity gap, a resource gap, a readiness-to-learn gap, and a preparation gap of teachers constituting an overall education gap. *Id.*

3. *Id.* at 10. The study cites several systemic factors contributing to the disparities, including inequitable distribution of skilled, experienced teachers; insufficient and inequitable school funding; and inequitable access to pre-college coursework.

courses, and higher education; and attainments of high school diplomas and GEDs, college degrees, and academic honors.⁴

These problems are not unique to Washington State—they have deep roots in our nation’s history.⁵ Efforts to address the achievement gap and inequities increased with *Brown v. Board of Education*⁶ and the passage of the Elementary and Secondary Education Act in 1965 (the current reauthorization of this Act is the No Child Left Behind Act of 2001), which was a far-reaching attempt to obtain equal access to education and educational resources.⁷ But gaps persist.

Washington has recently taken a further step to address the achievement gap and racial discrimination in schools. In 2010, the Washington legislature passed the Equal Education Opportunity Law (EEOL), HB 3026, in response to the recommendations in commissioned achievement gap studies.⁸ Now codified as Washington’s Revised Code 28A.642, the EEOL states the following:

Discrimination in Washington public schools on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability is prohibited.⁹

The EEOL is an expansion of Washington’s existing public school anti-discrimination law, which had only prohibited discrimination on the basis of sex,¹⁰ and was intended to model the sex equality law.¹¹ The EEOL

4. *Id.*; see also Tamar Lewin, *Black Students Face More Discipline, Data Suggests*, N.Y. TIMES (Mar. 6, 2012), http://www.nytimes.com/2012/03/06/education/black-students-face-more-harsh-discipline-data-shows.html?_r=0.

5. A PLAN TO CLOSE, *supra* note 1, at 1. Our society bears the legacy of a long history of racism, exclusion, and low expectations for minority children.

6. 347 U.S. 483 (1954).

7. 20 U.S.C. § 6301 (2011).

8. WASH. STATE H.R. EDUC. COMM., HB 3026 BILL ANALYSIS 1–2 (2010), available at <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/House/3026%20HBA%20ED%2010.pdf> [hereinafter HB 3026 EDUCATION COMMITTEE BILL ANALYSIS]. Draft recommendations from the Committee to the legislature recommended that OSPI be given legal authority to take affirmative steps to ensure that school districts comply with state and federal civil rights laws. WASH. REV. CODE § 28A.640 (2010) (the sex equity law) should be updated to include other federal and state protected classes.

9. WASH. REV. CODE § 28A.642.010 (2010).

10. WASH. REV. CODE § 28A.640 (1975).

11. WASH. REV. CODE § 28A.640.005 (2010) (“The legislature directed the OSPI to ensure that school districts comply with all civil rights laws, similar to what has already been authorized in chapter 28A.640 RCW with respect to discrimination on the basis of sex.”); see also HB 3026 EDUCATION COMMITTEE BILL ANALYSIS, *supra* note 8 (stating that new chapter is modeled after the sexual equality chapter already in the school code).

also authorizes the Office of the Superintendent of Public Instruction (OSPI) to enforce this law through regulations.¹²

This Comment argues that the OSPI's promulgated regulations to enforce the EEOL cannot effectively carry out the intent of the EEOL because they do not expressly prohibit disparate impact discrimination. Because legislators intended the EEOL to close the achievement gap, which results from race-neutral policies, an explicit prohibition of disparate impact discrimination is necessary to seriously address these deeply rooted problems.

Part II of this Comment explains the theory of disparate impact discrimination and its influence on the achievement gap.¹³ Part III examines the scope and purpose of the EEOL and the OSPI regulations in the Washington Administrative Code.¹⁴ Part IV argues that the OSPI regulations are insufficient to improve the achievement gap because if the law does not explicitly prohibit disparate impact discrimination, then aggrieved persons may be barred from relief because alternate claims—such as disparate treatment and equal protection—are much more difficult to prove.¹⁵ Also, a lack of clarity in the OSPI regulations may result in a limitation on aggrieved persons' right to a private right of action.¹⁶ Part V argues that OSPI should amend the regulations to clearly prohibit policies and procedures that *result* in discrimination in order to adequately reach achievement gap claims.¹⁷

II. THEORIES OF DISCRIMINATION AND THE ACHIEVEMENT GAP

The achievement gap is not a reflection on students' ability to learn, but rather on the inadequacies of our education system. We have come a long way since *Brown v. Board of Education*,¹⁸ but the legacy of racism in our schools still needs addressing. Section A introduces the laws put in place to stop racial discrimination in schools and explains how Washington's achievement gap problem should be addressed under the doctrine of disparate impact discrimination. Section B then explains how the achievement gap evidences proof of discrimination in the school setting.

12. WASH. REV. CODE § 28A.642.020 (2010) (“The superintendent of public instruction shall develop rules and guidelines to eliminate discrimination prohibited in RCW 28A.642.010 as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students.”).

13. See *infra* Parts II.A–B.

14. See *infra* Part III.

15. See *infra* Part IV.A.

16. See *infra* Part IV.B.

17. See *infra* Part V.

18. 347 U.S. 483 (1954).

A. Early Federal and Washington State Laws Prohibiting Discrimination in Schools

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁹ The purpose of Title VI is to ensure that public funds are not spent in a way that encourages, subsidizes, or results in racial discrimination.²⁰ To that end, Title VI authorizes and directs federal agencies to enact rules and regulations that are consistent with achievement of the statute’s objectives.²¹ Most federal agencies adopt regulations that prohibit the recipients of federal funds from using criteria or methods in the administration of their programs that have the effect of subjecting individuals to discrimination based on race, color, or national origin.²² Public school systems are included in Title VI’s definition of “program or activity.”²³

While Title VI does not expressly state what discrimination consists of, courts have held that Title VI claims may be proven under two theories: intentional discrimination (disparate treatment) and disparate impact (disparate effects). Under the theory of intentional discrimination, the recipient, in violation of the statute, engages in intentional discrimination based on race, color, or national origin.²⁴ Under the theory of disparate impact, no proof of intent is required if a recipient, in violation of agency regulations, uses a neutral procedure or practice that has a disproportionate adverse effect on a group protected by Title VI.²⁵

In Title VI cases, courts have followed Title VII’s standard of proof for disparate impact.²⁶ The Supreme Court first adopted the disparate impact theory in the context of employment and Title VII in *Griggs v. Duke Power Co.*²⁷ At issue in *Griggs* was an employer’s requirement that employees seeking jobs or promotions have a high school diploma and

19. 42 U.S.C. § 2000d (1964).

20. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 609 (1983).

21. 42 U.S.C. § 2000d-1 (1964).

22. *Title VI Legal Manual, VIII. What Constitutes Discriminatory Conduct?*, U.S. DEP’T OF JUSTICE (Sept. 1998), http://www.justice.gov/crt/grants_statutes/legalman.php#VIII [hereinafter *Title VI Legal Manual*].

23. 42 U.S.C.A. § 2000d-4a(2)(B) (1964) (“For the purposes of this subchapter, the term “program or activity” and the term “program” mean all of the operations of . . . a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system.”).

24. *Title VI Legal Manual, supra* note 22.

25. *Elston v. Talladega Cnty. Bd of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

26. *Id.* (“In deciding Title VI disparate impact claims we borrow from standards formulated in Title VII disparate impact cases.”).

27. 401 U.S. 424 (1971).

pass an intelligence test. While these requirements were applied equally to Caucasian and African-American persons seeking jobs and promotions, the requirement resulted in an adverse impact for African-American applicants, who had long received inferior education in segregated schools.²⁸ The Court found that the employer's requirements invalidated the Civil Rights Act of 1964 and held that the Act prohibited "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."²⁹ Even where the practice is neutral in terms of intent, it is prohibited unless justified by a business necessity related to job performance.³⁰

After establishing the disparate impact theory in *Griggs*, Congress codified the theory in Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, and national origin.³¹ To establish a prima facie case of disparate impact discrimination under Title VII, "a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination."³² In the education context, the defendant must show that the policy or procedure in question has a manifest relationship to the education in question.³³

Before the passage of the EEOL, the Washington state civil rights law that prohibited discrimination in public schools was the Washington Law Against Discrimination (WLAD).³⁴ WLAD generally recognizes

28. *Id.* at 429.

29. *Id.* at 431.

30. *Id.* "[B]ut good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

31. 42 U.S.C. § 2000e (1964). Section 703 of Title VII of the Civil Rights Act of 1991 provides,

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k)(1)(A) (2006).

32. *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Moore v. Hughes Helicopter*, 708 F.2d 475, 481 (9th Cir. 1983).

33. *Larry P. v. Riles*, 793 F.2d 969, 983 n.9 (9th Cir. 1984).

34. WASH. REV. CODE § 49.60.030 (2009).

“the right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal.”³⁵ Educational institutions are recognized within the statute and regulations as a place of public accommodation, and thus, are prohibited from discriminating on the basis of any of the protected classes.³⁶

Individuals claiming discrimination under the WLAD can file a complaint with the Washington State Human Rights Commission (HRC), created by the WLAD.³⁷ The HRC acts as a neutral fact finder and investigates complaints. Upon a finding of reasonable cause to believe that an unfair practice has been or is being committed, the HRC must endeavor to eliminate the unfair practice.³⁸ Alternatively, in lieu of the HRC complaint process, a complainant can file a civil suit against the alleged wrongdoer.³⁹ While the WLAD provided an avenue for complaints of discrimination, prior to the enactment of the EEOL, there was no state agency with authority—short of a specific claim of direct discrimination—to monitor or enforce the law.

In Washington, no case law yet exists where a student has brought a disparate impact discrimination claim against a school or school district. However, similar to the federal laws, employment and labor discrimination analysis lends itself to analysis for discrimination in public accommodation settings, such as educational institutions. Furthermore, Washington’s employment and labor cases confirm that the WLAD prohibits not only disparate treatment discrimination but also disparate impact discrimination. For example, in *Oliver v. Pacific Northwest Bell Telephone Co.*, the Washington State Supreme Court held that claims under state statutes prohibiting employment discrimination, such as the WLAD, may be brought under either disparate impact or disparate treatment.⁴⁰ As under Title VII, to establish a prima facie case of disparate impact discrimination under the WLAD, the plaintiff must prove that (1) a facially neu-

35. *Id.*

36. WASH. REV. CODE § 49.60.040 (2009).

37. WASH. REV. CODE § 49.60.050 (1985); WASH. REV. CODE § 49.60.230 (2008); WASH. REV. CODE § 49.60.240 (2010). The HRC is charged with investigating complaints, issuing written findings of fact, and determining whether there is reasonable cause to believe that an unfair practice has been committed. Upon a finding of reasonable cause, the HRC must try to eliminate the unfair practice. If no agreement is reached and the unfair practice is not eliminated, an administrative law judge can hear the complaint and is empowered to award damages, an injunction, and affirmative action so as to effectuate the purpose of the law.

38. *The Complaint Process*, HUM. RTS. COMMISSION, <http://www.hum.wa.gov/ComplaintProcess/Index.html> (last visited Apr. 16, 2013).

39. WASH. REV. CODE § 49.60.340 (1993).

40. *Oliver v. Pac. Nw. Bell Tel. Co.*, 724 P.2d 1003, 1005 (Wash. 1986).

tral⁴¹ employment practice (2) falls more harshly on a protected class.⁴² Proof of an employer's intent to discriminate by adopting a particular policy or practice is not required.⁴³ If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to establish that the practice complained of has a "manifest relationship" to the employment in question or is justified by a business necessity.⁴⁴ Thus, under *Oliver*, an aggrieved person could bring a WLAD claim under the theory of disparate impact discrimination without a required showing of proof of intent.

B. The Achievement Gap as Proof of Discrimination

The problem of disparate impact discrimination in the education system is often evidenced by severe disparities between various demographic groups of students. Achievement gaps are most significantly based upon race and ethnicity, but other factors such as income levels, language background, disability status, and gender also play a role.⁴⁵ In fact, these categories are often intertwined.⁴⁶ Wanda Brown, a representative for the African-American community in the achievement gap studies, described the disparities as follows:

The term 'achievement gap' puts the blame on students of color—that they are to blame for not achieving at the same rates as their white peers. The achievement gap is evidence of the inadequacies of our education system, not our students' ability to learn. All students can learn—the question is whether we give all students equitable opportunities or access to the tools they need to learn. In this con-

41. The court noted that the term "neutral" refers to an employment practice that contains no reference to race or other protected classes. This includes such practices as employment tests; educational requirements; professional and academic employment tests; arrest and conviction records; credit, garnishment, and bankruptcy records; drug history; length of experience requirements; specific work history requirements; and height and weight standards. *Oliver*, 724 P.2d at 1006 n.1.

42. *Id.* at 1006.

43. *Id.*

44. *Id.*

45. NAT'L EDUC. ASS'N, CLOSING ACHIEVEMENT GAPS: AN ASSOCIATION GUIDE 2 (2006), available at <http://www.friendsofpubliced.org/assets/Files/closinggaps.pdf> [hereinafter CLOSING ACHIEVEMENT GAPS].

46. See, e.g., Malik Edwards, *Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest*, 31 SEATTLE U. L. REV. 891, 892 (2008) ("While our cities may not be burning today, the maintenance of a system of ghetto schools provides the tinder from which they may ignite again. Educational reformers face a daunting task in their efforts to address the impact of the educational achievement gap. Reformers cannot address only a single issue and hope to adequately understand or ameliorate educational failure: the problem has too many facets. America's schools continue to be racially, ethnically, and economically segregated, and classrooms that had been integrated are re-segregating at a rapid pace.").

text, the most appropriate term is ‘opportunity gap’ or ‘access gap.’⁴⁷

The achievement gap is, in part, the result of policies and practices that are neutral—nondiscriminatory—on their face but have a disproportionately deleterious impact on students and communities of color.⁴⁸

In 2008, recognizing the presence of achievement gaps in schools throughout the state, the Washington State Legislature commissioned studies to analyze the differences in academic achievement and education outcomes among various subgroups of students—specifically African-American, Latino, Native-American, Asian-American, and Pacific Islander students.⁴⁹ These commissioned studies showed that white and Asian students in Washington consistently outperform students in other ethnic groups.⁵⁰ More specifically, the studies showed that African-American, Hispanic, Pacific Islander, and Native-American students scored consistently lower on Washington Assessment of Student Learning (WASL) exams—at both the fourth grade and tenth grade levels—than their white and Asian peers.⁵¹ Moreover, the studies showed that African-American students are more than two times as likely to drop out of school compared to white and Asian students.⁵² The committee also

47. ACHIEVEMENT GAP OVERSIGHT & ACCOUNTABILITY COMM., CLOSING OPPORTUNITY GAPS IN WASHINGTON’S PUBLIC EDUCATION SYSTEM 3 (2010), available at <http://www.capaa.wa.gov/documents/AgapLegReportFinal.pdf>.

48. Letter from Linda Mangel, Dir. of Educ. Equity Program, ACLU of Wash., to Yvonne Ryans, Dir. of Equity & Civil Rights, Office of Superintendent of Pub. Instruction (Jan. 26, 2011), available at <http://www.aclu-wa.org/aclu-wa-opposes-inadequate-rules-protecting-students-against-discrimination>. When these issues are litigated, courts apply a disparate impact analysis.

49. H.B. 2722, 60th Leg., Reg. Sess. (Wash. 2008). In 2008, the Washington State Legislature passed HB 2722, which expressed the legislature’s intention to “commission and then implement a clear, concise, and intentional plan of action, with specific strategies and performance benchmarks, to ensure that African American students meet or exceed all academic standards and are prepared for a quality life and responsible citizenship in the twenty-first century.” *Id.* at 2. The four other reports were commissioned and submitted to the legislature.

50. A PLAN TO CLOSE, *supra* note 1, at 11.

African-American students are under-represented in advanced placement and gifted programs, but over-represented in special education and discipline referrals. They are less likely to be enrolled in rigorous coursework, including the key disciplines of science and math, and more likely to drop out of high school. They are less likely to attend and graduate from college.

Id.

51. *Id.*

52. *Id.* at 22. The estimated on-time graduation rate for African-American students is 53.6 percent, nearly 23 percent below the highest performing demographic group. The estimated on-time graduation rate for Hispanic students is 57.5 percent, 19 percent below the highest performing demographic group. The estimated on-time graduation rate for white and Asian/Pacific Islander students is 74.1 percent and 76.5 percent, respectively.

recognized that Washington ranks second to last in the nation for a teaching force that is representative of the state's ethnic composition.⁵³

While it is possible that some of the disparities resulted from intentional racism, the African-American Achievement Gap Report cites to numerous sources that were likely put in place as neutral policies—without discriminatory intent—but resulted in a disproportionately deleterious impact on students and communities of color. The report specifically cites the following sources of discrimination that cause the gap: inequitable distribution of skilled, experienced teachers; insufficient and inequitable school funding; inadequate, obsolete, and unbalanced distribution of facilities, technology, and instructional materials; inequitable access to demanding, rigorous pre-college coursework; institutional racism; lack of cultural competence among teachers, school staff, administrators, curriculum and assessment developers, and the school system itself.⁵⁴ Similarly, the Education Trust cites one clear source of discrimination: “Many minority students attend inner-city schools, which are often underfunded. As a result, those students tend to receive poorer-quality instruction, have fewer high-caliber teachers, and have access to fewer resources.”⁵⁵

In an effort to close the gaps, the legislature formed a committee to synthesize the findings and recommendations into an implementation plan and to recommend policies and strategies to the superintendent of public instruction, the professional educator board, and the state board of education.⁵⁶ Among the several recommendations the committee brought to the legislature in 2009 were that the legislature broaden the protected

53. EDUCATION NEXT (Winter 2009), *reprinted in* ACHIEVEMENT GAP OVERSIGHT & ACCOUNTABILITY COMM., CLOSING OPPORTUNITY GAPS IN WASHINGTON'S PUBLIC EDUCATION SYSTEM 7 (2011), *available at* <http://www.k12.wa.us/AchievementGap/pubdocs/AgapLegReport2011.pdf>. Over 90 percent of the state's teachers are white, while only less than 70 percent of students are white. *Id.*

54. A PLAN TO CLOSE, *supra* note 1, at 10. “More than an issue of poverty, the achievement gap is also about race. WASL data reveals that White and Asian students in poverty score higher than African American students not in poverty.” *Id.* at 11.

55. THE EDUCATION TRUST (2002), *reprinted in* CLOSING OPPORTUNITY GAPS IN WASHINGTON'S PUBLIC EDUCATION SYSTEM, *supra* note 53, at 8.

56. S.B. 5973, 61st Leg., Reg. Sess. (Wash. 2009). Specifically, the Committee was charged with recommending policies and strategies in the following areas: supporting and facilitating parent and community involvement and outreach; enhancing the cultural competency of current and future educators and the cultural relevance of curriculum and instruction; expanding pathways and strategies to prepare and recruit diverse teachers and administrators; recommending current programs and resources that should be redirected to narrow the gap; identifying data elements and systems needed to monitor progress in closing the gap; making closing the achievement gap part of the school and school district improvement process; and exploring innovative school models that have shown success in closing the achievement gap.

classes and give OSPI the legal authority to ensure that school districts comply with state and federal civil rights laws.⁵⁷

III. THE EQUAL EDUCATION OPPORTUNITY LAW

In response to the Committee's recommendations, in 2010 the Washington State Legislature passed House Bill 3026, the Equal Education Opportunity Law, in order to specifically prohibit discrimination in public schools on the basis of "race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability."⁵⁸

Prior to the enactment of the EEOL, the OSPI did not have the authority to monitor or enforce civil rights laws in Washington public schools.⁵⁹ The legislature recognized that while numerous existing state and federal laws prohibit discrimination on these grounds, as well as on basis of sex, the common school provisions of Title 28A of Washington's Revised Code did not include specific acknowledgement of the right to be free from discrimination of this sort.⁶⁰ By specifically prohibiting discrimination on these bases, the legislature gave authority to its own agency, OSPI, to enforce this law. With its statutory authorization, OSPI developed rules and guidelines to eliminate the prohibited discrimination "as it applies to public school employment, counseling and guidance services to students, recreational and athletic activities for students, access to course offerings, and in textbooks and instructional materials used by students."⁶¹

57. Memorandum from the Achievement Gap Oversight & Accountability Comm. to Wash. State Legislature (Jan. 5, 2010), available at <http://www.k12.wa.us/cisl/pubdocs/MemotoLeg1.10.pdf>. Other recommendations are available at <http://www.k12.wa.us/cisl/pubdocs/Synthesis2008Recommendations.pdf>.

58. WASH. REV. CODE § 28A.642.010 (2010).

59. The OSPI oversaw other aspects of K–12 public education in Washington, including working with school districts to administer basic education programs, supervising school district budgeting and accounting, collecting data on student demographics and performance, and administering student testing.

60. WASH. REV. CODE § 28A.642.005 (2010). State anti-discrimination laws are important in addition to federal laws as most state laws provide relief that the federal laws do not. "It is important to determine whether the relevant state law reaches discrimination or harassment in education, whether it provides for administrative enforcement, whether it provides for a private right of action, and the type of relief available." Ivan E. Bodensteiner, *Peer Harassment-Interference with an Equal Educational Opportunity in Elementary and Secondary Schools*, 79 NEB. L. REV. 1, 45 (2000) (emphasis added).

61. WASH. REV. CODE § 28A.642.020 (2010).

According to its stated purpose, the EEOL was enacted to address the “deleterious effect of discrimination.”⁶² Moreover, the legislature names the recommendations of the Achievement Gap Oversight and Accountability Committee as a motivation for enacting the law.⁶³ Further, the EEOL is an expansion of Washington’s existing public school anti-discrimination law, which only prohibited discrimination on the basis of sex,⁶⁴ and was intended to model the sex equality law.⁶⁵

While the EEOL does not expressly define “discrimination,” it has been argued that the use of the general term “discrimination” was intended to include both direct discrimination and disparate impact discrimination—discrimination that results from policies or practices that are neutral on their face but have a discriminatory effect or impact.⁶⁶ Moreover, the EEOL was enacted to address the “deleterious *effect* of discrimination,” which is a common description of disparate impact discrimination.⁶⁷ Further, given the purpose of the EEOL to eliminate the achievement gap—which is partly caused by neutral policies that have a disparate, deleterious effect on communities of color—the EEOL should be construed to include disparate impact discrimination.

OSPI’s regulations are codified in chapter 392–190 of Washington’s Administrative Code, “Equal Education Opportunity—Unlawful Discrimination Prohibited.”⁶⁸ The purpose statement establishes that the rules and regulations implement Chapters 28A.640 and 28A.642 of Washington’s Revised Code, and the intent of the chapter is to encompass “similar substantive areas addressed by federal civil rights authorities and in some aspects extend beyond those authorities.”⁶⁹

The OSPI regulations are silent on disparate impact discrimination even though the language of the EEOL clearly prohibits such discrimina-

62. WASH. REV. CODE § 28A.642.005 (2010).

63. *Id.*

The legislature finds that one of the recommendations made to the legislature by the achievement gap oversight and accountability committee created in chapter 468, Laws of 2009, was that the office of the superintendent of public instruction should be specifically authorized to take affirmative steps to ensure that school districts comply with all civil rights laws, similar to what has already been authorized in chapter 28A.640. . .

Id.

64. WASH. REV. CODE § 28A.640 (1975).

65. WASH. REV. CODE § 28A.642.005 (2010); *see also* H.B. 3026, 61st Leg., Reg. Sess. (Wash. 2010).

66. Letter from Linda Mangel to Yvonne Ryans, *supra* note 48.

67. WASH. REV. CODE § 28A.642.005 (2010) (emphasis added).

68. This section in the Washington Administrative Code was previously entitled “Equal Education Opportunity – Sex Discrimination Prohibited” and contained regulations related to the Sex Equality Act, WASH. REV. CODE § 28A.640. After the EEOL was enacted, the entire section was amended to also prohibit discrimination against protected classes identified in the EEOL.

69. WASH. ADMIN. CODE § 392–190–005 (2010).

tion. Further raising questions about the clarity of the OSPI regulations is the presence of “effect” language elsewhere in the rule. For example, Washington Administrative Code Section 392–190–0591(3) states: “No school district shall enter into any contractual or other relationship that *directly or indirectly has the effect of subjecting any person to discrimination* in connection with employment.”⁷⁰

IV. THE OSPI REGULATIONS DO NOT ADEQUATELY PROHIBIT DISPARATE IMPACT DISCRIMINATION

The EEOL was enacted because commissioned studies on Washington’s achievement gap suggested that more comprehensive state civil rights laws would provide more effective avenues for creating and ensuring equality.⁷¹ However, the OSPI regulations to enforce the EEOL cannot effectively carry out the intent of the EEOL because they do not expressly prohibit disparate impact discrimination. Because the EEOL was intended to close the achievement gap, which is in part a result of race-neutral policies, an explicit prohibition of disparate impact discrimination is necessary to seriously address these deeply rooted issues. Specifically, aggrieved persons may face challenges in bringing claims related to the achievement gap because many claims could fall into a disparate impact discrimination analysis, which has been under attack in the last several years in federal litigation.

A. The EEOL Seeks to Eliminate the Achievement Gap, but the OSPI Regulations are Silent on Disparate Impact Discrimination

This Section addresses concerns with the regulations enacted into the Washington Administrative Code (WAC). As provided in the EEOL, the Superintendent of Public Instruction developed rules and guidelines to eliminate discrimination in public schools and ensure that school districts comply with all relevant civil right laws. As currently written, however, the rules will not ensure this compliance because they fail to clearly prohibit disparate impact discrimination.

Codified in WAC Section 392–190, OSPI’s rules and guidelines are silent on disparate impact discrimination, *indirect* discrimination, or *the effects of* discrimination.⁷² In its first draft of proposed rules, the State-

70. WASH. ADMIN. CODE § 392–190–0591(3) (2010) (emphasis added).

71. See *supra* text accompanying note 8.

72. WASH. ADMIN. CODE § 392–190–005 (2010) states, in part, as follows:

The purpose of this chapter is to establish rules and regulations which implement chapters 28A.640 and 28A.642 RCW. The referenced enactments prohibit discrimination on the basis of sex, race, creed, religion, color, national origin, honorably discharged veteran

ment of Purpose specifically provided that “policies and practices which have a disparate impact” are prohibited.⁷³ However, by the December 2010 draft of proposed rules, this language was absent, leaving questions about whether school districts can be held liable for disparate impact discrimination. In its comments submitted to the OSPI, the ACLU argued that “[t]his omission creates a situation whereby school districts, believing they are not liable for disparate impact discrimination, may inadvertently be in violation of other applicable state and federal laws.”⁷⁴

During the formal comment period, several individuals and organizations opined that the proposed code should clearly state that disparate impact discrimination is prohibited to ensure that school districts are in compliance with state and federal civil rights laws; otherwise, districts may inadvertently violate state and federal laws.⁷⁵ However, OSPI chose to take no action, stating, “[n]othing in these rules is intended to preclude the use of a disparate impact analysis to determine if unlawful discrimination has occurred. The proposed rules do not limit OSPI’s use of a disparate impact analysis when monitoring school district[s] for compliance with chapters 28A.640 and 28A.642 RCW.”⁷⁶

Moreover, while OSPI did not further explain in the Concise Explanatory Statement why it excluded express language in the Washington Code prohibiting disparate impact discrimination, it did remove the word “causing” from one section of the proposed regulation—after one public comment argued that this language conflicted with existing state and federal law, eliminated disparate impact claims, and imposed a causal standard, which would be too high of a standard to prove and also conflicted with the current sex equality rules. OSPI changed the “cause” language to “result,” which was also the original language of the sex equality rule.⁷⁷

or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental or physical disability, or the use of a trained dog guide or service animal by a person with a disability in Washington public schools.

73. Letter from Linda Mangel to Yvonne Ryans, *supra* note 48.

74. *Id.*

75. See SUPERINTENDENT OF PUBLIC INSTRUCTION, CONCISE EXPLANATORY STATEMENT FOR RULES PROPOSED AS WSR 11-01-134 (Apr. 11, 2011) [hereinafter CONCISE EXPLANATORY STATEMENT].

Comment at page 6: “OSPI should include a provision in the rules expressly prohibiting disparate impact discrimination. The proposed rules include a causation requirement, which is too high of a burden.” OSPI response: “Change made to WAC 392-190-010. The word ‘causing’ was removed from the proposed WAC 392-190-010(5) and the existing language ‘resulting in’ was retained. This change was made in order for the adopted rules to mirror the previous sexual equality rules. Nothing in these rules is intended to preclude the use of a disparate impact analysis to determine if unlawful discrimination has occurred.”

76. CONCISE EXPLANATORY STATEMENT, *supra* note 75, at 10.

77. WASH. ADMIN. CODE § 392-190-010(5)(2010):

By remaining silent on disparate impact discrimination in the regulations, OSPI fails to “ensure that school districts comply with all civil rights laws,” as directed by the EEOL.⁷⁸

B. Achievement Gap Claims May Be Appropriately Brought Under the Theory of Disparate Impact Discrimination

The theory of disparate impact discrimination must be available to students disadvantaged by the gaps in today’s educational opportunities because these disparities are mostly the result of unintentional discrimination. Proof of discriminatory motive is often unavailable, and in the case of the achievement gap, it simply does not exist.⁷⁹

Since the enactment of Title VI, courts have often provided a right of action for adversely affected groups to attack unintentional discriminatory policies and practices, such as those that contribute to the achievement gap. A leading case on the applicability of disparate impact theory is *Alexander v. Choate*.⁸⁰ In *Alexander*, the Supreme Court addressed whether Title VI reaches both intentional and disparate impact discrimination in the context of Medicaid allotments for inpatient hospital days.⁸¹ As Medicaid recipients, the plaintiffs claimed that a policy reducing the number of covered hospital days would have a disproportionate effect on handicapped persons, who often require longer or more frequent care in hospitals.⁸² Examining the holding of *Guardians Ass’n. v. Civil Service Commission of New York City*,⁸³ the Court held that federal law does not proscribe only intentional discrimination: “Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced

If a school district concludes that the use of such instruments, materials, or programs results in a substantially disproportionate number of students who are members of one of the groups identified in WAC 392-190-005 to be placed in any particular course of study or classification, the school district must take such immediate action as is necessary to assure that such disproportion is not the result of discrimination in the instrument, material, or its application.

78. WASH. REV. CODE § 28A.642.005 (2010).

79. *See, e.g., Alexander v. Choate*, 469 U.S. 287 (1985). “Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.” *Id.* at 297. While the practice at issue in this case is not directly related to education or schools, it is analogous to the policies and practices known to primarily cause the achievement gap—generally, inequitable access.

80. *Id.*

81. *Id.*

82. *Id.* at 287.

83. 463 U.S. 582 (1983).

those impacts.”⁸⁴ However, *Guardians* and *Alexander* suggest there are limitations to what disparate impact claims are actionable.⁸⁵

The Court classified the discrimination at issue in *Alexander* as unintentional: “Discrimination against the [disabled] was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect.”⁸⁶ The Court reasoned that federal law proscribed both intentional and unintentional discrimination against the disabled because “much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.”⁸⁷ Specifically, one of the central aims of the Rehabilitation Act was to eliminate architectural barriers, which limited physically disabled individuals access to buildings.⁸⁸ While architectural barriers were not erected with the intent of excluding disabled individuals, that the barriers existed and caused harm made those individuals victims of “[d]iscrimination in access to public transportation.”⁸⁹

In *Larry P. v. Riles*,⁹⁰ six black schoolchildren named as plaintiffs challenged the constitutionality of the use of standardized intelligence tests. As a result of a racial disparity in test performance, the standardized tests disproportionately placed black students in special classes for the “educable mentally retarded.”⁹¹ After the district court enjoined the use of these tests because of their racial bias, the Ninth Circuit Court of Appeals upheld the injunction on grounds of Title VI disparate impact regulations.⁹² But the students’ Fourteenth Amendment equal protection claims ultimately failed because the “pervasiveness of discriminatory effect” could not, without more, “be equated with the discriminatory in-

84. *Alexander*, 469 U.S. at 293.

85. *Id.* at 294.

86. *Id.* at 717.

87. *Id.* at 296–97.

88. *Id.* at 297. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.

89. *Id.* at 297.

90. 793 F.2d 969 (9th Cir. 1986).

91. *Id.* at 973. Black students constituted nine percent of California’s children and twenty-seven percent of the “educable mentally retarded” (EMR) population. The EMR classes “are conceived of as ‘dead-end’ classes, and a misplacement in EMR causes a stigma and irreparable injury to the student.” *Id.*

92. *Id.* at 972. The court held that there was a discriminatory impact.

It is undisputed that black children as a whole scored ten points lower than white children on the tests, and that the percentage of black children in EMR classes was much higher than for whites. As discussed previously, these test scores were used to place black schoolchildren in EMR classes and to remove them from the regular educational program.

Id.

ment required.”⁹³ Thus, it is unlikely that achievement gap claims will be viable under the Equal Protection Clause because they are generally not intentionally discriminatory.

Some courts have not permitted claims of educational inequality to move forward on the theory of disparate impact discrimination by placing the blame for the disparity on societal factors rather than factors within the educational system.⁹⁴ In *African American Legal Defense Fund, Inc. v. New York State Department of Education*, the New York District Court held that Title VI regulations could not provide a remedy for the plaintiffs’ disparate impact claims.⁹⁵ In that case, the plaintiffs—civil rights organizations and parents of Hispanic and African-American public school students—claimed that the attendance-based system of funds distribution among school districts had a disparate impact on minorities because absenteeism was higher among inner city minority students.⁹⁶ However, the court found that the practices of the school districts—the federal grantees—did not cause the absenteeism.⁹⁷ Rather, the court determined that social problems such as single parenting, poor housing, and medical problems contributed to absenteeism among inner city students.⁹⁸ While the court acknowledged that the policy at issue appeared racially neutral, it rejected the plaintiffs’ disparate impact argument, stating that the plaintiffs did not prove that the school’s policy was directly linked to the alleged disparate impact on minority students.⁹⁹

In denying the application of disparate impact theory to school related disparities, the court failed to recognize the complex and interrelated nature of the factors causing the achievement gap. Other courts, however, have acknowledged that the seemingly neutral policies and practices of schools have the effect of sustaining and fortifying the gaps that exist from decades of inequality. For example, *Robinson v. Kansas* stands in contrast to *African American Legal Defense Fund*. In *Robinson*, students pled a disparate impact claim by arguing that a Kansas statute allocating disproportionately large amounts of state funding to low-enrollment districts resulted in lower funding for minority, foreign, and disabled students who attended schools in large, non-affluent school dis-

93. The court cited the discriminatory intent required by *Washington v. Davis*, 426 U.S. 229 (1976), stating that the Court has “consistently held that where a neutral classification has a disproportionate effect upon a racial minority, it is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory purpose.” *Larry P.*, 793 F.2d at 989.

94. See, e.g., *African Am. Legal Def. Fund, Inc. v. N.Y. State Dep’t. of Educ.*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998).

95. *Id.* at 340.

96. *Id.* at 333.

97. *Id.* at 338.

98. *Id.*

99. *Id.* at 339.

tricts.¹⁰⁰ The district court in *Robinson* distinguished *African American Legal Defense Fund* stating, “[P]laintiffs in this case allege that the ‘societal ills’ are *caused* by the way the State funds the school districts.”¹⁰¹ The court found that such an allegation sufficed for pleading disparate impact.¹⁰²

To establish a prima facie case, plaintiffs must show that the challenged practice caused a disproportionately adverse impact.¹⁰³ Regarding the present issue—the achievement gap—Washington’s commissioned studies have identified several practices that have adversely resulted in lower scores for minorities.¹⁰⁴ Thus, future plaintiffs already have the groundwork for a claim of disparate impact discrimination.

C. Without an Express Prohibition of Disparate Impact Discrimination, Aggrieved Persons May Not Have Adequate Means to a Right of Action

If the OSPI regulations are construed as reaching only intentional discrimination, aggrieved persons seeking to challenge the achievement gap may struggle to find an adequate mechanism for enforcement of the EEOL. Students who perceive a disparity as a result of neutral policies or procedures will not be able to reposition their complaints under disparate treatment claims, because such claims require a showing of discriminatory intent.¹⁰⁵ Because the achievement gap is primarily the result of systemic inequalities, a finding of intent to discriminate based on race or any of the other protected grounds is unlikely.¹⁰⁶ Additionally, aggrieved persons will struggle to find adequate enforcement mechanisms under federal law because of recent limitations on disparate impact claims.

Prior to the enactment of the EEOL, aggrieved persons seeking enforcement of civil rights laws were required to file a complaint with an enforcement agency, such as the Washington HRC or U.S. Department of Education Office for Civil Rights, or file a civil suit in order to seek relief from the educational practices or procedures that had an actual or perceived discriminatory impact.¹⁰⁷ The latter remedy, the private right of action, is a vital enforcement mechanism that allows individual plain-

100. *Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1140 (D. Kan. 2000), *aff’d*, 295 F.3d 1183 (10th Cir. 2002).

101. *Id.* at 1141.

102. *Id.*

103. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989).

104. A PLAN TO CLOSE, *supra* note 1.

105. *Elston v. Talladega Cnty Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993). “To establish an [E]qual [P]rotection [C]lause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate.” *Id.*

106. *See supra* text accompanying note 1.

107. *See supra* Part II.B.

tiffs to sue to compel enforcement of the laws and regulations separate from how the enforcement agency handles the case.¹⁰⁸ This private right of action is a crucial tool to disparate impact discrimination litigation because these administrative agencies often lack the resources to investigate adequately every case where schools engage in practices that have a discriminatory effect.¹⁰⁹

While the EEOL and the OSPI regulations clearly protect the private right of action,¹¹⁰ if courts construe these laws so as to not reach disparate impact discrimination because of lack of clarity in the text, aggrieved persons with disparate impact claims will not have access to the courts. This concern is primarily the result of recent limitations to disparate impact litigation under federal law. Until recently, courts construed Title VI and its regulations to prohibit educational institutions (which includes school districts because they are recipients of federal funds) from engaging in policies and practices that have a disparate impact on minority students as well as students that fall into the other protected classes.¹¹¹

108. The U.S. Department of Education Office for Civil Rights, similar to the HRC and OSPI, is a federal enforcement agency that responds to complaints of discrimination under federal civil rights laws and engages in compliance reviews.

109. Sam Spital, *Restoring Brown's Promise of Equality After Alexander v. Sandoval: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 105 (2003).

110. The EEOL provides that there is a private right of action in superior court for both civil damages and such equitable relief as the court determines. WASH. REV. CODE § 28A.642.040 (2010). While HB 3026 was in the Washington Senate, Senator Honeyford proposed an amendment to the bill that would eliminate this section creating a new right of action in superior court. See *Proposed Amendment to H.B. 3026: Hearing on H.B. 3036 By Comm. on Ways & Means*, 2010 Leg., Reg. Sess. (Wash. 2010). However, the amendment was not adopted. *Id.* Criminal or civil actions under the EEOL and OSPI regulations will be held in abeyance during the pendency of any proceeding in state or federal court or before a local, state, or federal agency in which the same claim or claims are at issue. WASH. ADMIN. CODE § 392-190-081(2). This section also states that “[w]here the complainant elects to pursue simultaneous claims in more than one forum, the factual and legal determinations issued by the first tribunal to rule on the claims may, in some circumstances, be binding on all or portions of the claims pending before other tribunals.” *Id.* at (3).

111. Dissenting in *Sandoval*, Justice Stevens noted that “[j]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations.” *Alexander v. Sandoval*, 532 U.S. 275, 293 n.1 (2001) (Stevens, J., dissenting). For exemplary decisions, see, for example, *Powell v. Ridge*, 189 F.3d 387, 400 (3d Cir. 1999); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936-37 (3d Cir. 1997), *summarily vacated and remanded*, 524 U.S. 974 (1998); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999); see also *Latinos Unidos De Chelsea v. Sec’y of Hous. & Urban Dev.*, 799 F.2d 774, 785 n.20 (1st Cir. 1986); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Ferguson v. Charleston*, 186 F.3d 469 (4th Cir. 1999), *rev’d on other grounds*, 532 U.S. 67 (2001); *Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Buchanan v. Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); *Larry P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1986); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996). No Court of Appeals has ever reached a contrary conclusion. *But cf.* *N.Y. City Env’tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 72 (2d Cir. 2000) (sug-

The major blow to disparate impact litigation under Title VI came in *Alexander v. Sandoval* in 2001.¹¹² Plaintiff Sandoval, representing a class action, brought suit in federal court against the Alabama Department of Public Safety (the Department)¹¹³ to enjoin the Department from administering state driver's license examinations only in English.¹¹⁴ The plaintiffs claimed that the English-only test violated federal civil rights regulations because it had the effect of subjecting non-English speakers to discrimination based on their national origin.¹¹⁵ In its decision, the Supreme Court did not focus on whether the English-only policy had the effect of discriminating on the basis of national origin; instead, it focused on whether a private right of action to enforce the regulation existed.¹¹⁶

The Court held in its 5–4 decision that there is no private right of action to enforce disparate impact regulations promulgated under Title VI.¹¹⁷ While the Court recognized that agencies may validly prohibit policies and procedures that have a disparate impact on the protected classes, it interpreted the statute to prohibit only intentional discrimination.¹¹⁸

gesting that the question of whether a private right of action existed to enforce disparate impact regulations may be open).

112. *Sandoval*, 532 U.S. at 293; see also Theresa Glennon, *The Stuart Rome Lecture Knocking Against the Rocks: Evaluating Institutional Practices and the African American Boy*, 5 J. HEALTH CARE L. & POL'Y 10 (2002). Glennon notes that several lower federal court decisions have gone even further to eliminate private parties' access to any judicial relief for violations of the Title VI disparate impact regulations. See *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 788 (3d Cir. 2001) (holding that Title VI regulations are not enforceable under § 1983); *Bonnie L. v. Bush*, 180 F. Supp. 2d 1321, 1344 (S.D. Fla. 2001) (also holding that Title VI regulations are not enforceable under § 1983). But see *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767, 784 (E.D. Mich. 2001) (holding that Title VI regulations are enforceable under § 1983).

113. *Sandoval*, 532 U.S. at 278. The Department accepted grants of financial assistance from the Department of Justice and Department of Transportation and so subjected itself to the restrictions of Title VI. *Id.*

114. *Id.*

115. *Id.* In an exercise of the authority granted under Title VI, the Department of Justice promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 C.F.R. § 42.104(b)(2) (2000). The district court enjoined the policy and ordered the Department to accommodate the non-English speakers. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998). The Court of Appeals for the Eleventh Circuit affirmed. *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999).

116. *Sandoval*, 532 U.S. at 279. The issue of the private cause of action was the only question posed in the petitioner's, the Department, writ of certiorari. *Id.*

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

Petition for Writ of Certiorari, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99–1908), 2000 WL 33979586, at *i.

117. *Sandoval*, 532 U.S. at 275.

118. *Id.*

Therefore, under Title VI, individual plaintiffs can bring suit for alleged intentional discrimination. Moreover, the Court found no evidence that Congress intended to provide a private right of action to enforce disparate impact regulations.¹¹⁹ However, agencies may validly prohibit activities that have a disparate impact on the basis of the protected classes.¹²⁰

Dissenting, Justice Stevens argued that the Court repeatedly and consistently affirmed the right of individuals to bring civil suits to enforce rights guaranteed by Title VI, assuming that Congress intended a private right of action whenever such a right of action was necessary to protect individual rights granted by valid federal law.¹²¹ Moreover, Justice Stevens noted that the plaintiffs, although denied an implied private right of action under Title VI, may still be able to enforce the Title VI regulations against state actors under § 1983.¹²² Justice Stevens stated, “This legal distinction between reliance on an ‘implied’ right and explicitly accessing the regulation through § 1983 gave a glimmer of hope that disparate impact private actions might still be viable despite the Sandoval ruling.”¹²³ But merely a glimmer of hope remains as courts have since split on whether *Sandoval* also precludes disparate impact suits even if brought under § 1983.¹²⁴

119. *Id.* at 281–82. Specifically, the Court argued that § 602 of Title VI simply grants regulatory agencies the power to effectuate the individual rights created in § 601. *Id.* Because this language focuses on granting power to agencies rather than protecting individuals, the majority could not find any textual support for the proposition that Congress intended to create a private cause of action to enforce § 602 regulations. *Id.* at 288–89.

120. *Id.* at 283.

121. *Id.* at 294.

122. 42 U.S.C. § 1983 (1996). “Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .” *Id.*

123. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 *How. L.J.* 243, 267 (2004).

124. *Id.* See *Save Our Valley v. Sound Transit*, 335 F.3d 932, 944 (9th Cir. 2003) (affirming dismissal of complaint alleging that Department of Transportation policy violated disparate impact regulation issued under Title VI because “Title VI does not create the right the plaintiffs seek to enforce . . .”); *Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001) (holding that because Title VI proscribed only intentional discrimination, plaintiffs alleging that New Jersey Department of Environmental Protection policies had a disparate impact on them did “not have a right enforceable through a 1983 action”), *cert. denied*, 536 U.S. 939 (2002); *Ceaser v. Pataki*, 2002 U.S. Dist. LEXIS 5098, at *11 (S.D.N.Y. 2002) (dismissing housing discrimination complaint because Title VI disparate impact regulation at issue did not create federal rights for the purposes of § 1983 as it was “too far removed from what Congress proscribed in section 601”); *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 338–39 (S.D.N.Y. 2002) (granting summary judgment on a claim alleging that the use of certain teacher qualifying exams had a disparate impact on minority educators because regulations issued under Title VI do not create federal enforceable rights for the purposes of § 1983); *Bonnie ex rel. Hadsock v. Bush*, 180 F. Supp. 2d 1321, 1344 (S.D. Fla. 2001) (“To hold [that disparate impact] . . . regulations are enforceable under § 1983 would be equivalent to holding that while Congress did not intend § 602 regulations to be enforceable against pri-

Before *Sandoval*, the Court interpreted Title VI to proscribe disparate impact discrimination. In holding that plaintiffs cannot enforce Title VI through a private right of action, the *Sandoval* Court overturned thirty years of precedent.¹²⁵ One such overturned case was *Lau v. Nichols*.¹²⁶ In that case, the Court found that a San Francisco school system's failure to either provide English language instruction or alternative adequate instruction to approximately 1,800 students of Chinese ancestry who did not speak English had the effect of foreclosing these students from any meaningful education and thus violated § 601 of the Civil Rights Act of 1964.¹²⁷ Through the private right of action, the class of disadvantaged students was able to find relief. Post *Sandoval*, relief through private action would no longer be available for similarly situated plaintiffs.

Given the limiting nature of *Sandoval* on disparate impact claims in federal courts, aggrieved persons' legal avenues for challenging discriminatory policies and procedures in their schools would be in jeopardy if the OSPI regulations do not explicitly reach these claims. The only other enforcement mechanism available to aggrieved persons would be through either the OSPI or the Department of Education Office for Civil Rights, which may lack the resources to investigate and bring suit for every legitimate claim.¹²⁸

V. THE OSPI REGULATIONS SHOULD EXPLICITLY PROHIBIT DISPARATE IMPACT DISCRIMINATION

The OSPI regulations should be amended because they fail to clearly prohibit disparate impact discrimination. Specifically, Washington Administrative Code Section 392-190-005 should be amended to include language such as the following: "Policies and practices that cause *or result in* discrimination against persons on the basis of the classes de-

vate entities, it intended them to be enforceable against state actors."); Campaign for Fiscal Equity, Inc., v. New York, 100 N.Y.2d 893 (Ct. App. 2003). *But see* Robinson v. Kansas, 295 F.3d 1183, 1187 (10th Cir. 2002) (allowing disparate impact claims to be brought under 42 U.S.C. § 1983); Lucero v. Detroit Pub. Schs., 160 F. Supp. 2d 767, 783-84 (E.D. Mich. 2001) (concluding that there is a private right enforceable under 42 U.S.C. § 1983 for violations of regulations passed pursuant to § 602); White v. Engler, 188 F. Supp. 2d 730, 736-37 (E.D. Mich. 2001) (denying motion to dismiss claim that Michigan Merit Award Scholarship Program had a disparate impact on minorities because *Sandoval* did not foreclose the use of § 1983 to enforce rights found within the disparate impact regulations).

125. Glennon, *supra* note 112, at 44.

126. *Lau v. Nichols*, 414 U.S. 563 (1974); *see* Alexander v. Sandoval, 523 U.S. 275, 281 (2001) (holding that Title VI reaches only instances of intentional discrimination).

127. *Lau*, 414 U.S. at 566. The Court easily concluded that the San Francisco school system's practices were a violation: "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, to reverse the Court of Appeals." *Id.*

128. Spital, *supra* note 109.

fined in this chapter are prohibited.” Including this language is crucial to “ensure that school districts comply with all relevant civil rights laws” as they are statutorily required, including those that prohibit disparate impact discrimination.¹²⁹ First, a clear prohibition of disparate impact discrimination puts educational institutions on notice that even when there was no intent to discriminate against students that belong to a protected class, policies and procedures may still have an unfair, disparate impact on those students.

Second, a clear prohibition on disparate impact discrimination helps OSPI carry out the clear intent of the EEOL to address the “deleterious effect of discrimination” in Washington public schools.¹³⁰ Given that the EEOL was enacted to remedy the achievement gap in schools, it is essential that the OSPI regulations allow for enforcement against the root cause of these gaps—neutral policies that have a disproportionate effect on minority students.

Third, clearly acknowledging that the OSPI regulations reach disparate impact claims ensures that aggrieved persons will have a private right of action in Washington courts to enforce the EEOL and OSPI regulations. A lack of clarity in the reach of the OSPI regulations could jeopardize aggrieved persons’ ability to obtain relief, especially since *Sandoval* has drastically limited these claims in federal litigation.¹³¹

VI. CONCLUSION

The primary challenge facing American public education—and education in Washington State—is the achievement gaps among students of different races.¹³² According to the National Education Association, “[a]chievement gaps exist when students with relatively equal ability do not achieve in school at the same levels,” and one group far exceeds the other in academic success.¹³³

The causes of the achievement gaps are several and interrelated. Researchers have identified societal causes such as discrimination, poverty, home and community learning opportunities, access to health care, and issues of housing and mobility.¹³⁴ But the primary causes of the disparities in school performance are rooted in the policies and procedures of the school systems themselves, such as inequitable distribution of skilled, experienced teachers and insufficient and inequitable school

129. WASH. REV. CODE § 28A.642.005 (2010).

130. *Id.*

131. *Sandoval*, 532 U.S. 275.

132. *See supra* note 1.

133. *See Closing Achievement Gaps, supra* note 45, at 2.

134. *Id.*

funding.¹³⁵ These policies and practices are neutral—nondiscriminatory—on their face but have a disproportionately deleterious impact on students and communities of color.¹³⁶

The problems that contribute to the achievement gap will not be resolved overnight. But the enactment of the EEOL was an important step for Washington, signaling that legislators recognize that systemic, even if unintentional, discrimination is at least a contributing factor to the disparities children of color face in school. In order for OSPI to carry out the intent of the EEOL, the OSPI regulations must clearly prohibit policies and procedures that have a disparate impact.

135. *See supra* text accompanying note 54.

136. *See supra* text accompanying note 47.